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Dissertation Title:

**The Effectiveness of Decision Making in European Union Treaty Negotiations
An Empirical Analysis of Arguing and Bargaining
in the Debates on the European Constitutional Convention**

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List of Abbreviations

BATNA	Best Alternative To a Negotiated Agreement
CFSP	Common Foreign and Security Policy
CC	Constitutional Convention
COM	European Commission Document
CONV	Convention Document
Ed.	Editor
Eds.	Editors
e.g.	for example
EP	European Parliament
EU	European Union
HR	High Representative
IGC	Intergovernmental Conference
NP	Convention Members representing National Parliaments
p	Proposition (Speech Act)
PD	Plenary Debate in the Convention
QMV	Qualified Majority Voting
TEU	Treaty of the European Union
vs.	versus
WD	Working Group Document
WG	Working Group
ZOPA	Zone of Possible Agreements

“Mr Giscard d’Estaing will be piloting an untested vessel with an untried crew to a destination that is far from obvious.”

--Peter Norman, Financial Times, 25 February 2002

1. Introduction

1.1 Towards a Convention on the Future of Europe¹

The starting point of the latest debate on the future of Europe culminating in the convocation of the Constitutional Convention traces back to a speech by Germany’s Foreign Minister, Joschka Fischer. In his speech at the Humboldt University in Berlin on 12 May 2000, Fischer demanded that Europe “would have to be established anew with a constitution” and provoked the re-emergence of the constitutional debate between the federalists that demand a more integrated and democratized Union and the intergovernmentalists that stress the necessity of a clearer definition of the EU’s competences (Fischer 2000). On the EU level, the debate culminated in the adoption of the “Laeken Declaration on the Future of the Union” in which the EU member states called “for a deeper and wider debate about the future development of the European Union.” The Laeken mandate established the Constitutional Convention (CC) to serve as a preparatory body for the upcoming Intergovernmental Conference (IGC); the Convention held its inaugural meeting on 1 March 2002 and completed its work on 18 July 2003 with the presentation of a draft Treaty that proposed a Constitution for Europe (CONV 850/03). This draft Treaty was then reviewed by the following IGC, which was convened under the Italian and the Irish Council Presidencies.

Both politicians and academics alike harbored high expectations with regard to the European Convention’s ability to produce results. When the European council of Rome approved the constitutional treaty on June 18, 2004, followed by the signature of all 25 member states in October 2004, the Convention was regarded by politicians and academics alike as a great success that helped overcome stalemate in EU decision making.

¹ The terms, “Convention,” “European Convention,” “Constitutional Convention” will be used synonymously to describe the “Convention on the Future of the European Union”.

Yet, although the subsequent “IGC did not fundamentally modify the essential features of the draft proposed by the Convention,” initial enthusiasm quickly gave way to a debate questioning the achievements of the Convention and its usefulness as an alternative process for EU Treaty revision. Such criticism was further compounded when the constitutional treaty was rejected by domestic ratification referenda in France on May 29, 2005, and in the Netherlands on June 1, 2005.

After a period of Constitution fatigue, the German Council Presidency revitalized efforts around the Constitutional Treaty in October 2006; member states agreed to drop the controversial name “Constitution for Europe” and began referring to the Convention text as the “Reform Treaty.”² The final text was then signed by all Heads of State and Government of the 27 Member States of the European Union as the “Treaty of Lisbon” on 13 December 2007. The Treaty will enter into force after ratification by all member states on 1 January 2009 (European-Union 2007).

1.2 Research Problem and Research Questions

Although the Convention on the Future of the European Union is a relatively recent and unique event in the history of the European integration, it has raised the attention of a whole range of research disciplines, including, for example, law, integration theory, and democracy theory, and the literature on the Convention has been growing steadily over the course of writing this study. Such attention among the academic disciplines may seem surprising as it is not in line with the rather modest research on the Constitutional Convention’s precursor, the Convention on the European Charter of Fundamental Rights. The Fundamental Rights Convention already possessed many institutional features of the Constitutional Convention such as a Presidium, the transparency and publicity of its proceedings and broad participation involving government representatives, national parliamentarians as well as representatives of the European institutions. And although the results of the Fundamental Rights Convention were also acclaimed as highly successful

² <http://www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/Rede/2006/061004SilberbergEuropa.html>

and its dynamics were interpreted as an important step towards European participatory democracy, the publications mainly dealt with the Convention's implications for European Constitutional Law and Constitutional Politics (Eriksen, Fossum et al. 2003). A dramatic shift in academic and political attention occurred, however, when two independent events took place simultaneously at the end of 2000 - the failure of the IGC of Nice and the successful conclusion of the Convention for Fundamental Rights. The failure of the IGC of Nice led to such demands as "...the holding of a new IGC should be based on a radically different process which is transparent and open to participation..." (European-Parliament 2001) and thus the Convention method was increasingly put forth as a "model" (Magnette 2004: 210) and "an efficient – and legitimate – mechanism to deal with preparation of constitutional issues ... in conjunction with [the member states'] final capability to decide the outcome" (Closa 2004: 185).

The Convention was an exciting new governing body that combined many elements of input and output legitimacy in EU decision making.³ On the input legitimacy side, the Convention was authorized by the member states to take decisions on their behalf, and parliamentary representatives took part in the Convention's deliberations; technocratic expertise and due process also played important roles. Output legitimacy meant that the Convention delivered on state and voter preferences due to the government and parliamentary representatives in the body; it also delivered effective results on issues that were not solved in other forums and it expanded the rights within and of the European Union (Lord 2004: 175).

As the main reason for the convocation of the Convention, this study concentrates on the output legitimacy of the Constitutional Convention, defined as the effectiveness of the decision-making process, in comparison to the perceived failure and ineffectiveness of the Nice IGC.⁴ It was widely acclaimed that Nice delivered insufficient results that were

³ For more detail on the notions of input and output legitimacy in the European Union see: Scharpf 1999.

⁴ The literature comparing the Constitutional Convention to the IGC often uses the concepts of efficiency and effectiveness interchangeably or without qualifying their separate meanings. Efficiency in decision-making describes the means-end relationship of negotiations. In this sense a very efficient negotiation setup would be a two-party

not suitable for the implementation of the necessary reforms for the upcoming enlargement of the Union (Baldwin, Bergloef et al. 2001; Galloway 2001). Other reasons also played a role for the convocation of the Convention, for example, the Convention was installed at a time when European citizens expressed their dissatisfaction with EU democracy and calls for democratic legitimacy and transparency of EU decision-making became loud.⁵ Some observers also argue that the Convention is the EU member states' response to demands for transparency and democratic legitimacy in European politics. Indeed, the Laeken declaration, which called for the invocation of the Convention, mentions the so called 'democratic deficit' of the EU and outlines the challenges for transparency and democratic legitimacy. Nevertheless, transparency and democratic legitimacy are only parts of the wide reform agenda of the Union and the Convention's task must be seen in a much broader light. In convening the Convention the Laeken declaration states that the Convention should "... pave the way for the next Intergovernmental Conference ... [and that]... it will be the task of the Convention to consider the key issues arising for the Union's future development ..." (European-Council 2001). Despite its problems with public acceptance and the criticism based on the fundamental question of whether Europe should have a 'constitution' or not, the Constitutional Convention remains a unique experiment and provides the first opportunity for empirical observation of EU treaty reform.

This project focuses on the problem of uneven effectiveness of EU Convention negotiation results. Although it has been argued that about 90 Percent of the Convention text was endorsed by the IGC, there was still some disappointment and contention around

negotiation where both parties have strong but complementary preferences. Efficiency in multi-party, highly-complex negotiations such as IGCs or the CC is much more difficult to ascertain since in such settings many 'efficient' deals, i.e. deals that sufficiently meets the negotiating parties' preferences, could be possible. Therefore, this study focuses on the effectiveness of agreement defined as goal attainment and the adherence to the agreed outcome by the negotiating parties. See also: Neyer 2003: 697-699.

⁵ In the 2000 Eurobarometer (No. 54) 43 Percent of European citizens felt not very or not at all satisfied with the way democracy worked at the European level. See: European-Commission 2001.

certain issues that were not solved within the Constitutional Convention. The lack of resolution of such politically salient issues as the redefinition of the Qualified Majority Voting threshold led to a wide debate on the effectiveness of the Constitutional Convention. Therefore, the main research question followed for this study first empirically examines the causes for the failure or success of the EU Convention negotiation process and, second, determines factors that could enable effectiveness in the EU negotiation output, including the institutional setup of the Convention process, the conflict types negotiated, and the negotiation modes employed.

1.3 State of Research

1.3.1 General Studies on the Convention– observers and constitutional debate

In the wake of high expectations among member states, publicity surrounding the Constitutional Convention surged, revitalizing the debate on deliberative democracy in the European Union.⁶ Such publicity makes the operations of the Convention easily accessible, especially because the process of deliberation was documented and accompanied by a comprehensive Convention website.⁷ Many contemporary publications from Convention observers and participants also give an insider's perspective on the convention process, the atmosphere of the deliberations and the negotiation styles (Milton and Keller-Noëllet 2005; Norman 2005). Such perspectives are verified and enhanced through exhaustive coverage among a variety of journalistic sources⁸ and scientific and analytic studies (Barbier 2002; Closa 2003; Eriksen, Fossum et al. 2004; Maurer and Kietz 2004). Overall, it can be said that most of these publications focused on the contents of the reform issues and the quality of the Convention results; they either praise

⁶ For a detailed bibliography see the literature compilation by the Stiftung Wissenschaft und Politik which covers 631 publications on 52 pages. See: Brueckner, Held et al. 2004.

⁷ <http://european-convention.eu.int/bienvenue.asp?lang=EN>

⁸ www.euroobserver.com, www.euractiv.com, www.constitutional-convention.net.

the Convention as the eponymous success of European democracy or emphasize the political and strategic dynamics that drove the Convention proceedings.

1.3.2 The Academic Arguing and Bargaining Debate

Reflecting the observer's and practitioner's views, generally, scholars of European Integration are in disagreement with the true nature of the Convention. Basically there are two opposing camps which run along the controversy between Rational-Choice and constructivist approaches to European integration. The core of the debate lies in the relevance of social and communicative processes as opposed to classical bargaining resources as power and influence for the transformation of interests and preferences into negotiation output.

Accordingly, on the one hand, there are those that point to the "IGC-like bargaining" that took place during the Convention, arguing that deliberative dynamics only played a role on marginal constitutional issues concerning simplification, and that the "shadow of the IGC" hence led to the dominance of state representatives, so that "the Convention reproduced, by extension, the logic of intergovernmental bargains" (Magnette and Nicolaidis 2004: 394, 381). This reasoning is in line with the liberal intergovernmentalism literature developed mainly by Moravcsik. Liberal intergovernmentalism conceptualizes state preference formation and the bargaining power of the member states and therefore provides a good starting point for the analysis of EU negotiations at the Council level. But as liberal intergovernmentalism does not allow for preference change or for an influence of institutions or supranational actors in the negotiating process, it cannot sufficiently explain the differing outcomes of the Nice IGC and the Constitutional Convention. Thus liberal intergovernmentalism representatives have to admit that "the final result of the Convention would not have been imaginable as the output of an IGC" but they explain the "*Convention paradox*" with the prevalence of some "constitutional ethos" within the proceedings of the Convention as well as the exercise of some 'forceful leadership' by the Convention Presidium (Magnette and Nicolaidis 2004: 382).

On the other hand, proponents of the Convention process point to the various innovative features of the convention. (Maurer and Goeler 2004: 22) regard the inclusion of new actors as a crucial innovation of the Convention method. Several authors also stress the normative importance of the Convention method which can be considered as more representative and legitimate (Maurer and Goeler 2004, Maurer and Kietz 2004); ultimately studies in this category mainly convey positive attributions to the Convention and celebrate it as an alternative to IGCs and as a qualitative change in the constitutionalisation of the EU (Pollack and Slominski 2004: 218). Many of the proponents of this second part of the debate also have their research interests in deliberative policy making. The international relations and European integration community, esp. the German speaking part of it, have taken up this debate about the influence of arguing and deliberation on decision-making in international negotiations besides the dominant bargaining interactions as described by rational-choice theory.⁹ Within this debate arguing was defined as “justifying” or “giving reasons” to arrive at a mutually shared understanding of a situation through communicative action and bargaining as the exchange of demands and threats concerning a trade in order to generate the best possible individual outcome through strategic action. The main critique against this ‘arguing vs. bargaining debate’ was the absolute polarization of both aspects as well as its confinement to the mere theoretical realm (Checkel 2000).

The critique of this academic debate can also be seen as strength for further research, as the main advantage of the thorough debate among the authors involved in the arguing vs. bargaining debate is that they formulated many hypotheses and laid the theoretical groundwork for in-depth empirical research applications.

This empirical testing of the arguing and bargaining logics is the main goal of this research. In a similar realm several empirical studies on deliberative aspects of the Convention were published during the writing of this study (Goeler 2006; Kleine and Risse 2005; Landfried 2005), many aspects of these studies are to be seen as

⁹ The beginning of this debate is often attributed to the article by Harald Mueller in the German International Relations Journal *Zeitschrift fuer Internationale Beziehungen* (Mueller 1994). The article has provoked a debate that was followed up by many other articles. For a summary of the debate see: Chapter 3.1; Risse 2000; and Risse 2000.

complementary to this current research. Of particular relevance are especially the studies of Goeler (Goeler 2006) and Landfried (Landfried 2005) which both concentrate on the prerequisites of the institutional setup for effective deliberation. Both studies are highly enlightening for the ongoing research on deliberative politics within the EU and the debate surrounding arguing and bargaining in the European Convention. This study can in many ways be seen as an empirical test of the deliberation and arguing and bargaining research by resorting to speech act theory in order to analyze the occurrence of arguing and bargaining processes at the level of individual utterances.¹⁰ This empirical test allows to make valid empirical claims about the prevalence and relationship of arguing and bargaining in the European Convention and to make inferences on the particular ways in which actor strategies are shaped by different institutional settings and aims to let “empiricism ... play a more prominent role in the process of EU theorizing” (Aspinwall and Schneider 2000: 15).

The speech act theory as developed by John Searle (Searle 1969, Searle, Kiefer et al. 1980)¹¹ and adapted by Holzinger (Holzinger 2004) will be used to test the hypotheses from the arguing and bargaining debate while focusing on the stability of the Convention’s decision’s as opposed to the quality of the output.

1.3.3 Debate on conflict types

The literature on the EU institutions’ influence on policy making in the EU traditionally argues that EU institutions can shape EU decisions only in cases where member states do not risk losing power or influence in comparison to other member states. Beach (Beach 2005) made the distinction of political saliency versus complexity/technicality of issues and argues that in complex and/or technical issues, institutional actors like the EU Commission, can shape policy issues due to their “comparative informational advantages” over national representatives.

¹⁰ Holzinger has used the speech act theory to analyze arguing and bargaining in environmental dispute resolution. See: Holzinger 2004.

¹¹ Searle’s theory and its application to this study is described in detail in Chapter 3.2.

Similar to this tradition, within the academic debate on the Convention there was broad consensus with regard to the explanation on why the convention was more successful with regard to certain issues and failed to produce outcomes with regard to others. Many argued that the Convention was especially successful with regard to regulatory or judicial issues which were judged as “Convention friendly” (Marchi 2005). Examples cited for such issues comprise the judicial personality, the complementarity of competences, the simplification of the legal instruments, and the role of national parliaments. It has been argued that those issues were easily solvable due to their low political saliency, their tendency to produce win-win outcomes for all actors, their conduciveness to rational argumentation as well as to the existence of consensus prior to the Convention’s negotiations. In contrast to that, issues of high saliency such as the redefinition of the power structure, the institutional architecture of the EU, reinforced cooperation and the procedure of treaty revision are often cited as issues that involved hard intergovernmental bargaining within the Convention as they had a clear redistributive effect that could lead to zero-sum games (Beach 2007, Magnette 2003, Magnette and Nicolaidis 2004, Closa 2004).

Although these observations mostly coincide with the actual results of the Convention, no systematic links have been established between the nature of the conflict discussed during the Convention and the type of agreement that was obtained. Furthermore, the literature focusing on political saliency does not explain why the Convention was able to reach an agreement on an issue of relatively low political salience – namely the legal personality of the Union - while the same issue defied the IGC of Nice. Nor does the literature account for the agreement reached on the EU Foreign Minister, which is an issue that touches on member state power and influence.

In order to address these discrepancies and to obtain a better understanding on the issues negotiated during the convention, literature that analyses types of possible conflicts and explains how and under what circumstances conflicts can be resolved will be applied to the issues discussed during the convention. Aubert (Aubert 1963) has categorized conflicts as either, fact, value or interest-based and Holzinger (Holzinger 2005) has used this categorization to analyze the relationship between the types of conflict and their mode of resolution. The systematic approach gained from this literature will be applied to

understand the nature of conflict underlying the case studies selected for this study and to argue that the conflict type alone is not sufficient to explain the successes and failures of the Convention.

1.3.4 Negotiation Theory and Dispute Resolution Literature

The process orientation of this study is mainly influenced by negotiation and social choice theory which reveal that the process by which preferences are aggregated to a final decision is deeply influenced by procedural rules. As Elster (Elster 1992) argues the process influences the transformation, the expression and the aggregation of preferences in a way that can have a significant impact on the final result. The negotiation and dispute resolution literature as developed by the Harvard Negotiation Concept and its advancements cover many institutional aspects and show the necessities of active process design for the success of ‘principled negotiation’ (arguing) as opposed to bargaining.¹²

From a game-theoretical point of view, negotiation represents the communication aspect of a game. In a given negotiation situation the communicative acts are the moves of the game and can lead to cooperation or to confrontation (Joensson 1992: 51). Despite some pioneering efforts on the role of communication in negotiation by Midgaard (Midgaard 1983), as well as Schelling’s analysis of commitments (Schelling 1960), or Austin’s (Austin 1975) philosophy of language foundations, little systematic research has been done on the communication aspects of international negotiation. As Bell avers:

Negotiation is a complex process of verbal and non-verbal interaction. Its analysis entails attention to language as well as to non-linguistic aspects of communication. However, few theories of negotiation deal with these concerns, and little empirical research is informed by this perspective. On the contrary, much of the existing literature derives from theoretical

¹² The concept of principled negotiation was introduced by Roger Fisher and William Ury in their foundational book on negotiation: *Getting to Yes!* According to Fisher and Ury principled negotiation is based on four basic points: 1) Separating the people from the problem. 2) Focusing on interests, not positions. 3) Generating a variety of possibilities before deciding what to do. And 4) Insisting that the result be based on some objective standard. See: Fisher and Ury 1983: 10.

approaches that are particularly insensitive to language and communication (Bell 1988: 233).

Bell's early assessment from 1988 still holds true in that most of the literature on negotiation analysis focuses more on initial preferences and the broad negotiation strategies employed by the negotiators and not so much on in-depths analysis of the entire communication process. Yet international multilateral negotiation and diplomacy was traditionally – and some aspects continues to be - associated with secret talks behind closed doors or deals struck spontaneously in the hallway rather than with plenary discussions open to public scrutiny. Scholars have tended to ignore public speeches delivered by Heads of State and Government, arguing that the public forum does not provide insight into the internal negotiation process or the inter-personal interactions between key participants. Many scholars continue to argue that the examination of deals struck in relative secrecy and confidentiality is necessary as the place by which to capture honest opinion among decision-makers. However, since more and more negotiations are (voluntarily or involuntarily) no longer confined to take place behind hidden doors but are more and more carried out in public and with the participation of multiple stakeholders, the attention of many researchers has also shifted towards the negotiation process itself.

1.4 Aim of this Study and Research Objectives

The innovation of this study thus lies in the combination of the overlapping aspects of several research areas. It draws on European integration theory and focuses on the debate over arguing versus bargaining as well as on speech act theory as developed by John Searle. Negotiation and dispute resolution concepts further help to investigate the differences in arguing and bargaining in distinct institutional setups and allow analysis of their influence on the negotiation process and thus on the negotiation output. Moreover, such combination of theoretical perspectives permits the application of “new” methods (speech act theory, empiricism) to analyze international multi-lateral negotiations and European integration issues in terms of their decision-making effectiveness.

So far, no analytical framework shows the empirical occurrence of arguing and bargaining and thus the concrete relationship between the two modes of communication towards each other as well as towards the different independent variables as put forth by for example Goeler (Goeler 2006), Landfried (Landfried 2005) or Panke (Panke 2006). This study is an attempt to contribute to the empirical testing of European integration theory and to address the oft-cited shortcoming of EU research - namely that empirical testing has not kept pace with theoretical advances (Peterson 2001).

This study claims that there is a need for more process and actor-oriented negotiation studies. The goal is to identify and analyze a set of explanatory variables (causes) that presumably explain the negotiation output (effect) of decision-making processes. To reach this aim, this study has four main research objectives of which the first is descriptive and the other three analytical.

Descriptive:

1. The identification of modes of arguing and bargaining in the negotiation process.

This study should be seen in the context of the arguing and bargaining debate and aims to clarify further the occurrence of both modes within negotiations as well as their relationship to each other.

Analytical:

2. The analysis of the negotiation process with regard to the influence of the conflict type on the use of arguing and bargaining and their respective effectiveness in resolving the conflict at hand.
3. The analysis of the negotiation processes regarding the influence of the institutional setup. The institutional setting cannot determine the interaction modus (either arguing or bargaining) but it can enable one form or the other.
4. The evaluation of the negotiation process in light of the negotiation output. It is assumed that the process of argumentation determines which formula for agreement emerges and how its details are specified in negotiation. Thus the analysis focuses on the process of argumentation within the negotiations

themselves. The goal is to gain a better understanding of how argumentation is actually conducted among decision makers, and thereby achieve a better understanding of the policy process itself.

The Constitutional Convention process has sparked debates in many important areas of the EU politics. This study is a contribution to those debates and it touches particularly on four areas of future reform. Seen from the broadest to the most narrow objectives of this study, this study wants to contribute, first, very generally, to the revitalized debate on deliberative politics within the EU and the fundamental question about the legitimacy of European decision-making (Closa and Fossum 2004). Second, more specifically, this study seeks to explore questions of the effectiveness of European decision-making and the buy-in and compliance of various stakeholders with the policy choices in an enlarged Union that gets ever complicated (Neyer 2004). Third, this study analyzes the innovative method of the Convention and the experiences made with it during the drafting of the Constitution with the goal of giving practical recommendations for the usefulness of the Convention method in general and for the design of successful future treaty negotiations. Fourth, finally, and most specifically, this study traces causal mechanisms of arguing and bargaining in multilateral negotiations and, more broadly, seeks to inject a negotiation focus into EU research.

In order to reach those objectives, the study is divided into five main parts: analysis of the effectiveness of Intergovernmental Conferences; development of the theoretical foundation; description of the research design; explanation of the case study methodology; and in-depth examination of the case studies. Consequently, chapter 2 describes the current process for treaty reform negotiation in the EU and addresses the effectiveness of the EU Intergovernmental Conference while arguing that associated problems can be attributed to the structural setup of the Intergovernmental Conference negotiation process. Chapter 3 outlines the theoretical background underlying this study, i.e., the concepts of arguing and bargaining and their communicative roles in negotiations, and the influence of the conflict type on the resolution of conflict. The chapter further compares the structural differences of the Convention method to the IGC.

Chapter 4 presents the research design underlying the analytical framework and used in deriving the hypotheses that guide the analysis. Chapter 5 develops the methodology of the case study approach used for the study. More specifically, chapter 5 first examines the methodology of process tracing and structured, focused case study comparison as a means of predicting the values of the intervening variables in each case and then testing these predictions according to the hypothesis formulated in part three. Second, chapter 5 outlines the criteria for the case selection and the cases used in the subsequent empirical analysis. Thirdly, the chapter introduces and develops the method of speech act analysis and of data coding used in the empirical analysis. The final chapter 6 discusses in depth the four case studies selected for this study in presenting the coded data and discussing their relevance with regard to the formulated hypotheses. The conclusion of this study draws overall lessons for the feasibility of the predicted relationships among the variables discussed and the overall significance of this empirical study and list some institutional criteria for more effective convention deliberations and to guide and enhance the effectiveness of future treaty reform negotiations.

The annex entails three parts. Annex I gives a definition of the arguing and bargaining speech acts that have been used to guide the codification process. Annex II consists of various tables extracted from the data obtained through the coding of the plenary debates of the Convention. Annex III contains the seven plenary debates that were analyzed for this empirical research and shows the coded text passages as well as the codes identified in them.

“[W]e cannot continue to do business like this”

--Tony Blair after Nice Conference, cited in Milton and Keller-Noëllet 2005: 23.

2. The Negotiation Process in the European Union: Problems of the IGCs

Over the last 50 years, the EU has been created and shaped by a series of treaties. From the founding treaties to their revisions, all such treaties were negotiated within the framework of Intergovernmental Conferences (IGC). IGCs are basically a diplomatic multi-party negotiation among the member states' governments which hold the 'constituent power' for treaty change and engage in a “process to of creation and modification of the fundamental norms, rules and institutions of the [European] polity” (Closa 2004). Once the delegates of the member states reach an agreement, this treaty reform enters into force after the total number of member states - currently 27 in all – ratify the new treaty according to their respective domestic constitutional procedures. Before the Constitutional Convention, seven such constitutional conferences were held: the first treaties for the founding of the European Coal and Steel Community in 1951; the unsuccessful negotiations on the European Defense Community /Political Community in 1952; the Rome Treaties (1957), which founded the European Communities; the Single European Act (1987), which started the internal market program; the Treaty of Maastricht (1992), which introduced a common currency; the Treaty of Amsterdam (1997), which started the process of Eastern Enlargement; and the Nice Treaty (2000), which tried to resolve the necessary institutional reforms for the Union of 25. Each subsequent treaty each amended the previous treaties and defined the institutional framework of the European Communities or, later, the EU.

Those IGCs are very different from other EU decision-making processes. Supranational bodies such as the European Parliament or the European Commission still play only marginal roles and the decision-making mechanism is narrowed down to unanimity, reflected by the equality of the member states and the one-state, one-vote intergovernmental principle. IGC's assume a special role within the constitutionalization of the EU in that they can fundamentally change the structure and scope of the EU. Thus they do not reflect the various other decision-making mechanisms that exist side by side

within the EU multi-level governance system and that also play an important role for the incremental constitutionalization of the EU. Smith (Smith 2002) introduced the term of ‘constitutional IGCs’ in order to adequately name the grand-bargaining that enshrines the parameters and sets the course within which future EU integration and policy-making take place.¹³

Even though there has been an institutionalization of the IGC method of treaty reform, IGCs are still characterized generally by a lack of procedural structure as compared to other levels of decision-making within the EU. In IGCs government representatives are not bound by the same rigor and constraints on policy-making and they do not have to follow sophisticated and complex rules such as in the co-operation or the co-decision procedure which govern the interplay of such EU actors as the Commission, the Council of Ministers or the European Parliament. IGCs are convened according to Article 48 TEU which loosens the procedures to convene or negotiate an IGC. Article 48 reads, “The Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favor of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties” (European-Council 1997).

This meta-constitutional role of the IGCs to facilitate the treaties’ goal of “an ever closer union” has increased as treaty revisions have been gradually but firmly institutionalized in the evolution of the European Union. This can also be seen in the statement of the former Commission President Jacques Delors who remarked at the formal opening of the IGC in Luxemburg on September 9, 1985, that “Conferences like this one are not convened every five or ten years. There may not be another between now and [the year] 2000.” (quoted in Smith 2002: 209). While there is no firm trend in the increase of IGCs - e.g. there were four IGCs during the 35 years until the adoption of the Single European

¹³ Smith lists three features that define a constitutional IGC. A constitutional IGC is, first, a process that either amends or intends to amend the existing treaties or formulate a new treaty; secondly, in attempting to make, or in making these amendments to the treaty a set of policy objectives are set out; and thirdly, these policy objectives have to be flanked by a series of institutional adjustments. See: Smith 2002: 8.

Act in 1985, and five in the 20 years since then – the trend nevertheless reveals that the constitutional IGC has now become a regular part of the EU and is no longer an exceptional event. A further trend within IGCs is a shift in focus from the traditional focus of negotiating policy objectives. That trend is flanked by institutional reform towards what Moravcsik and Nicolaidis described in their analysis of the Amsterdam IGC – namely, that the primary focus of future IGCs will be on the construction of a legitimate constitutional order for policy-making, as opposed to the expansion of common policies (Moravcsik and Nicolaidis 1999). As the European Union moves away from issue-specific integration and heads towards the direction of a political union with constitutional characteristics, the continuous institutional reform process surfaces amongst others conflicts about the *finalité* of the European Union, cleavages between intergovernmentalists and supranationalists, and cleavages between large, medium and small states and maybe in the future cleavages between ‘old’ and ‘new’ member states. Those lines of criticism of the IGC are not new and have been raised on the grounds that the treaty revision process needs to be more effective and more legitimate (Risse and Kleine 2007). The problems gained new urgency after the Nice IGC negotiations clearly produced the smallest common denominator. To many analysts and observers, the Nice treaty process was evocative of the clash between the need for a new and clarified foundation for the enlarged EU of 25+ on the one hand; and the limitations inherent in the purely aggregative and piece-meal problem solving approach of IGCs, on the other. This stalemate together with growing public discontent about the EU as it became manifest in so called public and academic debate about the democratic deficit, led to criticism of the current ineffective and intransparent treaty reform methods.

The following are the main characteristics of the shortcomings of IGCs as pointed out by many authors. The inadequacies of the IGC process can be described in four points.

1. Ambiguous objectives and indirection.
2. High politization and unintended outcomes.
3. Tendency towards compromise and left-overs.
4. The need for broader-based participation.

The first three inadequacies are process related and stem from the structural problems and complexities associated with multi-party negotiations. The fourth point is more normative

than process specific and will be dealt with in less detail during the course of this study. Nevertheless, the normative factor of broad-based democratic participation accounts for the attractiveness of the Convention method in the view of many supporters.

It will be argued that some of this ineffectiveness can also directly be related to the institutional prerequisites for effective arguing and bargaining. The main institutional prerequisites to overcome those structural weaknesses of multiparty negotiations and their effect on arguing and bargaining will be discussed and examples from prior IGCs will be used to illustrate when and how this ineffectiveness played a role and how it was overcome in particular contexts.

2.1 Ambiguous objectives and indirection

Liberal Intergovernmentalism explains IGCs as negotiations where national governments as unitary actors make rational choices and decisions based on predefined national preferences. These national preferences culminate through interstate negotiations in policy agreements also called “substantive bargains”. Within this process, governments pursue their well-defined “national preferences” with “the maximum efficiency afforded by available political means” whereby the outcome of the “negotiation agreements appear to be efficient” because preferences are transparent and therefore “information and ideas required for efficient bargaining are plentiful and cheap” (Moravcsik 1998: 61).

If this assessment were true, governments would only bargain during IGC negotiations and find an efficient agreement consisting of some point in the Zone of Possible Agreements (ZOPA) where the preferences of the member states meet. Contrary to Moravcsik’s explanation, Smith shows in his analysis of IGCs that the negotiating governments and the institutions often had only loosely defined objectives on a range of levels when they entered in IGCs, lacking the vision of a ‘grand design’ for the future of the EU. These ambiguous objectives further complicated effective bargaining and led to periods of indirection in the negotiations. This indirection is especially manifest in the beginning of negotiations when governments’ uncertainty about their own and their counterparts’ preferences and positions hinder their appropriate assessment of the common bargaining space. If the actors cannot tie in with the discussion of a particular

issue that would help to move the process along in some direction from what had previously been discussed and if the member governments, or the EU institutions or the Presidency fail to provide any initial direction to drive the process, most governments will find it beneficial to hold back their positions as long as possible in order to adapt their positions to the demands of the other governments or some will try to go forward with high opening positions which might when too excessively formulated provoke protest from the other governments or even offend them that much that they can derail the negotiation process. The Nice negotiations are again a good illustration of this point. The Nice IGC was meant to pick up on the left-overs of the Amsterdam IGC and had as its main goal the reforming of the institutions. But in the lack of clear objectives provided by the governments the negotiations drifted for the longest part without any substantial input from the Portuguese and the French Presidencies. When the French government finally wanted to provide some leadership in the latter half of 2000, it faced difficulties of credibility, as it had itself many interests at stake such as maintaining parity between the German and French Council votes, and consequently its propositions led to open accusations that it was using its position in the Presidency to steer the outcomes in a direction that would disregard the interests of the smaller Member States at the expense of the larger ones (Smith 2002: 205).

2.2 High politicization and unintended outcomes

Panke (Panke 2006) argues that the level of horizontal and vertical institutional differentiation in the preparatory stage of an IGC (involving the Ministers in the General Affairs Council, various preparatory group meetings, negotiations on bureaucratic and vertical political levels) is higher than the division of the Convention's work into three phases and various working groups and that consequently the IGC would facilitate effective argumentation to a stronger extent than the Convention. Indeed, the preparatory period leading up the Nice IGC, for example, was very intensive, involving an estimated 350 hours of meetings at all levels over a ten-month period. There is no doubt that the preparation of the IGC at the official level is thorough and meticulous, involving highly qualified expert negotiation teams. Therefore, Panke's argument of high norm density

and thus predominant patterns of arguing among lower levels of IGCs where experts on the subject matter share evaluative standards can be supported. Joerges and Neyer also support this point in their illustration of the norm density and the predominance of argumentation regarding the foodstuff sector (Joerges and Neyer 1997).

However, once the official IGCs start the complex subjects that are handled during an IGC require a degree of specialist knowledge which often exceeds the capacity of foreign ministers and heads of government and the problem is the lack of an effective political filter below the heads of government level to set out political choices. Therefore, once the foreign ministers and heads of government and state take over the process, they face an overload with regard to the depth of technical detail that they need to handle. Those technical details were especially prominent during the IGC of Nice involving the Council vote weighting and the definition of qualified majority voting. The heads of government had to make these crucial decisions while relying on a limited number of meetings such as the Council meetings of Biarritz and Nice. As a result, these meetings were characterized by political tensions leading to inefficient bargaining and to unintended outcomes due to the complexity of handling the process coupled with the need to make decisions under time pressure and wide media attention (Galloway 2001: 34).

In their analysis of the Nice negotiations, Tsebelis and Yataganas (Tsebelis and Yataganas 2002) have shown that member states had particularly dissimilar preferences with regard to the definition of the QMV rule, they disagreed with regard to the voting procedure, the number of countries required for majority voting and the population percentage threshold. They concluded that the Nice QMV arrangement will reinforce policy gridlock because of the introduction of the two additional criteria for the definition of qualified majority. Koenig and Braeuninger (Koenig and Braeuninger 2000) come to a similar conclusion and argue that the qualified majority voting core will expand and shift towards the poorer states. The authors further demonstrate that bureaucratic and judiciary powers of the EU institutions, respectively the Commission and the Court of Justice, will increase by the Nice reform. Tsebelis and Yatanagas (Tsebelis and Yatanagas 2002) therefore conclude that “It is not clear to us whether these were intended results of the contracting parties.”

2.3 Tendency towards compromise and left-overs

From an analytical perspective, the fifteen governments of the EU are the veto players at the IGC negotiation table, whose agreement is necessary for a change in the status quo (Tsebelis and Yatahanas 2002: 19). The literature on veto players in general (Tsebelis 1995, Tsebelis 2002) and on two-level games (Putnam 1988) and divided government (Scharpf 1988, Leuffen 2006) in particular stresses the various complicating factors below the member states level. In general, the higher the number of participating governments and their domestic veto players and divided governments, the more complicated will be the identification of the (collective) preferences and the more complicated the outcomes of decision making will become. (Tsebelis and Yatahanas 2002: 39) Strong domestic players highly constrain the government's 'creativity' at the negotiating table by binding them to tight mandates and thus forcing them to look for compromise solutions.

Another complicating factor is the decision-making mechanism. The prevalent decision making mode in IGCs is still the rule of unanimity. Unanimity reflects the sovereignty and equality of the member states and protects single member states from being outvoted and coerced into the will of the majority. Hence in multi-party negotiations unanimity has basically two negative effects: first, it is extremely time-consuming as each and every member is a potential veto player whose consent is needed to reach an agreement (Tsebelis and Yatahanas 2002) and second it favors the status quo by making bargaining inefficient and resulting in lowest common denominator agreements. The unanimity rule further hinders the search for an effective bargaining outcome as players will tend to conceal their true preferences and reservation points in order to get higher concessions from the other parties for their agreement. Elgstroem and Joensson (Elgström and Jönsson 2000: 690) point out on this subject that unanimous decision-making leads to agreements where the most reluctant actor can determine the level and scope of policy coordination. Under unanimity the single "holdout" will have an increased amount of bargaining power. In his study of collective behavior of groups of individuals, Olson

observes the corruptive nature of unanimity in that “this incentive to holdouts makes any group-oriented action less likely than it otherwise would be.” (Olson 1972: 41).

Due to unanimity and tight mandates agreement between the negotiators can only be reached in the space where all actors perceive that they will receive positive benefits from an agreement relative to their next best alternative in the absence of an agreement.

Striking agreements during IGCs becomes a huge coordination problem because most actors try to maximize individual gains rather than overall efficiency. Consequently, the range of the bargaining space is typically reduced dramatically in multi-party negotiations, since the agreement needs to serve the simultaneous interests of all participating parties (Hopmann 1996: 249).

Multi-party negotiations often require the recourse to coalitions in order to move towards agreement. Coalitions reduce complexity by aggregating preferences into common positions and to essentially simplify bargaining between the two parties with the narrowest positions.¹⁴ In the absence of arguing and preference change, the best way out for governments to avoid smallest common denominator solutions is to engage in issue linkages for compensations and trades. Those issue linkages make bargaining efficient and allow the parties to satisfy their strongest preferences. Linking issues with the purpose of allowing for compensation and trades in exchange for consent to a deal often require asymmetries in preference intensity, power, or resources between the governments. Issue linkages and trades are facilitated by a broad agenda which artificially widens the agreement space and are most efficient when governments can add and subtract issues in order to strike efficient deals (Sebenius 1983, Wallace 1976). This mechanism can also explain why some IGCs do not exactly address the issues that they set out to resolve. The more that the preference intensities of the parties and their power resources are equal the less efficient will issue linkage be. If all governments set out with strong mandates and fixed preferences to preserve their Commissioner in the College and

¹⁴ Coalitions can also serve different functions dependent on the agreement rule. Coalition formation is strategically important in majority voting systems where ‘minimum winning coalitions’, which try to garner enough support to be assured of winning the vote without having to spread the spoils of victory too widely, play an important role for securing agreement. Raiffa 1982: 11.

are not interested in trades or compensations, the less efficient will IGCs be and they will be characterized by positional bargaining which can ultimately lead to unresolved issues and stalemate.

This tendency to avoid taking decisions on certain issues and to postpone them for future IGCs has been another characteristic of IGCs (Smith 2002). This tendency was very pronounced in the Nice negotiations which were themselves already dealing with the leftovers from Amsterdam. In Nice governments postponed to deal with what had been described as the necessary reforms, ranging from the downsizing of the Commission to the extension of QMV.

2.4 Need for broader based participation

Governments are the masters of the treaties and their legitimacy as the supreme political authority in the Union as democratically elected representatives of the member states remains unquestioned. However, a large part of the current criticism of the IGC process stems from the growing sense that the political preparatory process for treaty reform requires a broader based participation than it currently has. Even the heads of government have acknowledged this need for broader participation in calling in the declaration on the future of the Union attached to the Nice Treaty for “a deeper and wider debate about the future of the European Union”. In a joint declaration the Swedish and Belgian presidencies in cooperation with the EU Commission and the European Parliament further suggest “discussions with all interested parties; representatives of national parliaments and those reflecting public opinion; political, economic and university cycles, representatives of civil society, etc.” Although the Convention was complemented by a website¹⁵ which was meant to document the Convention proceedings through webcasts, the publication of convention documents and the provision of a forum to foster public discussion on the future of the European Union, public attention to the Convention

¹⁵ http://europa.eu.int/futurum/index_fr.htm

process remained very low and did not extend beyond specialized civil society organizations and lobby groups. The Convention therefore remained a largely parliamentary forum involving only state and European institutional actors. The failure of the successful integration of the European public can also be seen as one of the reasons for the rejection of the Constitutional Treaty during the referenda in France and the Netherlands in 2005. As already discussed in the introduction, the calls for broader based participation are closely linked to concepts of input legitimacy of decision making processes through deliberation by those affected by the decisions. They do not put the problems of effectiveness at the center but the lacking “legitimation of outcomes” linked to the democratic deficit of the EU (Closa 2004). This democratic deficit describes the non-engagement of the EU citizens in and with the European polity. This exclusion of civil society is extreme during the IGC process which is carried out only by national ministers and government representatives behind closed doors. Although broader based participation is relevant for this study because it allows for the generation of more ideas and arguments, this study focuses mainly on the output side of the negotiations in comparing the effectiveness of the decision making in the Convention as opposed to the IGC process and will therefore not further analyze the participatory aspects of the Convention.¹⁶

2.5 Factors determining IGC effectiveness

Much of the ineffectiveness described above can be traced back to the barriers of multiparty negotiations and some such as the increase of complexity will not be able to be avoided. It also needs to be considered that IGCs are iterated negotiations, in which cooperation increases with every negotiation round and in which a long-term perspective and reputational considerations play bigger roles. Therefore, each new IGC round will

¹⁶ for more discussion on the deliberative aspects of the Convention see: Closa and Fossum 2004; Closa 2005; Fossum and Menéndez 2005; Neyer and Schroeter 2005.

not be treated by the governments as a new problem to be resolved, but it is affected by the previous bargaining stage (da Conceição-Heldt 2004). Finally, caution needs to be exercised while criticizing a system that has successfully managed the deepening and widening of European integration.

As described above effectiveness in negotiations declines with the number of parties at the table, the symmetry in preference intensity, and the requirement of unanimity for agreement. Some of the structural problems of IGCs highlighted above can also be overcome by effective issue linkage, preparation, leadership and process management (Duer and Mateo 2006). Four factors should especially contribute to the success of IGCs. Firstly, broad agendas that make bargaining effective as they allow for issue linkage. Issue linkage has been discussed as an important element for the reduction of complexity in multi-party negotiations. It is a means of broadening the zone of possible agreements and of maximizing joint gains in negotiations through the combination of multiple issues to change the balance of interests in favor of a negotiated agreement (Davis 2004: 153). (Sebenius 1983: 287) defines issues to be linked in negotiations “when they are simultaneously discussed for joint settlement.” Issue linkage can thus help to overcome stalemate in negotiations and encompass side-payments, log-rolling bargains, or the broadening of the negotiation agenda. Issue linkage is especially effective in distributive negotiations when external standards and norms are not sufficient to satisfy interests and trade-offs might be important in order to compensate one party for giving in one issue by offering it another issue that is of value to this party. It can therefore be argued that issue linkage is an important factor for the success of IGCs and is less practical in Convention settings where issues are discussed separately within working groups. The lack of effective issue linkage during the constitutional convention might indeed be an explanatory factor for the unsuccessful case four of the definition of Qualified Majority Voting. In their computational analysis of issue linkages during the final negotiation game of the Intergovernmental Conference 1996 which resulted in the Amsterdam Treaty, Thurner and Linhart show that issue linkages and the staging of the negotiations helped the negotiating parties to cope with the complexity of the bargaining situation (Thurner and Linhart 2004).

Secondly, effectiveness of multiparty negotiations can be increased through effective preparation. Panke (Panke 2006) points out that arguing should be especially predominant during the preparatory stages of IGCs where possible options for package deals are set out and a high degree of coordination is achieved. The arguing in those stages is expected to be effective due to high norm density and repeated interaction. The preparatory stages of the IGC if conducted in such a manner thus resemble significantly to the Convention process of working groups and expert deliberation.

Thirdly, stalemate and complexity in IGCs could be overcome when single actors or a group of actors exercise leadership and push the process forward either by compensating the parties that lose from a deal through bargaining or by effectively arguing for an agreement that is supported by a norm shared by all participants or due to “comparative informational advantages”. Beach analyses factors under which EU institutional actors can translate their bargaining resources into influence and argues that the ability of EU institutional actors to translate their bargaining resources into influence varies inversely with the level of political salience of the issue, and that levels of influence increase the higher the technicality and complexity of the issue area (Beach 2005, Christiansen 2002, Duer and Mateo 2006). Beach describes the negotiations of the 1996 and 2000 IGC when the Member State Presidencies were very dependent upon the informational resources of the Council Secretariat. This dependency put the Council Secretariat in a privileged institutional position through which it was able to set the agenda of the IGC meetings, to influence the conduct of the negotiations and thus to significantly shape the outcome of the IGC process (Beach 2004).

Fourthly, IGC are rendered efficient through effective mediation and leadership by the EU Presidency i.e. when the country holding the EU Presidency is perceived as a neutral party that works closely together with the Council Secretariat and arrives to formulate initiatives that move the negotiations ahead. Tallberg’s analysis of the Council Presidencies between 1999 and 2001 as well as Metcalfe’s article on Council leadership both underline that the Member states resources of coercion, reward, legitimacy, socialization, expertise and information can be translated into an effective leadership strategy of the Presidency for the purpose of guiding the negotiating parties toward the

achievement of common ends through a cooperative process (Tallberg 2003, Metcalfe 1998).¹⁷

Overall, except for the first point the success factors for IGCs rely too much on individual agency or the deliberation style of the current EU member state that holds the Council Presidency. So far, these success factors are therefore still actor specific and not institutionally profound. It will be argued below that the convention process is an institutionalization of some of those aspects that account for successful IGCs.

¹⁷ See also specific case studies on effectiveness of Council Presidencies held by different member states: Elgström 2003.

"Politics is doing things with words."

--Austin cited in Malnes and Underdal 1991: 78.

3. Theoretical Background

3.1 Arguing and Bargaining: The Concepts

The debate on arguing and bargaining has evolved significantly and changed its focus during the exchange of ideas between various researchers. Generally the debate is traced back to Harald Mueller's article which drew on the Habermasian concept of communicative action to introduce a logic of action in which actors are prepared to change their ideas in the wake of the better argument (Mueller 1994). This article stimulated a wide debate among German International Relations scholars and concentrated at first on whether communicative action actually takes place. The two distinct speech acts arguing and bargaining were used as empirical indicators to distinguish strategic from communicative action. The result was a confrontation between arguing and bargaining and their respective communication modes of communicative action and strategic action. When empirical studies showed the coexistence of both types of communication modes within negotiations, the focus shifted on the question of the superiority of either communication mode and on the quest for contextual conditions to facilitate effective argumentation. Many approaches conceptualized arguing as a good and bargaining as a bad form of negotiation while favoring communicative action over rationalist approaches and tried to identify institutional prerequisites that would foster the increased use of communication mode of arguing. In this study, it is argued that arguing as such is no sign for effective decision making and no guarantee for a preference change or persuasion within the negotiation participants. The focus will be put on meaningful communication defined as a communication that is based on the same premises of either arguing or bargaining. Thus assuming that dependent on the contextual preconditions arguing and bargaining can both be successful for the communication of ideas in interactions and for the resolution of conflicts as has been suggested by Panke (Panke 2006).

3.1.1 The Origins of the Debate: Rationalism vs. Deliberative Democracy and Discourse Theory

As the name of the debate suggests, the controversy about arguing and bargaining has been about the question of supremacy of one communication mode over the other. In order to fully understand the debate and its implications it is therefore important to understand the theoretical underpinnings of the discourse. Rational choice theory emphasizes bargaining and argues that rational actors have predetermined preferences and make their choices according to their power resources in negotiation. They further stress strategic action as the dominant interaction logic which actors use to get the best possible outcome for themselves. Essentially, bargaining aims at the aggregation of differing preferences. Agreement is then not a function of the solution of all problems but an assessment of the fact that either one's own preferences are represented enough in the package that the solution is acceptable or that preferences are deferred in exchange for side-payments.

Based on this rational choice foundation, bargaining theory was founded on game theory. Oran Young defined bargaining as “a means by which two or more purposive actors arrive at specific outcomes in situations in which: (1) the choices of the actors will determine the allocation of some value[s], (2) the outcome for each participant is a function of the behavior of the other[s], and (3) the outcome is achieved through negotiations between or among the players.” (Young 1975: 5) The theory of bargaining is usually based on mixed motive games representing situations of interdependent decision making where elements of both conflict and cooperation coexist (Hopmann 1996: 38). Game theory basically assumes that players are rational in that they will try to maximize their gains or to minimize their losses. Game theory also assumes that players have perfect information about their own utilities and those of the other players and will thus at any given time choose the action that offers the greatest expected utility defined as a best response to the action(s) of the other player(s). The limitations of game theory also highlight the limitations of rational choice explanations of negotiations. The most important critique concerns the static character of game theory and rational choice that focuses almost exclusively on the relationship between initial conditions and outcomes, with almost no attention paid to the process of bargaining. The second critique refers to

the simplifying assumption of perfect information which is seldom observable in the real world. The third critique targets the assumption that utilities are fixed and unchanging allowing for no dynamic element of the process of changing utilities (Saam, Thurner et al. 2004: 5, Young 1975: 135). In summary, although game theory helps actors to choose the best strategy among a given set of possible strategies, it is not helpful for the development of new strategies or new ways of problem solving.

Many of the proponents of arguing as the “better” communication mode for the resolution of conflicts have their roots in constructivist theory and/or are a part of the deliberative or participatory democracy theory.¹⁸ In order to fully understand the debate it is important to look at the philosophical foundations of the discourse. All of these approaches try to find answers to legitimate governance structures which account for the urgent questions of how to resolve conflicts in modern societies in which stakeholders demand to take part in decisions that affect them and many of those theories try to find appropriate mechanisms to institutionalize broad participation in the formation of opinion and decision-making within democratic governance structures. All proponents of this theory come to the conclusion that modern democratic societies have to provide a forum for the development of “a viable sense of collective identity” (Benhabib 1994). This forum can be institutionalized through a public sphere of opinion formation and the recognition of basic rights as guaranteed within constitutional states.

The ‘Theory of Communicative Action’ by Juergen Habermas stands at the origin of many recent approaches to deliberative democracy and especially of the arguing and bargaining debate in international relations (Habermas 1981). Habermas develops his theory from the basic question on the legitimacy of law. His answer is that legitimacy of law derives from the legitimacy of the law-making process within the framework of a constitutional state. Law is legitimate when those that are concerned by the law are at the same time its authors as well as its addressees. Those decision-making procedures require participation of all those affected by a regulation that is not only restricted to

¹⁸ This is also the name of a book by Elster (Elster 1998) which is the forerunner of the arguing and bargaining concepts.

parliamentary representation but that involves various actors of civil society that operate in different arenas of public life.

More than the participatory elements of the theory, for this study Habermas' ideas about the decision-making process through which this multitude of societal actors get to democratically legitimate decisions are of particular relevance. Habermas argues that a shared rational consent among those multiple actors with their different legitimacies is the prerequisite for their ability to arrive at common and thus democratically legitimate decisions. 'Communicative action' is central to this coordination process and it is defined as an action pattern in which the actions of the policy makers get coordinated over a shared rational consent. Consequently, as Habermas argues that this shared rational consent - which is the basis for joint and democratic decision making - can only be acquired through communicative action, he calls attention to the relevance of argumentative discourse processes. The main difference to classical bargaining concepts lies in Habermas' conceptualization that decision-making processes do not only represent an aggregation of different preferences and interests of the actors but that the preferences themselves can change in the course of an open discourse. This open discourse or communicative action requires a common "lifeworld" that is the shared reference system which consists of a meaningful knowledge pool, social orders and affiliations that generate solidarity, and of the individual's capacities to act. The shared "lifeworld" is the measure of all things and represents the foundations of communicative action that make understanding between the different actors possible (Strecker and Schaal 2001). Critiques of the discourse theory often allude to the prominence of the common "lifeworld" for the functioning of deliberation and doubt its transferability to inter- or supranational politics. The theory was indeed originally developed for domestic policy making but Habermas himself sees it as a rule that this common "lifeworld" gets constructed during the deliberations themselves. Others have also argued that international institutions, and particularly the European Union, can also create collective identities due to their high institutionalization and the shared norms and values they represent (Risse 2000: 15). The debate about the existence or not of a European public sphere has also to be seen in this context. Similarly to Habermas, Dubiel also argues that the "community spirit" is not something that is prior to any social order and thus a

prerequisite for the constructive handling of conflicts but that social conflicts themselves produce the valuable ties that hold modern democratic societies together and lend them the strength and the cohesion they need.¹⁹ Crick also rejects this idea of a prior community spirit for the institutionalization of democracy within a society.

“It is often thought that for [politics] to function, there must be already in existence some shared idea of a “common good,” some “consensus” or *consensus juris*. But this common good is itself the process of practical reconciliation of the interests of the various ... aggregates, or groups which compose a state; it is not some external and intangible spiritual adhesive ... These are misleading and pretentious explanations of how a community holds together ... *Diverse groups hold together because they practice politics – not because they agree about “fundamentals,*“ or some such concept too vague, too personal, or too divine ever to do the job of politics for it. The moral consensus of a free state is not something mysteriously prior to or above politics: it is the activity (the civilizing activity) of politics itself.”²⁰

For the sake of the research topic at hand in this study it needs to be pointed out that most arguments about deliberative democracy and the creation of public spheres refer to and draw on the experiences of modern nation states. As already pointed out during the discussion of Habermas’ theory, the weakest links of these concepts are their arguments on if and how they are applicable to other societal concepts that go beyond the nation state such as to the European level. Consequently, traditional European integration theory has focused on power concentration on the supranational versus the intergovernmental level without putting much emphasis on the linkage between political order and discourse (Neyer 2003: 687). New approaches to international relations in general which focus on norms and ideas (Finnemore and Sikkink 1998, March and Olsen 1998) and discursive interaction (Risse 2000, Weiler 2000) as well as European concepts of ‘multi-level governance’ (Jachtenfuchs 2001) and transitional networks (Eising and Kohler-Koch

¹⁹ Dubiel, Helmut as discussed by Hirschmann (Hirschman 1995: 235).

²⁰ Crick 1962: 24, quoted in: Hirschman 1995: 238-39 (Hirschman’s emphasis).

1999) have introduced a new governance approach to the study of European integration which no longer exclusively relies on concepts of power, anarchy and hierarchy but uses empirical studies to explain effective regulation of social and political relationships which cannot be explained by concepts of power, anarchy and hierarchy alone. The empirical evidence of those studies show that political interaction in the EU relies very much on deliberation (Joerges and Neyer 1997, Lewis 2003). The main critique against these approaches maintains that they still rely very much on case studies without presenting a new meta-theory of political order that would replace the old concepts (Jachtenfuchs 2001: 258-60).

It is important to understand these fundamental theoretical differences in the underlying assumptions of the proponents of arguing or bargaining, as most of the applications of the concepts presuppose one philosophical underlying or the other. This study on the contrary proposes a less confrontational view of arguing and bargaining and tries to establish a 'bridge building approach' (Panke 2006) by focusing on the interactive dynamics between the two negotiation modes. For this we assume that arguing and bargaining are not mutually exclusive but that they often both occur side by side in a discussion. Especially with regard to the multi-level governance structure of the EU it needs to be particularly emphasized that arguing and bargaining both take place within the negotiation system of the European Union (Elgström and Jönsson 2005). Before proposing the bridge building approach, some clarifications need to be made that will help to overcome the dichotomy between the rationalist and the constructivist approaches.

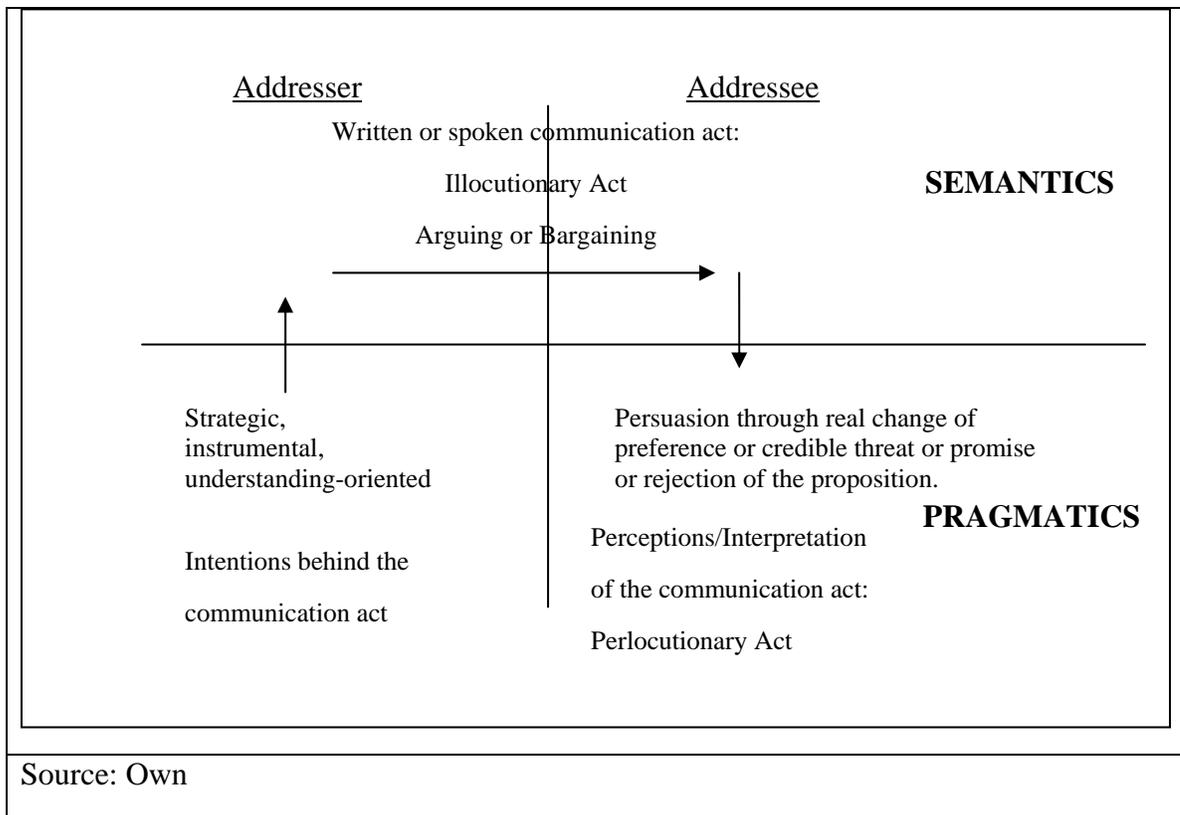
The debate on arguing and bargaining is often confusing as many different levels of analysis are mixed together. Many authors refer to arguing and bargaining and criticize each other's argumentation while referring to different levels of analysis. So far a lot of different aspects have been stressed in the debate on arguing and bargaining mixing very often arguing and bargaining as communication modes with the theoretically distinct levels of actor rationality, i.e. the individual actor's motivation underlying the action, and the communication mode, the actual and observable interaction between the actors.

In this study, arguing and bargaining will be mainly conceptualized as modes of communication defined as the expression of speech acts aimed at convincing other actors to accept the preferences of the speaker as a guideline for collective action. The unit of analysis will thus be at the level of the speech act. The two communication modes are defined by differences in illocutionary content. While bargaining is characterized by speech acts that rely on the use of promises and threats, arguing speech acts rest on claims of factual truth and or normative validity.

3.1.2 Differences in Communication Mode and Actor Rationalities

Panke (Panke 2002) has shown that it is important to distinguish the analytically distinct concepts of communication mode on the one hand and actor rationality on the other hand in order to solve the prevailing confusion in the current debate on arguing and bargaining. The difference between communication mode and actor rationality can be illustrated through the linguistic concepts of semantics and pragmatics which refer respectively to the form and the meaning of speech acts. Morris' initial definition describes semantics as dealing "with the relation of signs to ... objects which they may or do denote" and pragmatics as concerning "the relation of signs to their interpreters" (Morris 1938: 35, 43). As the figure below illustrates, communication modes refer to the semantic structure of the written or spoken sentences. They describe the form of the linguistic communication act as it is written or spoken. Arguing and bargaining are the two distinct communication modes that subsume all communication modes. Communication modes are above the line and thus unmistakably identifiable as either arguing or bargaining. All communication acts can be distinguished as either a form of arguing or a form of bargaining. The distinction in this study is determined by the verb used in the speech act (see table defining arguing and bargaining speech acts in Annex I).

Figure: Communication Flow



Actor rationality on the other hand lies below the line and refers to the pragmatics of what is meant by the communication act, i.e. the intention behind the written or spoken sentence but also its interpretation by the addressee of the communication.²¹ Three basic forms of actor rationalities can be distinguished. Actors can influence the communication interaction by using arguing and bargaining in a strategic, instrumental or understanding-oriented way.

Strategic action can be defined as a means to an end attitude to communication modes. A strategic actor is only interested in his own preferences and interests and chooses the communication mode that promises the highest chance of preference enforcement in

²¹ Therefore, while semantics easily distinguishes between arguing and bargaining just by looking at the structure of the sentence, pragmatics is complicated by two factors. First, the addresser can use the same sentence of e.g. "I love porridge" with different intentions, e.g. in a rhetorical sense, meaning that he/she actually hates porridge or in the direct semantic meaning, stating that he/she likes porridge. Secondly, pragmatics is further complicated by the interpretation of what was said by the addressee who himself/herself can interpret the expression as a rejection or acceptance of porridge.

response to the action of the other communication participants. Strategic action highlights that the speech act as such does not say anything about the intentions of the speaker. A strategic actor would choose arguing over bargaining and reveal his true motivations if this communication mode would seem to be more promising in order to effectively pursue his preferences and to persuade the other actors of his true reasons. But arguing if it is strategic can also involve deception. Deceptive arguing becomes attractive for a strategic actor if he has a weak bargaining position and assumes that false reasons for his motivation would persuade others of his position. The actor can thus reason according to common standards accepted by the group although they do not represent his own reasons for wanting a particular outcome. Such a behavior is the same as regular arguing. If the criteria of the common standards are met, any underlying motivation that the strategic actor might pursue will not interfere with the communication/ with the common construction.

Strategic action is often equated with rhetorical action or 'hypocrisy' as Elster (Elster 1998: 111) calls it. Rhetorical action is a subset of strategic action and can be described as strategic action in the communication mode of arguing. An actor displaying rhetorical action aims at 'persuasion at any price' and justifies his position by using standards he is not himself convinced about rather than his true motivations because he assumes that such a behavior has better chances of persuading others of his reasoning. The other actors will thus criticize the speaker's reasoning only on the basis of the publicly expressed standards which were not important for the preference formation of the rhetorical actor. Such an interaction can then lead to a two level communication, where the insincerity of one actor impedes true understanding. Elster points out that such 'false arguing' can lead to an entrapment of the rhetorical speaker in this own arguing patterns and can thus trigger reflective learning on the part of the rhetorical speaker. If the majority of the actors use the communication form of arguing other actors will also adopt arguing patterns in order not to derogate the efficacy of their statements. During such an interaction the true preferences of the rhetorical actor can be revealed and can thus come up for discussion. During the process of criticizing and the evocation of common standards and shared reference systems reflexive learning can occur on both sides. The revealing of those hidden preferences is not deterministic though. It needs to be pointed out that arguing is a

dynamic process dependent on the interaction between the participants. For any arguing situation it is therefore not possible to predict which arguments will be used to which reasons they will be tied to and which of the points will be picked up for criticism by the other actors. Those argumentation patterns need to be constructed in retrospect.

Instrumental action does not incorporate considerations about the action of other interaction participants in order to generate a best response strategy. Communication modes are only used to serve the purpose of the speaker and are targeted to achieve a certain outcome. Instrumental action therefore defines its rightness based on the success of the communication. Due to the teleological nature of instrumental action, i.e. its lack of interaction and its reference to the objective world, instrumental action should only use the communication mode of bargaining, but it will not be relevant for this study.

The third rationality an actor can act upon is best described by the understanding-oriented discourse theory of Jürgen Habermas. While strategic and instrumental action is a means for enforcing the actors own preferences and interests, understanding-oriented actors are prepared to give up on their own interests and preferences during the deliberation process for the benefit of jointly constructing a common understanding of the situation in order to derive the rationally true, right and best possible solution. The ‘ethics of discourse’ enable a transformation of preferences through public and rational discussion. The core of the theory states that rather than aggregating or filtering preferences, the political system should be set up with a view to changing them by public debate and confrontation. Within the ethical discourse the understanding-oriented predisposition of the actors describes their conscious willingness to question their own mindsets and their openness to persuasion (Mueller 1994: 24-27). Their conceptual impossibility of expressing selfish arguments in a debate about the public good and the psychological difficulty of expressing other-regarding preferences without ultimately coming to acquire them, jointly bring it about that public discussion tends to promote the common public good. The expression of the *volonté générale*, then will not simply be the Pareto-optimal²² realization of given (or expressed) preferences, but the outcome of preferences

²² The principle of Pareto efficiency or Pareto optimality was introduced by the sociologist and economist Vilfredo Pareto. Given a fixed set of alternative allocation of goods and corresponding individuals, Pareto improvement can be achieved by shifting

that are themselves shaped by a concern for the common good (Elster 1986: 113). As actors build their preferences in understanding-oriented discourse during the interaction, bargaining is not compatible with this rationality. In the ‘ideal speech’ situation actors would thus only use the communication mode of arguing.

Table: Actor Rationalities and Modes of Communication				
		Actor rationalities		
		Strategic	Instrumental	Aimed at mutual understanding
Modes of Communication	Arguing	Rhetorical action	---	Discourse (Habermas), consensus-oriented arguing
	Bargaining	The strongest survives Bargaining	Means to Ends Bargaining	---

Source: Adapted from Panke 2002: 49.

3.1.3 Arguing and Bargaining as distinct Communication Modes

In this study, we will concentrate on the analysis of arguing and bargaining that takes place above the line (see figure below) by identifying arguing and bargaining as distinct communication modes.

Arguing

the allocation of the goods to the individuals as long as the shift can make at least one individual better off, without making any other individual worse off. The point where such shifts are no longer possible is called Pareto optimal or Pareto efficient. Pareto efficiency is used in negotiation theory to measure value creation and efficiency. The advantage of the Pareto criterion lies in the fact that it does not require interpersonal utility comparisons but simply suggests that efficiency in negotiation is improved whenever the parties come to an agreement that either makes both parties better off, or at least makes one party better off compared to the status quo (Mnookin 2003: 209).

“To argue is to engage in communication for the purpose of persuading an opponent.” (Elster 1998: 15) Persuasion necessitates the other to change beliefs about factual or normative matters through non-manipulative reason-giving (Keohane 2005). In arguing the only thing that is supposed to count is “the power of the better argument”. Parties are not allowed to appeal to their superior material resources.

Arguing can take the form of factual or normative statements. Factual statements establish the link between data and information with an analytic conclusion. Normative statements draw conclusions based on values and norms. Often a direct, informal testing of an argument is not possible. Most contemporary conflicts are “trans-scientific”²³ – questions of fact that can be stated in the language of science but are in principle, or in practice, unanswerable by science. In such cases, when science, norms and public policy intersect, different attitudes, perspectives and rules of argument have to be reconciled. Scientific criteria of truth clash with legal standards of evidence and with political notions of when regulation becomes necessary and when not. The testing of arguments must then rely on a variety of standards that depend on the analytic methods employed and the choice of evidence, on the plausibility and robustness of the conclusions, on the agreed-upon criteria of adequacy and effectiveness, on expert opinion, reputation and intuition, as well as on the consistency, impartiality, rightness and adequacy of the conclusion (Majone 1989: 10, Elster 1998, Müller 2004) (see figure on Validity Criteria for Arguing below).

Purely factual arguing mainly has to pass a simple validity criterion: truth. A factual statement such as “It is raining!” can be easily validated by verifying the empirical truth, accuracy or rightness of the statement by going out and checking the underlying data or information if it is raining or not. Often it is not as easy to verify factual statements. The statement that “Global warming is caused by human activity!” is a factual statement but difficult to establish empirically. The testing of this kind of argument requires the recourse to evidence. Evidence is thus not equal to facts or data as it cannot be evaluated according to objective standards. It consists of selected information from the available pool of information that is introduced in the argument in order to persuade a particular

²³ Alvin Weinberg cited in Majone 1989: 3.

audience of the truth or falsity of a statement. The evaluation of evidence is dependent on a number of factors such as the situation at hand, the specific nature of the case, the type of the audience, the prevailing rules of evidence, the consistency of the argument, reference to experts or the credibility and reputation of the speaker or even intuition can help in persuading the hearer (Majone 1989: 11-18). When optimal decisions cannot unambiguously be stated, consistency becomes an important evaluation criterion. Consistency can be established at two levels, first with regard to the consistency of the argument as such, the proposed policy choice must be consistent with the speaker's valuations of the probability and utility of the various consequences of the particular argument. Secondly, the speaker needs to be consistent within his continued argumentation over time, i.e. in the absence of persuasion, the speaker should not advocate one version of the argument at one time and another one at a different time, context or when facing a different audience.

Additionally to all criteria cited above, for normative statements such as "It is bad to kill a person" to be valid, further criteria such as imperfection, cogency, persuasiveness, clarity and the impartiality of the speaker are important elements for evaluation.

Elster (Elster 1998: 6) states that the transformation of preferences through deliberation is the goal of arguing. This transformation occurs through persuasion. Ultimately, arguing is aimed at persuasion by providing acceptable reasons for one's choices and actions.

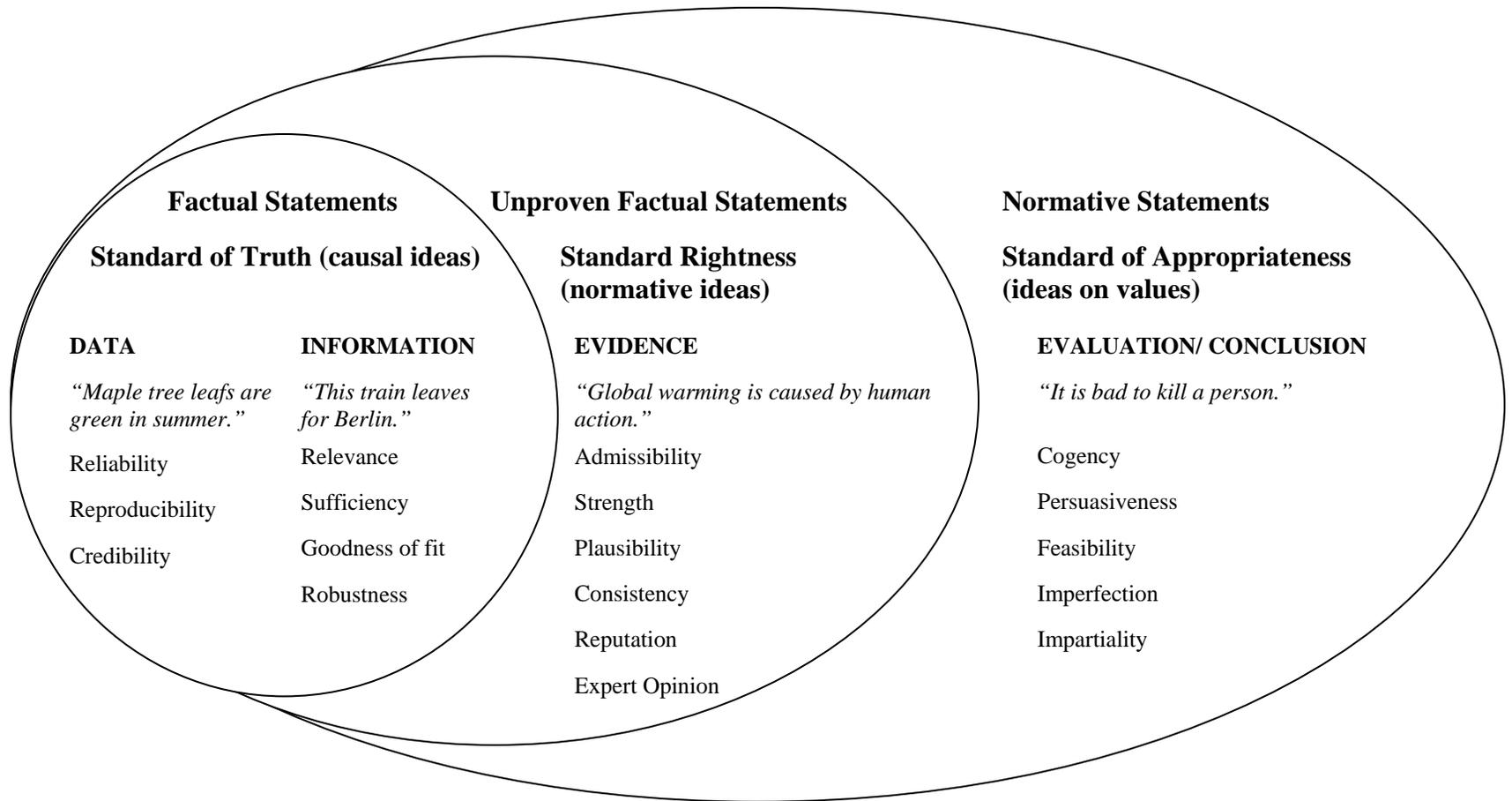
Persuasion is a cognitive process that involves changing attitudes about cause and effect in the absence of overt coercion. It is a mechanism through which social learning may occur, thus leading to interest redefinition and identity change (Checkel 2001: 54). In contrast to manipulative persuasion which is asocial and lacking in interaction and often aims at manipulation of mass publics, argumentative persuasion aims at convincing the counterpart and can be described as "an activity or process in which a communicator attempts to induce a change in the belief, attitude or behavior of another person ... through the transmission of a message in a context in which the persuadee has some degree of free choice" (quote in Checkel 2000).

Overall, argumentation is a vital part of the policy process when power is shared and when problems are so complex that the participants are not sure that their own initial positions are necessarily the best ones. When preferences are less fixed and the interests

not obvious, they need to be discovered and developed piecemeal, this development of interests in a policy choice is done through arguing and by seeking the causal links between the alternatives and utility (Axelrod 1976: 175). Such authentic arguing and persuasion rests on the requirement that the actors can reflect upon their preferences in non-coercive fashion (Dryzek 2000: 1).

Taking this coercive element into account, most researchers suggest that this arguing process is more likely to occur especially at the beginning of interactions and less during the 'endgame' and the hammering out of concrete agreements. (Christiansen, Falkner et al. 2002: 36; Elgström and Jönsson 2000: 692-693; Mueller and Risse 2001: 13-15). This is an assumption that needs to be explored in the empirical part.

Figure: Validity Criteria for Arguing



Source: own from Elster 1998, Majone 1989, Müller 2004, Risse 2000

Bargaining

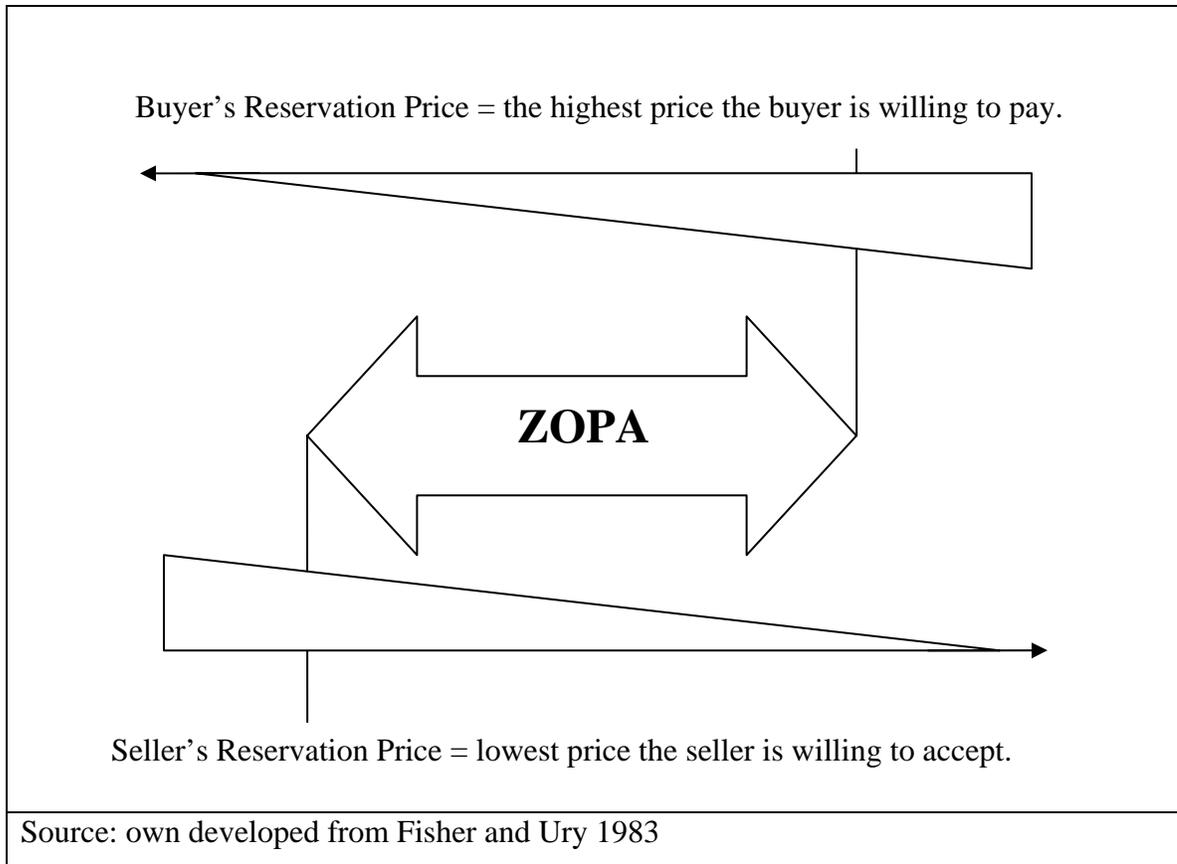
Chapter 2.2 has already pointed out the key variables that drive bargaining interactions such as power, influence, and fixed preferences. In contrast to arguing, bargaining often proceeds without reference to any motives beyond self-interest. “To bargain is to engage in communication for the purpose of forcing or inducing the opponent to accept one’s claim” (Elster 1998: 15). This bargaining is carried out through “a series of sequences, during which negotiators propose joint strategies, representing demands and offers, proposals and counterproposals, tending typically to converge as a result of an exchange of concessions” (Bartos 1974). Crucial for the credibility of a bargaining act is the bargaining power of an actor or its perceived bargaining power by the other actors. The most obvious and most cited form of power in negotiation is the better alternative option. The party that does not need to agree to a deal at the specific time can be defined as more powerful. This power expresses itself in the party’s better Best Alternative to a Negotiated Agreement (BATNA) (Fisher and Ury 1983) compared to its counterpart’s BATNA which it can realize without the negotiating partners at the table. Such power positions are often manifest in parties that have veto power, authority with the other actors or more resources than the other actors (economic, moral, knowledge etc.). But for power to be effective the actor also needs to be perceived as powerful by the other actors. With regard to the formal bargaining power this means that the other actors need to be convinced that the powerful actor would actually follow through with his threat or promise. In bargaining the interaction is defined by exchange of demands between actors who through explicit or implicit threats or promises make claims for credibility. Bargaining statements are credible, in the sense that the bargainers must make their opponents believe that the threats or promises would actually be carried out. Central to bargaining is the notion of bargaining power. Bargaining power derives from tangible sources such as material resources, manpower or from intangible sources such as knowledge, informal authority etc. Generally, the more asymmetrical power resources are or are perceived to be, i.e. the more bargaining power that a party has (or is perceived to have) over others the more likely it will be able to have its preferences reflected in the final deal. But the efficiency of bargaining does not only depend on power asymmetries, it is also a function of the number of parties involved. From a negotiation theory

standpoint, bargaining concerns the division of the benefits from cooperation. The perfect bargaining setting would involve only two actors, one of which is strong and rich and the other weak and poor (Neyer 2004: 29). In a price negotiation for example, the seller of a car will determine for himself the lowest price that he is willing to accept in order to sell the car and a particular buyer will determine the highest price that he is willing to pay in order to purchase that car. If the seller of the car is very short on money and pressed in time and therefore needs to sell the car even below its market value to the first person that comes along, the buyer would be in a more powerful position because he could offer the seller just about any price. Perfect information provided, the stronger party will always be able to effectively threaten the weaker party or to buy the weaker party off if it raises the price high enough. In a world of imperfect information, in which both parties do not know their counterpart's reservation price, the parties will start with offers that are the closest to their preferred outcome (aspiration point) and gradually through the mutual issuance of (walk away) threats and commitments / promises adapt their bargaining positions until their demands intersect within the Zone of Possible Agreements (ZOPA) which is defined as the space between the two reservation or walk-away points of the actors.²⁴ Pure bargaining will always result in compromise solutions where at least one but often both parties do not get their target value with regard to a single issue but an agreement in which the parties succeed in securing enough to satisfy their interest as opposed to their BATNA.²⁵

Figure: Basic illustration of single-issue, two-party bargaining situation

²⁴ The reservation point represents the bottom line of a negotiator and describes the least acceptable value (e.g. price) for a negotiator at which it would be more valuable for him or her to walk away from the deal rather than to reach an agreement with the other side. At any value below this point the concerned negotiator would prefer to pursue his/her next best alternative with a different negotiation partner. See: Raiffa 1982.

²⁵ For a detailed description of the bargaining model and the analysis of the steps of the bargaining protocol, see: Powell 2002.



Haggling situations as described above are typical for bargaining situations and have been identified by Hirschman as 'more-or-less' conflicts (Hirschman 1994). From a rational actor perspective, as long as the proposed deal is better for the weaker party than the current situation the weaker party should join in the agreement even if the other party gains much more than itself. However, pure bargaining rarely produces equitable or stable compromises as each party seeks out only for its own advantage thus introducing potential problems of non-compliance, free riding and inequity (Neyer 2003). Indeed, the sharp bargainer might rationally come to the conclusion that secrecy and deception would play to his advantage. Overall, these tactics can lead to deadlocks and costly delays in negotiations and can hinder the discovery of efficient trades and outcomes (Mnookin 2003: 209).

The bargaining exchanges get more and more complicated with increasing issues under discussion and parties 'at the table'. In a setting such as an Intergovernmental Conference of 15, 25 or more actors in which no single actor or a coalition of actors is able to enforce

a deal by excluding or threatening the other parties, two criteria can serve as the norm for agreement. Firstly, the Pareto-criterion can be applied requiring that no agreement can be reached unless the deal serves all parties' interests better than the status quo. Secondly, the Kaldor-Hicks criterion can be applied through which parties that are left worse off in an agreement get compensated by the other parties for their compliance when the agreement accounts overall for more efficiency. Both criteria however imply that every party to the negotiation has veto power over the outcome and that agreement in Intergovernmental Conferences can only be reached through unanimity. The unanimity rule further creates the strategic risk of holdout problems. Typically due to the variety of issues discussed, the ZOPA in an Intergovernmental Conference setting should include several possible deals – with different distributive implications – that make all parties better off than the current status quo. With the unanimity rule, in pure bargaining contexts parties shift their focus away from the goal of reaching the best agreement overall towards the achievement of the highest possible gains for themselves by holding back their consent. E.g. whenever all parties but one have agreed to a particular deal, the last party can use its veto to obtain a higher concession from the other parties. If more than one party enters into this game, the transaction costs of agreement will rise and might lead to the breakdown of the negotiations or as has been more often the case in the context of IGCs, in situations where nobody is willing to shoulder the costs of compensating the holdout parties through side-payments, the deal will be a lowest common denominator of the interests of all actors involved (Mnookin 2003: 210). Empirical studies of multi-party negotiations have shown that a number of mechanisms that aim at changing the structure of the negotiation help to overcome deadlock and promote agreements even when they involve an issue where cooperation is unlikely on that issue when it is discussed in isolation. Most of these mechanisms can be subsumed under the concept of issue linkage. Issue linkage encompasses side-payments, log-rolling bargains, or agenda shaping. E.g. when negotiations prove to be contentious the addition of new issues or the subtraction of nonnegotiable issues can broaden the ZOPA and help to gain the consent of all parties (Steinberg 2002). Other forms of issue linkage occurs through tactical linkages which involve the combination of complementary issues that do not substantively require joint settlement but that are packed in a negotiation deal in order

to create a balance of enough gains (and/or costs) on all sides to achieve agreement (Davis 2004: 156).²⁶

3.1.4 Effective Communication through arguing and bargaining

The literature on arguing and bargaining has highlighted the coexistence of both modes of communication in negotiation situations. Still, depending on their theoretical background, rationalist or constructivist, most approaches do not arrive at constructing a meta-frame that could serve as an “overarching action-theoretical foundation encompassing the logic of strategic and of communicative action, and endogenous as well as exogenous strategic positions and substantial policy interests” (Panke 2006: 361). Most approaches set either arguing or bargaining as the predominant communication mode and analyze institutional variables according to their conduciveness to or hindrance of the preferred communication mode. Deliberative approaches that build on Habermas’ discourse theory for example assume that persuasion only takes place when arguing is used as the predominant communication mode. On the institutional level this would mean that institutional conditions that model as closely as possible the ‘ideal speech situation’ such as broad participation of stakeholders and the transparency of the decision-making process enable the communicative action through the communication mode of arguing. The communication mode of arguing is further often equated with effective arguing. Indeed, is it important to put the effectiveness of argumentation at the center of the debate. It is not the frequency or the predominance of one communication mode compared to the other but more the effectiveness of the communication mode in the shaping of the negotiation outcome that is important.

Therefore, it is necessary to develop a systemic approach that neither puts arguing or bargaining as the superior interaction mode (Panke 2006: 362). Instead, emphasis is put on the interactive dynamics of the process which influences the adaptations of the actors’ strategic positions and changes in their substantial policy interests. Within a communication, actors automatically search for meaning in filtering relevant from

²⁶ Compare discussion on IGC effectiveness in Chapter 2.5.

irrelevant information. Thus filtered ideas that are carried on in the communication can replace the actor's own ideas underlying its strategic positions or substantial policy interests if they are more compelling than the initial ones. This *flow of ideas* can lead to ideational change among the actors and to the adaptation of their positions and interests. A flow of ideas can occur through both the communication modes of arguing or bargaining. Arguing is characterized by propositions that are justified by the reference to facts, norms or values which are established as accepted and shared standards in the intersubjective world. Bargaining is characterized by exchanges of demands, concessions, or rejections which are often linked to threats or to subjective valuations of the good in dispute.

In order to produce effective outputs to which the negotiating actors can agree to, this flow of ideas through arguing and bargaining needs to be meaningful. Meaningful interaction presupposes two conditions. First, the negotiators need to communicate in the same speech modes, i.e. arguing acts are replied to with arguing acts and bargaining speech acts are replied to with bargaining acts. Second, meaningfulness requires that the actors share common standards for assessing the quality of the speech acts. Qualitative speech acts are those that facilitate ideational change and thus enable agreement among the actors.

Arguing aims at change in the substantial policy interests of the actors. Substantial policy interests are the fundamental needs and reasons that an actor has for a particular issue, they underlie the positions which are behavioral manifestations of a specific target point that the actor will claim during a negotiation in order to satisfy those interests. E.g. the desire of a member state to exercise influence in the decision-making of the EU because it is affected by its policies is an interest, while the demand for one Commissioner per Member State is a position defined as one possibility of exercising influence. For arguing to be effective, there need to be common standards for the evaluation of the quality of arguments (ideas) that are shared among the actors. As described above, the standards to evaluate the quality of arguments can be subsumed under truth, rightness or appropriateness (see figure on Validity criteria for Arguing). When negotiators engage in a meaningful exchange of ideas and evaluate those ideas according to the standards of quality for arguments, they engage in '*argumentation as a structure of interaction*'

(Panke 2006: 364). This argumentation structure will facilitate ideational change and thus change in the interests of the actors and will often cumulate in a consensus agreement. *'Bargaining as the structure of interaction'* can also represent meaningful communication. As above the communicators need to negotiate in the same speech act modes of bargaining and as bargaining relies on threats and promises, the actors need common standards to evaluate when a bargaining act is credible. Through the mutual exchange of credible threats and offers actors will gradually adjust their strategic positions and will strike a deal as long as it leaves them better off than their best alternative.

This systemic approach to the relevance of arguing and bargaining accounts for the coexistence of arguing and bargaining without putting one of them prior or superior to the other. In the next chapter institutional variables that facilitate or hinder the effectiveness of arguing and bargaining will be discussed with regard to the institutional setup of the traditional IGCs and the Constitutional Convention. Before that another contingency variable for the effectiveness of arguing and bargaining will be introduced. It is claimed that the relationship between the conflict type to be resolved and the appropriateness of arguing and bargaining for their resolution is another determining factor for the effectiveness of arguing and bargaining.

3.2 Conflict Types

Pluralistic market societies are characterized by the frequency and ubiquity of conflict.²⁷ Globalization, technical and technological progress and the unequal wealth creation, inequality and instability associated with them are just some of the factors that fuel modern conflicts. In democratic societies with freedom of speech and association, people who are directly affected by social change or those that are concerned about social justice tend to mobilize and voice their concerns. Growing interdependence and the advantages and promises of cooperation not only lead to the enlargement of the global wealth pie but

²⁷ Term conflict will be used here as a “state of tension between two [or more] actors irrespective of how it has originated and how it is terminated.” Aubert 1963: 26

also raise distributive issues for sharing the benefits. All those stakeholders involved make demands that are based both on self-interest, by trying to claim as much value as possible for themselves, as well as on a genuine concern for the public good, by trying to create as much value as possible - thus based on both negotiation modes on arguing and on bargaining.

Both the negotiation as well as the political theory literature distinguish between two or three basic forms of conflict: factual, value-based and interest-based conflicts. The first form of conflict which is the easiest to resolve if it occurs in its pure form is the fact-based conflict. Those are conflicts that can be solved by scientific evidence and facts (see Chapter 2.4 above). Their standard for resolution is truth and they are easy to resolve if the fact in dispute can be proven or disproved. In reality there are not many purely fact-based conflicts but most conflicts contain elements of fact-based disputes or concern fact-based disputes which are not incontestably backed up by theory and evidence. A very prominent example for such a dispute which involves fact-based elements is the debate on global climate change. The global scientific community was for a long time very split about the significance of global warming with many scientists arguing that the current warmer weather was statistically insignificant and others arguing that this was only the beginning of a significant change in the world's climate. In this example it were the concrete interest-based impacts of recent weather changes – severe hurricanes in the Caribbean, the significant and visible melting of the ice layer in Greenland - and the value-based framing of the debate – “leaving an intact world to future generations” - that shifted the political balance towards the now widespread acceptance of the problem of global warming. Therefore, most social conflicts involve a certain degree of fact-based uncertainty but can be framed as either belonging to the category of interest-based or value-based conflict.

Many contemporary conflicts of modern societies tend to be interest based and are of a divisible nature, they are conflicts about distribution, over the question of who gets more or less of a social good. It is often claimed that conflicts of interest are easier resolvable than conflicts over values because they presuppose a basic agreement at least on the value of the good which is sought after by the opposing parties (Aubert 1963: 29). An illustration for this can be contestants for the gold medal in the Olympics where the

contestants share the same values of fair competition and sportsmanship and compete for the same medal. In this particular example, there is no area of agreement as one party's gain is the other party's loss. On the other hand it can be established that both parties' interests point in the same direction. They both want the same good or object whose shared valuation constitutes the precondition for their conflict of interest. Conflicts of interest emphasize the similarity of the contestants, their common needs and aspirations. Therefore, both parties can acknowledge the other party's interest in the valued object and as the Olympic Games are not a once in a lifetime event, the parties can use this understanding to establish common rules of process and procedure, such as the no-doping and fair play principles, and can ensure that each one of them has an equal chance of obtaining the indivisible object.

Conflicts over values and norms are also very prominent in modern, democratic societies. Some authors even argue that the growing interdependence and the increased cultural exchange have led to a new prominence of value-based conflicts. Generally, conflicts over values or norms are much more fundamental than conflicts of interest and can be characterized as non-divisible. Conflicts of value are based upon a disagreement concerning the normative status of a social object and they often involve constitutional issues such as rights and responsibilities, or more specifically topics such as religion and multiculturalism. These conflicts have often contributed to overt and aggressive conflict behavior. In value conflicts the parties are characterized by the different valuation of a social object, often even denying the validity of the other party's positions.

Accordingly, negotiation theory and political theory agree that interest-based or distributional conflicts are generally easier resolvable than conflicts over non-divisible issues such as norms and values (Hirschman 1995). In interest-based conflicts, the opposing parties mostly want a share of the same object and can reach agreement through trades, compensation, distributional mechanisms such as "split the difference" or repeated games as illustrated in the Olympics example above. Pure conflicts of interest can be solved on the level of compromises through the mode of bargaining when the negotiation remains along a single dimension of the good in dispute, e.g. price of a good, number of votes in the European Council. On this single dimension any gain to one party is a relative loss to the other, but as most distributive conflicts are about material or economic

goods in the broadest sense, by involving elements of quantity and quality, price and costs, time and space and other trade-offs, most of those conflicts can be settled through compromises that involve package deals, and substitutive and/or compensatory deals (Sebenius 1991). Even goods that cannot be physically split are amenable to compensatory or functional strategies to overcome deadlock in negotiations through the inclusion of additional issues and resource expansion. (Pfetsch 1999: 203), cites in this context the deal among the European States during the negotiations about the seat of the European Central Bank. This was a single issue, indivisible good negotiation where the Member State that manages to secure the seat for itself would win and all others would lose out. The member states finally were able to decide on one location for the central bank, Frankfurt in Germany, after they added decisions on the seat of other European institutions to the negotiations, such as the seat for the European Environmental Agency (Copenhagen), Europol (The Hague), and the European Drugs Agency (London) which compensated the other countries for consenting to Frankfurt. Divisible goods facilitate the search for compromise as they represent opportunities for give-and-take and are usually not highly value loaded.

Those distributional mechanisms are often not applicable to value or norms based conflicts where the either or nature of the subject requires one side to get it all and the other to get nothing.²⁸ As value based conflicts cannot be solved at the level of the norm or value in dispute, they often require the recourse to a third unifying higher value or norm. The resolution often takes the form of consensus which can be achieved if the parties can overcome the single dimension by finding a third, common aspect which is above the object in dispute. Disputes over religion for example can be resolved if the

²⁸ Some authors argue that certain compromises are even possible with regard to value-based conflicts, e.g. through a strategic perspective on the good and by exchanging and dividing along the functional aspects of the good. An example for this is cited in Pfetsch 1999. In the example, Pfetsch argues that the question on the status of the city Jerusalem could be addressed by differentiating the city along the functions that it has and by distributing these functions among Jews and Arabs. The problem with this compromise is that it circumvents the real value issue behind the conflict by solving only one material aspect of it. The conflict of the sharing of power between Arabs and Jews is manifested itself in various other issues besides the status of Jerusalem and needs to be addressed on the level of mutual recognition and right to existence of both sides.

overarching value of tolerance is brought into the discussion which allows the rival parties to exercise their religious beliefs while obliging them to show respect for other groups' right for the exercise of another religion. The Harvard negotiation school argues that in principle even conflicts of interest can be solved by consensus if parties get to 'integrative bargaining' and can surface their underlying interests. However, if the parties should indeed succeed in focusing on interests, not positions, in being open about interests and use fair principles, in insisting on objective criteria and using reason not pressure to come to win-win solutions and would thus exercise 'integrative bargaining' as defined by Fisher and Ury (Fisher and Ury 1983: 13) this would actually mean that the parties would engage in arguing and no longer in bargaining. Therefore, it remains to be investigated if and under what conditions, interest-based conflicts could be solved by arguing.

A complicating factor for the answering of this question is that most conflicts are mixed versions of factual, interest and value based. Non-divisible issues often have some aspects that are negotiable. Similarly, conflicts over distributional issues often have a non-divisible component or sources. Additionally, both interest-based and value-based conflicts often involve disagreements over or differing interpretations of facts. In order to analyze the influence of the conflict type on the negotiation mode and outcome, the four case studies in this research try to account for some variance with regard to the type of conflict at hand.

Within the debate about arguing and bargaining the two communication modes have mainly been discussed as appearing in different contexts. Jon Elster also claimed that arguing is the mode of the 'forum' and bargaining the mode of the 'market' (Elster and Hylland 1986). Holzinger also examined the relationship between communication mode and conflict type (Holzinger 2005). She showed that arguing and bargaining tend to appear both at the market and in politics and put forth the alternative explanation that it is the type of conflict, which determines whether arguing or bargaining is chosen as a mode of communication (Holzinger 2001, Holzinger 2004). In an early work Aubert (Aubert 1963) suggested some systematic relationships between the sources of conflicts and their settlement arguing that certain sources of conflict may tend to call forth a certain type of mechanism for conflict resolution. Based on Aubert and on her empirical analysis of the

Neuss Mediation Sessions, Holzinger claims that whereas factual and value conflicts can be resolved by pure arguing, in conflicts of interest bargaining and arguing will appear together.

3.3 The Institutional Differences of the Constitutional Convention Process

As described above, arguing and bargaining can both be expected in IGCs and they can both be efficient if certain conditions are fulfilled. The argument here states that these conditions for efficient arguing and bargaining can be established through the institutional setup of EU treaty reform negotiations. Hereby it will be argued that the institutional setting cannot determine the interaction modus but it can enable one form or the other in acting like a mechanism. Elster formulates mechanism as an intermediate between laws and descriptions and defines them as “frequently occurring and easily recognizable causal patterns that are triggered under generally unknown conditions or with indeterminate consequences.” Mechanisms provide explanation because they are more general than the phenomenon that they subsume.²⁹ Institutions act like mechanisms because they do matter, but what is less evident, is under what conditions and to what extent they affect and constrain the behavior of the principals. Actors find themselves constrained by their interactions and by the institutional setting (Kerremans 1996: 218) and institutions not only regulate the access of actors to problems, but also specify the rules, location and timing of the game (Aspinwall and Schneider 2000).

The institutional setting does not determine the interaction mode but has a constitutive effect, i.e. it constitutes a necessary but not sufficient condition for the emergence of an interaction structure. This statement has consequences for the epistemological significance of the following analysis. This thesis does not postulate a positivist model that is based on hypothesis which can be empirically tested through falsification (Popper

²⁹ Mechanisms take the form of “If A, then sometimes C, D, and B.”, this formulation differs from scientific laws which take the form of “If A, then always B.” In allowing for some indeterminacy, mechanisms allow for the formulation of certain conditions that make it more likely for them to be triggered and acknowledge the existence of opposing mechanisms that make the assessment of their net effect difficult. For more details see: Elster 1998.

1968: Chap. 3 and 4). As the institutional setting is only seen as a condition for interaction structures but not as their cause, it will not be possible in this research to develop universally valid, falsifiable hypotheses but to target and test the assumptions put forth in the arguing and bargaining debate on the empirical analysis of this study. The distinction between the two forms of interaction is therefore not as selective as postulated by e.g. (Mueller and Risse 2001; Elgström and Jönsson 2000).

Joerges and Neyer (Joerges and Neyer 1997; Joerges and Neyer 1997) have argued that there are core institutional features of the EU which correspond to the supranational versions of the deliberationist model. They have examined the comitology process as an area where deliberation plays a role in EU policy-making. They pointed out the importance of arguments, binding rules and of expert opinion for decision making and discerned the “development of co-ordination capacities between the Commission and member state administrations with the aim of establishing a culture of interadministrative partnership which relies on persuasion, argument and discursive processes rather than on command, control and strategic interaction” (Joerges and Neyer 1997: 620).

Consequently, from beginning of convention process there was debate about the deliberative nature of the convention and the Convention was often labeled as a method more conducive to deliberation (Closa 2003; Maurer and Goeler 2004).

The focus on deliberation is also in line with the constructivist international relations literature which attribute the importance of deliberation for fundamental policy questions or as Risse argues “argumentative rationality appears to be crucially linked to the constitutive rather than the regulative role of norms” (Risse 2000: 2).

There are also many alternative explanations that point to the crisis and policy failure that was perceived by politicians and citizens alike after the debacle of the Nice IGC. Indeed, many constructivist approaches explicitly state that social learning and arguing are more efficient where the group feels itself in a crisis or is faced with clear and incontrovertible evidence of policy failure, and that a redirection of the process after failure will be conducive to arguing effectiveness (Kleine and Risse 2005; Checkel 2001 p. 54).

Although the external circumstances that led to the appointment of the Convention are acknowledged as being conducive to arguing, in the following analysis, the emphasis will

be put on the institutional differences of the Convention process and its influence on arguing and bargaining.

Various studies point out the following elements as the distinctive differences of the Convention compared to IGCs:

1. High horizontal and vertical institutional differentiation
2. Norm density and stages of norm definitions
3. Consensus rule for decision making
4. Open vs. restricted mandates
5. Publicity and transparency
6. Inclusion of new actors
7. Shadow of the ex-post approval

1. High horizontal and vertical institutional differentiation

The Convention method was characterized by high vertical institutional differentiation, involving a Presidium, various working groups, and expert hearings as well as horizontal differentiation comprising the three stages of the convention (the listening, the debate and the drafting phase). So far the literature's assessment of the role of differentiation is inconclusive and comes to different assessments depending on the theoretical background. Rationalistic approaches assume that actors bargain whenever possible irrespective of the institutional context (Benz, Scharpf et al. 1992; Magette and Nicolaidis 2004) and constructivist approaches stress institutional prerequisites for effective arguing (Fossum and Menéndez 2005; Kleine and Risse 2005).

Generally, actors can use both patterns of speech acts irrespective of the horizontal or vertical differentiation. As Panke (Panke 2006) points out, the effectiveness of the speech acts depend on shared standards for the evaluation of communicated ideas among the participants. As explained in earlier chapters, the three possible standards to evaluate the quality of the communicated ideas among participants are the standards of truth, rightness and appropriateness. Consequently, the more specialized or homogeneous the participants of an interaction will be, the higher the likelihood that they share common standards for the evaluation of arguments (Checkel 2001). In that regard, the homogeneity of the convention participants was less strong than e.g. the homogeneity of IGC preparatory

groups. Indeed, this argument of high integration and homogeneity has been used to analyze the role of working groups of the Council of the European Union in effective IGC preparations (Beyers and Dierickx 1998). In contrast to the Council working groups, the Convention working groups were not gathering of experts but comprised of interested actors and mirrored the plenary's heterogeneity. Nevertheless, author's like Goeler (Goeler 2006) argue that the intensive and repeated interaction among the working group participants and their exchanges with experts (such as e.g. in the WG Legal Personality), had a socialization effect and led to the development of common standards for the evaluation of arguments similar to what Habermas called a common "lifeworld". Goeler thus argues that there should be more arguing in the working groups and that the socialization effect facilitates effective arguing. Therefore, it can be assumed that vertical differentiation leads to effective arguing through e.g. the use of working groups, a fact that will be investigated in the empirical part. Arguing should occur much less and should be less effective in the cases where no working groups were used, reflecting the high workload of the plenary and the heterogeneity of the participants. The likelihood that actors share common perceptions of bargaining power should not be affected by the institutional differentiation, as threats are always possible. Bargaining should also occur in the Convention but should occur more often in the last phase of the negotiations when concrete articles were discussed.

Related to that it is often discussed that horizontal differentiation, such as sequencing, allows for the exclusion and the adjournment of controversial issues (Benz, Scharpf et al. 1992). The possibility to postpone controversial issues helps to avoid deadlock in negotiations. By leaving aside issues on which the negotiators cannot agree on common standards to either evaluate the quality of the communicated ideas (arguing) or on common perceptions of bargaining power (bargaining), they can reach either compromises or consensus on the other issues on the agenda by using both arguing and bargaining speech acts respectively. Sequencing is very common in IGCs and often produces left-overs when governments cannot solve certain issues through negotiation and lack decision-making by voting or by authoritative means. The issue of institutional reform was also often pointed out as an example for sequencing in the convention (Fossum and Menéndez 2005: 22-42; Magnette and Nicolaidis 2004: 397). In the first

step the Presidium advised the Convention to concentrate on the simplification of the 15 legal instruments. After the successful conclusion of the task of simplification the Presidium introduced the institutional debate very late in the Convention process (Norman 2005). For institutional issues it can thus be assumed that the lack of norm discussion and norm hierarchy generation e.g. within working groups inhibited effective arguing. Therefore, Conventioneers had to rely on bargaining speech acts to discuss the institutional reform, the impossibility to postpone issues over which the parties could not bargain successfully and the rather directive facilitation style of the Presidium on institutional issues might be an explanation for the later rejection of some institutional reforms. This is again a hypothesis that needs to be investigated in the empirical part. Within institutional differentiation, one innovative aspect in the Constitution was the working method of the Presidium. In the third and last phase of the Convention, also called the drafting phase, the Presidium used a drafting mechanism which is labeled as 'the one-text procedure' in the negotiation literature (Fisher and Ury 1983; Raiffa 1982). In this method, the Presidium acting as a third party drafted the treaty articles, in most cases after hearing the working group results, and submitted them to the plenary for criticism. Convention members then discussed the drafts in the plenary and submitted their amendments in written form to the Presidium which then tried to incorporate the interests that emerged from the criticism, revised the draft accordingly, and resubmitted the draft for further criticism until the Presidium judged the draft to be representative of the consensus in the Convention. The virtue of such a single negotiating text lies in its fostering of the interaction mode of arguing as negotiators do not have to make concessions or commit to a draft until the final round of changes. Normally a concession feels like a sure loss from one's position in return for an uncertain increase in the probability of ultimate agreement. Making concessions can be costly, especially when external constituents' look out for every supposed "sellout." Concessions can also be interpreted as weakness by the counterpart. The single negotiating text seeks to avoid some of the destructive dynamics of positional bargaining by transferring the responsibility for value creating away from the negotiating parties which are focused on value claiming towards the mediator who has an interest in a balanced and efficient deal for all.

2. Norm density and stages of norm definitions

Norms are critical parameters in negotiations that make arguing and bargaining effective. In negotiations the actors will often start off with different conceptions of a situation and different ideas about which norm would be more right or appropriate for resolving it. Through arguing amongst each other they will either define a new norm that overlaps with their initial norms and resolves a common interest or in lack of such an overarching norm, they will need to establish norm hierarchies through the communication mode of bargaining. High diversity of norms within the negotiation participants increases the possibility that participants will find it more difficult to find a common norm and they will thus resort to bargaining in order to solve their disputes. (see also Checkel 2001: 56) Generally, the more diverse that the negotiators are, the higher the number of (diverging) norms that are to be expected. As the participants of the Convention are much more diverse than the participants of IGCs (bureaucrats and experts on lower levels, ministers and heads of governments on higher levels) this would point to more norm density and arguing within the respective levels of IGCs and more norm diversity and bargaining within the Convention.

In contrast to that, as mentioned above most constructivist approaches argue that high norm density/diversity stimulates the development of a common 'lifeworld' and fosters arguing dynamics when groups meet repeatedly and have a high density of interaction among their participants (Checkel 2001). Within the convention the interaction between the participants was very intense especially during the second convention phase in the working groups. With regard to arguing and bargaining within the Convention this would lead to the assumptions that in cases where different norms itself were under discussion, esp. with regard to constitutional issues, the use of certain institutions such as working groups or mediation, help the development of arguing as the dominant form of interaction and thus facilitate the development of a common shared norm among the participants. Similarly, in cases where it is important to build norm hierarchies, esp. with regard to the settlement of distributive issues, the convention institutions should also facilitate effective bargaining and the search for compromise as they help the participants to

establish a common definition of the situation. As discussed above, these assumptions need to be tested in the empirical part.

The diversity of norms is not only dependent on the number of participants but also on the nature of the issue in dispute. Whereas e.g. the issue on the Foreign Minister of the Union was mainly a dispute between the intergovernmentalist and the federalists, the issue of the Union Presidency e.g. involved cleavages between intergovernmentalist and federalists but also between small and large states. Generally, the more cleavages are relevant for an issue, the higher is the diversity of norms, and the higher is the likelihood that actors do not share a common standard (or a hierarchy of standards) for evaluating the quality of the arguments to resolve the issue and will thus use more bargaining communication acts (Panke 2006: 368).

3. Consensus rule for decision making

The president of the convention defined consensus as the decision rule of the Convention and argued that “there is no doubt that, in the eye of the public, our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus”. Giscard also added that “consensus does not mean unanimity” (Giscard d'Estaing 2002: 11).

The notion of consensus is often vaguely defined and refers at the same time to the process of decision making as well as to the quality of the outcome. Some observers even argue that consensus is basically the same decision rule as unanimity. Lawrence Susskind defines consensus to be reached “when everyone agrees they can live with whatever is proposed after every effort has been made to meet the interests of all stakeholding parties” (Susskind 1999: 5).

The difference between consensus and unanimity can indeed best be summarized under three points that mainly cover the procedural aspects of a consensus building process rather than delivering a clear cut definition. Consensus differs from unanimity first, by the absence of voting; second, its vagueness and a “lower minimum degree of support” required by the consenting party, i.e. consensus agreements do not need to integrate all negotiating parties and as long as a party does not actively voice its opposition it will be

assumed that it can consent to the agreement; and third, consensus is often conceived as a norm and thus often carries a positive symbolic value (Lindell 1988: 42).

Under the consensus rule, the power to block the process and prevent decisions is not equal among the participants. (Lindell 1988: 13). Whereas even one dissenting voice can block any decisions under unanimity, consensus rule rests more ambiguous as it states that a small minority would not be able to prevent the large majority from adopting a common position. The precise size of this 'small minority' is deliberately left unclear as it helps to blur perceptions of bargaining power.

The necessity to 'persuade' large numbers, the conscious intention of trying to integrate all parties into the deal as well as the Presidium's power to define when consensus is reached, should indeed fuel arguing in the beginning of a negotiation. The main merit of the consensus rule esp. combined with a neutral facilitator is that it gives arguing a chance. As parties need to make their interests intelligible to a third party, they will be incentivized to argue first in order to make intelligible why their position better meets the standards of truth, rightness and appropriateness. Nevertheless, if parties do not manage to develop common standards through arguing, there is no obvious reason why they should not bargain, esp. when the negotiations move towards their closing stage. The consensus rule confers a lot of power to the Presidium who will determine when a consensus is reached and how it looks like. Effective arguing would only occur if the presidium was truly impartial and competent to deliver a verdict on the 'closest possible' consensus reached. But as the negotiating parties know that the shadow of ex-post approval applies and that the Presidium cannot declare a consensus that would be rejected by any one of the veto powers, bargaining should also occur under the consensus rule and will be as efficient as the Presidium's sensitivity towards the limits of 'tacit consent'. The power conferred on the Presidium also runs the risk of being misused when the Presidium does not limit its role to a facilitator but actively engages in the negotiations with its own ideas about what an efficient outcome would look like. The consensus rule can thus lead to inefficient Convention outcomes when the Presidium defines consensus on issues where no actual consensus either through arguing or even a compromise through bargaining emerged. Those issues will then be vetoed by the subsequent IGC. It can be

argued that those issues would represent left-overs, where any IGC would have given up because of lack of unanimity.

4. Publicity and transparency

Deliberative approaches to European governance that favor the logic of communicative action over the logic of strategic action argue that the relatively high degree of transparency in the process of the European Convention (compared to the closed door policy of the IGCs) is an important factor for the assertiveness of arguing. It is put forth that negotiators which have to express their views in public will be forced to link their claims and positions to shared norms and standards and that publicity by this mechanism favors the triadic nature of arguing and the power of the better argument. Elster argues that generally speaking, “the effect of an audience is to replace the language of interest by the language of reason and to replace impartial motives by passionate ones” and calls this effect the “civilizing force of hypocrisy” (Elster 1998: 111). Other authors point to the constraining nature of publicity with regard to the honest and open exchange of arguments. They argue that especially with regard to contentious issues negotiators might be reluctant to voice their true convictions and might thus remain on the level of strategic action. Some scholars of European integration even argue that interstate bargains are only possible because decision-makers operate in closed session. (Hayes-Renshaw and Wallace 1997: 7) state that the secrecy of the Council negotiations allows the ministers to speak in unvarnished terms and to use arguments that they would not repeat in public. This argument ignores that closed door negotiations also favor the ‘unreasonable’ party that plays hardball during the negotiations. By that closed door negotiations can reinforce the two level game by turning it into a “double-edged diplomacy”. Secrecy makes it easy for the representatives to explain to their domestic constituents that they fought hard on the issues but that the other side would not accept their views. In a similar manner, transparency can also inhibit preference change as negotiators fear political defeats and a loss of face by changing their positions. On the other hand, it is also argued that in camera settings would facilitate true arguing as it would free the negotiators from public pressure or interest representation. Thus, the variable of transparency has been often put forth as an important element for the deliberations in the Convention being portrayed as

both hindering and promoting the exchange of ideas and the facilitation of preference change. As the theoretical conceptualizations are contradictory and the empirical findings rather weak, it is suggested that the variable of transparency should not have an impact on the negotiation process and the outcomes of the Convention deliberations and will thus not be considered in this analysis.

5. Inclusion of new Actors, Broader Participation

One of the most striking differences of the Convention process is the inclusion of new actors in the negotiations of treaty reform. The convention consisted of a Presidium that was composed of a President/chairman (Giscard d'Estaing), two Vice-chairmen (Amato and Dehaene), 28 government representatives from the 15 member states and the 13 candidate countries, 56 national parliamentary representatives, 16 representatives of the European Parliament, and 2 representatives of the European Commission. Altogether the Convention comprised 105 participants with their 102 alternates as well as 13 observers (from the Committee of the Regions, the Social Committee and the social partners) (Closa 2004: 190).

The inclusion of new actors is also often cited as one element that fostered arguing in the Convention (Bellamy and Schoenlau 2004; Goeler 2006; Landfried 2005). Some of the actors in the convention such as the candidate countries, members of the EP or the Commission lack formal veto power or other means of threatening the conclusion of an agreement. The normative discourse theory emphasizes access and voice as important variables of an ideal discourse that foster argumentation (Habermas 1981). And although it makes sense that actors without formal blocking power should argue more and bargain less, there is no reason why they should totally refrain from bargaining. Especially the candidate countries can substitute for their lack of formal bargaining power by e.g. issuing threats by pointing out that certain provisions might lead to ratification problems after joining the EU. Even the supranational actors can engage in bargaining by aligning with either the candidate countries or other member states positions that serve their own institutional interests. Panke (Panke 2006) even argues that the increased heterogeneity among the different actors in the Convention makes effective argumentation more difficult as the number of coexisting reference systems increase. So even if the

supranational and candidate country representatives would argue more than the member state representatives, the likelihood that the standards for the evaluation of arguments overlap should decline and undermine effective argumentation.

Nevertheless, this question of whether communication acts are actor specific or not has implications for the main argument of this thesis which states that the institutional setup has influence on effective argumentation and thus needs further investigation. It will be dealt with in the empirical analysis of the convention debates where it will be investigated if the 'new actors' always do use more arguing than the member state actors or if the institutional setup has some socialization effect on the harmonization of the communication modes used.

The analysis of this hypothesis needs careful investigation as the fluctuation rate among delegates in the Convention was very high with almost a quarter of all participants being exchanged in the course of the whole process. This movement is especially important for the last phase where the number of national ministers increased up to 46 percent, with the number of experts declining accordingly from 46 to 32 percent (Maurer and Goeler 2004: 20). This rotation decreased the socialization effect of the Convention and made bargaining more prominent. National ministers, also busy with other crisis in the world such as the US invasion in Iraq, were not intensively engaged in the daily operations of the Convention but mainly just appeared to deliver their speeches in the plenary and to rush to their next appointment right afterwards.³⁰ As national ministers did not have as much technical knowledge as the experts that they replaced, they should rely more heavily on their political authority and thus use more bargaining speech acts (Maurer and Goeler 2004: 20). Therefore, we expect much more bargaining than arguing in the later phases of the convention than in earlier phases.

6. Restricted vs. open mandates

Generally, restricted mandates shrink the ZOPA and lead to positional bargaining and compromises whereas open mandates allow for the change of substantive policy interests

³⁰ This lack of engagement was also criticized by many convention participants. See Debates on the reform of the institutions on 20/21 January 2003 and 15/16 May 2003.

among the negotiating actors and for consensus agreement. Although mandates in the convention were much less restricted as mandates of IGC participants, Convention members were not fully independent as they had to account to those who had nominated them. Most of them further represented bodies and institutions whose behavior would be regulated by the new constitution and had thus strategic interests for a more favorable outcome for their own constituents than for the ‘common good’.

Actors can use arguing and bargaining communication acts irrespective of their mandate. Actors with strongly restricted mandates are not able change their policy positions or interest during interactions and will thus interrupt the arguing process within the boundaries of their mandate. Therefore, actors with restricted mandates will use more bargaining speech acts than actors with open mandates which should use more arguing speech acts. The empirical part will investigate if and which actors refer to their restricted mandates in order to restrict the predominantly argumentative interaction mode.

7. Shadow of the ex-post approval

The shadow of the ex-post approval acts as a very similar mechanism on the communication mode as the issue of the restricted or open mandates. The Convention was from the beginning set up as a preparatory body for an upcoming IGC. As such it operated from the beginning in the *shadow of ex-post approval* although the Laeken Declaration had left the crucial question on the ‘final outcome’ of the Convention open giving it the option of presenting a complete text or options to choose from. In the very first session of the convention, its President framed the ambitious goal of achieving a “broad consensus on a single proposal ... (that) would thus open the way towards a Constitution for Europe” (Giscard d’Estaing 2002).

Nevertheless, the shadow of ex-post approval was acknowledged and often stated by many convention members during the debates and used this fact to constrain arguments which they thought would not pass the upcoming IGC.³¹ The threat of ex-post approval should per se not have an impact on the participants’ abilities to use arguing or

³¹ See discussion of plenary debates with regard to case 3, the EU President, and case 4, the definition of Qualified Majority Voting.

bargaining speech acts. Generally, ex-post approval can have two effects both of which tend to foster bargaining: firstly, it can be used by the participants as a bargaining tool to construct a conception of external constraints in order to limit arguments within the debate, or secondly, it can be used by the participants as a self-enforced reality check if they develop a common understanding of what is possible and what not, in that it would limit the possible range of arguments hindering substantial changes of policy interests but not arguing as such.

Summary of Institutional Variables and Selection of Relevant Variables as Indicators for Independent Variable on Institutions

Institutional Characteristics	Implications for the structure of interaction	IGC	Constitutional Convention (CC)
Vertical differentiation	Helps manage the process, conducive to arguing and consensus building	Mediation and leadership through EU Presidency or supranational actors can be conducive to effective arguing	Effective arguing through institutionalized Presidium and one-text procedure
Horizontal differentiation	Sequencing conducive to effective arguing and effective bargaining. More effective arguing esp. in earlier phases, followed by effective bargaining in later stages if package deals can be crafted	Effective arguing especially in the preparatory groups and processes leading up to an IGC; During IGC bargaining can be effective through issue linkages and adequate package deals.	Effective arguing should take place in working groups. Bargaining in later stages can be less effective if issue linkages and package deals are not entertained (esp. if issues were not initially addressed in working groups)
Norm density/hierarchy	Initial norm density conducive to effective bargaining Development of common norms through interaction and debate conducive to effective arguing	IGC conducive to effective bargaining	CC conducive to effective arguing where working groups were used, Inefficient arguing and bargaining expected in issues where no working groups were used
Decision rules	Unanimity leads to inefficient bargaining and high transaction costs, can only be overcome by issue linkage	Unanimity in IGC leads to strong bargaining and to lowest common denominator solutions	Consensus rule in CC is conducive to effective arguing esp. in the early phases of the work

	and compensation Consensus rule facilitates arguing		
Mandates	Restrictive mandates lead to compromise solutions through bargaining Open mandates allow for more 'creativity' and arguing in order to reach consensus	Restrictive mandates of IGC more conducive to compromise and bargaining (can be efficient if issue linkages are entertained)	Open mandates of Convention more conducive to effective arguing
Publicity and transparency	Will not be considered due to contradictory theoretical conceptualizations and weak empirical findings	-	
Inclusion of new actors	Theoretical conceptualizations rather weak. Will be tested empirically as a negative hypothesis to institutional variable (indicator working groups).	-	
Shadow of ex-post approval	Conducive to effective bargaining	-	Conducive to bargaining within convention

4. Research Design and Methodology

4.1 A comparative case study approach

Case studies still represent one of the most important methods by which to investigate organizational behavior and to improve the understanding of that behavior (George and McKeown 1985). According to George, they should serve to develop “typological theories,” or contingent generalizations on “*the variety of different causal patterns that can occur for the phenomena in question [and] the conditions under which each distinctive type of causal patterns occurs*”. (George 1979).

As case studies mostly study only a fraction of the universe of possible n – in this case from the variety of topics handled during the Constitutional Convention, case studies of limited number always remain selective. As the sheer quantity of the data and the labor intensive data coding method would make an analysis of all cases a too complex and time- consuming process, the problem of the selectivity of case studies will be solved by conducting an in depths analysis of the representative cases selected and by employing the methods of process tracing and structured, focused comparison.

George and McKeown argue that arguments about causal processes in studies of human and organizational decision making often involve a “process-tracing” procedure. This method will also be used in this study as it aims at investigating and explaining the decision processes by which various initial conditions are translated into outcomes. Process tracing focuses on whether the intervening variables between a hypothesized cause and observed effect move as predicted by the theories under investigation and looks at the observable implications of putative causal mechanisms in operation in a case. Therefore, a process tracing approach entails abandonment of “black boxing” the decision process and makes this process the object of the investigation which is also the main goal of this study.

Process tracing is a mainly deductive method. It uses theories to predict the values of the intervening variables in a case and then test these predictions. In doing this it is important to also trace the predicted processes of alternative hypotheses as well as those of the main hypothesis of interest. Process tracing is also open to inductive reasoning, by being open to unexpected clues or puzzles that indicate the presence of left-out variables. This can

lead to the development of new hypotheses which can then be formulated to be tested by subsequent studies (Bennett 2004: 23).

Process-tracing is a method to investigate and explain the decision process by which various initial conditions are translated into outcomes (Checkel 2000: 4). By doing this, we are not looking for definite correlations between independent and dependent variables but try to answer the question if arguing and bargaining played a role for effective decision making within the Convention. Therefore, we are not trying to establish laws of cause and effect but rather look for mechanisms (Elster 1998).

The second aspect of the case study method, the method of “structured, focused comparison” George’s approach (George 1979) is used here to ‘focus’ selectively on only those aspects of each case that are relevant to the research objectives and data requirements of the study and to ‘structure’ the study by defining and standardizing the data requirements for the cases at hand. This is done by formulating theoretically relevant hypotheses to guide the examination of each case and thus by making the comparability of the cases much more systematic and defensible.

4.2 Case selection

4.2.1 Criteria for case selection

In order to judge the effectiveness of the Convention process for decision-making in the EU it is important to analyze it in light of the IGC processes and thus to focus on the left-overs of Amsterdam and Nice. Four cases will be analyzed during the course of this study. Besides the fundamental requirement of being a left-over, the cases were selected according to three criteria.

First, according to the dependent variable, ‘consensus’ defined as agreement within the Convention. This agreement rule is carried over to the subsequent IGC in that some agreements of the Convention were accepted by the IGC and some were changed. As an indicator for true and false consensus, both variances will be considered. In their social science standard book “Designing Social Inquiry” (DSI) King, Keohane and Verba strongly advice against case selections on the dependent variable and attest those studies systematic selection biases (King, Keohane et al. 1994). This recommendation of DSI is

highly relevant for statistical studies. Nevertheless, the case studies in this research were deliberately chosen with regard to a particular outcome, thus on their variance on the dependent variable. The variation in the value of the dependent variable is important for this study as it shall help to identify which variables are not necessary or sufficient conditions for the selected outcome. The research program on arguing and bargaining is still in its early stages and selection on the dependent variable shall serve here the heuristic purpose of identifying the potential causal paths and variables leading to our dependent variable of interest, efficient consensus outcomes. As some sort of proxy or functional equivalent to a proper scientific experiment, with controlled variation in independent variables and resulting variation in dependent variables, the case selection table below shows that the cases represent all combination possibilities with regard to the variations in the dependent variable and the two independent variables. This full range of values was chosen to avoid a selection bias towards the suggested predictions of the hypotheses (George and Bennett 2004: 22).

As a second selection criterion, we choose on the first independent variable by varying the institutional process features of the Convention to study the importance of single mechanisms. Whereas most topics were dealt with in the convention plenary and in working groups involving the institutional setup variables of the Convention process, some topics were not prepared in a working group but directly discussed in the plenary thus resembling more the process of an Intergovernmental Conference with added publicity and broader participation.

Third, we chose the cases depending on the conflict type that the cases represent. As many convention observers argued that the types of conflict played a role for finding agreement and that there were more or less 'Convention suitable topics', different types of conflict cases were selected. The main difference in the topics is that some issues are more of a constitutional nature and thus value-based, as they deal with the supranational governance structure of the EU, and some conflicts fall more into the category of distributional conflicts as they relate directly to the powers and influence of the member states within the EU.

4.2.2 Cases selected for this study

The first case deals with the legal personality of the Union. It represents a surprising agreement as it is an issue that was discussed in Nice and during the CC but only agreed on during the CC. The single legal personality of the Union is a crucial aspect of the Convention's work as it is a prerequisite for the merging of the treaties and pillars and thus for the existence of a Constitutional Treaty. This example of the single legal personality of the EU is also representative of a resolution that was based on a large consensus reached within the Convention. The discussions within the plenary debate on the 'Legal Personality of the Union' will thus be used to test if the agreement can be attributed to arguing processes. If the hypothesis holds true we should find much more arguing than bargaining in this case.

The second case will deal with the Common Foreign and Security Policy (CFSP) of the Union, particularly with the discussion on the merging of the post of High Representative for the CFSP with the post of the EU Commissioner for External Affairs. The problematic of the overlaps between the two posts had been discussed in prior IGCs but agreement always fell through because of the federalists-intergovernmentalist divide. This case is an interesting example because the Convention participants accomplished to bridge this divide and reached a more integrative compromise than the solutions of the IGC. The Foreign Minister of the EU is not a left-over as such but represents an important topic of the current reform and constitutional debate and addresses long standing fundamental problems of the EU. Therefore, the post of the EU Foreign Minister was one of the critical institutional issues but it was dealt with within a separate working group. The records of the CFSP discussions should thus show both arguing and bargaining processes. Particular focus will be put on the sequence and patterns of arguing and bargaining throughout the debate.

The third and fourth cases were selected from the highly controversial institutional issues that were dealt with during the Convention, in particular the new post of the European Presidency and the Qualified Majority Voting regulations in the Council. The European Presidency falls in the same category as the post of the European Foreign Minister. It is not a left-over as such but a crucial long standing aspect of the integration agenda. The question about the QMV provisions entered the post-Nice process officially with the

adoption of the Laeken Declaration (European-Council 2001). It was chosen because it is a very sensitive area concerning the relative powers of the Member States and determines the degree to which each Member State can influence the decision-making process within the Council. The member states did reach agreement on the QMV rule during the Nice IGC but criticism on the insufficiency of the formula emerged directly after the signing of the treaty. As most member states agreed that the solution was imbalanced and not sustainable, the QMV regulation also qualifies as a left-over which was explicitly mentioned in the ‘Declaration on the Future of the Union’.

Both cases three and four are special as they were not dealt with within a working group but relied on plenary discussions only. The following IGC significantly changed both of these agreements. The member states accepted the EU Presidency but were able to change the provisions for the post significantly because they had been left too vague by the Convention. The IGC further rejected the QMV formula of the Convention, which was no surprise as many countries openly voiced their opposition to the agreed formula during the Convention. In both cases we can assume that no consensus or viable compromise was reached by the Convention. Therefore, we would expect the predominance of ineffective arguing and bargaining at the debates on institutional issues. The systematic comparison of agreement and non-agreement cases and a focus on the changing institutional features of the Convention should then lead to the identification of institutional prerequisites for effective arguing in EU treaty reform.

The immense amount of Convention debates, documents and drafts does not allow a comprehensive study of all Convention aspects and topics in general. In taking this into account, the cases above were selected to allow insights about institutional variables that are conducive to successful arguing and thus to decision-making effectiveness in the EU.

Figure: Case Selection Criteria					
Agreement		Institutional setting		Conflict Type	
Accepted by following IGC	Rejected by following IGC	Convention method: WG group etc.	No working groups	Constitutional issue	Distributive issue
A1	A2	B1	B2	C1	C2

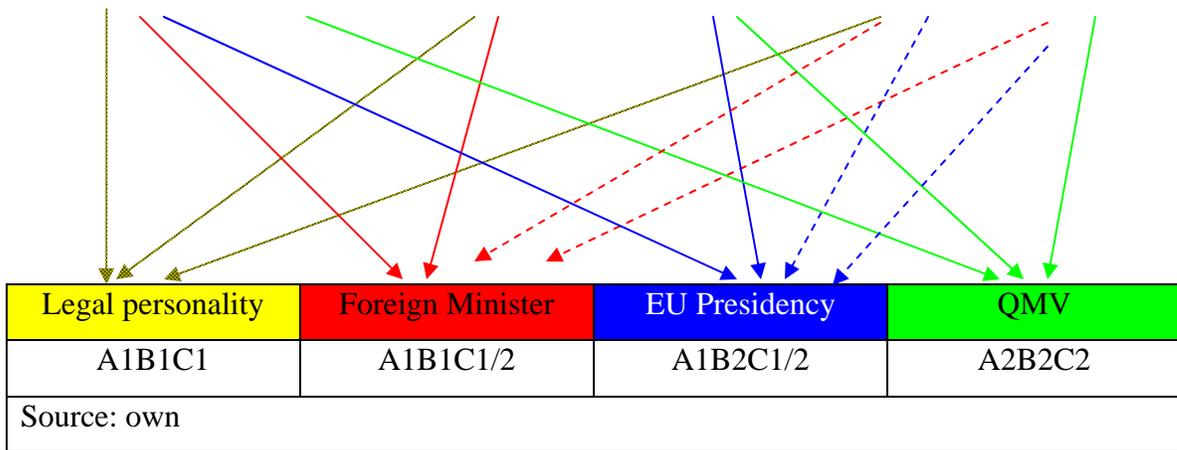


Table: Overview of all combination possibilities of Case selection criteria with examples:		
A1B1C1	accepted by following IGC, convention method, constitutional issue	Legal Personality , Status of Charta of Fundamental Rights
A1B1C1/2	accepted by following IGC, convention method, constitutional and distributive elements	Foreign Minister, EU Presidency , making EU Central Bank an institution of the EU, renaming of Court of First Instance to ‘High Court’ plus creation of an appointment panel
A1B2C2	accepted by following IGC, no convention method, distributive issue	No cases found
A2B1C1	rejected by following IGC, convention method, constitutional issue	No cases found
A2B1C2	rejected by following IGC, convention method, distributive issue	e.g. introduction of QMV in tax, Union resources, and with regard to the multi-annual financial

		framework
A2B2C1	rejected by following IGC, no convention method, constitutional issue	Legislative Council
A2B2C2	rejected by following IGC, no convention method, distributive issue	QMV, Composition of EU Commission, Seats in European Parliament
Source: own		

4.3 Analytical Framework

The central aim of this study is to find out whether actor preferences are shaped through the negotiation process and *how* the institutional setting influences the interaction modes of the negotiation participants and whether it has repercussions on the effectiveness of problem solving. The study questions mirror the research objectives and were formulated in order to find out:

With regard to research objective 1:

How much arguing and how much bargaining do we find and what was the distribution of both modes over the course of the procedure?

With regard to research objective 2:

Is there a relationship between the type of conflict and the communication mode used? Are certain communication modes better to resolve certain conflict types?

With regard to research objective 3:

Is there a relationship between the negotiation process (as determined by the institutional setup) and the mode of the negotiation process? If yes, how does this relationship play out?

Which institutional setup causes more arguing or more bargaining?

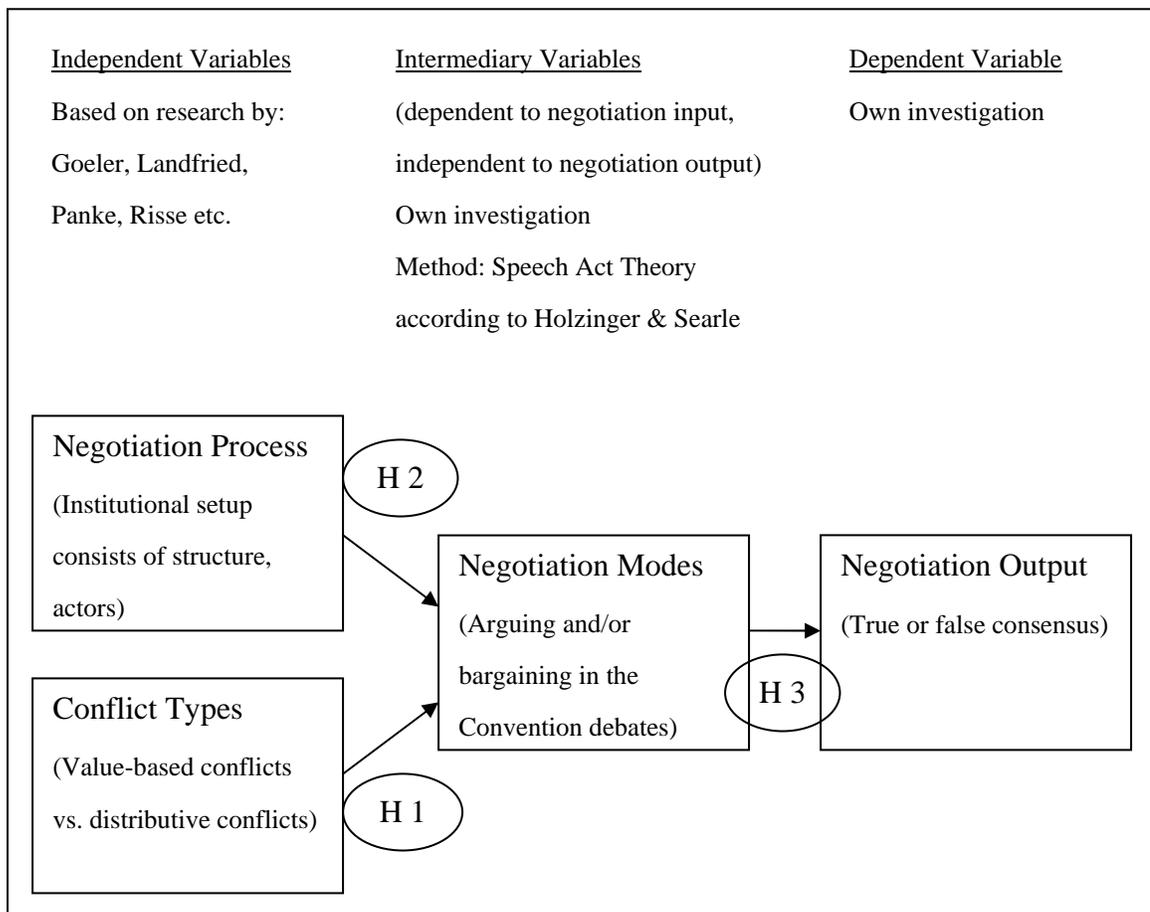
With regard to research objective 4:

Is there a relationship between the negotiation process and the output of the negotiation? Does the varying institutional setup affect the output, i.e. does a

particular institutional setup lead to more bargaining and cause thus more confrontation while another institutional setup enables arguing and leads to consensus?

Are there any negotiation frame variables (variance in institutional setup according to conflict type) that facilitate consensus building processes in multi-party negotiations through the fostering of effective arguing and bargaining?

The following figure shows the above mentioned components (variables) in an analytical framework and points out the assumed relationships between the different variables.



The institutional setup and the conflict types will serve as the two independent variables. Those variables and their expected influence on arguing and bargaining have been discussed in detail in chapter 3. As pointed out, among the institutional variables,

institutional differentiation and norm density seem to be the most important institutional factors that influence effective arguing and bargaining in the Convention. The factor of whether working groups were used or not accounts significantly for these institutional variables. Therefore, the existence of working groups will be the main indication for the presence or absence of the institutional setup variable. The conflict type has also been accounted for as developed in the case selection subchapter.

The outcome of true or false consensus will be the dependent variable which is determined by the effective use of arguing or bargaining respectively caused by the combination of the two independent variables.

Based on the discussion of the literature, several hypotheses can be formulated to test: firstly, the general relationship between each independent variable and the use of the communication modes of arguing and bargaining, secondly, to test the assumptions with regard to the influence of each independent variable on effective arguing and bargaining to achieve true consensus agreements, and thirdly with regard to the interplay of the two independent variables for consensus building.

4.4 Hypotheses

Based on the theoretical framework presented above, three sets of hypotheses will be analyzed with regard to the four cases.

The first set of hypotheses relates to the independent variable “conflict type” and how its distinct forms of “value-based” and “distributive” conflicts determine the occurrence of arguing and bargaining in the Convention debates (negotiation modes).

The second set of hypotheses will test the second independent variable “institutional setup” considering two major characteristics: structure of the negotiation process (“working groups”) and the specific predisposition of various actors in the negotiation process (“actors”).

The third set of hypotheses will serve to test whether the occurrence of arguing and bargaining are relevant indicators for the negotiation output, i.e. to the effectiveness of consensus building within the Convention. (First: occurrence of true or false consensus, and second: the occurrence of persuasion in cases where expected output does not appear, e.g. bargaining position diminish or arguing is picked up).

Furthermore, the study includes a weighting of the different influence of the independent and intermediary variable regarding the negotiation output.

The overall assumption, underlying the hypotheses of this study is: The occurrence of arguing and bargaining in the convention is a function of the conflict type, the institutional setup and it is an indicator for the effectiveness of consensus reached.

1.2.1. Certain Conflict Types are better solved in certain communication modes

Seldom do conflicts belong clearly into one or the other conflict category. Most conflicts are mixed forms of value and interest-based (i.e. distributive) conflicts. Therefore, we would expect to find both communication modes in all four cases. Nevertheless, the literature suggests that ideally, value conflicts should be solved more effectively through arguing, and distributive conflicts would better be solved through effective bargaining. It would thus be interesting to see if the respective conflicts were tried to be solved in the appropriate communication modes. Accordingly:

H1.a The more the negotiation conflict is value and fact-based the more arguing is to be found.

This means that within a value-based conflict we would expect the predominance of arguing over bargaining. This should be confirmed in case 1.

H1.b The more the negotiation conflict is interest-based and distributive the more bargaining is to be found.

This means that within a distributive conflict we would expect the predominance of bargaining over arguing. This should be confirmed in case 4.

H1.c If mixed conflict types are under negotiation, typically arguing should be predominant over bargaining.

Cases 2 and 3 were qualified as mixed conflict cases, therefore, either arguing or bargaining could be predominant. However, from previous empirical research we would expect that arguing should be predominant over bargaining with regard to mixed conflict cases (Holzinger 2004: 200).

1.2.2. The design of the institutional setting can make arguing and bargaining more effective.

The second set of variables will aim at the institutional setup as the independent variable for the negotiation mode and will test the theoretical assumption of when arguing is more effective for consensus building from an institutional setup perspective. The empirical analysis concentrates on two major components: first, the existence or non-existence of working groups in the negotiation process, and second, the power composition of the speakers, i.e. arguing and bargaining issued by national government representatives in comparison to national parliamentarians and European actors.

Accordingly:

H 2.1.a If working groups are involved (sequenced negotiation) like in cases 1 and 2 the speakers use more arguing to justify their preferences.

H 2.1.b If no working groups are involved like in cases 3 and 4 the speakers use more bargaining.

If the institutional setup (or rather the existence or non-existence of working groups) would not play any role, it would be expected that the communication modes of the participants reflect their power positions among the Convention's composition. Thus:

H 2.2. In the absence of appropriate institutional design (working groups), communication modes will be determined by the distribution of power among the actors, i.e. European actors (being the less powerful) should argue more than national parliamentary actors than government

representatives as government representatives have veto power and can issue credible threats.

But, it is not only the inclusion of new actors (EU parliament, commission) that resulted in more effective argumentation but much more the process that led to an environment conducive to argumentation! If this hypothesis holds true the institutional setup should be mirrored in the use of arguing by the various actors.

If H2.2 should be confirmed in all cases, this might indicate that the actor specific predisposition would play a bigger role than institutional setup and or conflict type. From the cases we selected based on the theoretical assumptions with regard to this study H2.2 should be especially true for cases 3 and 4 which did not involve working groups and less so for cases 1 and 2 which made use of working groups. If this finding should be confirmed, we can suggest that the institutional setting plays a role for the prevalence of arguing and bargaining. We would further expect that H2.1 should be more true for case 4 and case 3, than for case 2 and case 1. This finding would suggest that the institutional structure did play a role for these negotiations, that the actors were able to build 'a common lifeworld' within the working groups and made thus deliberation possible. If however, H2.1 holds most true for case 4 and least true for case 1, this might suggest that the conflict type might have played a bigger role for the determination of the use of arguing and bargaining than the institutional setup. As a further step, differences between case 1 and 2 (both had Convention institutional setup), and cases 3 and 4 (just plenary discussion) will be investigated.

A final test of this hypothesis will be conducted through the comparison of the usage of arguing with regard to the various actor groups (government representatives, national parliamentarians, European actors). If the differences between the usage of arguing among the actor groups should be consistent throughout the cases, the hypothesis formulated above might not be true. Then arguing would not be process but actor specific. If however, differences in the arguing patterns would correlate with working

group involvement or not then it could be assumed that the institutional setup might have played a role for the usage of arguing or bargaining by various actor groups.

Overall, with regard to the institutional setup hypotheses, there should be more arguing in cases one and two than in cases three or four if the institutional setup plays a role.

1.2.3. The convention method enables more effective consensus building.

The third set of hypotheses aims at the dependent variable, true or false consensus based on the confirmation or rejection of the convention conclusions by the subsequent IGC and will examine if the empirical results match the outcome and if arguing did really translate into the negotiation results.

H 3.1.a More arguing in the negotiation mode is an indication of shared values and is conducive to consensus agreements (true consensus).

That means there should be more arguing in cases, where the agreements were accepted by the following IGC such as in case 1 and in case 2 than in case 3 and in case 4.

H 3.1.b Bargaining in the negotiation mode is an indication for confrontation and can lead to compromise agreements.

This hypothesis will require a combination of a quantitative and a qualitative analysis of the argumentation patterns. The increasing use of arguing speech acts alone does not allow making inferences about their effectiveness in shaping outcomes and in reaching effective compromise or consensus (Panke 2006: 361). Therefore, it is important to put emphasis on the occurrence of persuasion as a prerequisite for effective consensus building. Persuasion can only occur through communication (Heradstveit 1992: 75).

H3.2.a Persuasion: Cases where the following IGC did not change the draft are a sign of effective agreement. With regard to effective arguing this would be best shown quantitatively if bargaining positions diminish over time and qualitatively if the speakers succeed in establishing common values or standards on which to base their agreement. Persuasion could thus be traced by showing that speakers change their position over time and agree to proposed solutions.

H3.2.b Non-persuasion: Changes in the next IGC should have occurred in cases where arguing was picked up by the presidium while there were still bargaining against this particular point. This would indicate that no real persuasion had taken place and that the governments used their power in retrospect to correct that point.

Since case 1 was qualified as a true consensus agreement that was accepted by the following IGC, we would expect that arguing must have been efficient in this case. This should be proven quantitatively through the diminishing of bargaining positions over time and qualitatively through the emergence of shared values among the various actor groups. Although we expect bargaining to be prevalent in case 4, as the recommendation of the Convention was changed by the subsequent IGC (false consensus), we expect that bargaining was not effective. In the qualitative and quantitative analysis, we would expect that bargaining does not diminish in the course of the debate and qualitatively that the negotiators were not able to find a compromise solution or to strike a deal in order to reach agreement.

Cases 2 and 3 were qualified as a true and a false consensus respectively since the recommendation of case 2 was accepted by the following IGC while the recommendation of case 3 was altered by the IGC. With regard to the quantitative and qualitative analysis we would expect firstly with regard to case 2 that bargaining positions should diminish over the course of the debate and that the negotiators successfully define common values and standards on which to base their agreement and secondly with regard to case 3 that bargaining positions do not diminish over time and that the negotiators do not succeed in establishing common values on which to base agreement.

1.2.4. Putting it all together: Steps of analysis and case specific expected results

The first set of hypotheses described above will serve to test the underlying assumptions of this study by determining the individual frequencies of arguing and bargaining with respect to the conflict type, the institutional setup, and the effective consensus. After determining whether there are indeed relationships to be established, the second set of

hypotheses will further deepen the analysis and combine the occurrence of arguing and bargaining with the structural indicators and actor dispositions. Particular emphasis will be put on potential differences in the occurrence and on patterns of arguing and bargaining with regard to the different institutional setup underlying the cases. The third set of hypothesis will then be used to determine whether a change in preferences had occurred or not.

Overall, within the four selected cases, case 1 on the legal personality of the Union and case 4 on the definition of QMV are clear cut cases representing a value based and a distributional conflict respectively. One had a working group, the other didn't. The patterns of arguing and bargaining should therefore be very clearly discernable within these cases; arguing should be dominant in case 1 and bargaining should be dominant in case 4.

The other two cases are mixed conflicts displaying constitutional, i.e. value-based, but also distributional aspects and are thus more representative of most of the contemporary conflicts which are often hybrid forms. Based on the conflict type it is thus difficult to predict whether arguing or bargaining will be dominant within these cases. The difference between the cases is that one of them, the case on the Foreign Minister, had a working group, and the other, the case on the EU President, did not. The institutional differences would indicate that arguing should be more effective in case 2 than in case 3. The discussion of arguing and bargaining within these two cases can thus show if the institutional variable played a role for the outcome after all or not.

In matching the selection criteria to the hypotheses the four case studies a first assessment of the expected results would be as follows:

Case	Conflict Type	Institutional Setup	Distribution of Arguing/ bargaining	Output/ consensus type	Expected outcome	Applicable Hypotheses and expected value
Legal Personality	Value-based	WG	Arg > barg	True consensus	Effective consensus building through	H1.a exp. value (+) H2.1a exp. value (+) H2.2 exp. value (-) H3.1a exp. value (+)

					arguing	H3.2a exp. value (+)
Foreign Minister	mixed	WG	Arg > barg	Integrative compromise	Effective compromise through arguing	H1.c exp. value (+) H2.1a exp. value (+) H2.2 exp. value (-) H3.1a exp. value (+) H3.2a exp. value (+)
EU President	mixed	No WG	Arg > barg	Minimum compromise	Ineffective arguing	H1.c exp. value (+) H2.1b exp. value (+) (compared to case 2) H2.2 exp. value (+) H3.1b exp. value (+) H3.2a exp. value (-) H3.2b exp. value (+)
QMV	Distributive	No WG	Barg > Arg	False compromise	Ineffective bargaining	H1.b exp. value (+) H2.1b exp. value (+) H2.2 exp. value (+) H3.1b exp. value (+) H3.2a exp. value (-) H3.2b exp. value (+)

- Case 1 on the Legal Personality has been qualified as a constitutional issue which was negotiated within working groups and resulted in a consensus agreement. Therefore, the empirical results should show more arguing than bargaining. This case has positive values on both variables the institutional setup (working groups, sequencing, involvement of experts etc.) and the conflict type (constitutional, i.e. value conflict conducive to consensus).
- Case 2 on the EU Foreign Minister has been qualified as a mixed issue that was negotiated within working groups and resulted in an integrative compromise agreement. Since one of the variables, the conflict type, is ambiguous in this case, the institutional setup should play an important role in reaching effective agreement.

- Case 3 on the EU president has been qualified as a mixed issue as well but was not negotiated within a working group and produced a minimum compromise agreement. Here again the conflict type variable remains ambiguous, therefore, the institutional setup variable should be the main factor for the ineffective agreement.
- Case 4 on the definition of Qualified Majority Voting was defined as a distributive issue which was not negotiated within a working group and did not produce an effective agreement. Bargaining in this case is expected to be inefficient throughout the procedure.

4.5 Operationalization: Speech Acts and Data Coding

4.5.1 Speech act theory and speech acts

While some studies have attempted to code negotiation interaction to identify how individuals use communication tactics in negotiation setting, speech act analysis is a fairly new method in the social sciences (Donohue, Diez et al. 1984). It is based on speech act theory, an area of linguistic pragmatics developed by (Austin 1975) in his lecture series from 1955 and further defined by (Searle 1969). Austin founded the pragmatics of linguistics by observing that some statements are not only true or false descriptions of some state of affairs but constitute the performance of an action by themselves. Searle further elaborated on this performative function of statements and defined language as “rule-governed intentional behavior” and talking as “performing acts according to rules.” (Searle 1969: 16) Communication through language is an act of expressing oneself through the realization of a series of sets of underlying constitutive rules through the uttering of expressions in accordance with these sets of constitutive rules. Within the semantic structure of language, speech acts are the basic or minimal units of linguistic communication. Speaking a language is performing speech acts, acts such as making statements, giving commands, asking questions, making promises, and so

on. These acts are made possible and consequently follow certain rules for the use of linguistic elements (Searle 1969: 16).

A speech act, according to Austin (Austin 1975) or Searle (Searle 1969), is defined as the action that a speaker performs by making an utterance. It consists of the following four components:

- The locutionary act, that is, the pure utterance of sounds and words.
- The acts of reference and predication, which make up the propositional content of the utterance
- The illocutionary act, that is, the action the speaker performs by making the utterance and
- Where applicable, a perlocutionary act, that is, the effect on the addressee brought about through the speech act (Austin 1975, Searle 1969, Bach and Harnish 1979).

Figure: The Speech Act and its four components

Example:			
	<u>Addresser:</u>		<u>Addressee:</u>
Locutionary Act:	“Smoking is bad for your health!”	Reaction:	accepts
Acts of Reference and Predication:	Standards of health, authority, common knowledge	Perlocutionary Act:	to persuade
Illocutionary Act:	Demands addressee to quit smoking.		

Source: adapted from Searle 1969

The figure above illustrates the four components of a speech act. If the addresser sees a smoker and utters the words “Smoking is bad for your health!” (locutionary act), the

addresser bases this statement on factual and normative predications of the harmfulness of nicotine and the importance to take care of one's health. In this context however, the addresser does not intend to only inform the addressee of the dangers of smoking but actually demands the addressee (illocutionary act) to quit smoking. Based on the receptiveness of the addressee, the addressee could among other possible reactions either disregard this demand and purely respond to the informational side of the locutionary act by replying that he/she knows of the dangers of smoking but does not care about them and continue to smoke or the addressee can accept the demand and be persuaded to stop smoking (perlocutionary act) because he/she cares about the acts of reference and predication of this demand or because he/she accepts the authority of the addresser. A speech act can only gain meaning with regard to a common reference system for the evaluation of its content. In the case of arguing there need to be common evaluation standards for what is true, right and appropriate. In the case of bargaining there needs to be a common assessments of bargaining power. Arguing aims mainly at persuading others of the legitimacy of a claim. Such a persuasion is not only dependent on logically consistent argumentations but also have to be measured against common standards. Searle developed an instrument for the analysis of illocutionary acts. Basically individual illocutionary acts need to be uttered as sentences in order to be meaningful. Searle has defined four constitutive rules which must be valid, in order to be possible for an illocutionary act to be performed as a sentence.

1. Rules of the propositional content: What can be said?
2. Introductory rules: What social preconditions must apply?
3. Rules of sincerity: What must one assume the speaker's motivation to be?
4. Essential rules: What does the action consist of?

Searle spells these rules out for the example "to claim that" as follows (Searle, Kiefer et al. 1980: 100):

1. Any proposition p.
2. (1) The speaker has proof (reasons etc.) of the truth of p.
(2) It is not obvious to either the speaker or the hearer that the hearer knows p and does not need to be reminded of it.
3. The speaker believes p.

4. Serves to ensure the content, that p stands for a real-material situation.

Following this example, all illocutionary acts are described by performative verbs such as to claim, to offer, to justify, to demand, etc. Austin puts particular emphasis on those verbs in his theory and claimed that there were over a thousand such performative verbs denoting illocutionary acts in English (Austin 1975: 149). Those verbs are performative in that their action is accomplished merely by saying them. If you say e.g. “I promise” or “I protest” or “I request”, you have performed those actions by the simple act of saying them. An apology can be used as an illustration of the idea of performatives. If somebody says “I’m sorry that I am late”, in order to apologize for coming late, she is by the act of uttering these words (verbally) expressing regret for an act and thereby acknowledging that she did something which might have bothered the hearer. An apology is thus the communicative expression of the attitude of regret and it will fulfill its communicative function if it is accepted by the hearer (perlocutionary effect). Generally, an act of communication succeeds if it ‘produces uptake’ (Austin 1975) i.e. if the semantics of the speech act (what is said) intersect with the pragmatics of the speech act (what is intended and understood). For that to be true particular attention needs to be paid to the pragmatics of the speech act in that the intentions of the speaker, e.g. a regret, need to be interpreted by the addressee as such (Bach N.Y.).

The choice of a particular performative verb, in this case “I am sorry”, is not constitutive for the illocutionary act or the success of the communication. Communicative success will be achieved if the speaker chooses his words in a way that the hearer will recognize his communicative intention. Illocutionary acts that do not include a performative verb such as e.g. “I feel very bad about what happened!” can under the right circumstances also express regret and serve as an apology. Therefore, illocutionary acts can be identified either by the existence of a particular performative verb in the communication or by the fact that the same communicative act can be expressed with a performative verb without a change in the meaning of the illocution. If we regard the performative verb “to demand”, just to change the performative verb in the example, the illocution “I demand half of the apple.” can thus take the form of “Give me half of the apple!” or of “Leave me half of the apple!” etc. Basically, all illocutionary acts can be rendered without changing meaning, in the form of “I hereby demand (or any other performative verb) that...”

Based on Searle's speech act theory, Bach and Harnish (Bach and Harnish 1979) have developed a detailed taxonomy of illocutionary acts sorted by the type of attitude expressed with the illocution.³² The fundamental idea behind their taxonomy is to look at the perlocutionary function of an illocutionary act and to classify the acts according to the identification of the intent of the illocutionary act being performed. Accordingly, they define four major categories of communicative illocutionary acts:

- constatives express the speaker's belief, together with the expression of an intention or desire that the hearer form (or continue to hold) a like belief
- directives express the speaker's attitude toward some prospective action by the hearer and his intention (desire, wish) that his utterance, or the attitude it expresses, be taken as a reason for the hearer's action
- commissives express the speaker's intention and belief that his utterance obligates him to do something specified in the propositional content (perhaps under certain conditions) and
- acknowledgements express feelings regarding the hearer or the speaker's intention that his utterance satisfy a social expectation to express certain feelings and his belief that it does (Bach and Harnish 1979: 39-55).

Those four categories can also serve to classify illocutionary acts according to our communication modes of interest, arguing and bargaining (see table on classification of performative verbs below). The first category of constatives cannot exclusively be attributed to either arguing or bargaining dependent on whether they make recourse to facts and values or to power and demands. The second and third category of directives and commissives fit perfectly into the definition of bargaining as demands based on promises and threats. The fourth category of acknowledgements comprises speech acts that refer to feelings and address rather social expectations and relationship issues.

³² Many taxonomies of illocutionary acts have been proposed. Among them is Austin's original scheme (1962, Lecture XII) which has been criticized for not having clear principles for the speech act classes and various improvements of it. Only Searle's taxonomy is tied to a general theory of illocutionary acts and fulfills the criteria that the classification is principled, its categories do not overlap, and its basis for classification is tied to a systematic account of speech acts. See: Bach and Harnish 1979: 40.

Acknowledgements play a very important role in conflicts as interpersonal animosities can impede the parties from addressing the substantive issues but the emphasis in this study will rather be put on the first three illocutionary categories.

Table: Classification of Performative Verbs		
	Arguing	Bargaining
Constatives	<p><i>Assertives</i> (affirm, claim, maintain, state, etc.)</p> <p><i>Predictives</i> (forecast, predict, prophesy)</p> <p><i>Retrodictives</i> (recount, report)</p> <p><i>Descriptives</i> (assess, categorize, date, describe, portray etc.)</p> <p><i>Ascriptives</i> (ascribe, attribute, predicate)</p> <p><i>Informatives</i> (advise, inform, insist, point out, etc.)</p> <p><i>Confirmatives</i> (appraise, assess, conclude, confirm)</p> <p><i>Disputatives</i> (dispute, object, question, etc.)</p> <p><i>Responsives</i> (answer, reply, respond)</p> <p><i>Suppositives</i> (assume, hypothesize, suppose, theorize)</p>	<p><i>Concessives</i> (admit, concede, confess, grant, etc.)</p> <p><i>Retractivives</i> (deny, disclaim, renounce, take back.)</p> <p><i>Assentives</i> (accept, agree, assent, etc.)</p> <p><i>Dissentives</i> (differ, disagree, dissent, reject)</p> <p><i>Suggestives</i> (conjecture, hypothesize, speculate, suggest)</p>
Directives		<p><i>Requestives</i> (request, beg, solicit, urge, etc.)</p> <p><i>Questions</i> (inquire, interrogate, query)</p> <p><i>Requirements</i> (command, demand, dictate, order, require)</p> <p><i>Prohibitives</i> (forbid, prohibit, restrict)</p> <p><i>Permissives</i> (allow, authorize, dismiss, grant, sanction)</p> <p><i>Advisories</i> (advise, recommend, suggest, urge, warn)</p>
Commissives		<p><i>Promises</i> (promise, swear, vow)</p> <p><i>Offers</i></p>

		(offer, propose)
Acknowledgements	<i>Acknowledgements</i> (apologize, condole, congratulate, greet, thank, bid)	
Source: Bach, Harnisch 1979		

The constatives, directives and commissives can thus be sorted in a list of arguing and bargaining speech acts that covers all performative functions to be expected within a negotiation situation. The table below lists the illocutionary acts in arguing and bargaining that will be coded in this study. The appendix gives further detail on those verbs, their codes, and spells out the four constitutive rules for each of them.

Table: Illocutionary Acts in Arguing and Bargaining	
Bargaining	Arguing
<i>Demand</i> , require to, call for, desire	<i>Claim</i> (facts and values)
<i>Offer</i> , to be willing to, to be prepared to	<i>Establish</i> , mention (facts and values)
<i>Suggest</i> (e.g. a solution)	<i>Assume</i> , conjecture, believe
<i>Suggest a compromise</i>	<i>Ask</i> , want to know
<i>Accommodate</i>	<i>Inform</i> , report
<i>Promise</i> , confirm, commit oneself, give one's word, vow to, guarantee	<i>Conclude</i> (logically), infer
<i>Threaten</i> , announce (withdrawal, strategies outside the negotiation)	<i>Persuade</i> (perlocutionary)
<i>Accept</i> , endorse, approve of, consent to, acquiesce, fall in with	<i>Approve</i> , admit as correct
<i>Decline</i> , reject, refuse	<i>Contradict</i> , reject, dispute, call into doubt, object
<i>Concede</i> , make concession, give way	<i>Concede</i> , grant, acknowledge, accept, admit, recognize (facilitative)
<i>To judge</i>	<i>Justify</i> , argue, give reasons, explain, clarify, verify (empirically), prove (logically), demonstrate (prove)
<i>Uphold</i> (an offer, a call for, a suggestion)	<i>Insist</i> , persist (with an option), stick to (a belief)
<i>Take back</i> (offer, promise)	<i>Take back</i> (arguments, claims)
<i>Ascertain unanimity</i> (consensus); ascertain a resolution, conclude a contract	<i>Ascertain agreement</i> (consensus), establish a result
<i>Ascertain non-agreement</i>	<i>Ascertain non-agreement</i>
Source: Holzinger 2004	

4.5.2 Coding of the speech acts

Prior research has shown that the examination of negotiation processes through quantitative coding is a labor-intensive process which involves several distinct steps for the development of coding schemes and their application to data (Weingart 2004). In the following the speech act theory based on Searle as operationalized by Holzinger (Holzinger 2001, Holzinger 2004, Holzinger 2005) is used for analyzing empirical communication processes, for the purpose of identifying bargaining and arguing speech acts. The method of speech act coding is foremost a qualitative method. It requires the classification of individual speech acts while taking their semantic and pragmatic relationships into consideration. (Holzinger 2005: 3-6)

But the method can also be used quantitatively by counting the occurrence of certain types of speech acts. Since the research question of this study asks about the relationship of arguing and bargaining during the Convention negotiations, a mainly quantitative analysis will be carried out in the first place.

This quantitative analysis will be complemented with a qualitative consideration of the successful speech acts in the end. In order to show the effectiveness of an argument it is important to show an observable action that changed the outcome from what it otherwise would have been in the absence of this action, to do this Moravcsik and Nicolaidis suggest (Moravcsik and Nicolaidis 1999: 69-70) that we look for proposals that were both “unique” and “successful”. The threshold for ‘unique’ is quite low in this study in that it describes a suggestion made by a convention member, the attribute of ‘successful’ will hold if a suggestion makes it into the (next or the) final draft.

For the mechanics of coding, the most important two questions that have to be addressed with regard to any data coding scheme are first about how to identify appropriate, reproducible units for the study of social interaction and secondly about how to assign those units empirically valid meanings.

Coding and interpretation involves: a) identifying the units of a text amenable to interpretation (unitizing); b) employing the configuration of these units, the setting and social knowledge as the context for the interpretation; and c) utilizing this context, plus a set of interpretive rules, to make some plausible, and hopefully accurate, interpretation (Folger, Hewes et al. 1984: 116-117).

4.5.3 Application of the Speech Act Theory to the Convention

The four cases at hand were all mixed forms of conflict involving conflicts of interest and value conflicts, thus we could expect to find both arguing and bargaining in the debates. In the analysis of the documents we took record of the respective amount of arguing and bargaining as well as their distribution throughout the Convention process. It was also recorded at what time, by whom and about what the arguing or bargaining occurred. The documents were coded to find explicit bargaining speech acts and to classify the propositional content as belonging to the substantial, the procedural or the relationship level.

In the same way speech acts were recorded that could be identified as arguing. Technically every sentence in the documents represents an illocutionary act and thus represents a bargaining or an arguing act. Generally, there are much more arguing speech acts in a document than bargaining speech acts. But many of the arguing acts do not directly relate to the conflict at hand. Therefore, in the first step, we will extract the “conflict-related” arguments from the “not conflict-related” ones. E.g. within a speech, we will separate the arguments that directly relate to one of the cases, e.g. the foreign minister of the Union, from other arguments e.g. relating to defense issues. As a second criterion, as done with the bargaining speech acts, we will distinguish the level that the arguments refer to. Every speech act can refer to the substantive, the procedural or the relationship level. Those levels can be substantive, when the arguing relates to the conflict at hand, procedural, when it relates to the way the Convention consensus-building process was conducted, or relationship oriented, when it relates either to attitudes and emotions toward the Convention process itself or other Convention participants. Within the substantial arguing, two further levels can be distinguished. If the arguing is directly conflict related, i.e. it refers to who gets what; it will be labeled as “interest-oriented”. As formulated in the hypotheses, in the context of a conflict of interest, we expect arguments to be serving as justifications for bargaining positions. Interest-oriented arguing can also serve as a justification for a bargaining act, it puts forth the standards, norms and values which support the bargaining position and which should

serve to persuade the other party to agree to a certain position. It occurs whenever factual matters are closely related to the subjective interests and bargaining goals of a party to the conflict.

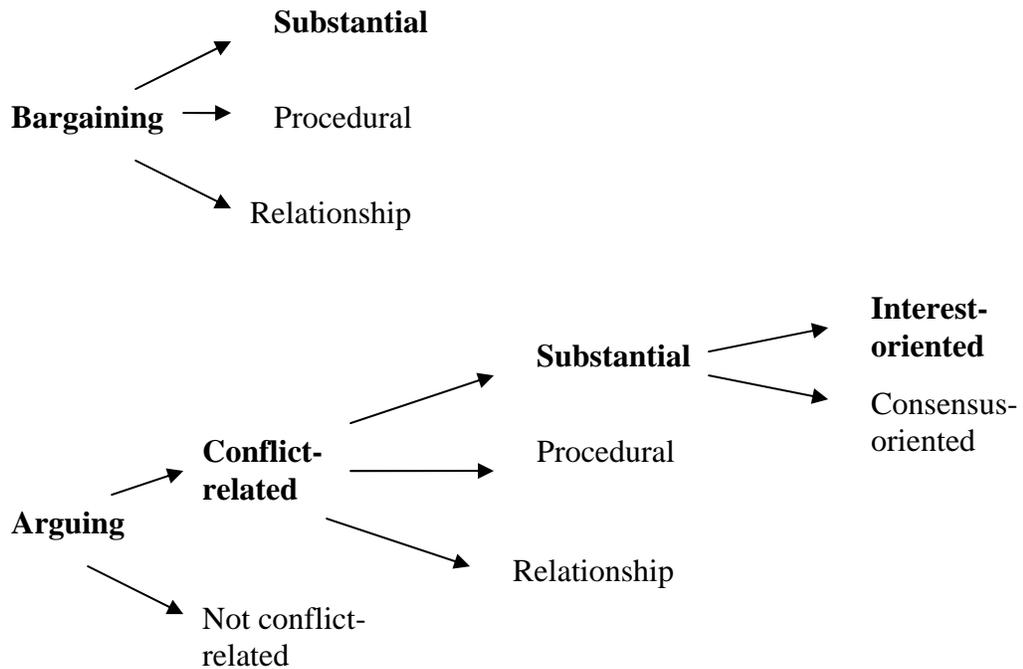
All other forms of arguments which serve as a means of discussing and clarifying factual matters or pursue the end of mediating between the parties either by searching for a consensus or by suggesting compromises will be labeled as “consensus-oriented”. Those consensus-related speech acts were not distinguished as either belonging to arguing or bargaining. As cases two and three show consensus and compromise are both valid problem-solving mechanisms that allow for effective decision-making.

The substantial (interest based) arguing and bargaining speech acts are particularly important for this study. For every speech act in those two categories in the data, a record was kept of the speaker, the illocutionary intention, illocutionary indicators, and the propositional content of the utterances. Finally, the revealed or implied goals of the arguing or bargaining speech acts were recorded. Here it needs to be stated that the goals, motivations or views of individual speakers can never be stated with certainty. Even when the goal is explicitly stated by the speaker the discussion on arguing and bargaining above has shown that the “true” goal can nevertheless be different from the stated one and it is impossible to reconstruct the “true subjective goal” of the speaker.

Table: Speech acts and propositional content				
Speech Acts	Level			
Conflict-related Arguing	Substantial (interest-oriented)	Substantial (consensus or compromise oriented)	Procedural	Relationship
Bargaining			Procedural	Relationship
Not conflict-related arguing		substantial	Procedural	Relationship
All speech acts	Substantial (conflict related)	Procedure, relationship, substantial (not conflict related)		

Source: Own

Figure: Illustration of substantial arguing and bargaining



Source: own

4.5.4 The data used

European Integration studies lack investigations based on “hard” primary sources (Moravcsik 1997) this study is an attempt to fill this gap by employing empirical speech act analysis to analyze the communication modes in the Convention. The methodology of this study consists of a combination of the use of primary sources, which consist mainly

of verbatim records of the plenary sessions of the Convention that dealt with the cases under consideration, and secondary sources.³³

The Convention plenary sessions selected were the session of October 3, 2002 which comprised the debate on the Legal Personality of the Union; the sessions of July 11, 2002, of December 20, 2002 and of May 16, 2003 which dealt with the External Action of the Union; and the sessions of January 20-21 and of May 15-16, 2003 which dealt with the institutional issues.³⁴ The written contributions of the speakers were further considered as supporting material.³⁵

The coded documents comprise seven plenary debates from the Constitutional Convention during which the four cases of this study were discussed. The preliminary and final drafts of the working groups as well as the drafts of the presidium were further considered in order to check if the arguments put forth by the convention participants were incorporated by the Presidium and if the Presidium suggestions reflected the consensus or compromise formation in the plenary.

Secondary sources, particularly the vast literature on the Convention, will be used in order to complete and corroborate the coding findings and thereby to enhance the validity and reliability of the findings through triangulation (King, Keohane et al. 1994).

Particular attention will also be put on whether one type of sources refutes the findings and or assumptions of the other.

³³ Most of the Convention participants spoke in their own language during their plenary interventions. Thus the verbatim records comprised all 12 official EU languages. The languages English, French, German, Italian, and Spanish were coded directly by the author. For the other languages (Danish, Dutch, Finish, Greek, Portuguese, and Swedish) the author relied on translations. All translators were instructed to pay particular attention to the exact performative verb that was used and to translate it literally in order to capture the right illocutionary mode.

³⁴ Verbatim records of all plenary debates can be found at: http://www.europarl.eu.int/europe2004/index_en.htm

³⁵ See Convention website: <http://european-convention.eu.int/bienvenue.asp?lang=EN&Content=>

Despite the triangulation efforts, the coding system applied to the Plenary Debates of the Convention will be the foundation of the analysis. In order to obtain scientifically relevant data from the coding efforts, the coding system needs to meet four important standards. These four standards are consistency in the coding systematic, accuracy of the codes, reliability of the coding system, and the validity of the codes.

The consistency in the coding systematic will be achieved by having all of the documents coded by the same person. Once the codes have been identified, codification by the author only will minimize differences in interpretation and ensure the most consistent application of the codification definitions to the text. In order to check for coder bias and the universality of the coding system, i.e. to test the accuracy of the codes as such and the reliability of the coding system when used by different coders or applied to different texts, a test document (the plenary debate on the legal personality of the Union has been coded by two different persons and a very low Kappa of 0.25 has been determined.³⁶ The analysis of the two coder's work revealed that the main problem consisted in the codification of different passages in the text. In order to achieve better focus on the specific passages relevant to the cases, the author marked all passages relevant for the cases in the colors chosen for each case (Legal Personality: yellow, Foreign Minister: red, EU President: blue, Qualified Majority Voting: green). A second test coding increased Kappa to 0.74 which is an acceptable level for intercoder reliability. However, to increase consistency of the codes throughout this study, all plenary debates were coded by the author of this study alone. The final validity of the codes and their scientific usefulness

³⁶ Intercoder reliability describes the extent to which independent coders evaluate a characteristic of a message and reach the same conclusion. Intercoder reliability is important for the validation of a coding scheme and for the establishment of a high level of reliability of the codes. The Kappa statistic proposed by Cohen caclucates chance agreement using individual coder marginals according to the following formula:

$$K = \frac{P_o - P_e}{1 - P_e}$$

Cohen's kappa calculation is considered to be the measure of choice among communication analysis literature and a coefficient of 0.7 or greater is considered as an acceptable level of reliability. For more details see: Cohen 1960, Lombard, Snyder-Duch et al. 2005.

will be further looked at in the qualitative analysis of the cases and the usefulness of the codes for the analysis of the hypotheses.

*“What has been my advice to the working groups? In a word, "simplify".
The texts which govern how the Union and the Community work are so complex as to be in many cases
incomprehensible to the citizen. ... One knows how their complexity has come about, through successive
diplomatic negotiations amending or partially amending the basic texts, decking them out with additions
and exceptions, protocols and declarations, all at the time politically important to someone,
and resulting in a text now standing at 1 045 pages.”*

--Convention President, Valéry Giscard d’Estaing³⁷

5. Analysis of the Convention Process

5.1 The Convention Method: Working Groups

The institutional differences of the Convention setup have already been discussed in detail in chapter 3.3 and will not be repeated here. However, it needs to be emphasized that the introduction of working groups as a method of intensive pre-negotiation in a smaller forum to structure the debate and to make suggestions for agreement to the plenary is the most significant change in the Convention process.

Over the course of the Convention eleven working groups focused on constitutional and policy related issues. Each working group was chaired by a member of the Presidium and each group had about 30 members representing all three actor groups. Because the Presidium defined a low political profile for them, insisting that their task was to explore the legal and technical issues involved in their working group subject and not to reach political conclusions, the groups were instructed to follow the conclusions drawn from the first listening phase of the Convention but told not to draft final articles.

The working groups had thus a limited agenda; they examined particular issues that were already identified in the course of the listening phase of the Convention and considered these issues in relation to their specific mandates (mostly in form of questions directed by

³⁷ Valéry Giscard d’Estaing, Speech given at the College of Europe Bruges on 2nd October 2002, cited in: http://www.constitutional-convention.net/bulletin/archives/cat_edition_14_031002.html

the Presidium to the working group). The working group members met several times for deeper and more focused discussion, they were able to consult experts from outside of the Convention and their reporting task was to submit possible options to the plenary. The overall successes of the working groups' recommendations remain mixed. The recommendations that discussed issues which derived directly from the Laeken mandate and had a more technical nature (e.g. simplification, subsidiarity, role of national parliaments) were generally integrated into the Constitutional Treaty and also accepted by the subsequent IGC. On the other hand, some other working groups such as the working groups on social Europe and economic governance became highly politicized and failed to produce consensual recommendations (Closa 2004; Milton and Keller-Noëllet 2005; Norman 2005).

5.1.1 Case 1: Legal Personality of the Union - A value-based conflict negotiated in a working group

The Convention examined the consequences of explicit recognition of an EU legal personality and of merging such legal personality with the legal personality of the European Community. The goal was to find out if these actions would help simplify the treaties. The existing European treaty structure did not grant the Union an explicit legal personality, while the three communities that it encompassed (the European Communities, Euratom and the now defunct European Coal and Steel Community) possessed their own legal personalities. This provision of the Maastricht Treaty on the Union meant that the European Union, unlike its three sub-units, could not represent Europe, sign treaties, be summoned by a court, become a member of international organizations or accede to international conventions, such as the European Convention on Human Rights (Norman 2005). The conflict on the legal personality of the Union can be seen as a constitutional or value-based conflict because granting legal personality to the Union would not take any power away from the EU member states but would allow the Union to act on its own behalf on issues that concern the institution of the Union as a

whole. The new legal personality clarified the relationship between the Union and its member states and the structure of the Union itself.

Before the deliberations, the Presidium provided the working group on the legal personality of the Union with Document 1 (WG III – WD 01), which intended to inform, shape and guide the working group deliberations. The document outlined the effects of a Union legal personality on the merger of Union and Community legal personalities, and it summarized the current treaty provisions, their legal interpretations and the evolution of the doctrine of the legal personalities used by the various Intergovernmental Conferences. The document closes with more than four pages of questions for the working group, and these questions can be grouped under three main headings: the consequences of explicit recognition of the Union's legal personality; the consequences of a merger of the Union's legal personality with that of the Community; and the impact on the simplification of the Treaties.

Working phase: The institutional setup of the negotiation process

The working group on the Legal personality had 30 members: six government representatives from the EU member states, six government representatives from the candidate countries, six representatives from the EU parliament, one representative of the Commission, six representatives from EU member country national parliaments, and three representatives from candidate country parliaments, as one representative from the Committee of the Regions as well as its chair Giuliano Amato. With a ratio of 12 government representatives to 8 EU actors and 9 national parliamentarians (the chair has not been included in this calculation), the working group displayed some imbalance toward the government representatives. Government representatives held 40% of the seats; this was more than the 30% held by national parliamentarians, and almost double the number of EU actors (23%) (see table in Appendix II).

The highly judicial nature of the working group topic is also reflected in the working documents and the fact that the working group invited legal experts from the European

institutions and universities to give expert opinions on the consequences of granting a single legal personality to the Union.³⁸

Guiliano Amato chaired the working group, which met seven times between June 18 and September 30.³⁹ The group concluded its work early and cancelled its last two meetings scheduled for October 2 and 17, 2002. The working group issued its final report on legal personality of the Union on October 1, and the plenary meeting of the Convention discussed the report on October 3, 2002 (WG III – 16, CONV 305/02).

In its final report, the working group on the legal personality of the Union submitted a clear recommendation in favor of a single legal personality with only one working group member, William Arbitbol (MEP), objecting.

Role of the Presidium

Since the issue on the legal personality of the Union was primarily judicial, Guiliano Amato was well chosen to be the working group's chair. Amato is a Professor on Italian and Comparative Constitutional Law and was therefore very well qualified to understand the complexities and implications of the legal personality. In his presentation of the final report of the working group during the plenary debate on 3 October 2002, chairman Amato summarized the arguments in favor of the single legal personality. He stressed that the single legal personality would make the EU more effective, that it would foster

³⁸ WG III – WD 02, 25 June 2002 contains a list of questions which the working group addressed to the legal experts. In WG III – WD 03, 3 July 2002, Mr. Jean-Claude Piris, Legal Advisor to the Council, Mr. Pieter Kuijper, Director of Legal Service of the Commission and Mr. Gregorio Garzon Clariana, Legal Advisor to the European Parliament, submitted their evaluations of the WG's questions. Other experts heard by the working group were: Professor Alan Dashwood, University of Cambridge; Professor Jean-Victor Louis, Free University of Brussels; Mr. Michel Petite, Director-General of the Commission Legal Service; Mr. Antonio Tizzano, Advocate-General, Court of Justice of the Communities; Mr. Carlos Westendorp y Cabeza, Chairman, the European Parliament Committee on Industry, External Trade, Research and Energy; Prof. Bruno de Witte, European University Institute of Florence; Professor Peter-Christian Mueller-Graff, University of Heidelberg.

³⁹ The working group met on June 18 and 26; July 10 and 18; and on September 11, 19, and 30. See: CONV 103/1/02, CONV 170/02, CONV 211/02.

legal certainty and transparency, give the Union a higher profile both towards the external world and towards its own citizens, and that the legal personality would make the Union a subject of international law and enable it to engage in international action and to sign international treaties. Throughout the debate on the legal personality of the Union all actor groups commended the chair of the working group, Amato, for laying out convincing arguments for the adoption of the single legal personality and for excellent chairmanship of the working group.⁴⁰

Plenary Debate

During the plenary debate on the legal personality of the Union on October 3, 2002, 37 speeches directly related to the single legal personality of the Union.

The Convention President, d'Estaing, opened the plenary discussion by stating that the group achieved a very "large consensus," with only one member opposing the working group's recommendation to grant a single legal personality to the Union.⁴¹ He further stated that these recommendations would simplify and strengthen the Union and thanked the working group for their concrete suggestions on the new architecture of the Constitutional Treaty (4-004).

After the President, Vice-President Amato, the Chair of the working group on legal personality, took the floor and explained the recommendations of the working group and summarized the deliberations. Amato explained that there was a lot of confusion about the actual existence of a legal personality of the Union and that it was difficult for European citizens to understand their rights if they were not able to hold the Union accountable as a legal entity. He concluded that the Union needed a single legal personality, and he established that the single legal personality would give more

⁴⁰ See e.g. the contributions by : Hain (4-009), Fini (4-012), Pleuger (4-013), Nagy (4-014), Barnier (4-016), Carnero Gonzalez (4-017).

⁴¹ Groupe de travail III "Personnalité juridique", Working Document 24, Bruxelles, le 17 septembre 2002: "Il y a eu un large consensus (une voix contre) au sein du groupe de travail visant à accepter la reconnaissance explicite de la personnalité juridique de l'Union." : 2.

effectiveness to the actions and to the visibility of the European institutions and that it would allow the citizens to hold the Union accountable for their rights. From this recommendation he argued that for the sake of simplification it would be a “logical” consequence to also have a single consolidated treaty that distinguishes between a constitutional part and a policy part containing the political acquis and to abolish the pillar structure in order to achieve a single institutional frame for the Union.

Amato further reported that the group recommended modifying Art. 300 TEU (new numbering after Nice IGC) and Art. 24/28 TEU to provide a single disposition of international treaties signed between the Union and third states or between the Union and international organizations. The negotiating competence of the Union would only concern areas that fall exclusively or largely within community competences and or are applicable to titles V and VI of the TEU, or to areas where the Council asks the Commission to negotiate treaties in the name of the Union or its Member States. The group also recommended modifying Art. 23-24 TEU to maintain the right of Member States to abstain from certain community actions without jeopardizing the unity of the external action of the Union.

In addition to the recommendations related to the legal personality of the Union, the working group further recommended that the working group on external action combine the two posts of the High Representative and the Commissioner for External Relations and the working group asked for a diplomatic corps to assist this new post. Those new regulations would ensure that the Union expresses a single position on the international level and would strengthen the external policies of the Union. These new competences would further require an “ex ante” (on the basis of art. 300 TEU) as well as an “ex post” (on the basis of 230 TEU) control of the Union’s external actions as well as the consultation of the European Parliament (4-007).

The majority of the speakers in the plenary session represented all actor groups (government, national parliamentarian and European actors), and demanded that the Union get “rid of the confusing complexity.” These speakers argued that simplifying the treaties would make the Union easier to understand and better accepted by its citizens, and that this would strengthen the Union’s internal political image, visibility and value in

the international system (Hain 4-009, Giannakou-Koutsikou 4-010, Pleuger 4-013, Yilmaz 4-015, Barnier 4-016, Carnero Gonzales 4-017, Spini 4-026).

The opponents objected to only a few of the group's recommendations. Some disputed that the single legal personality should go hand in hand with an abolition of the pillared structure of the EU. These opponents argued that the pillars were the guarantors of the intergovernmental nature of the common foreign and security policy, and justice and home affairs (Kirkhope 4-011, Fini 4-012, Yilmaz 4-015). Others argued against the pillars but claimed that the disappearance of them would not jeopardize the different status of certain procedures or the nature of policy areas (Carnero Gonzales 4-017, Rack 4-019, Tiilikainen 4-020, Duff 4-023, Barnier 4-045).

Discussion of Hypotheses

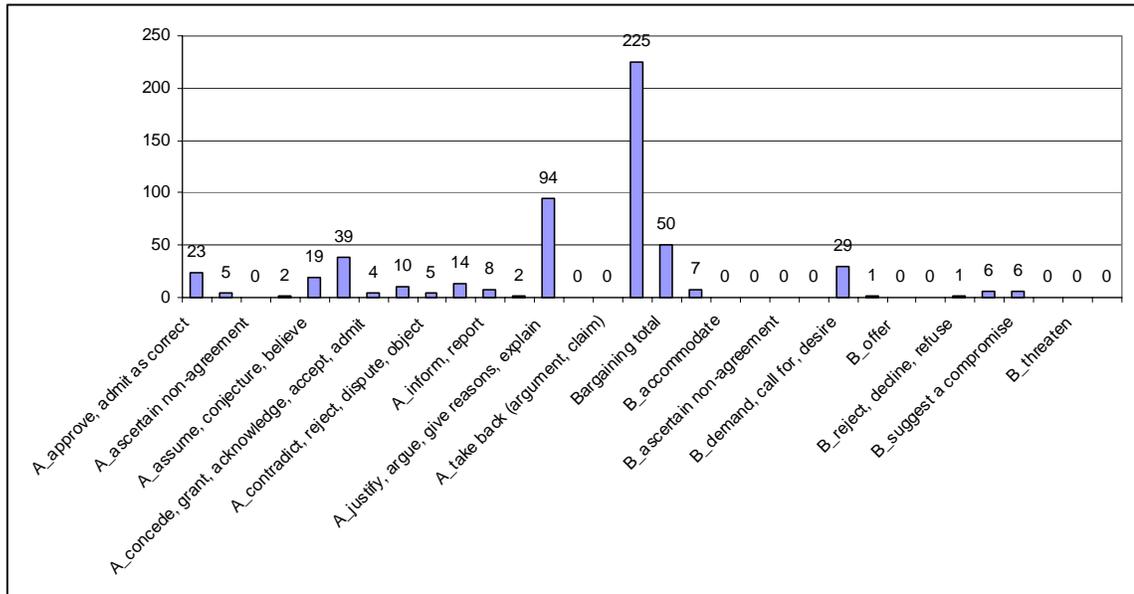
The discussion of hypotheses follows the development of hypotheses in the theoretical part of this study. First, the relationship between the conflict type and the negotiation mode will be examined. Second, it will be determined whether the institutional setup, i.e. the existence of working groups, shows any correlation to the frequency and occurrence of particular negotiation modes. And thirdly, a deeper analysis of the arguments will determine whether preference change has occurred within the actors and thus helped to establish a consensual output to the negotiation.

Hypothesis 1: Conflict Type and Negotiation Mode

H1.a The more the negotiation conflict is value and fact based the more arguing is to be found. *CONFIRMED*

With regard to the relationship between conflict type and the use of speech acts, it was expected that as the issue on legal personality was classified as a value-based conflict, arguing would be prevalent during the plenary discussion on the legal personality of the Union. During the 3 October plenary debate on the legal personality of the Union, 275 speech acts were codified that directly related to the legal personality of the Union. The majority of those, 82% or 225 out of 275, were arguing speech acts and the remaining

18%, 50 out of 275, were bargaining speech acts. The hypothesis that the more the conflict is value-based the more arguing is predicted, was therefore confirmed. The following figures show the distribution of the two negotiation modes and of the specific speech acts within the plenary debate on the legal personality of the Union.



Legal Personality: Distribution of Arguing and Bargaining Speech Acts throughout the debate on the legal personality of the Union.

The distribution of the arguing speech acts shows that most categories defined were used by the speakers except for the three categories of “to ascertain non-agreement,” “to persuade” and “to take back argument/claim.” A breakdown of the respective percentages of the arguing and bargaining speech acts further confirms that the debate was very consensus oriented. Speech acts that try to establish values and represent attempts to support one’s position were the most dominant arguing speech acts. Value-based categories such as, “to justify, argue, give reasons, explain” (42 %), “to claim” (18%), “to assume” (9%) and “to establish” (5%) all point to the legalistic and value based orientation of the debate. The second largest group were speech acts which express agreement and consensus such “to approve,” “to ascertain agreement” and “to acknowledge” which accounted together for 15%. These speech acts are especially important to the discussion procedure: once a consensus has been ascertained without

groups are involved, more arguing should be observed. This hypothesis can be confirmed. As a counterfactual hypothesis the opposite of the institutional hypothesis was formulated. This hypothesis stated that if the institutional setup (working groups) did not play a role, European actors (being the less powerful) should argue more than national parliamentary actors than government representatives because government representatives have veto power and can issue credible threats.

The breakdown of arguing and bargaining by the different actors, i.e. government representatives, European actors, and national parliamentarians shows only slight differences among those different actor groups. Overall, all actors used more arguing than bargaining.

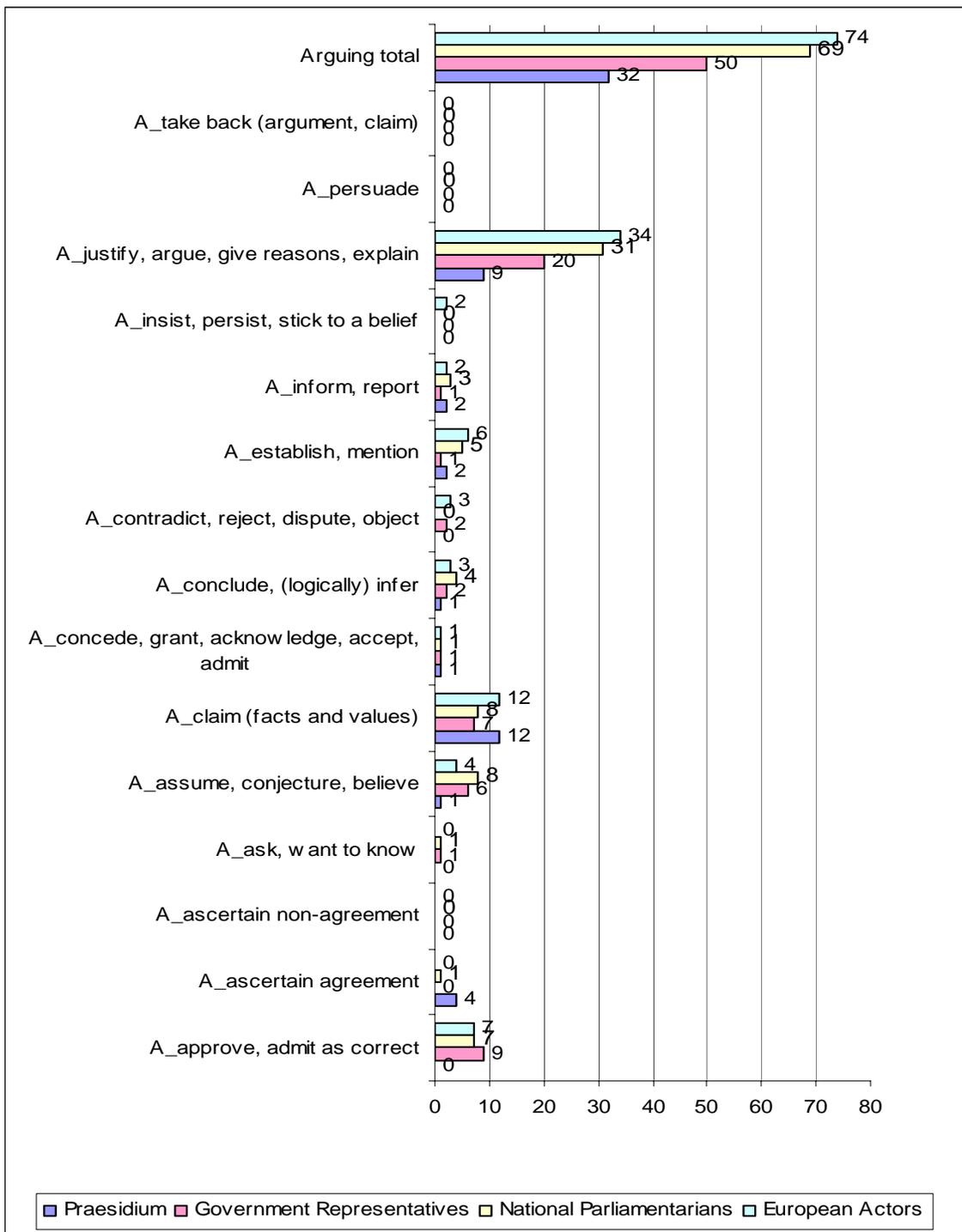
Of the 37 contributions considered in the plenary debate, 3 interventions occurred by the Presidium. Among those who intervened, 9 speakers were government representatives 13 speakers were EU actors and 12 speakers were members of national parliaments.

The distribution of contributions during the debate shows that EU actors and national parliamentarians were more active during the debate, representing 37% and 32% of the speakers, while government representatives only represented 24%. The participation in the debate thus reverses the imbalance of representation in the working group. Out of the 275 speech acts codified in the plenary debate, 36 came from the Presidium (the Convention President and the Chair of the working group, Amato), 70 were uttered by government representatives, 88 were issued by European actors, and 81 by national parliamentarians.

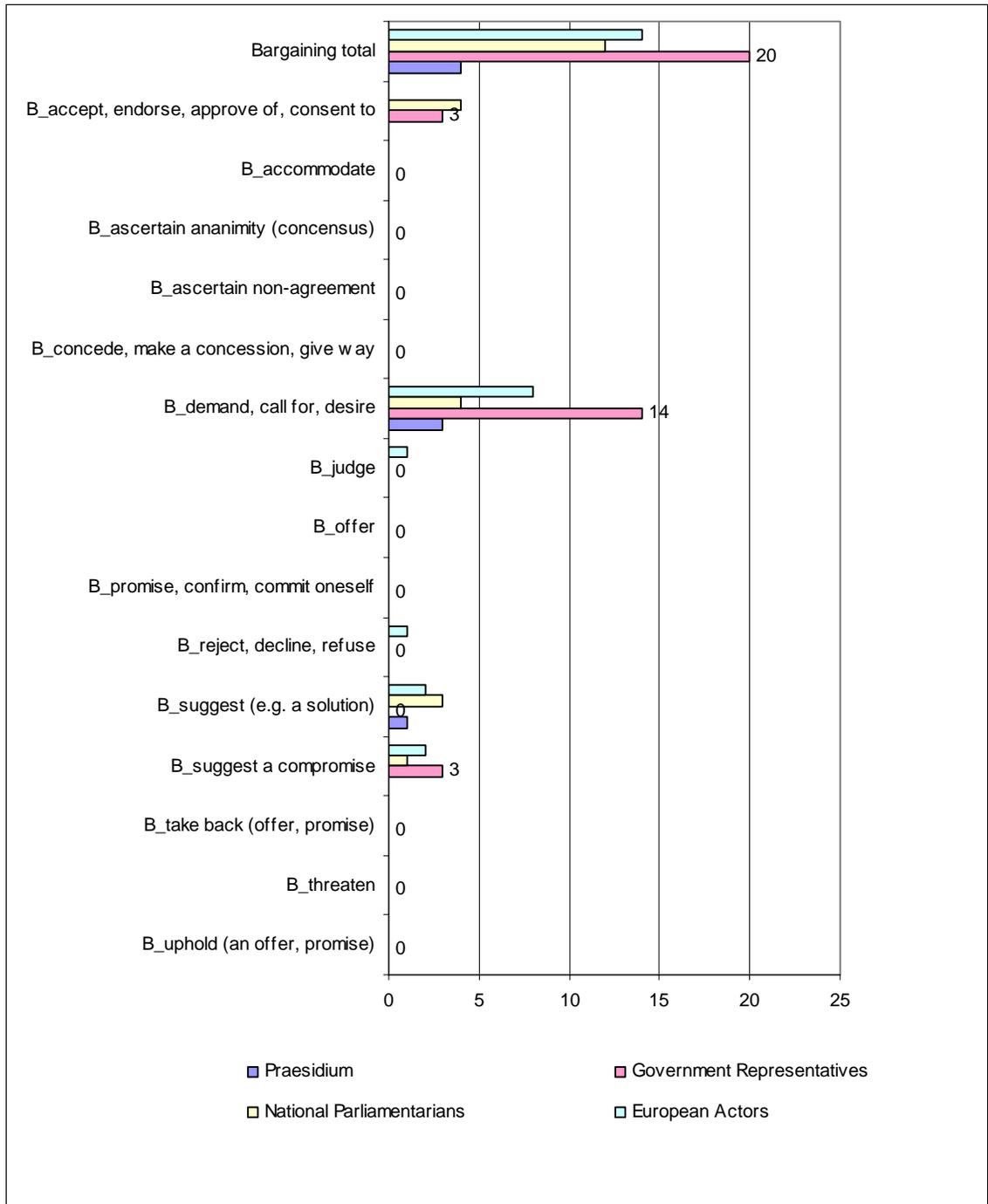
Government representatives made 50 arguing acts (71.4%) and 20 bargaining acts (28.6%). The breakdown of the arguing acts shows that 20 of them fell under the category of “to justify, argue, give reasons, explain,” 9 were expressions of “to approve,” 7 speech acts were in the category “to claim,” 6 under “to assume, believe.” The categories “to conclude” and “to contradict” recorded each 2 speech acts and the categories of “to ask,” “to concede,” “to establish” and “to inform” each recorded one speech act. Fourteen of the 20 bargaining acts were in the category of “to demand,” while three were in the category of “to accept” and three in the category “to suggest.”

European actors made 74 arguing acts (84.1%) and 14 bargaining acts (15.9%). The breakdown of the speech acts shows that almost all categories of arguing were used with

the majority of speech acts being in the following categories: 34 acts were intended “to justify, argue, give reasons,” 12 were acts of “to claim,” 7 were acts intended “to approve,” 6 were in the category “to establish,” and the rest of speech acts were distributed to all other categories, except for the three categories of “to ascertain agreement,” “to ascertain non-agreement” and “to ask.” The bargaining speech acts fell into the categories of “to demand” (8), “to suggest a solution” and “to suggest a compromise” (2 each) and in the categories “to judge” and “to reject” (1 each). National Parliamentarians displayed 69 arguing speech acts (85.2%) and 12 bargaining speech acts (14.8%). The arguing speech acts of national parliamentarians also covered almost all arguing categories, with the majority falling in the category of “to argue, justify, explain” (31), and further speech acts in the categories of “to assume” and “to claim” (8 each), “to approve” (7), “to establish (5). The rest of the speech acts distributed to the remaining categories, with the exception of the categories “to ascertain non-agreement,” “to contradict” and “to insist” which were not represented. The bargaining speech acts were distributed among the categories “to accept” and “to demand” (4 each) as well as among “to suggest a solution” (3) and “to suggest a compromise” (1). With regard to the arguing speech acts, all actor groups used very similar speech act categories. This holds also true for most of the bargaining speech acts. However, government representatives and national parliamentarians were the only actors that used the bargaining speech act “to accept, endorse, consent to,” which is an indication of their acceptance of a solution which might not have been their first choice or even of a change in their preferences. Overall, from the breakdown of arguing and bargaining acts with regard to the actor groups, it can be concluded that the hypothesis H2.1.a was confirmed, and that arguing and bargaining were in this case not actor specific (rejection of H2.2).



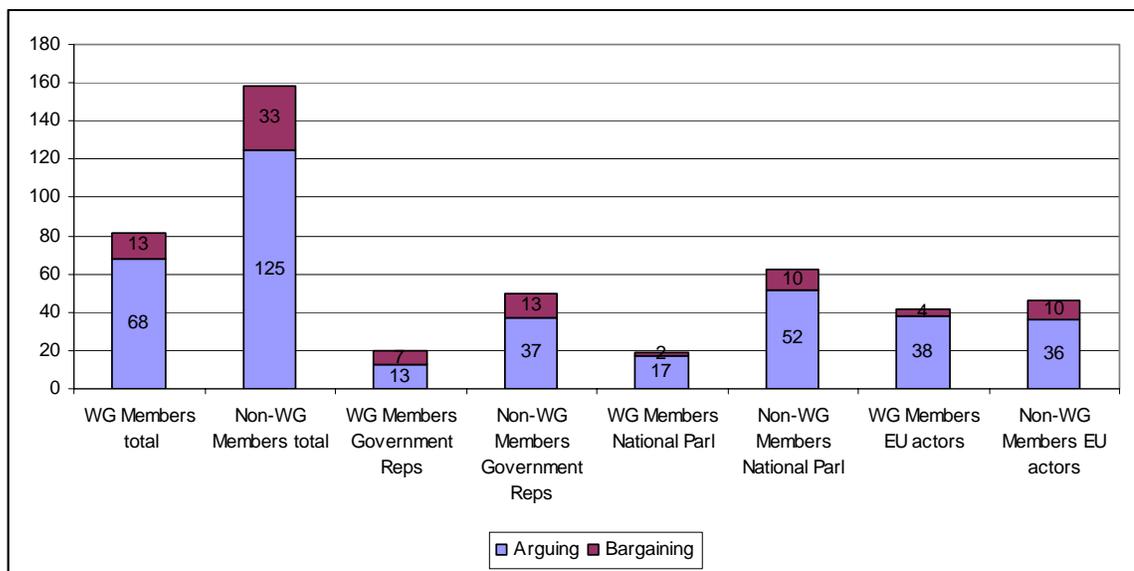
Legal Personality: Arguing by Actor group



Legal Personality: Bargaining by Actor group

Within each actor group a further distinction can be drawn between those actors that were part of the working group and those that did not take part in the working group's deliberations. Here again, as working group members were more intensively exposed to

the deliberation and were actively involved in the creation of the working group's recommendation, it should be expected that actor groups that were part of the working group should argue more than those that were not part of the working group on the legal personality of the Union. A comparison of arguing and bargaining among actors in consideration of working group membership largely confirms the hypothesis H2.1a and shows evidence against the validity of hypothesis H2.2. Out of the 37 total contributions to the debate on the legal personality of the Union, 13 (38%) contributions were made by members of the legal personality working group. Among the speakers, three of the nine government representatives (33%), four of the 12 (33%) national parliamentarians, and seven of the 13 (50%) EU actors were also members of the working group on the legal personality of the Union.



Legal Personality: Arguing and Bargaining based on Working Group membership

A comparison of arguing and bargaining speech acts of members of the working group with arguing and bargaining speech acts of non-working group member speakers reveals that working group members used more arguing (84% arguing, 16% bargaining) than non-working group members (69% arguing, 21% bargaining) within the debate on the legal personality of the Union. This finding supports the hypothesis that interaction within the working group would lead to the development of a Habermasian 'common

lifeworld' and consequently to shared values and norms among the working group participants. The further breakdown of arguing and bargaining within the actor groups of the working group, however, does not entirely mirror this finding. While European and national actors who were members of the working group on the legal personality of the Union argued substantially more than their colleagues who were not members of the working group, government representatives that were members of the working group argued slightly less than government representatives that were not members of the working group. This slight discrepancy among the government representatives might, however, also be attributed to the relative small number of working group member government representatives that spoke during the debate. Therefore, with a slight caveat to the arguing pattern of working group member government representatives versus non-working group member government representatives, it can be stated that the case on the legal personality of the Union confirmed the hypothesis of the positive relationship of membership in working groups and the amount of arguing within a debate.

Hypothesis 3: Changes in beliefs or preferences

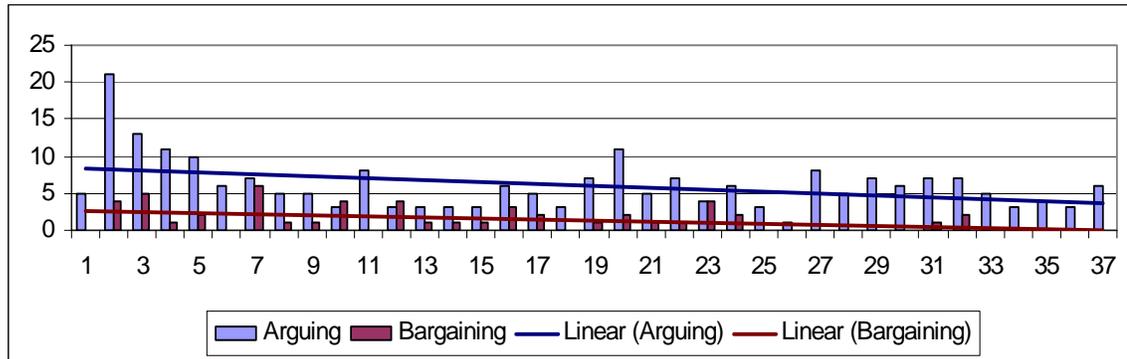
H3.1 More arguing in the negotiation mode indicates shared values and if effective is conducive to consensus agreements. *CONFIRMED*

H3.2.a Cases where the following IGC did not change the draft are a sign of effective agreement. Effective arguing is best shown quantitatively if bargaining positions diminish over time and qualitatively if the speakers succeed in establishing common values or standards on which to base their agreement. Persuasion could thus be traced by showing that speakers change their position over time and agree to proposed solutions.

CONFIRMED

H3.2.b Non-persuasion: Changes in the next IGC should have occurred in cases where arguing was picked up by the presidium while bargaining continued on this particular point. This would indicate that no real persuasion had taken place and that the governments used their power to correct that point. *NOT CONFIRMED*

The third set of hypotheses about the relationship between the negotiation mode and the negotiation output formulated that more arguing in negotiations leads to consensus (true consensus) and that persuasion would have occurred if bargaining positions diminished over time or if bargaining actors adopted the arguments of arguing actors.



Legal Personality: Development of Arguing and Bargaining throughout the debate

The patterns and frequency in the occurrence of arguing and bargaining over time support the persuasion hypothesis. As shown in the chart above, throughout the debate arguing was dominant over bargaining. Furthermore, bargaining speech acts show a significant decline over the course of the debate and virtually disappear towards the end of the debate. The declining parallel arguing and bargaining curves are an indication of effective consensus formation.

However, it is much more difficult to show that an actual change of preferences took place, as there was only one single debate on the legal personality of the Union. As all actors but one were in favor of granting the legal personality to the Union, the predominance of arguing is not surprising. The debate showed a clear convergence of all actors towards the norm of “simplicity,” which was used to change preferences. Some actors were at the outset in favor of legal personality, but some were against a single legal personality for the Union. It has been also discussed that many of the recorded consensus speech acts point towards a change of preferences or in position, such as to concede, to accept, or to accommodate.

As should be expected from this speech act pattern, by the end everybody agreed to the single legal personality. This can be hypothetically shown by analyzing the working

group documents as indicators for preference change. During the working phase, the working group produced 29 working documents. The three draft reports that were issued during the course of the working group proceedings did not undergo fundamental changes. While the general agreement on the necessity of a legal personality emerged from the beginning, the working group debated the different options for legal personality and its implications on the functioning and the nature of the Union.

The essentials of the groups' recommendations were already contained in the first draft report WG III – WD 10, 9 September 2002, which already stated that “there was broad consensus (one vote against)⁴² within the working group as regards conferring explicit legal personality on the Union.” In its second draft report, WG III – WD 15, 17 September 2002, the working group repeated the broad consensus (one vote against) and considered the options of either conferring the Union legal personality alongside those of the Communities and Euratom, or giving it explicitly a single legal personality to replace the existing legal personalities. In its final draft report, WG III – WD 29, 24 September 2002, the group recommended unanimously that the Union should have its own explicit legal personality. It further recommended (with one member against) that this legal personality should be a single legal personality and replace the existing personalities. This broad consensus was also reflected in the final report, CONV 305/02, 1 October 2002, in which all members except one voted for conferring an explicit single legal personality to the Union. This final report was then discussed during the plenary debate on October 3-4, 2002, and its recommendations incorporated into the final draft of the Constitution text.

Although the patterns of arguing and bargaining were mostly confirmed with regard to the conflict type and the institutional setup, the debate seemed to be very consensual from the outset. Arguing and bargaining in this case serve very well to reconstruct the true consensus outcome of this negotiation, but a transformation of preferences can only be discerned in the use of speech acts that point towards preference change, such as “to admit as correct” or “to accept.” The progression of the draft reports has shown that the one member that was against the legal personality of the Union from the outset did not

⁴² The objection came from William Abitbol, the French MEP.

change his preference, but that some members which were in the beginning not convinced by the single legal personality for the Union finally agreed to it in the final report. However, because there was only one debate, a strong preference change in the locutionary statement of the speech acts could not be shown within the course of the debate on the legal personality of the Union.

The working group's recommendation to grant the Union a single legal personality was accepted by the Convention and endorsed by the IGC. Although it can be argued that the legal personality was not a very controversial or revolutionary recommendation, the Constitution achieved a clearer, more coherent and user-friendly structure of the Union's fundamentals when the prior IGC's never found the time or expertise to undertake this task. The legal personality was one of the first recommendations that the Convention developed and had a wide-ranging impact on the final shape of the constitutional treaty by expressing a preference for a new treaty that would combine the existing treaties into a 'single constitutional text' (Norman 2005).

5.1.2 Case 2: The Foreign Minister of the European Union - a mixed conflict negotiated in a working group

The Laeken declaration is quite explicit in its expectation that the Convention should look at the Union's powers in the area of external policy. Generally, the declaration gives a lot of prescriptions about the external affairs of the Union. Under the heading of 'Europe's new role in a globalized world,' it asks two questions: "Does Europe not, now that it is finally unified, have a leading role to play in a new world order?" and "What is Europe's role in this changed world?" Both of these questions seem rather rhetorical, as the declaration further talks about the Union as an enlightened power acting in the support of the greater good. The declaration also expresses the need to improve the synergy between the High Representative and the Commissioner responsible for External Affairs.

Here again, it needs to be pointed out that the Convention did not disagree with the underlying prescriptions of the Laeken declaration that the Union should play a leading role globally. Therefore, while the external action working group chaired by Jean-Luc

Dehane presupposed Europe's leading role in the world, it mainly concentrated on improving coherence and consistency within the area of external action.

Within the many topics dealt with in the working group on external action, e.g. communitarization of the external policy, the merging of the pillar structure, etc. we will concentrate on the debate consolidating the roles of the Commissioner responsible for External Action (Chris Patten) with the High Representative for CFSP (Javier Solana).

From its inception, the Common Foreign and Security Policy (CFSP) was a constant issue of debate among member states, and they struggled to reconcile more effectiveness in European Foreign Policy with assuring that the common foreign policy did not turn into a single policy. Member states had created the 'second pillar' of the Maastricht Treaty to cover European Foreign policy through its own intergovernmental procedures and policy instruments. In the Treaty of Amsterdam, member states had created the post of the High Representative for foreign and security policy to assist the Council. The proliferation of actors and the increasing confusion on roles and responsibilities can best be summarized by the by now famous story in which Henry Kissinger once asked for the EU's telephone number and could not get one single response.

The issue on the Foreign Minister of the EU was qualified as a mixed conflict because as a policy issue it has constitutional as well as distributive implications. Because the foreign minister post could confer a new quality to the European Union, similar to the granting of the legal personality in that the Union would be able to represent itself externally and make its own policies, it has constitutional implications. On the other hand, the distributive aspects can be described by the initial precautions taken in establishing the CFSP. Member states want to make sure that they maintain control over the EU's external actions and that this post does not take away any powers from national governments.

Working Phase: the institutional setup of the negotiation process

The external action working group discussions took place after a general plenary debate on EU external action on 11 and 12 July 2002. The presidium provided the working group with a reflection paper on the issues which it should discuss (CONV 161/02). The working group on external action had 50 members: 13 government representatives from the EU member states, 7 government representatives from the candidate countries, 8 representatives from the EU parliament, one representative of the Commission, 11 representatives from EU member country national parliaments, and 7 representatives from candidate country parliaments, as well as one representative each from the Committee of the Regions and the European Economic and Social Council (EESC), as well as its chairman Jean-Luc Dehaene. Thus with 20 government representatives to 9 EU actors and 18 national parliamentarians, the composition of the working group displayed some imbalance toward the government representatives, which held 40% of the seats, slightly more than the 36% for national parliamentarians, and more than double the number of EU actors (18%) (see table in Annex II).

The working group on external relations also heard external experts such as Chris Patten, Commissioner for External Relations, Javier Solana, Secretary General of the Council and High Representative for CFSP, Pascal Lamy, Commissioner for Trade, Poul Nielson, Commissioner for Development Cooperation and Humanitarian Aid, and Pierre Boissieu, deputy Secretary General of the Council. The group held eight meetings, one of which was held jointly with working group VIII on defense, on the issue of crisis management. Over the course of the discussions a high number of written contributions were submitted.⁴³

In its final report submitted to the Convention, in contrast to working group III, the working group on external action did not submit one single proposal but presented a list of several options for the Convention to choose from (described in greater detail below). The Convention chose the middle option presented in the working group's paper. This

⁴³ For a list of all 56 contributions see Annex of WG VII – WD 17.

choice merged the functions of the High Representative for foreign affairs with those of the Commissioner for External Affairs while maintaining the specific characteristics of each office. This solution was labeled the “double-hat,” and the Convention further recommended that the new ‘double-hatted’ High Representative/Commissioner for External Affairs should represent the Union in external relations and chair the Foreign Affairs Council. The IGC broadly accepted the Convention’s recommendation of the ‘double-hat’ and gave this post the name of the “European Union Foreign Minister.”

Role of the Presidium

When the working group on the external actions of the EU took up its work, there was little guidance except for the questions formulated in the Laeken Declaration, which asked how to strengthen the synergy between the posts of the High Representative for foreign and security policy, Javier Solana, and the external affairs commissioner, Chris Patten and also whether to extend the EU’s external representation in international fora. Jean-Luc Dehaene, the chairman of the external relations working group presented the working group with a set of questions to answer throughout their deliberations:

- How should the interests of the Union be defined and formulated?
- How should the consistency of the Union activities be ensured, taking into account all the instruments at its disposal?
- What should be done to speed decision making, giving attention to the possible extension of the Community method or easing unanimity?
- What were the lessons learned from creating the Solana post?
- What changes in the Union’s external representation would boost its international influence?⁴⁴

When Dehaene presented the group’s final report to the convention on 20 December 2002 (WG VII 17, CONV 459/02), he emphasized the inclusive and consensual elements of the discussion and referred to the “high degree of support,” “significant numbers in

⁴⁴ Questions listed in Norman 2005: 91.

favor of” and “a large trend.” Although the debate as described revealed that there was less than complete consensus within the working group or Convention members, Dehaene succeeded in presenting a synthesis between the community and intergovernmental method. The speakers acknowledged this achievement throughout the debate on the foreign minister of the Union. All actor groups commended the chair of the working group, Mr. Dehaene, on his excellent mediation and leadership skills within the working group and praised him for presenting a report that was acceptable to all participants in lack of a full consensus on a single solution.⁴⁵

Plenary Debate: again arguing over bargaining

Six plenary sessions dealt with external action and the EU foreign minister, including debates designated to be on external affairs as well as debates that dealt with the future institutional architecture of the Union.

On 11 July 2002 the President opened a general debate on external action of the EU claiming that there was consensus on the vision that the Union should play an important role on the international scene and that the task of the convention was to define how the Union could play that role to the best (4-012). In the following debate most of the speakers agreed that the coherence of the CFSP should be improved, that the European people wanted a common European Foreign, Security and Defense Policy, that Europe risked being marginalized and that it needed to speak with one voice on the international scene.

Although no specific details were discussed, various actors talked about the necessity of convergence (Michel 4-028), connection, closer cooperation or of merging the two posts of High Representative and EU External Relations Commissioner (Brok 4-015).

⁴⁵ See e.g. speeches by: Van der Linden (5-014), Hain (5-015), Michel (5-016), Augerinos (5-019), Tiilikainen (5-020), Duff (5-011), Dini (5-023), Hjelm-Wallen (5-027).

Proponents of communitarization argued that ideally there should be a complete communitarization of foreign politics under the first pillar of the Union, but these members also acknowledged that this would be unrealistic for the foreseeable future. Consequently they thus concluded that the European people wanted Europe to play a stronger role and that synergies could only be obtained by integrating Solana's and Patton's posts. They also argued that the cooperation between Patten and Solana had shown what could be achieved when these resources were joined together. Therefore, they believed that the first step should be to ensure that the community's role as regulated in the treaties was respected and that the Commission played a larger role in external affairs. This step could best be achieved by unifying the personnel of the High Representative, who should be part of the Commission and should have his own external administration.

Proponents of the merger of the two posts argued that it was an anomaly that one EU body had the competence in external affairs and the power to decide (Council), while another body (Commission) had the means and instruments to implement decisions. They also stated that increased efficiency and coherence and consistency of EU external action might require greater fusion of the posts and that the continued establishment of two parallel administrations would inevitably lead to rivalry and conflict.

Advocates of the merge argued for giving this new post a special legitimacy with the Council. They also assured the session that there would be no monopoly of initiative with the Commission but that member states must also shape European foreign policy initiatives. Some argued that if the two posts were to merge, the external representative should be associated with the Council and not the Commission (Hjelm-Wallen 4-082). Many speakers were further cautious and emphasized that the merger had to be undertaken gradually. These speakers referred to the historical evolution of the two posts and the necessity of maintaining the point of equilibrium between the respect for national sovereignty and the search for the collective interest of the Union. They argued the first step should be having joint initiatives among the Commissioner and the High

Representative, and than ultimately by the double hatted “Mr. PESC.” (Brock 4-015, Puwak 4-018, Timmermans 4-017, Attalidis 4-022, McDonagh 4-020, Hamzik 4-044, Glotz 4-045, Fini 4-054, Augerinos 4-060, Dini 4-061, Hain 4-062, Barnier 4-063, Meyer 4-066, Muscardini 4-067, Maij-Weggen 4-069, Kiljunen 4-070, Vassiliou 4-073, Wittbrodt 4-076, Migas 4-077, Follini 4-078, Szent-Ivanyi 4-091).

Proponents of reinforced cooperation without a merger of the two posts argued that communitarization would not work and that a European CFSP could only be strong if it drew on the experience and assets of the Member States and that accountability through elected governments to national parliaments needed to be maintained. They further argued that the complexity in the institutions reflected the lack of a fully federal Union and that some states were not ready to cede sovereignty in external affairs. These members pointed at the real issues of democracy and accountability in external affairs and argued that “fiddling around with instruments, fiddling around with bringing two people under one hat is not the solution” (De Rossa 4-085). They suggested a more “realistic approach” and stated that because the High Representative had proven effective, it should be reinforced. They further argued for a closer cooperation between the Council and the Commission in order to ensure the optimal use of the external action instruments under the first pillar. In suggesting that the External Relations Commissioner and the High Representative should make joint proposals to the Council and further that the High Representative should chair the External Affairs Council, thus eliminating the rotating presidency system and reinforcing continuity and effectiveness (Michel 4-028, Hain 4-031, Nahtigal 4-052, Kristensen 4-074).

A minority of speakers also stressed the importance of coherent and efficient joint action; however, these members remained rather vague on which solution they preferred and argued that the Commissioner and the High Representative were needed “both, and together” (Martikonis 4-068), that all changes needed to be made gradually (Farnleitner 4-080) and through “evolution” (Oleksy 4-087), and that the institutional consequences of such choice needed to be carefully considered (Moscovici 4-089).

On 20 December 2002, the convention held a joint debate on external action and defense. The chairman of the group on external action, Dehaene, presented the group's final report and reiterated that the working group desired that Europe should act more efficiently and coherently concerning foreign policy and that it be a real global actor in the international level. The report formulated the principles and objectives of foreign and external action, and Dehaene ascertained that there was a rather large consensus in the working group on this text. He also informed the Convention that the working group focused on how to coordinate the two distinct decision-making channels of the intergovernmental and the common aspects of foreign policy in order to allow the Union to make use of all its instruments but not end up with two forms of foreign policy. Therefore, the discussion concentrated on both the High Representative's and the Commissioner for foreign policy's respective roles. Instead of presenting one option, the report offered different options on how to resolve the coordination between the two posts. In its recommendations the report tried to satisfy both approaches of intergovernmental and community policies. The working group preserved the intergovernmental approach for the common foreign and security policy, while preserving the community approach for all aspects that were currently under the community's responsibility. Dehaene then cautiously introduced the idea of designating "someone responsible for foreign policy" who is called "European External Representative" in the final report. According to Dehaene this representative could be named "Minister of foreign affairs" or a "foreign secretary," and he would have a double mandate, one from the Council (European Council and Council of the European Union) and one as a member of the Commission. Dehaene also clarified that both mandates would be "clearly separated" and would refer to "two distinct tasks which are not to be mixed." The working groups further tried to avoid any contradictions and conflicts in the creation, appointment, and function of the foreign secretary. Dehaene argued that this proposal represented a compromise agreed to by the majority of the working group and that it was thus meant as a "proposal which

completely respects the governments and the community, by which one person is in charge of both tasks and has coordination between both, and with respect to the two different approaches.” Dehaene also reported that a large group was in favor of the High Representative presiding over the Council of ministers for foreign affairs in order to ensure a stable presidency and continuity of the agenda, and he believed that the foreign policy needed to be coordinated with the Commission. He concluded by stressing that the group’s recommendations did not change the competences but aimed at coordinating the two decision-making organs on a political level as well as on a level for services and financing with the goal of ensuring common action in all dimensions of the Union (Dehaene 5-009).

The four options were presented in the working group’s final report were:⁴⁶

1. The recommendation to keep the functions separate and to adopt practical measures to further strengthen the role of the HR and to enhance synergy between the HR and the Commissioner for external relations.
2. The recommendation to merge the functions of the HR into the Commission.
3. The compromise solution to bridge the gap between the first and second options that recommended the exercise of both offices by one person, titled the “European External Representative.” This Representative would be appointed by the Council by qualified majority with the approval of the President of the Commission and endorsement of the European Parliament. The Representative would receive direct mandates from and be accountable to the Council for issues relating to CFSP, and also be a full member of the Commission, and even its Vice President.
4. The proposal to create the post of “EU Minister of Foreign Affairs,” who would be placed under the direct authority of the President of the European Council.

⁴⁶ WG VII 17 – CONV 459/02.

This minister would combine the functions of the HR and the External Relations Commissioner, and would also chair the external action Council.

In the following discussion members supporting the merger of the two posts were in the majority. Out of the 49 speeches that were coded, 39 speakers supported some form of merger of the two posts (options 2, 3 and 4), only 6 were strictly opposed to a merger, and 3 said that they were opposed but would consider it under certain conditions. One speaker did not take a position on the merger.

Some of the members who rejected merging the two posts, simply argued that it would not change anything in the way EU external action was conducted (Arbitbol 5-089), or backed the criticism voiced by Javier Solana, who enjoys a lot of credibility among the European actors. Solana justified his rejection by pointing at potential conflicts of interest; he believed that the 'double hatted' representative would not be able to mediate in a disagreement between the Council and the Commission and demanded that those and other open questions needed to be answered first (Hain 5-015). Opponents further argued that efficiency and coherence could also be achieved without a merger of the two posts. These opponents believed that a clear cut system that would give the powers of policy initiation and representation to the Commission and the power of decision making to the Council would have provided a simple and efficient model. In their view merging the two functions could only be treated as a long-term goal (Kelam 5-034), which would otherwise create double structures in external action (Tiilikainen 5-020). Some supported the suggestion of having the HR chair the External Relations Council but they argued that a merger of the two functions would pose more problems than it would solve because the Commission and the Council had distinct roles which needed to be respected (Hjelm-Wallen 5-027). One member rejected all proposed options by arguing that foreign policy was a characteristic of an independent state (Skaarup 5-046).

Some speakers preferred to keep the two posts separate in order to avoid institutional complexity, but these members were willing to consider the 'double hat,' especially once

the other institutional issues were discussed (Hololei 5-055, Dastis 5-062, Kristensen 5-064).

Among those that supported the merger, the positions varied and all three options were argued for by various actors. Some proponents of option two pointed out that there was still confusion in the relationship between the Commission and the Council. These speakers argued that it was difficult for a representative to serve two masters and that a Commission member with a mandate from the Council would “be a Council cuckoo in the Commission’s nest” (Duff 5-021). They also argued that the unification of the two posts in the Commission would ensure intergovernmental control, more efficiency and coherency (Wittbrodt 5-081).

Among the proponents of option three, some speakers reported that they would have preferred the second option of merging the two posts into the Commission, but because this choice was not realistic at the moment, they accepted the compromise option three of having a European External Representative (Van der Linden 5-014, Cushnahan 5-037, Kauppi 5-061). Some argued that it was very important to ensure that the selected person would have the confidence of the Commission, the Parliament and the member states (Christoffersen 5-035) and that this double-hatted HR/Commissioner should have only one administration which should be established under the Commission (Brok 5-041). Firm proponents of the ‘double-hat’ solution explained that such a merger would not entail the communitarization of the CFSP but that it would reinforce coherence and enable better mobilization of external action instruments. They pointed out that the merger would increase efficiency and coherence (Lopes 5-051, Figel 5-071, Yakis 5-072, Kohout 5-100), and constitute a median and pragmatic approach, thus a compromise (Haensch 5-043, Borrell Fontelles 5-052, Costa 5-060, Peterle 5-069). This compromise would consolidate the Union’s institutional role (Michel 5-016, Santer 5-084), and increase the Union’s external visibility, its internal coordination, and contribute to the synergy and common thinking between Council, Commission and the Member States (Attalidis 5-038). Proponents reiterated that a single voice of the Union in foreign

relations was an essential element of European unification and that the member states did not have the capacity to effectively defend their interests by themselves. In calling for a European Representative, proponents demanded that this person would also hold the seat of the Vice-president of the Commission and its attendance in the Council of Ministers (Augerinos 5-019, Akcam 5-096). Members continued to disagree over the chairmanship of the external relations Council, but most supported the chairmanship of the external relations Council by the double-hatted foreign representative (Beres 5-082). Some proponents even argued that agreement on this permanent chair formed a prerequisite for agreement on the double-hat (Hain 5-056), while others would only support the double-hat solution if that person would not chair the external relations Council (Roche 5-040). Proponents of a strong Council with regard to foreign affairs supported option four, the true European Foreign Minister (De Villepin 5-065, Fischer 5-107).

The rest of speakers supported the merger of the two posts but did not specify which option they specifically endorsed. Among the main arguments for a merger were the need for efficiency (Lequiller 5-039, De Vries 5-042, Fini 5-053, Severin 5-067, Meyer 5-087) and credibility of the Union's foreign action (Timmermans 5-022), the desire for even more ambitious proposals (Dini 5-023), the pursuit of the interest of the whole common foreign and security policy (Fogler 5-028, MacLennan of Rogart 5-033) as well as the idea of strengthening the link between foreign policy decisions and external action instruments (Almeida Garrett 5-086). Some speakers also pointed out that some aspects of the merger still needed to be worked out, especially the relations with other commissioners and the relation with the President of the European Commission (5-066). Other members pointed to potential problems of serving two masters, i.e. the Commission and the Council, and argued that responsibilities and obligations of the External Representative needed to be defined (MacCormick 5-078).

Many speakers stressed the interdependence between the two issues of the External Representative and the European President and that the decisions on each of them could not be taken independently (Kristensen 5-064, Azevedo 5-068).

The plenary sessions on the institutions of the EU on 20 and 21 January 2003 and on 15 and 16 Mai 2003 focused on interdependence, and members also linked the issue of the foreign minister to the issue of the EU presidency.

During the plenary debate of 20 and 21 January 2003 proponents of the merger argued that continuity (Attalidis 1-054), visibility (Serracino-Inglott 1-062) and coherence of EU foreign policy would necessitate that the functions of the High Representative and the Commissioner for External Affairs were exercised by the same person, i.e. a European Foreign Minister (Eckstein-Kovacs 1-040). These members argued that this new and creative approach would create the much-needed synergy between activities of the Commission and the Council (Huebner 1-050). This person would also preside the external relations Council (Lequiller 2-013, Frendo 2-029) while being at the same time a member of the Commission or even its Vice-President (Korcok 2-034). Consequently, the new post would replace the formerly four-headed external representation comprised of the foreign minister of the member state holding the EU Council Presidency, the foreign minister of the member state holding the subsequent EU Council Presidency, the High Representative of the Council, and the Commissioner for external relations (Fischer 2-020). Some members even called for establishing the post of European Foreign Minister without giving any further arguments (Teufel 1-053). Others supported creating the post while demanding that this person would have to represent the will of the Council and could not act individually (Speroni 1-066).

A few speakers still questioned the role of the foreign minister and pointed out that it needed to be determined whom such a minister would report to and which Council formations he/she would chair. These resisting members also insisted on a strong Commission with the right of initiative and the power to ensure that the decisions that have been taken get implemented (Kristensen 1-058).

During the plenary debates of 15 and 16 May 2003 on the institutions of the European Union, several speakers took up the issue of the foreign minister once again. Most of the speakers welcomed the Presidium's proposal to place the Foreign Minister within the Commission while keeping it under the authority of the Council and having the Foreign Minister preside the External Affairs Council (Barnier 4-043, Maij-Weggen 4-075, Vitorino 4-088, Brok 5-038, De Vries 5-041, Dastis 5-045, Hain 5-047, Tiilikainen 5-074, Severin 5-078, Kelam 5-091) as a positive development (Van der Linden 5-068, Andriukaitis 5-072, Lopes 5-073, Haenel 5-075, Vilen 5-092, Rupel 5-093, Costa 5-101, Hololei 5-110, Lopez Garrido 5-122). In calling this proposal one of the most important recommendations of the Convention (Costa 4-025, Rupel 4-026, Vitorino 5-039, Fini 5-049, Kacin 5-050, Spini 5-052, Bury 5-056, Huebner 5-059) they argued that it would give foreign policy a more consistent and prominent role within the Union as well as on the international scene (Fini 4-023, Kacin 4-147, Figel 5-037, Meyer 5-040, De Villepin 5-042, Oleksy 5-046, Azevedo 5-057, Lenmarker 5-060, Christophersen 5-064, Teufel 5-065, Lequiller 5-066, Kalniete 5-070).

A few speakers supported creating the post while stating that the labeling of Foreign Minister would be misleading as there was no European government (Paciotti 5-114).

The speakers called for a closer and clearer definition of the post (Duff 5-069), demanded that the External Relations Council continue to be presided by the member states and not by the European Foreign Minister (Roche 5-062, Kiljunen 5-071, McDonagh 5-107), or argued that the Foreign Minister should not be Vice-President of the Commission (Hjelm-Wallen 5-067).

Critical voices were raised by Bonde (5-053) who argued that the post of the Foreign Minister would be monopolized by the large member states and undermine the smaller states' voices, as well as by Voggenhuber (4-153) who pointed at the constitutional consequences of such a merger and argued that the incumbent of this post if he/she was meant to be a part of the Commission, needed to be confirmed by the European Parliament and should also be subject to the vote of confidence in order to guarantee the

double legitimacy for the post. Finally, Arbitbol (5-109) remarked that the appointment of a European Foreign Minister would not automatically lead to a true Common European Foreign Policy.

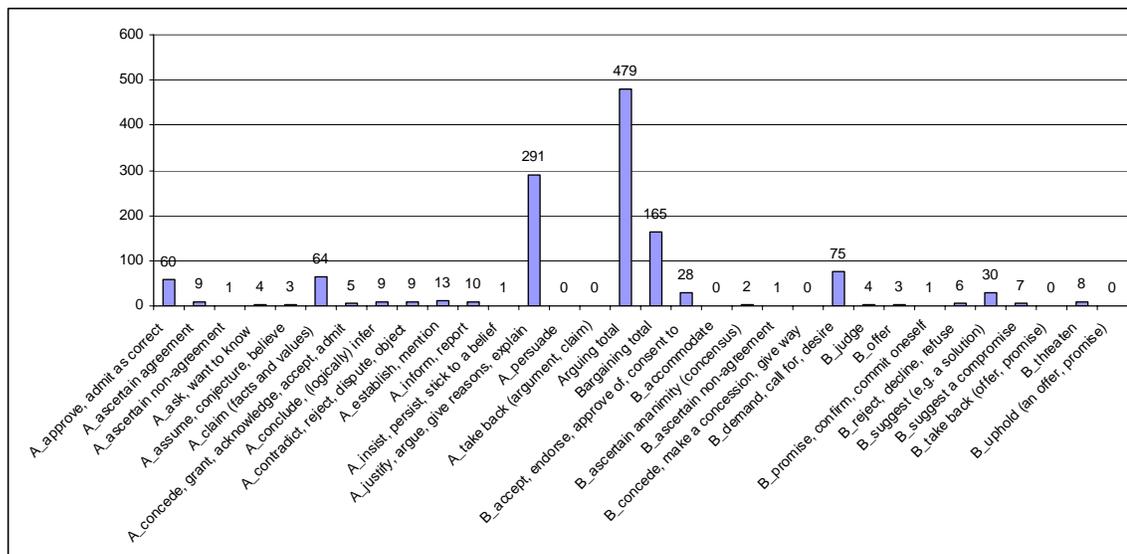
Accordingly, the President of the Convention closed the debate on the institutions by ascertaining a consensus on the establishment of the post of a European Foreign Minister and by acknowledging that the exact place of that post and its relations with the Commission still needed to be specified (President 5-128).

Discussion of Hypotheses

Hypothesis 1: Conflict Type and Negotiation Mode

H1.c In negotiations over mixed conflict types arguing should be predominant over bargaining. *CONFIRMED*

The issue of the European Foreign minister was classified as a mixed conflict which had both elements of a constitutional, or value-based, conflict as well as aspects of an interest-based conflict. Therefore, both modes of arguing and bargaining were expected to occur, and prior research indicated that in most mixed conflict cases, arguing should be dominant over bargaining. Plenary debates on the foreign policy of the Union took place on 20 December 2002, 20 and 21 January 2003 and 15 and 16 May 2003, and 644 speech acts were codified that directly related to the merger of the posts of High Representative and the Commissioner for External Relations of the Union. The majority of those, 74% or 479 out of 644, were arguing speech acts and the remaining 26%, 165 out of 644, were bargaining speech acts. The expected prevalence of arguing during the debate on this mixed conflict was, therefore, confirmed. The following chart shows the distribution of the two negotiation modes and of the specific speech acts with the plenary debates relating to the Foreign Minister of the EU.



Foreign Minister of the EU: Distribution of Arguing and Bargaining throughout the debates

The distribution of arguing speech acts shows that speakers used all categories except for two categories, “to take back (argument, claim)” and “to persuade.” A breakdown of the respective percentages of the arguing speech acts further points out that the debate was conducted in a very argumentative way, and speech acts that tried to establish values and facts to support one’s position were the most dominant: “to justify, argue, give reasons, explain” (61%), “to claim (facts and values)” (13%). The second largest group of speech acts indicate the establishment of agreement and consensus: “to approve, admit as correct” (13%) and “to ascertain agreement” (2%). All actors ascertained agreement in every debate. This indicates that a shared understanding of values and facts and of the conclusions that need to be drawn from them persisted throughout the debate. Most of the other speech acts used during the debate point to the interactive nature of the negotiation and indicate that the speakers picked up other speakers’ arguments, rejected them, established new arguments, informed the Convention participants of facts, or conceded to others’ arguments.

There were significantly fewer bargaining speech acts than arguing acts, and the majority fall into the more problem-solving categories of bargaining rather than in the categories of confrontation. As expected, the majority of the bargaining speech acts were demands (45%), however, when considered in the context of the overall speech acts, demands only account for 11 percent of the speech acts. Similarly to the arguing speech acts, the

slight differences among those groups. Overall, all actors groups used roughly 75 of their speech acts for arguing and 25 percent for bargaining.

During the plenary debates 153 speeches were coded as directly relating to the merger of the two posts of the High Representative of the Council and the Commissioner for External Relations. Of those 153 contributions, 64 speakers were government representatives 59 speakers were EU actors, 25 speakers were members of national parliaments, and 5 speeches were attributed to the Presidium. The distribution of contributions during the debate shows that EU actors and government representatives were more active during the debate representing 38% and 41% of the speakers while national parliamentarians only represented 17%.

A deeper analysis of the individual speeches reveals that all actor groups displayed a much larger percentage of arguing speech acts than of bargaining speech acts. Out of the 644 speech acts codified in the plenary debate, 25 were uttered by the Presidium (the Convention President and the Chair of the working group, Dehaene), 299 came from government representatives, 93 were issued by European actors, and 227 by national parliamentarians.

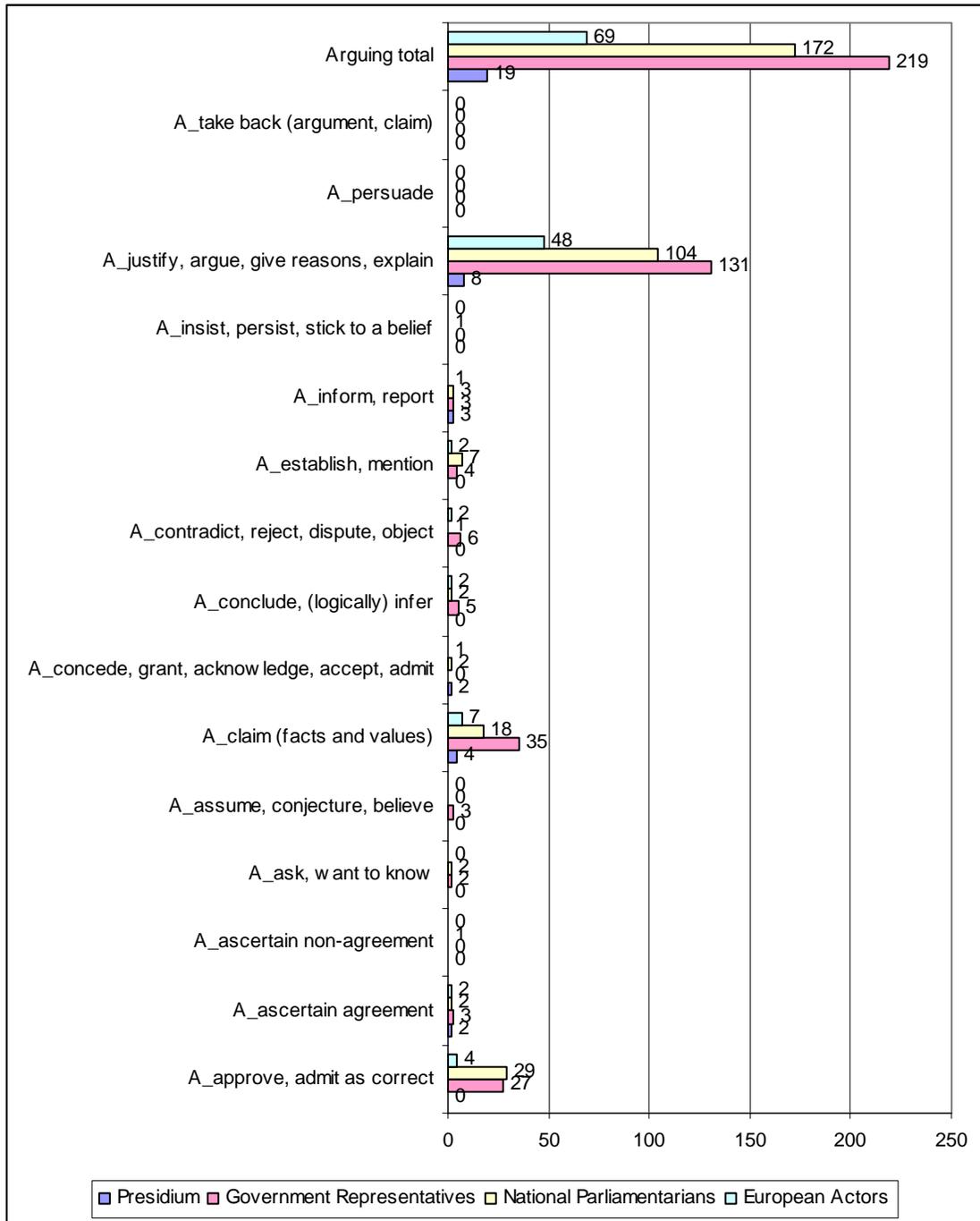
Government representatives issued 219 arguing speech acts (73%) and 80 bargaining speech acts (27%). The breakdown of the arguing acts shows that most of them, 131, fell under the category of “to justify, argue, give reasons, explain,” 35 were in the category “to claim,” and 27 speech acts were expressions of “to approve.” The rest of the speech acts were distributed among the other arguing categories, with the exception of “ascertain non-agreement,” “concede, grant, acknowledge,” “insist, stick to a belief,” “persuade” and “take back (argument, claim),” which were not recorded during the debates. With regard to the bargaining distribution, 41 out of the 80 bargaining acts fell in the category of “to demand,” 19 were in the category “to suggest (a solution)” and 9 were in the category “to accept, endorse, approve of.” The rest of the bargaining acts were distributed among all other categories, except for the categories “to accommodate,” “to ascertain unanimity (consensus),” “to ascertain non-agreement,” “to concede,” “to take back (offer, promise)” and “to uphold (an offer, promise),” which were not recorded.

National Parliamentarians displayed 172 arguing acts (76%) and 55 bargaining acts (24%). The breakdown of the speech acts shows that almost all categories of arguing

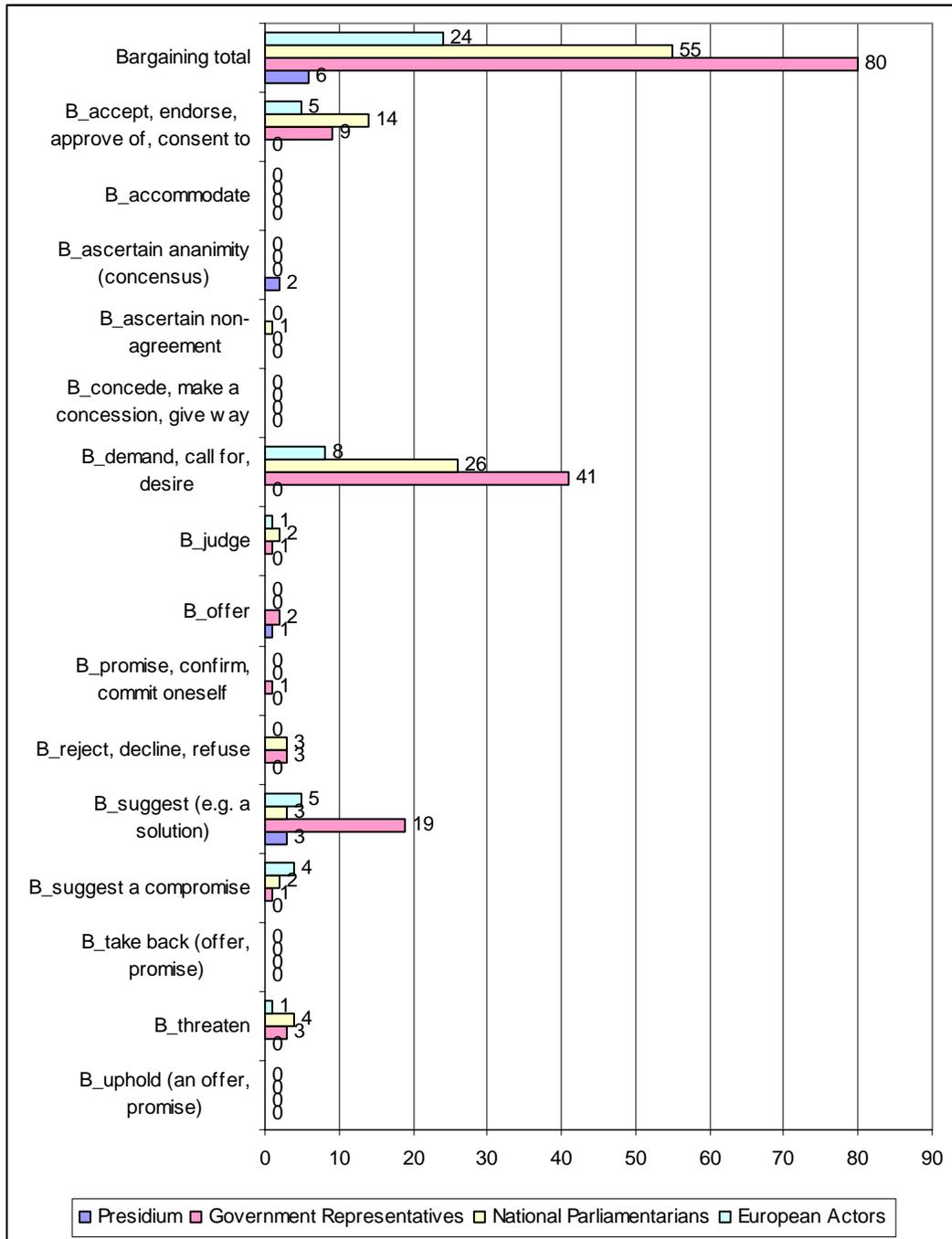
were used, and the majority of speech acts fell in the following categories: 104 in “to justify, argue, give reasons,” 29 were acts of “to approve,” 18 were acts of “to claim,” 7 were in the category “to establish,” and the rest of speech acts were distributed to all other categories, except for the three categories of “to assume,” “to persuade” and “to take back (argument, claim)”. The bargaining speech acts fell in the categories of “to demand” (26), “to accept, endorse” (14), and in the categories of “to threaten” (4), “to reject, decline”, “to suggest (a solution) (3 each), “to judge”, “to suggest (a compromise) (2 each) and “to ascertain non-agreement” (1).

European actors displayed 69 arguing speech acts (74%) and 24 bargaining speech acts (26%). The arguing speech acts of European actors also covered many categories. The majority fell in the category of “to argue, justify, explain” (48), and further speech acts fell in the categories of “to claim” (7), “to approve” (4), “to ascertain agreement,” “to conclude,” “to contradict,” “to establish” (2 each), and “to inform,” “to concede” (1 each). The bargaining speech acts were distributed among the categories “to demand” (8), “to accept” and “to suggest (a solution)” (5 each), “to suggest a compromise” (4), and “to judge” and “to threaten” (1 each).

Overall, there were no significant differences in the usage of speech act categories among the actor groups. Therefore, it can be concluded, that the hypothesis H2.1a was confirmed, and that arguing and bargaining in this case were not actor specific as suggested by hypothesis H2.2.

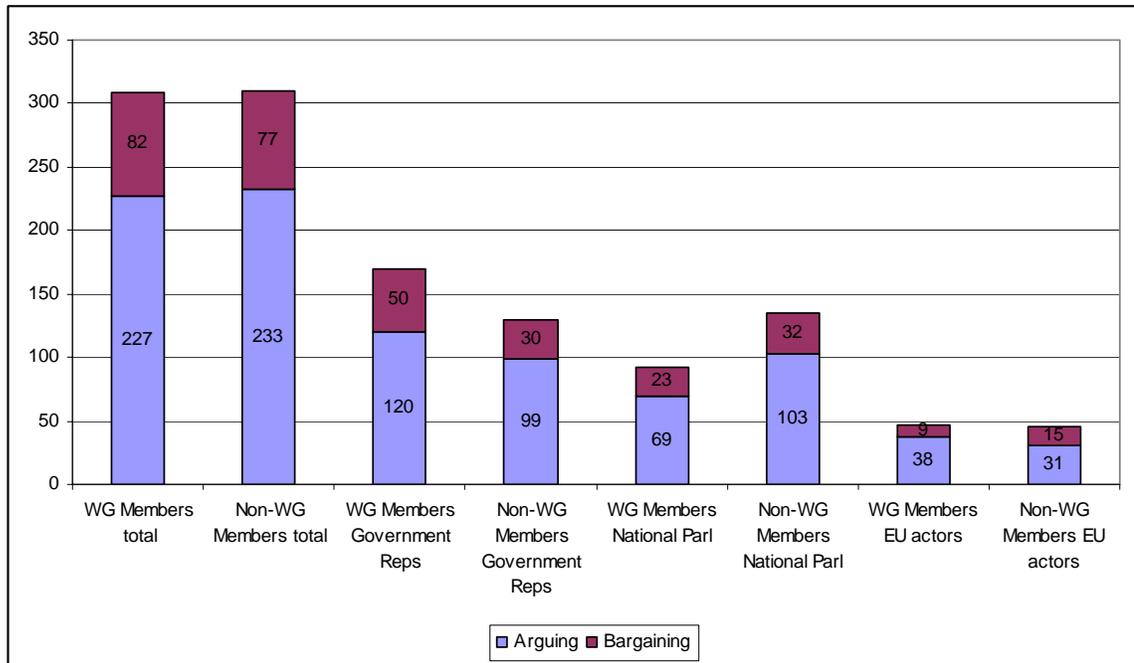


Foreign Minister of the EU: Arguing by Actor group



Foreign Minister of the EU: Bargaining by Actor group

In comparing the arguing and bargaining patterns of members of the working group on external action with speakers that were not members of the working group, we would expect working group members to show a higher percentage of arguing than non-working group members. The findings of arguing and bargaining within actor groups, and in consideration of working group membership, remain inconclusive with regard to the second aspect of the hypothesis. Although it was shown above that all actor groups displayed the same amount of arguing and bargaining overall, a further breakdown of those ratios in consideration of working group membership does not confirm this pattern. Out of the total 153 contributions on the Foreign Minister debate almost half of the speeches, i.e. 69 (45%), were made by members of the external action working group. Among those speakers, 34 out of the 64 government representatives (53%) were members of the working group, 11 out of the 59 European actors (19%) were members of the working group, and 22 (88%) out of the 25 national parliamentarians were also members of the working group on the external action of the Union. The discrepancy in participation of non-working group members of the various actor groups further confirms that the 'double-hat' did not provoke great interest among national parliamentarians. This can be seen by the very low number of non-working group member participation by national parliamentarians. The high participation and involvement of non-working group members from government representatives and EU actors show that this issue was of high interest to them.



Foreign Minister of EU: Arguing and bargaining by working group membership and actor group

An overall comparison of arguing and bargaining of working group members to arguing and bargaining of non working group members shows no difference in the ratios.

Although the earlier hypothesis suggested that working group members should argue more due to the establishment of the 'common lifeworld' and intensive exchange within the working group, working group members and non-working group members displayed the same ratio of arguing and of bargaining.

This trend further holds true when working group members are compared to non-members within the actor groups. Government representatives and national parliamentarians that were not part of the working group on the external affairs of the Union argued slightly more than the working group member government representatives and parliamentarians. A significant difference can only be discerned within the group of European actors where working group members argued significantly more than non-working group members.

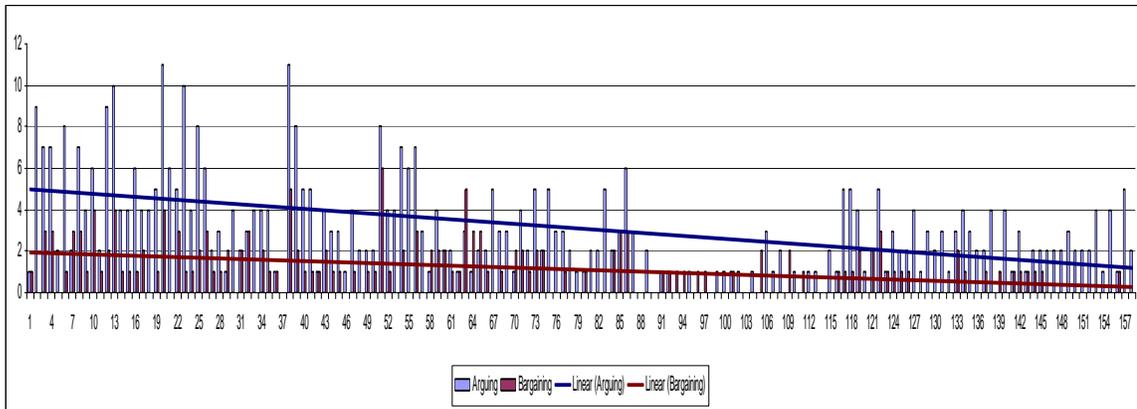
It can therefore be stated that the first part of hypothesis two, which formulated a positive relationship between working groups and arguing, was confirmed, however, the second part of the hypothesis, which assumed that there should be differences in arguing and bargaining patterns among the various actor groups, was not confirmed.

Hypothesis 3: Changes in beliefs or preferences

- H3.1 More arguing in the negotiation mode is an indication of shared values and, if effective, is conducive to consensus agreements. *CONFIRMED*
- H3.2.a Cases where the following IGC did not change the draft are a sign of effective agreement. This effective arguing would be best shown quantitatively if bargaining positions diminish over time, and qualitatively if the speakers succeed in establishing common values or standards on which to base their agreement. Persuasion could thus be traced by showing that speakers change their position over time and agree to proposed solutions. *CONFIRMED*
- H3.2.b Non-persuasion: Changes in the next IGC should have occurred in cases where arguing was picked up by the presidium while there were still bargaining against this particular point. This would indicate that no real persuasion had taken place and that the governments used their power in retrospect to correct that point. *NOT CONFIRMED*

The empirical analysis suggests that the diminution of bargaining over time would be an indicator of effective consensus building. The patterns and frequency in the occurrence of arguing and bargaining over time support this hypothesis.

As shown in chart below, throughout the debate arguing was dominant over bargaining. Furthermore, bargaining speech acts, such as objections, demands or other barriers to agreement show a significant decline over the course of the debate and almost disappear towards the end of the debate. Those diminishing parallel arguing and bargaining curves resemble the curves that have been shown for the case of the legal personality and are an indication of effective consensus formation.



Foreign Minister of EU: Arguing and bargaining throughout the debate

The high number of plenary debates that were codified for the case of the European Foreign Minister made a more detailed analysis of preference change possible. Qualitative analysis of the debates shows that the agreement in the Working Group on External Action, as well as in the Convention, provided the common diagnosis of the main problems of the external representation of the Union. In a first step, the Working Group members agreed that responding to the question in the Laeken declaration of how to achieve better synergy between the posts of the High Representative and the Commissioner for External Affairs required that the two posts be brought closer together to achieve more efficiency, coherence and transparency in EU external action. After establishing those norms for the discussion, the working group members further did not enter into the debate of whether EU external action should be either intergovernmentalistic or supranational. Instead, they stated that the external action was governed by both principles and that different areas of external action needed different regulations and decision making mechanisms. The speakers concluded that the external representative needed to have a close link to the Council as well as to the Commission (CONV409/02 2002).

Improving coherence and consistency became the principal objectives of the working group on external action. Most of the arguments made during the debates reflected this goal, and speakers proposed to strengthen efficiency, coherence and transparency in the common European foreign policy through a stronger integration of the functions of the external commissioner and the high representative.

The discussion in the plenary debates was also characterized by a high degree of argumentation as the speakers justified their arguments, gave reasons and made suggestions. The discussion showed consistent argumentation patterns in that all speakers argued for more cohesion between the two posts in order to achieve consistency. These speakers also acknowledged that some areas of EU foreign policy had to remain intergovernmental and others would be communitarized. The proposed solution of the double hat clearly responded to all three aspects of those fundamental principles; it merged the two posts in one, while keeping their functions separate. This solution met the interests of those who wanted to keep the functions separate as well as of those that wanted closer cooperation between the posts. This agreement can also be seen in the statements of the speakers who criticized the merger. These critics did not question the proposal as such, but pointed to potential conflicts of interest that such a double hat might create.

Although no persuasion speech acts were recorded, it can be assumed that at least some Convention members must have changed their preferences and agreed to the final consensus on the double hat. A change of preferences can be attributed to speakers who took the floor repeatedly and favored a different option than the one they had preferred in the first place. During the debates on the foreign minister of the Union, 45 out of the 88 different speakers spoke at least twice, with some speakers even taking the floor up to six times (e.g. UK representative Hain). The first plenary discussion after the presentation of the working group's final report showed that different members favored different options for the closer synergy between the two posts. A qualitative analysis of the speakers' positions shows that at the beginning of the discussion, a majority of the speakers called for greater synergy between the two posts without describing in much detail how such a synergy could be achieved. Throughout the debate these speakers adopted the position of the double hat as a 'natural solution' to the coherence problem. Others started off by promoting greater coherence but initially rejected the proposal of the double hat after the conclusions of the working group. However, persuasion must have occurred since 19 out of the 45 (42%) of the speakers who spoke more than once changed their preference in the course of the debates on the European Foreign Minister. Some of those preference changes were out of pragmatism by speakers who stated explicitly that although they

would have preferred another option they would vote for option three as this option would have better changes of being accepted by all members.⁴⁷ This is a clear and open readjustment of preferences to the negotiation context. Other speakers changed their position after seeking more clarification on the responsibilities and reporting lines applicable to this new post.⁴⁸ Finally, the double hat solution was also an innovative proposal as it was developed within the working group discussions and had not been discussed before and thus cannot be attributed to any particular actor's prior preferences. All these aspects point to the conclusion that the Convention proposal for the European Foreign Minister succeeded in efficient consensus building. The proposal developed was innovative, addressed the problematic formulated in the Laeken declaration, and aligned the preferences of the various actors so that it was sustainable enough to meet the test of the following IGC (Goeler 2006).

⁴⁷ Those speakers were e.g.: Hololei (5-055), (5-110); Timmermans (4-017), (5-022), Lennmarker (5-101), (5-060) and Van der Linden (5-014), (5-068).

⁴⁸ E.g. Dastis (5-062), (5-045); De Villepin (5-065), (5-042); Duff (4-059), (5-021), (5-069); Hain (4-062), (5-015), (5-056), (5-047) ; Hjelm-Wallen (4-082), (5-067), (5-067); Katefores (4-043), (1-037); Kelam (5-034), (5-091); Kilijunen (4-070), (5-071); Kristensen (4-074), (5-064), (1-058); MacDonagh (4-020), (5-107); Maij-Weggen (4-069), (5-066), (4-075); Martikonis (4-068), (5-088); Oleksy (4-087), (5-046); Severin (5-067), (5-078) and Tiilikainen (4-065), (5-020), (5-074).

“What won’t be solved by the Convention will hardly be done so elsewhere.”

--Joschka Fischer⁴⁹

5.2 Institutions: Decision-making without working groups

The Laeken declaration placed institutional reform under a paragraph with the heading “More democracy, transparency and efficiency in the European Union.” In that paragraph, the Laeken Declaration formulated a series of specific questions among which it questioned the six-month rotation of the Council Presidency and asked for more synergy between the High Representative and the Commissioner for External Relations (European-Council 2001).

Within the case studies, the institutions case is special because it was not dealt within the Convention in the framework of a dedicated working group. Giscard, the Convention President, was a proponent of the “form follows function” methodology and insisted that the Convention concentrate first on the Union’s mission and tasks. Most observers also suggest that this approach reflected, firstly, Giscard’s fear that institutional issues would paralyze the convention, and make it impossible for working groups to come up with specific recommendations, and secondly, his belief that institutional issues were of such big importance to the entire Convention that it would not be wise to confer this task to working groups with limited membership. It was also significant that Giscard did not present the Convention a text that had already been debated by some of its members and which could be discussed before it was reintroduced into the debate in the form of draft articles. Instead Giscard presented his draft articles on institutional issues to the Convention before Convention members had held any discussions on the topic. The articles were circulated by Giscard among the Presidium members and discussed by the French newspaper *Le Monde*. These articles provoked such a strong reaction among the

⁴⁹ quoted in: <http://www.federalunion.org.uk/acrobatfiles/TheConventionsofar.PDF>.

Convention members that Giscard was forced to amend his original proposals for the official presentation of the Presidium's draft articles on 23 April 2003 (CONV 691/03).⁵⁰ The institutional issues thus entered the convention discussion very late, and many convention members expressed their disagreement with this delay and asked for an earlier discussion of institutional issues. Many critics spoke during the plenary debates of 29 October and 8 November 2002, when the so called 'skeleton' of the Constitution was discussed. On 29 October Teija Tiilikainen stated that "we have not been debating institutional issues, the whole debate has not been open for the Convention" and on 8 November Kimmo Kiljunen demanded that the Convention establish a working group on the institutions. Some member states simply did not wait until the Presidium allowed them to discuss the institutions issue and circulated their own reform papers, thus creating a parallel discussion forum outside of the Convention. Within the Convention, institutional issues were finally the topic of a plenary discussion on January 20 and 21, 2003. The first draft articles were only presented in April 2003 (CONV 691/03 of 23 April 2003), followed by a debate on May 15-16, 2003, less than two months before the end of the Convention mandate.⁵¹

The articles on the institutional issues were thus the most controversial topics within the Convention. Accordingly, many of the convention's proposals failed to meet expectations. First, many of the Convention's proposals lacked innovative capacity, and were not able to solve the problem they were faced with. The Convention was not able to come up with new institutional structures and rules that would better enable the Union's institutions to meet the requirements of efficiency and legitimacy. Second, most of its recommendations were either rejected or substantially altered during the following IGC.

⁵⁰ See article in *Le Monde*: http://www.lemonde.fr/international/article/2003/04/23/le-projet-de-vge-pour-l-europe-des-25_317776_3210.html and also discussion in Crum 2004: 7.

⁵¹ The draft articles on the institutions received a large number of amendments and comments, most of which aimed at maintaining the institutional provisions as laid out in the Treaty of Nice. See summary sheet of proposals for amendments relating to the Union's Institutions (CONV 709/03).

This indicates that the consensus building mechanism failed for the case of institutions and that the Convention was not able to produce an integrative compromise.

Although there were numerous recommendations, we will concentrate first on the proposal to create a post of a full-time President of the European Council. This case is interesting because it was initially met with resistance and fear that it would shift too much power from the Commission to the Council. Although the subsequent IGC endorsed the Presidency without modification, which suggests success, the final proposal left the functions of such a Presidency so unclear that the IGC was able to redefine the Presidency to a rotating country team system. Therefore, although it appears that a consensus formula had been found by the Convention, this formula can clearly be qualified as a lowest common denominator outcome that did not provide adequate solutions for representation and consistency problems with the EU presidencies. Second, we will look at the definition of the Qualified Majority Voting in the Council. The double majority principle proposed by the Convention was controversial because it raised the principle of fair representation and democratic legitimacy. This was a difficult case because Spain and Poland had gained a good deal of proportional voting power in Nice and did not want to give up their weighted voting power. During the subsequent IGC the double majority was modified and coupled with many other provisions, and this did not serve to make decision making procedures less complicated. Therefore, this case represents an example of failed consensus building.

5.2.1 Case 3: EU President: A mixed conflict without a working group

The question on the EU president is closely related to the question of enlargement. In a union of 25 member states and a half yearly rotation, member states would assume the presidency every 12 1/2 years. This would complicate both the positive effects of the rotation principle, i.e. the regular integration of national decision-makers in European decision-making on the one hand, and would aggravate the problem of continuity and variable performance in EU leadership. The rotation further raised questions of efficiency. Greater numbers of participants in decision-making processes require a more

central role for the chairman as a mediator and discussion leader. The conference of Nice received a lot of criticism and it has shown the difficulty of having a chairperson who is also a head of state or government representing his national interests. In order to avoid such conflicts of interest, it was proposed to designate an “external” president of the European Council for a longer time period. Proponents argued that a longer-term chairperson could concentrate on the mediator’s role and would provide a strengthening of and more continuity in foreign representation of the Union. The Laeken declaration also raised the question of improving efficiency of decision-making in a Union of some thirty Member states, implicitly putting the six-monthly rotating Presidency of the Union into question.

In the Seville European Council in June 2002, the EU member states began instituting reforms to make the European summits run more effectively. The specific provisions included better preparation through preparatory meetings and discussions on the agenda before the actual Council meeting, better organization of meetings, the periodical drafting of conclusions throughout the debates, and a better presentation of the conclusions.⁵² During the proceedings of the Convention, heads of state and government outside of the Convention deliberations circulated proposals for a permanent president. One of these proposals was called the “ABC Plan,” named after the three heads of state and government which promoted the permanent presidency (Aznar, Blair, Chirac). Just after the start of the Convention process, President Jacques Chirac gave a speech in Strasbourg on 2 March 2002 (Chirac 2002) in which he argued that the rotating presidency would no longer be viable in an enlarged Union. He proposed that the European Council should elect a person to assume leadership for a ‘sufficient’ period of time and to represent a strong Europe in the eyes of the world. The Spanish Prime Minister, Aznar, followed

⁵² See: Council of the European Union (2002): Seville European Council 21 and 22 June 2002, Presidency Conclusions, Brussels, 24 October 2002, 13463/02, POLGEN 52, ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72638.pdf.

with a speech he held at St. Anthony's College in Oxford on 20 May 2002 (Aznar 2002). In that speech Aznar argued that his experience with Spain's Council Presidency had convinced him that the rotating Presidency would no longer be viable and that a Council President with a mandate of two and a half to five years would make the Union's institutions more effective. This president of the Council, who would probably be a former head of state of government, could be assisted by a "presidential team" comprised of five to six heads of states or government on a rotational basis. The British Prime Minister, Tony Blair, during a speech in Cardiff in November 2002 (Blair 2002) called for a strong and powerful President of the Council and declared that the rotating presidency system had "reached its limits." Blair argued that the rotating presidency stood in the way of Europe being taken seriously at international summits, hindered the development of common foreign and security policy and made it difficult to follow up European initiatives.

In response to the advances made by the ABC Plan, the Benelux countries issued a memorandum (CONV 457/02) in December 2002 in which they laid out the institutional framework for "an enlarged, more effective and more transparent Union," while extending the Community method and strengthening those institutions which can best further the common interest. The memorandum argued vehemently against ending the rotation and said "that the Benelux will in any case never accept a president elected from outside the Council." Initially supported by eleven small and medium sized countries,⁵³ the group expanded to sixteen members and began to organize itself in meetings outside of the Convention schedule, calling themselves the "Friends of the Community Method." The proliferation of different initiatives continued, and on 15 January 2003 the governments of France and Germany submitted a joint Franco-German proposal (CONV 489/03) in which they proposed a pragmatic deal to reconcile the polarized

⁵³ Those countries were Belgium, Netherlands, Luxemburg, Ireland, Finland, Portugal, Greece, Denmark, Austria, the Czech Republic and Slovenia.

intergovernmental and communitarist positions. The two countries proposed a full-time president of the European Council who would be elected by the European Council by qualified majority for five years or for two and a half years with the possibility for reelection. The president's competencies would limit itself to the preparation and chairing of the Council's meetings and to the supervision of the implementation of the Council's decisions, while the Council would still determine the political and strategic guidelines of the Union in cooperation with the Commission. The President would further represent the Union at international meetings while not interfering with the Commission's competencies and leaving the operational tasks of CFSP to the Foreign Minister of the Union.

Role of the Presidium

The Convention president's draft articles with regard to the EU President were presented on 22 April without consultation of the Presidium or any prior debate within the Convention. Convention President Giscard pleaded for the abolition of the rotation system and a long-term chair of the European Council. Member States would elect the chair by qualified majority for two and a half years, renewable once. This Council chair would "prepare, chair and drive" the work of the Council and ensure continuity as well as the Union's representation in the wider world. The proposed Council chair thus corresponded to the ABC group's suggestions and the EU Commission, the EU Parliament and the small and medium sized Member States criticized the proposal.

Throughout the debate Convention members criticized Giscard's approach and reproached him for not listening to the objections of the small and medium-sized member states. Convention member Maij-Weggen took it upon herself to take record of the speeches for and against the EU President and reminded President Giscard several times of the higher number of rejections to the proposal than approvals (Maij-Weggen 1-085, Maij-Weggen 2-057).

This loss of confidence in the neutrality of the President by the Convention members culminated in the issuing of a 'personal vote of no confidence' in Giscard by Convention member Johannes Voggenhuber, who also declared that "the bitter irony of this

Convention is that, if it fails it will be because of its president and if it succeeds, it will be despite him” (cited in Norman 2005: 195).

The Plenary Debate

The Presidium did not submit proposals on institutional reform, nor was the issue on the EU Presidency formally discussed before the debates on the institutional reform of the European Union on 20 and 21 January and 15 and 16 May 2003.

Therefore, when the plenary debate on the institutions opened on 20 January, reactions to the Franco-German proposal dominated the discussion. The first speaker after the Convention President condemned the paper and his arguments were supported by most of the speakers that represented smaller member states, applicant countries and EU actors. Opponents of the Franco-German proposal argued that the key to the success of the Union was its double balance between the institutions and the member states and that the institutional balance in particular was dependent on the preservation of the Community method. Instead of making the Union more effective and more democratic, the full-time European Council President would encroach on the powers of the EU President and lead to confusion, acrimony and stalemate. A Council President would further overlap with the position of the high representative or foreign minister and would not bring the EU closer to its citizens. Opponents labeled the Franco-German proposal as a “cut and paste” exercise and a “juxtaposition without synthesis” which tried to combine the presidential-style Europe with a parliamentary-style Europe. Opponents argued that the proposal not only fails to provide a proper compromise between the two styles but also accentuates the differences between the federal and the non-federal parts of the EU system. They cautioned against creating a Europe of Presidents by giving more titles, more status and expanded powers, and the opponents reminded the Convention of the need of the Laeken mandate which demanded “a more democratic European Union, nearer to its people” (De Vries 1-011, Duff 1-012, Heathcoat-Amory 1-032, Bruton 1-041, Skaarup 1-051, Rack 1-063, Bonde 1-067).

The smaller member states argued for the rotation as an expression of the formal equality of the member states and feared that the big member states would claim the presidency

for themselves. The federalists also argued that the permanent presidency would lead to a distortion of the institutional balance in favor of the European Council and thus strengthen the intergovernmental component of the EU. They argued that maintaining equality amongst the member states was more important for the reform of the Council and its presidency than issues of continuity or full-time occupancy (Costa 1-034, Rupel 1-021, Kelam 1-028, Van der Linden 1-029, Costa 1-034, Boesch 1-036, Kiljunen 1-038, De Rossa 1-044, Peterle 1-047, Azevedo 1-052, Serracino-Inglott 1-062, Speroni 1-066, Santer 1-068, Farnleitner 1-070, Martikonis 1-079, Lopes 1-080, Lennmarker 1-082, Carnero Gonzales 1-084).

Many critics also spoke against the dual presidencies of the Council and the Commission and argued that this double system would lead to rivalries among the two posts. These opponents pointed out that the Franco-German proposal contained provisions in which the Council President would control the Commission President, thus putting the Commission in the institutional hierarchy below the Council. An enlarged European Union needed a stronger Commission not a weaker one, as implied in the Franco-German proposal. Furthermore, smaller countries insisted on the rotating presidency labeling it as essential. Many speakers stressed that institutional balance needed to be maintained and that all institutions needed strengthening, not only the Council. (Michel 1-024, Katiforis 1-037, Eckstein-Kovacs 1-040, Balazs 1-042, Tiilikainen 1-045, Maij-Weggen 1-057, Hasotti 1-064, Krasts 1-073, Gricius 1-078, Brok 1-022)

Some opponents argued that the Council had the right to choose its chairman, but as this post was not a permanent post, it should not have any operative functions or external representation tasks and should thus not be developed into a second Presidency next to the president of the Commission. Some speakers vehemently argued that the European citizens did not need a new Napoleon. Finally, critics believed that the Council could improve efficiency through technical modifications such as multi-annual programming and more effective management procedures while keeping the rotating presidency (Einem 1-031, Voggenhuber 1-061, Hololei 1-055, Attalidis 1-054, Roche 1-059, Hjelm-Wallen 1-071, Fayot 1-081).

The more enthusiastic supporters of the Franco-German proposal praised the paper as an effort for synthesis and for bridging the differences between the federalist and the intergovernmentalist approaches, and they argued that the proposal would clearly separate the two poles around which European integration would grow. On the one hand, the internal market and all policies relating to it would be conferred upon the Commission; on the other hand, the Council and its President would tackle issues of foreign and defense policy as well as justice and home affairs (Haenel 1-013). Other supporters argued that a European Council in a Union of 25 with a constantly changing president could not be an effective partner for the Commission or the Parliament and that the Franco-German proposal was therefore a good solution that would bring continuity and strategic drive in the Council's work (Hain 1-019, Oleksy 1-025). Some remained vague about their actual support to the proposal and only stated that due to the revolution in numbers, greater Europe needed a permanent chairman of the Council (Lamassoure 1-020, Kristensen 1-058) and that clear leadership was required while reserving rotation for the sectorial Council (Huebner 1-050). Some did not directly reject the proposal but cautioned that if the rotation was to be abandoned, that a clear delimitation of competencies for the EU President was needed to avoid creating conflict with the President of the Commission (Teufel 1-053).

Some speakers remained neutral towards the Franco-German proposal and suggested instituting a single "president of Europe," who would be the president of the Council and of the Commission and work full-time with this dual function (Dini 1-016). This "double-hatted" president would thus bring the two institutions closer together and avoid conflicts of competences and personalities (Follini 1-048). Some speakers did not specifically refer to the Franco-German proposal and stressed the principles of equality and transparency in the institutions and called for a stronger role of the European Parliament (Kalniete 1-014).

At the end of the discussion on 20 January 2003 a count of the opinions given during the debate revealed that 7 speakers had declared themselves in favor of the Franco-German proposal, 7 had hesitations about the proposal but did not voice specific endorsement or

rejection while 40 speakers declared themselves against the proposal (Maij-Weggen 1-085).

The debate on the institutions and thus the President of the EU continued on 21 January with the presence of the French and German foreign ministers at the Convention. Most members were not as polarized as the day before, and speakers primarily asked how to reform the institutions to achieve a stronger Union internally and for its external representation. Members acknowledged that an enlarged Union with 25 or more members would not function well with the current institutional setup. Speakers demanded that the equilibrium between the triangle of the Parliament, the Commission and the Council be maintained, and that the delimitation of competences be clarified to achieve better continuity and visibility (Haensch 2-005, Demetriou 2-028, Heathcoat-Amory 2-030) and to reinforce the institutions while achieving a balance between the national interests of the member states and the common interest for the Union without antagonizing one or the other (Borrell Fontelles 2-006). Equality of member states, sufficient “checks and balances” between the institutions, democratic legality and accountability and a better delimitation of competencies were put forth as guiding principles for institutional reform, and it was argued that those principles needed to be maintained no matter which system would finally be established (Christophersen 2-008, Barnier 2-011, Fini 2-012).

Proponents of the rotating presidency argued, that the proper balance between the institutions could be maintained with the rotating presidency and that it would enable the hosting member state to be a showcase (Stuart 2-007). Opponents of the Presidency of the Council pointed out that most arguments had already been presented. These speakers remained opposed because the new Presidency would increase complexity of the institutions (Rack 2-041), that it would come into conflict with the Presidency of the Commission, lack democratic legitimacy (Van Lancker 2-009, Frenco 2-029, Abitbol 2-037, Giannakou-Koutsikou 2-042, Seppänen 2-044, Voggenhuber 2-060) and concentrate power within the Council (Marinho 2-014, Tiilikainen 2-038, Costa 2-055). Some opponents argued that they were not convinced of the arguments for the institutionalization of a permanent President of the Council (Carey 2-043, Gormley 2-

047). Because they believed that too many questions were left unanswered (Duff 2-049, Lamassoure 2-050, Paciotti 2-051), they suggested that stability and continuity in the Council could be achieved by reforming the rotating presidencies (Peterle 2-059) or by combining the rotation principle with team presidencies to chair the council (Kohort 2-023, Korcok 2-034, Boesch 2-054). These opponents insisted that equal access of all Member States to the Council must guide all reform efforts (Karins 2-024, Vanhanen 2-046) and pointed out that a constitution could not have two parallel and competing executive powers (Oliveira Martins 2-027).

Some Convention members offered a compromise solution by suggesting that the EU President could be supported by a troika composed of Heads of State and Government representing one member of the big, one of the medium and one of the small member states. This team would then compose the Presidium of the Council and rotation among the Troika would guarantee access to all member states (Meyer 2-010, Ralacio Vallelersundi 2-018, 2-022). Other possibilities, such as the introduction of a Vice-President (Speroni 2-040) or several vice-Presidencies for member states which could rotate every six months (Hain 2-026, Cisneros Laborda 2-033, Muscardini 2-052) were also suggested. In this context convention members demanded more discussion time and suggested that the Convention President to give one of the Convention working groups the task of analyzing all proposals and submitting its findings at the next plenary session (Andriukaitis 2-053).

The German Foreign Minister, Joschka Fischer, took the floor to defend the Franco-German proposal in front of the Convention. He argued that the goal of a more democratic and more capable Union stood at the heart of the Franco-German proposal and pointed out that this proposal represented a compromise which would nevertheless increase the quality of European cooperation (Fischer 2-020). The French Foreign Minister, Dominique de Villepin, seconded Fischer's speech and argued that the proposal would reinforce the institutional triangle while reinforcing each one of them. He also addressed most of the arguments raised against the permanent Council Presidency and argued that there would be no rivalry between the President of the Council and the

President of the Commission because their functions would be separate. The President of the Council would follow up on the decisions of the Heads of Government and State and represent the Union on the international scene while the President of the Commission would concentrate on the Commission's competencies. The President would be guardian of the Treaties and guarantee the common European interest (De Villepin 2-021). Those in favor of the Franco-German proposal pointed at the need for reform and argued that the Franco-German proposal already represented a very good compromise which strengthened the Commission and maintained its right of initiative and independence while guaranteeing stability of the Council Presidency (Lequiller 2-013, Tajani 2-035).

At the end of the debate Convention member Maij-Weggen (2-057) presented again a count of the various positions and reported that 12 Convention members were radically in favor of the Franco-German proposal, among those the German and French Foreign Ministers, 15 Convention members were neutral but voiced serious hesitations, and 64 Convention members declared themselves against the proposal. Therefore, she concluded that the message was clear, that the Franco-German proposal was not the solution for the problems and that something else must be found.

As he closed the debate, the President of the Convention (2-064) restated the need for institutional reform and argued that the European Union would not continue to function in the current institutional setup. He stressed the importance of defining the role of the Council President and argued that the post would not come into conflict with the President of the Commission as both functions were very different in the institutional setup.

The debate on the EU President continued during the plenary debate of 15/16 May 2003. The debate showed that the positions remained polarized. Proponents of the EU President argued that the Presidium proposal would help to guarantee continuity, coherence and visibility of EU action while limiting the powers of the EU President (Teufel 4-052, Fischer 4-085, Cisneros Laborda 4-148, De Villepin 4-149, Severin 4-157). They argued that the rotating presidency would simply not work in an enlarged Union and dismissed

all proposals that tried to reform the Council while keeping the rotation as not helpful (Haenel 4-031). The proposal of the Presidium was presented as an acceptable attempt at finding a compromise which combines stability with rotation (Dastis 4-048, Hain 4-102). Some argued that the proposed architecture resembled the German system of having a representational Head of State (Bundespraesident), in this case the EU President, a Head of Government (Bundeskanzler) who directs the external policy and takes the fundamental decisions of external policy, in this case the European Council, and a foreign minister who co-directs and implements the foreign policy. This was a system that worked very well and would therefore be appropriate on the European level as well (Duhamel 4-056). Some speakers demanded further clarification of the delimitation of competences as well as the relations between the different posts e.g. with regard to external representation (Dini 4-058). Some of the proponents were inclined to accept the post of a rotating Vice-President in order to provide more access to all EU countries and to guarantee the acceptance of the proposal through the intergovernmental Conference (Fini 4-023). Similarly, others suggested having team presidencies which would support the work of the President (Hain 4-045, Tajani 4-134, Lekberg 4-140, Lequiller 4-142).

Opponents of the EU President argued that the proposed presidency had caused divisions within the Convention and if adopted would leave clear winners and losers within the Convention members (Costa 4-025). They emphasized the importance of equal representation through the rotation principle, and argued that the balance between small and large Member States had not been duly taken into account in the Presidency proposals (Rupel 4-026, Peterle 4-064, Tiilikainen 4-065, Figel 4-066, Dimitriou 4-100, Heathcoat-Amory 4-108, Martikonis 4-126, Andiukaitis 4-144, Kelam 4-145, Kalniete 4-151, Gricius 4-152, Arabadjiev 5-007, Migas 5-008). They therefore argued that the Presidium proposal would be much closer to the French system of the Fifth Republic than to the German system (Timmermans 4-063). Other reiterated that the proposal would favor the larger Member states, that it was too intergovernmentalistic and would disturb the balance between the institutions (Borrell Fontelles 4-032, Piks 4-068, Roche 4-082, Guel 4-087, Azevedo 4-095, Fayot 4-096, Lopes 4-099). These opponents argued that change would be much more detrimental than keeping the old system (Balazs 4-112).

Because the EU President would have executive powers without parliamentary control (Bonde 4-047, Marinho 4-150, Voggenhuber 4-153), the post would further complicate external representation in creating one more post next to the Commission President and the EU Foreign Minister, thus contributing to the proliferation and competition of actors (Wittbrodt 4-046). Some argued that the Presidium proposed a weak President who would bring no more efficiency than the one guaranteed by the rotation principle (Kacin 4-147). They pointed out that continuity could also be achieved by other means such as the institutionalization of longer rotating presidencies or group presidencies, multi-annual strategic work programs, or an increase of Council secretaries to organize its work, or the granting of more competencies to the Commission President and the EU Foreign Minister (Brok 4-027, Einem 4-028, Santer 4-030, Van Lancker 4-044, Duff 4-051, Huebner 4-053, Kuneva 4-070, Vitorino 4-088, Mac Lennan of Rogart 4-090, Oleksy 4-098, Roche 4-105, Christophersen 4-118, Boesch 4-120, Serracino-Inglott 4-121, Giannakou-Koutsikou 4-125, Kohout 4-136, Hololei 5-005, Rack 5-009, Eckstein-Kovacs 5-011, Kauppi 5-020). Other opponents proposed creating an EU President who would have the highest protocol standing but no real executive power nor direct influence on the Union's decision-making process. This executive would thus serve as a consensus builder and would travel across the Union in order to raise awareness of the European identity and common destiny, thus representing a new symbol of European integration (Zieleniec 4-042). Some of the opponents of the EU president argued that they were not against such a post but that the principle of democratic legitimacy required that this President be directly elected by the European citizens, and that such a development would be very desirable but not realistic in the near future (Papandreou 4-033, Bruton 4-041, Barnier 4-043, Maij-Weggen 4-075, Paciotti 5-010).

The opponents also used factual arguments, stating that 101 Convention members had submitted proposals against the permanent Council Presidency, and 15 Member States were represented in these proposals. They argued that this opposition was reason enough to dismiss the proposal for the EU President (Voggenhuber 4-035) and regretted that the Convention President was not listening to them (Vilen 4-116). Other Convention members also reported that a total of 68 Convention members supported the maintenance

of the rotation principle but that it was strange that the Presidium ignored their views (Kiljunen 4-089, Farnleitner 4-094).

A few speakers demanded more attempts to find a consensus and argued that neither of the two polarized positions could get everything. The large countries wanted a President of the Council and the smaller ones wanted to maintain rotation. They pointed out that neither solution would be catastrophic for the opposing party, and that it would be much worse if the two sides did not come to any agreement and left the institutions in their current bad shape (Duhamel 4-060 and 4-092, Follini 4-086). They presented three principles which could be the foundation for the compromise solution which would ensure continuity without creating a super-President. First, a clear description of the Presidents tasks and competences; second, maintenance of the rotation principle, e.g. by the establishment of a troika which would work together with the EU President; and third, delimiting the President's powers by having him work with the secretariat of the Council instead of establishing parallel administrations (Meyer 4-080, Puwak 4-123).

In his final remarks, the President of the Convention argued that he had counted more interventions in favor of the abolition of rotation than for its continuation (5-134).

Discussion of Hypotheses

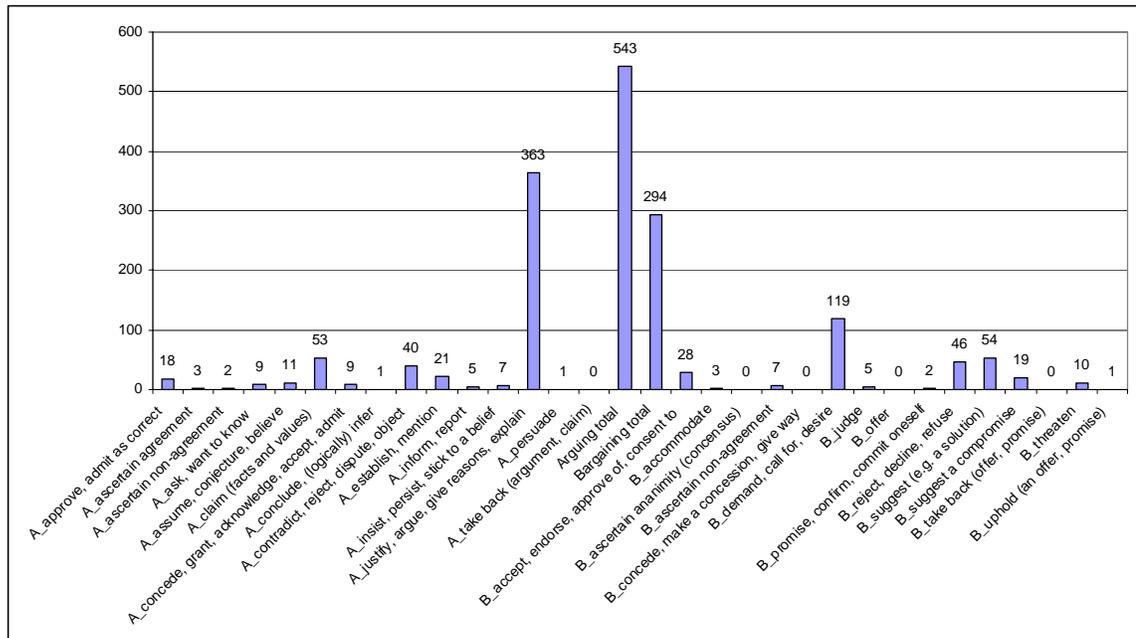
Hypothesis 1: Conflict Type and Negotiation Mode

H1.c In mixed conflict negotiations arguing should be prevalent over bargaining.

CONFIRMED

The institutionalization of a European Union President had been qualified as a mixed conflict including constitutional or value-based aspects as well as distributional aspects. Therefore, it was expected that arguing should be prevalent during the plenary discussions on the EU Presidency. The EU Presidency was discussed during the four plenary debates on institutional reform. In the course of these debates 763 speech acts were codified that directly related to the institutionalization of a EU President. The majority of those, 65% or 494 out of 763, were arguing speech acts, and the remaining

35%, 269 out of 763, were bargaining speech acts. The hypothesis that arguing should be generally prevalent in mixed conflicts was therefore confirmed. The following chart shows the distribution of the two negotiation modes and of the specific speech acts used during the plenary debates on the EU president.



EU President: Distribution of Arguing and Bargaining

A breakdown of the arguing and bargaining speech acts indicates that the negotiation included significant resistance to the arguments put forth in the debate. All arguing categories defined were used except for the category “to take back (argument, claim).” Argumentative speech acts that supported the speaker’s position dominated: “to justify, argue, give reasons” (67%), “to claim (facts and values)” (10%), and “to establish” (4%). In addition to those argumentative speech acts, confrontational arguing speech acts, such as “to contradict, reject, dispute, object” (7%), “to insist, persist, stick to a belief” (1%) as well as “to ascertain non-agreement” (1%) were common in the debate. In contrast, agreement-oriented arguing acts, such as “to approve, admit as correct” (3%), “to ascertain agreement” (1%) or “to concede” (2%) occurred less.

Bargaining speech acts made up about 35% of the overall speech acts and consisted of 40% of demands. The problem-solving bargaining acts such as “to suggest (a solution)”

(18%), “to suggest (a compromise)” (6%), and “to accept, endorse” (10%) were the second largest bargaining group. Nonetheless, the confrontational and unconceding speech acts of “to reject, decline” (16%), “to threaten” (3%), and “to ascertain non-agreement” (2%) were also used significantly.

The distribution of the arguing and bargaining speech acts leaves an ambiguous picture. Elements of cooperation and confrontation could be found within both the arguing and the bargaining speech acts. This finding could suggest that two parallel negotiations took place and some speakers that engaged in cooperative arguing and bargaining used mainly confrontation forms. It could also suggest that certain aspects of the negotiations were cooperative, while other aspects were confrontational. In both cases it could be concluded that no common values or norms that would have helped to establish effective arguing could be established for the entire debate.

Hypothesis 2: Institutional Setup and Negotiation Mode

H 2.1.b If no working groups are involved, like in cases 3 and 4, speakers use more bargaining. *CONFIRMED*

H 2.2. In the absence of appropriate institutional design (working groups), the distribution of power among the actors will determine communication modes be by, i.e. European actors (being the less powerful) should argue more than national parliamentary actors than government representatives as government representatives have veto power and can issue credible threats. *NOT CONFIRMED*

The second set of hypotheses about the relationship between the institutional design and the communication mode stated that when working groups are involved, more arguing should be observed. As there were no working groups involved for the discussion on the EU President, this hypothesis cannot be applied to this case. The following description thus focuses on the counterfactual hypothesis H.2.1.b which stated that in cases where the institutional design (working groups) was not present, power positions should be more prominent. Because European actors were less powerful, they should argue more than

national parliamentary actors or government representatives who have veto power and can issue credible threats.

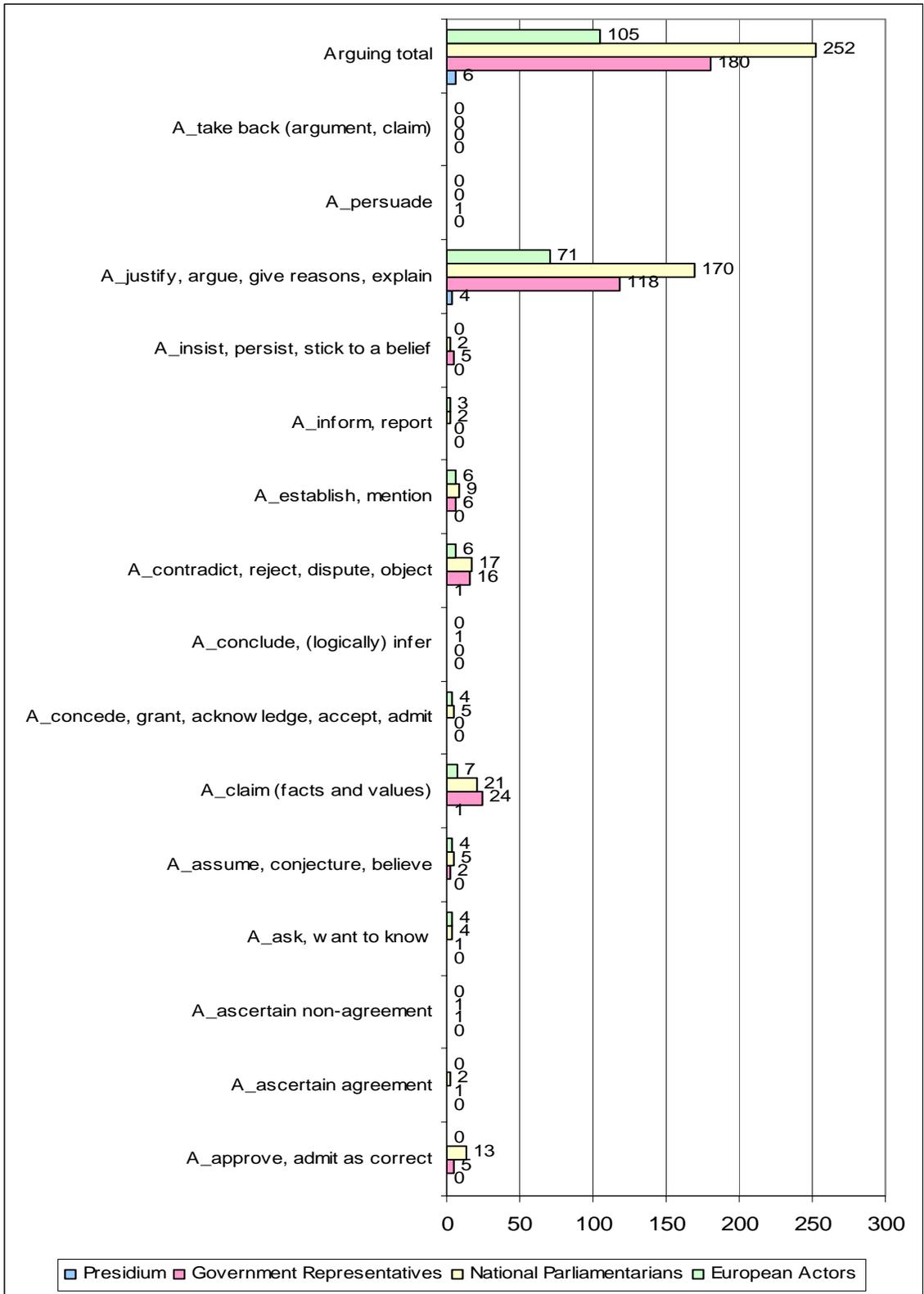
The breakdown of arguing and bargaining by the different actors shows that all actors used more arguing than bargaining within the debate. During the plenary debates of 20/21 January and of 15/16 May 2003, 189 speeches referred to the EU Presidency. The debate registered the highest ratio of representatives from national parliaments, with 43% of the speakers. The second largest group, government representatives, made up 31.5% of the contributions. EU actors accounted for 21.5% of the speakers and the Presidium contributed 4% of the speakers.

Government representatives displayed 295 speech acts, of which 180 were arguing acts (61%) and 115 bargaining acts (39%). 118 of the arguing acts fell under the category of “to justify, argue, give reasons, explain,” 24 speech acts were in the category “to claim,” 16 under “to contradict, reject, dispute,” the categories “to establish, mention” recorded 6 speech acts, and “to insist” and “to approve” recorded each 5 speech acts. All other categories recorded one or two speech acts and no records were made for the four categories of “to concede,” “to conclude,” “to inform,” and “to take back (argument, claim).” With regard to the bargaining distribution, 54 out of the 115 bargaining acts were in the category of “to demand” while 13 were in the category of “to reject, decline,” 24 in the category “to suggest (a solution),” and 9 in the category of “to suggest (a compromise).” Furthermore, four threats and eight acceptances were coded throughout the debate.

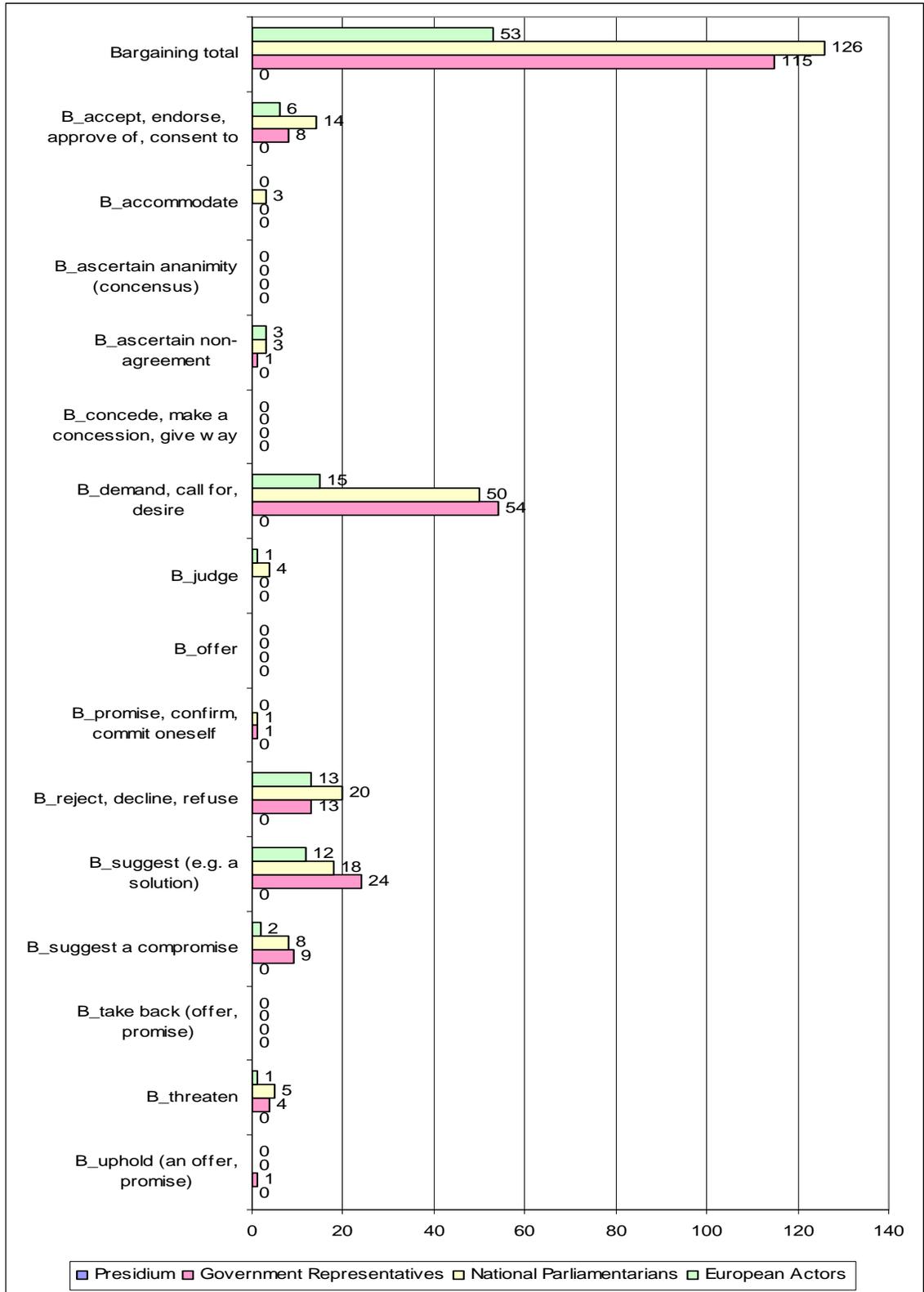
National Parliamentarians issued 378 speech acts, of which 252 were arguing speech acts (67%) and 126 were bargaining speech acts (33%). The arguing speech acts of national parliamentarians also covered almost all arguing categories with the majority falling in the category of “to argue, justify, explain” (67%). Others fell in the categories of “to claim” (8%), “to contradict, reject” (7%), and “to approve” (5%). The rest of the speech acts distributed to the remaining categories with the exception of the categories “to persuade” and “to take back (argument, claim).” The bargaining speech acts were mainly distributed among the categories “to demand” (40%), “to reject” (16%), “to suggest a solution” (14%), “to suggest a compromise” (6%) as well as “to accept” (11%).

European actors displayed 158 speech acts, of which 105 were arguing acts (66%) and 53 bargaining acts (33%). The breakdown of the speech acts shows a different pattern than the speech acts used by government representatives and national parliamentarians. The main arguing category for European actors was “to justify, argue, give reasons” (68%). The other speech acts were used primarily to stimulate the exchange of ideas or to clarify and support arguments, such as “to ask,” “to assume,” “to claim,” “to concede,” “to object,” “to establish,” and “to inform” (altogether 32%). The absence of speech acts that show consensus or agreement, such as to approve or to ascertain agreement, is notable. This indicates that although European actors tried to stimulate exchange and establish common values, that they were not successful and thus did not agree with the positions of the other actors. The bargaining speech acts were also concentrated around “to demand” (28%), cooperative elements such as “to suggest a solution” (23%) or “to accept” (11%), but also confrontational speech acts such as “to reject” (25%).

It can be concluded that arguing and bargaining were not explicitly actor-specific. Although European actors and national representatives argued more than government actors, the patterns of speech acts used do not vary very much from the ones used by government representatives. Furthermore, European actors were less engaged in the negotiations (18% of the overall speech acts) than government representatives (35% of the overall speech acts) or national parliamentarians (45% of the overall speech acts). Therefore, it can be argued that the negotiations were dominated by the exchange between national parliamentarians and government representatives and included both cooperative and competitive elements.



EU President: Arguing by Actor group



EU President: Bargaining by Actor group

Hypothesis 3: Changes in beliefs or preferences

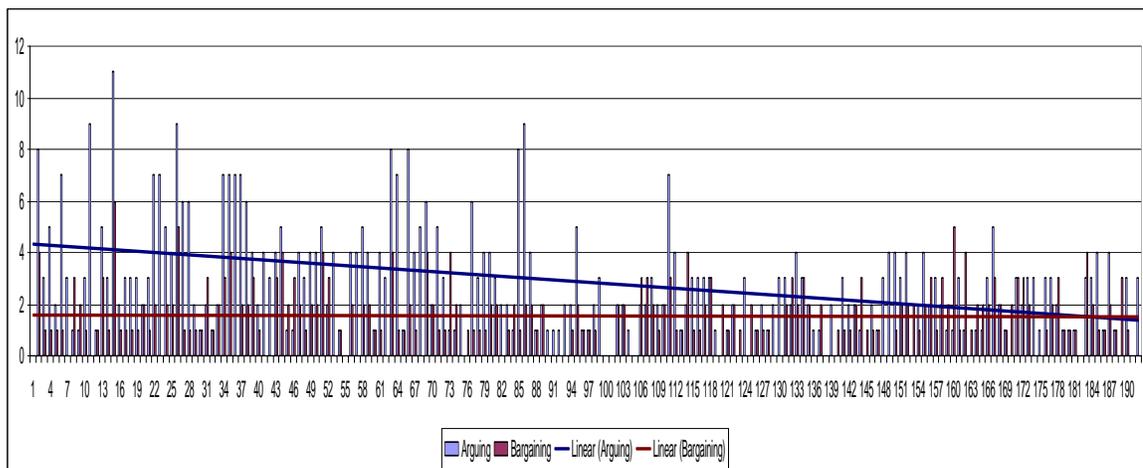
H3.1b Bargaining in the negotiation mode indicates confrontation, and if effective can lead to compromise agreements. *CONFIRMED*

H3.2.a Persuasion: Cases where the IGC did not change the draft are a sign of effective agreement. Effective arguing could be best shown quantitatively if bargaining positions diminish over time and qualitatively if the speakers succeed in establishing common values or standards on which to base their agreement. Persuasion could thus be traced by showing that speakers change their position over time and agree to proposed solutions.

NOT CONFIRMED

H3.2.b Non-persuasion: Changes in the next IGC should have occurred in cases where arguing was picked up by the presidium while there were still bargaining against this particular point. This would indicate that no real persuasion had taken place and that the governments used their power in retrospect to correct that point. *CONFIRMED*

The third set of hypotheses about the relationship between the negotiation mode and the negotiation output suggested that more arguing in the negotiation leads to consensus (true consensus) and that persuasion has occurred if bargaining positions diminished over time or if bargaining actors adopt the arguments of arguing actors.



EU President: Arguing and bargaining throughout the debate

The patterns and frequency of arguing and bargaining are distinct from the patterns observed in the case of the legal personality and the foreign minister of the Union. While arguing and bargaining start off as parallel lines, with arguing dominating over bargaining, over the course of the debate, the arguing curve diminishes significantly until it crosses slightly below the bargaining line. Bargaining, on the other hand, remains almost at a constant level throughout the debate. The shapes of those two curves indicate that arguing was not effective in the debate because it did not succeed in addressing the bargaining positions and in diminishing them. Because the negotiations ended with a pure bargaining game, it can be concluded that the agreement found in the negotiation consists of a lowest common denominator outcome.

The qualitative analysis of the arguing and bargaining throughout the debate confirms the quantitative observation. The discussion the EU President showed very strong positional bargaining between two opposite poles, the introduction of a permanent President of the Council on the one side, and the maintenance of the rotation principle. Those two poles represented distinct but related conflict lines. First, there was significant tension between the equality of the member states which many saw guaranteed and symbolized in the rotating council presidency, on the one hand, and the call for more efficiency especially with regard to the Union's external representation, on the other hand. Second, the proposed President for the Council was interpreted as a strengthening of the Council and the intergovernmental aspects of the Union. This brought back the fundamental question of European integration namely, should the EU further develop towards a more intergovernmentalistic or a more federal union. The discussion was very confrontational and manifested itself in a battle between the small states that favored a more supranational orientation of the Union and larger states that wanted to strengthen its intergovernmental elements.

The plenary discussion confirms the positional bargaining between the opposing parties. Proponents of rotation addressed the coherence and continuity problem by offering various options for longer-term or team presidencies and firmly clung to the rotation principle as a central symbol for the equality of the member states. The advocates for a EU President similarly concentrated all of their efforts on the establishment of such an office and made significant concessions to the maintenance of rotation in the various

Council formations. Both sides thus abandoned the principles of coherence and continuity which they set out to improve and entered into bargaining which gave both of them the minimum of their negotiation position. This positional bargaining is confirmed by the lack of position change observed among the speakers. 61 out of the different 106 speakers took the floor more than once throughout the debate on the EU President. Only 6 of those 61, that is fewer than 10%, of the speakers, who had initially rejected the Presidency, changed their position after receiving clarifications and listening to the arguments of the other speakers.⁵⁴

The formula proposed by the Convention represented a classic IGC-like compromise. It proposed a President of the EU Council but kept the rotation in the Council formations (except for external affairs) and extended this rotation to one year. Although this solution appears to be a victory for both parties, the interests of both sides were more harmed than helped. On the one hand the EU President will enhance the status of the Council, and this harms the interest of the smaller member states, which favor a more supranational conception of the EU. On the other hand the competencies of this President were significantly limited and blurred from initial proposals by the big member states (as e.g. outlined in the ABC-proposal). The IGC endorsed the Convention's proposal on the President and maintained the existing rotation, while including some provisions for better coordination between the three consecutive Member States that constitute the 'team presidency' in order to improve continuity. Whether the post of the Council President will be purely ceremonial or will become the foundation for a visionary European leader remains one of the great unknowns of the Constitution.

⁵⁴ Those six speakers were: Demeteriou (2-028), (4-100); Hasotti (1-064), (4-114); Hjelm-Wallen (1-071), (2-025), (4-059); Lamassoure (1-020), (2-050), (4-024); Oleksy (1-025), (4-098); Serracino-Inglott (1-062), (4-121).

5.2.2 Case 4: Qualified Majority Voting: a distributional conflict without a working group

Weighing votes in the Council, extending qualified majority voting, and determining the size and composition of the EU Commission are all examples of distributional conflicts that are directly related to the power and influence of the member states. They are considered to be zero-sum issues without win-win solutions because member states fight for the biggest possible share of a fixed pie and any gain for one member state will be a loss for another. These issues represent recurrent conflicts that form the core of the left-overs from the Maastricht and the Amsterdam IGCs. In Nice, the conflict over the future vote distribution and the relative power and influence of member states had almost led to the collapse of the negotiations. France, the UK and Italy, for example, had secured favorable deals by obtaining each 29 votes, equal to the votes granted to Germany, which is one third bigger than each of these three countries. Poland and Spain, which each have less than half of Germany's population, made even better deals in securing 27 votes each. With these voting weights, and all the special clauses included, according to Nice a decision, to be adopted by QMV would have required obtaining 232 votes out of the total 321 votes in the Council (72.27%), representing a majority of the member states, if it was based on a proposal by the Commission – otherwise two-thirds of the member states would have to approve. This decision could be blocked if the approving states represented less than 62% of the Union's total population. This Nice formula could serve as a prime example for the inefficiencies of Intergovernmental Conferences which lead to sub-optimal outcomes for some parties due to high complexity, time pressure and hard bargaining by some negotiation participants. Just after the Nice ICG, commentators agreed that this QMV definition was an unsatisfactory, highly complex minimum compromise which reflected more tough negotiation by certain member states rather than a logical 'reweighting' of votes.

In the final Constitutional Convention text, Article I-20 defined QMV as a majority of the member states representing at least 60% of the population. This regulation should, however, only come into effect on 1 November 2009, after the European Parliament elections have taken place (European-Convention 2003).

Even with this provision to come into effect only at the end of 2009, the Convention's formula was later rejected by the following ICG. The revised Constitutional Treaty defined QMV as at least 55% of member states, representing at least 15 states as well as 65% of the Union's population. This QMV can be blocked by a minority representing at least four Council members. This rejection could have hardly come as a surprise to the Convention members. The opposition to the double majority did not decrease over the course of the debate and the final days of the Convention. While simplicity could be established in the case of the legal personality of the Union as a guiding principle for constitutional reform, this did not apply to the case of the QMV definition.

Role of the Presidium

Consequently, the issue on the QMV was one of the most controversial topics of the Convention. Although the Laeken declaration did not specifically ask the Convention to redefine the qualified majority threshold, the Convention's President, Giscard, actively tried to redefine QMV. On 22 April, without consulting other Presidium members he proposed a new formula in his 15 draft articles for the Constitution. In these draft articles, he introduced the principle of dual majority which had to consist of the majority of member states, representing at least two-thirds of the population of the Union (Norman 2005: 191). Giscard's first draft was a unilateral project which received strong criticism within the Presidium as well as from the member states. Nevertheless, Giscard's principle of dual majority remained in the Presidium's official draft articles but was slightly modified so that article 17b [I-25] of the draft articles defined QMV as a majority of member states, representing three-fifths of the Union's population (CONV 691/03). The following plenary debates on the institutions did not conclude in an agreement on the redefinition of the qualified majority, a fact that the Convention President himself acknowledged during the last plenary debate. Despite this resistance, in the final Convention text Giscard's formula reemerged once again with only slight modifications.

The logical conclusion of the debate would have necessitated the Convention president to acknowledge the lack of agreement on this issue. However, the Convention President clearly stepped out of his role as a neutral mediator in this case and imposed his own position on the Convention members.

Description of Plenary Debate

The debate on QMV clearly showed two diametrically opposing camps. The proponents of a reform argued that the Nice rules would lead the EU into sclerosis, and the adversaries insisted that Nice represented a complicated compromise that should not be touched.

Reform proponents often only demanded the adoption of their preferred option without even giving reasons for why this option would be the best solution (Michel 1-024, Tiilikainen 1-045, Dini 4-058, Kiljunen 4-089). Only few tried to develop arguments. Some proponents pointed to the difficulties and complexities of the current system and argued that the adoption of a simple double majority rule defined as the majority of member states and the majority of citizens would increase the legitimacy of EU decisions (Kalniete 1-014). Others believed that applying a clear and durable rule that would be simple (Demiralp 2-045, Santer 4-030), egalitarian (Fayot 4-096) and would not need readjusting with each new enlargement (Kiljunen 1-038). This argumentation pattern is clear in Duhamel's speech (2-016) in which he establishes five principles that should guide consensus building within the convention: double legitimacy as the founding principle of the Union, the principles of simplicity, efficacy, and democracy as laid out in the Laeken declaration, and finally the principle of reinforcing all three institutions (the Council, the Parliament and the Commission). Duhamel suggests that the dual majority fulfills all five principles.

Some actors supported the dual majority and argued against the current Nice formula. They explained that a 60% population threshold in QMV would allow the three biggest

countries to block the will of the rest and even suggested introducing a 75% threshold of member states and a 50% threshold of population for QMV to disempower the large member states (Bonde 4-047). The big member states argued that the population threshold should be raised to 66% (Teufel 4-052).

It was also argued that because the Nice compromise was so hard to understand, that it could not be anything but provisional (Duhamel 4-092), that it was not a solution and that it was up to the Convention to correct it (Van Lancker 4-093).

Defendants explained that the Nice formula involved the principle of degressive proportionality, which is also applied for the European Parliament. They argued that if pure proportionality was demanded, it should then also be applied to the other institutions, such as the European Parliament or the Commission (Dastis 4-103).

The Polish representatives stressed this argument and pointed out that their referendum was based on exactly this compromise. Others pointed out that the rules of Nice had not come into effect and that it would make no sense to abolish rules that have not been tested yet (Roche 4-105). They insisted that the Convention did not have a mandate to change the QMV definition and issued implicit threats by warning the Convention members from opening up the painfully struck compromise solution of Nice without explaining for why the compromise should not be opened or what the opening would entail (Lekenberg 2-019, Kuneva 4-070, Wittbrodt 4-046, Kalniete 4-151). Nice defenders argued that there was no *bona fide* reason to reopen the compromise (Roche 4-082) and stressed that the QMV formula struck in Nice was part of a larger compromise involving the questions of equal representation, the institutions and the weighting of votes and that it thus could not be opened (Hain 4-102). They warned that the opening of one part of this compromise might block the work of the Convention (Hjelm-Wallen 4-059), reopen the debate on the other aspects (Rupel 4-026, Lekberg 4-140), threaten agreement on other important constitutional issues, and hamper the balance between small and bigger member states (Oleksy 4-098, Roche 4-105, Serracino-Inglott 4-121). These members openly declared that overturning Nice would be rejected by the following

Intergovernmental Conference (Dastis 4-048, Cisneros Laborda 4-148), and they argued that the compromise could not be undone unless member states would be able to find a new principle that would allow them to define a new balance among the institutions (Lenmarker 4-083). This view was also reflected in the paper 'Principles and Premises' about reforming the Union's institutions and summarized in the speech by Hololei (5-005) in which he expresses his support to all previous speakers who intervened in support of Nice and stressed that the Union needs to remain a Union of equal member states cooperating efficiently on the basis of the Community method and that the imminent enlargement would not constitute an excuse for radical reform of what has been so far well-served decision-making. He acknowledged that an efficient Council was crucial for a well functioning Union but also reminded the Convention that the discussion on the QMV did not start at the convention, that it had been going on for a while and thus represented important compromises which maintain the institutional balance and guarantee the equality among member states, that it would therefore be unfair to not let this hard won compromise function in practice. He demanded that the three issues of the composition of the Commission, the weighting of votes in the Council and the size of the Parliament should be untouched by the convention and claimed that this would be the best way to comply with the Laeken declaration and to preserve the most important values of the European Union.

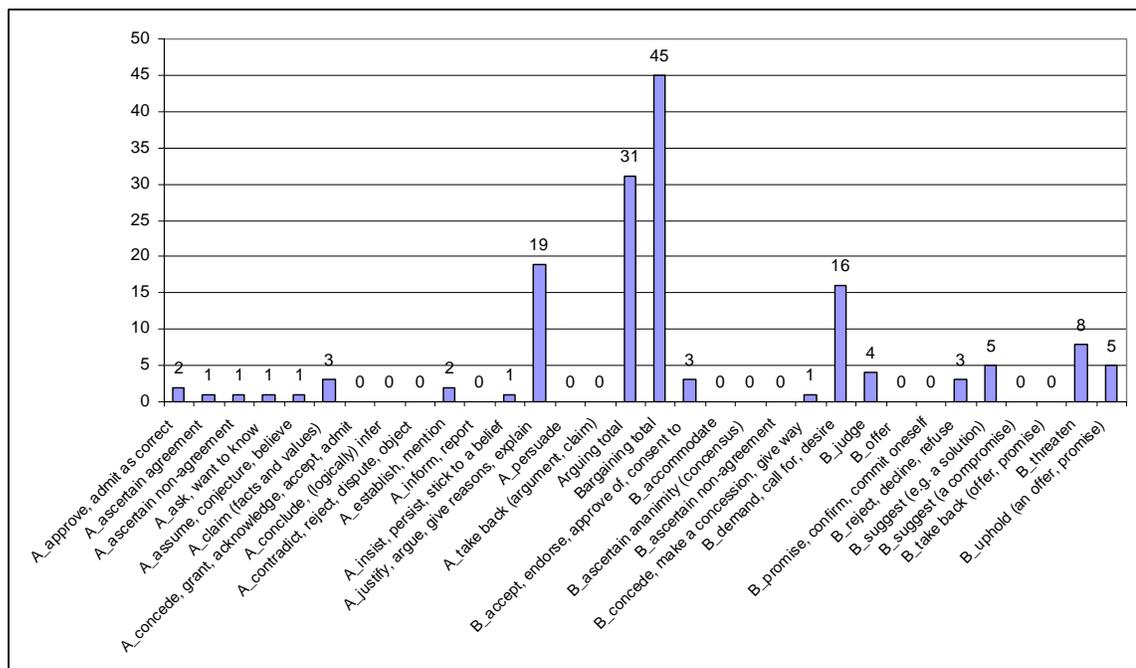
At the end of the last debate on the institutions of the EU, Giscard acknowledged this controversy and reminded the convention during the plenary debate of 16 May that convention members were still favoring differing conceptions of qualified majority and that there was still no agreement on its definition (5-025).

Discussion of Hypotheses

Hypothesis 1: Conflict Type and Negotiation Mode

H1.b The more the negotiated conflict is interest-based and distributive the more bargaining is to be found. *CONFIRMED*

With regard to the relationship between conflict type and the use of speech acts it was expected that as the issue on qualified majority voting (QMV) was classified as a purely distributive conflict, that bargaining should be prevalent during the plenary discussion which had to decide the definition of QMV. The topic of QMV was discussed during the plenary debates of 20 and 21 January and 15 and 16 May 2003. During those debates 76 speech acts were codified that directly related to the definition of qualified majority. The majority of those, 59% or 45 out of 76, were bargaining speech acts and the remaining 41%, 31 out of 76, were arguing speech acts. The hypothesis that the more the conflict is distributive the more bargaining is to be expected was therefore confirmed. The following chart shows the distribution of the two negotiation modes and of the specific speech acts within the plenary debates on the definition of the qualified majority voting.



QMV: Distribution of Arguing and Bargaining

should be more prominent, thus meaning that European actors (being the less powerful) should argue more than national parliamentary actors than government representatives as government representatives have veto power and can issue credible threats. The breakdown of arguing and bargaining with regard to the different actor groups confirms this hypothesis.

Contributions from 35 speeches during the plenary debates of 20/21 January and of 15/16 May 2003 made reference to the topic of QMV. The QMV debate registered the highest number of government representatives with 49% of the speakers. National parliament representatives made up 31% of the contributions, EU Parliament representatives 11% and the Presidium 9% of the contributing speakers.

The breakdown of arguing and bargaining with regard to the different actors, i.e. government representatives, European actors, and national parliamentarians shows indeed differences among those groups. While national actors, i.e. government representatives and national parliamentarians used more bargaining speech acts, European actors used more arguing than bargaining.

Out of the 76 speech acts codified in the plenary debates 3 were uttered by the Convention President, 39 were uttered by government representatives, 20 were issued by national parliamentarians, and 14 by European actors.

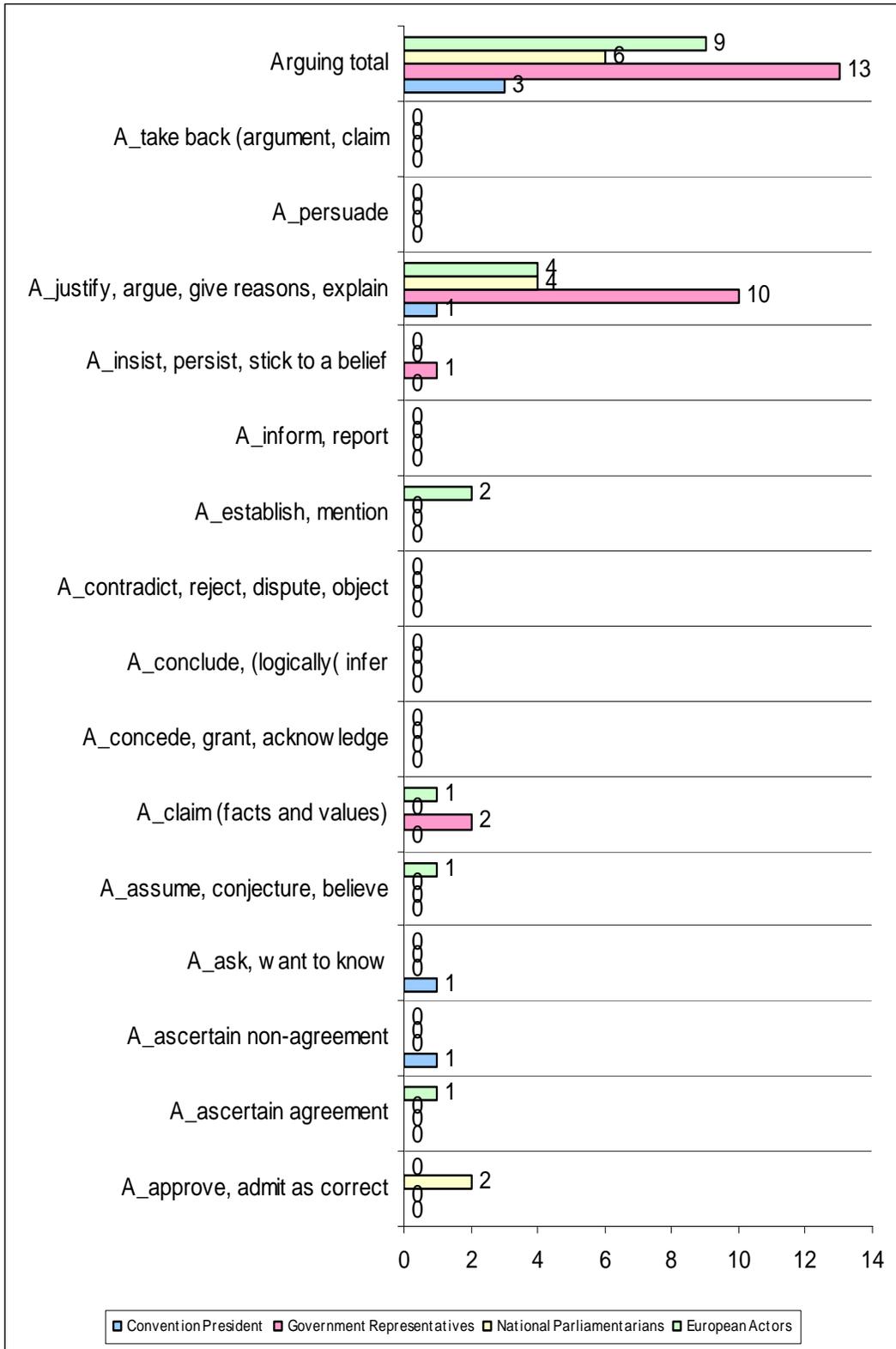
Government representatives displayed 13 arguing acts (33%) and 26 bargaining acts (67%). The breakdown of the arguing acts shows that all of them represent argumentative speech acts which serve the speaker in justifying his/her position: “to justify, argue, give reasons, explain” (77%), “to claim” (15%), “to insist” (8%). With regard to the distribution of bargaining speech acts shows a high number of confrontational speech acts: “to demand” 10 out of the 26 bargaining acts (38%), “to uphold” (19%), “to threaten” (23%), and “to reject, refuse” (8%). Agreement oriented concessional speech acts such as “to accept” and “to concede” only accounted for 15% of the bargaining speech acts of government representatives.

National Parliamentarians displayed 6 arguing speech acts (30%) and 14 bargaining speech acts (70%). The arguing speech acts fell in the two categories of “to argue, justify, explain” (4), and “to approve” (2). The bargaining speech acts consisted mainly of confrontational speech acts such as to demand (43%), to threaten (36%) or “to reject”

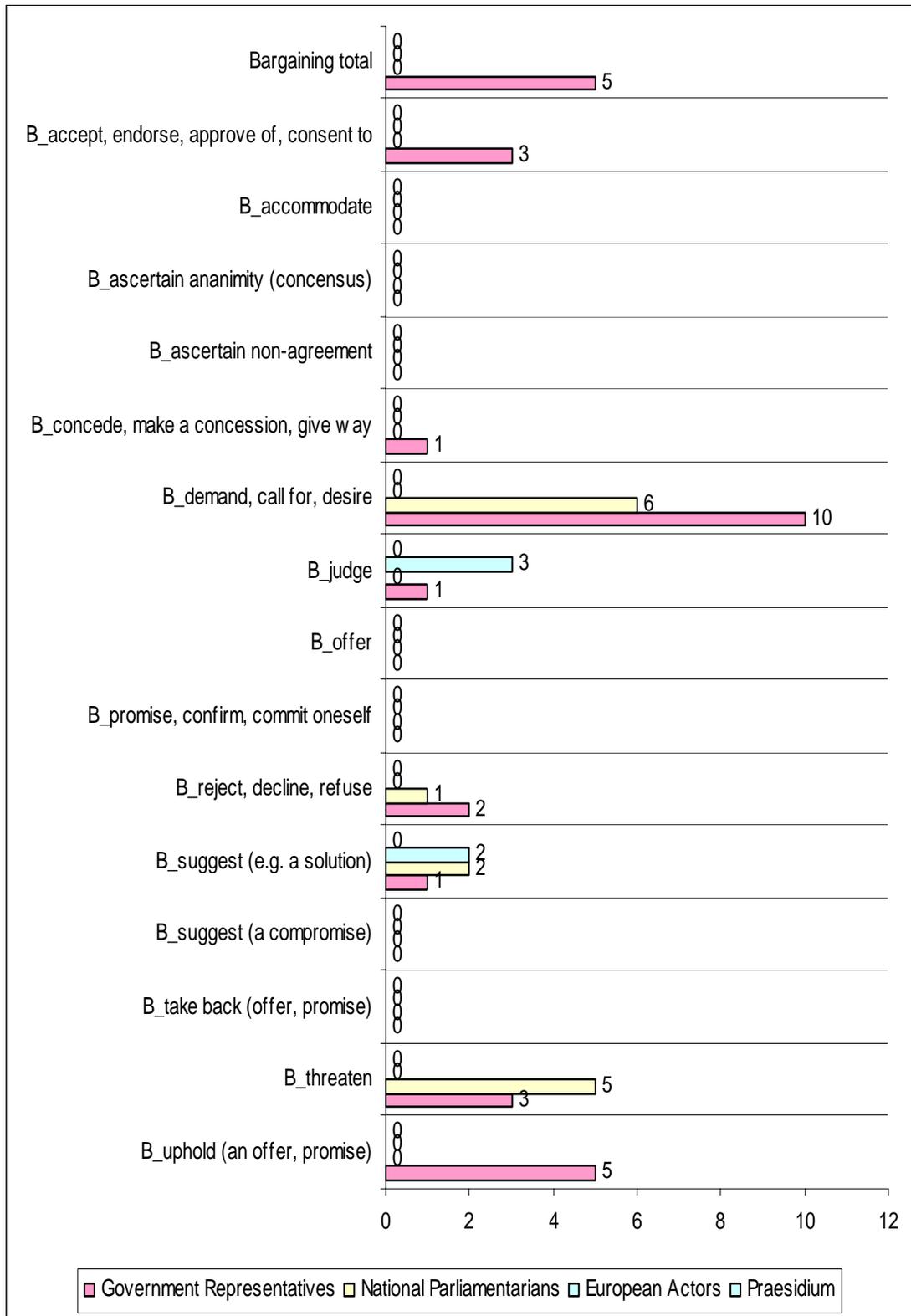
(7%). Cooperative bargaining acts such as “to suggest (a solution)” only accounted for 14% of the bargaining speech acts of national parliamentarians.

European actors displayed 14 speech acts of which 9 were arguing acts (64%) and 5 were bargaining acts (36%). European actors exclusively used cooperative arguing speech acts such as to justify (44%), to establish (22%), and to claim, to assume and to ascertain agreement (each 11%). The bargaining speech acts were also based on values and facts through the use of “to judge” (60%) as well as cooperative through the use of to “to suggest a solution” (40%).

The breakdown of the speech act patterns with regard to the actor groups confirms the hypothesis that arguing and bargaining was in this case actor specific. While European actors used mostly arguing speech acts and cooperative bargaining acts, government representatives and national parliamentarians used more confrontational arguing and bargaining speech acts.



QMV: Arguing by Actor group

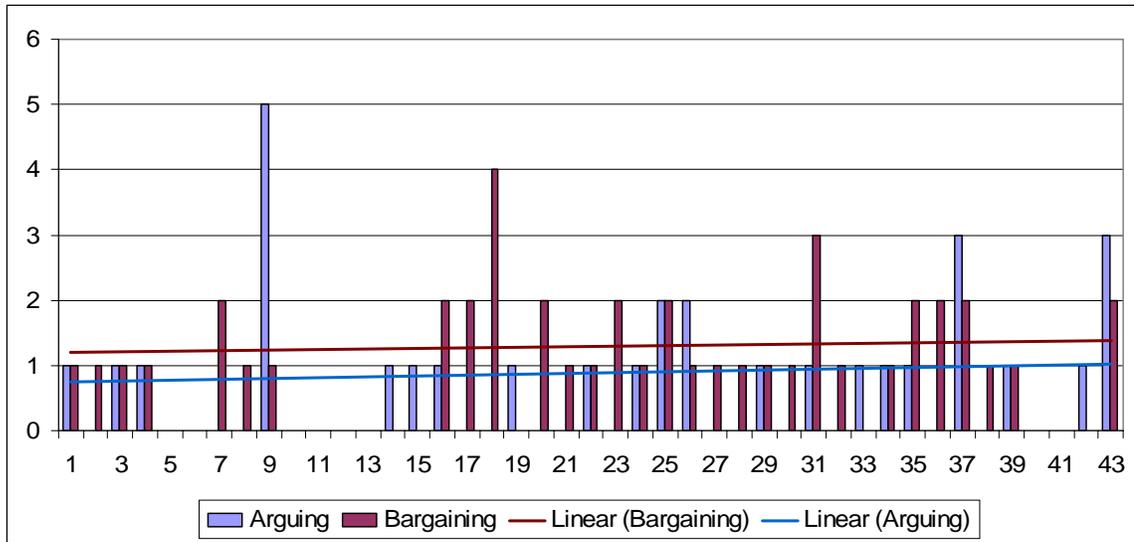


QMV: Bargaining by Actor group

Hypothesis 3: Changes in beliefs or preferences

- H3.1b Bargaining in the negotiation mode is an indication for confrontation and if effective can lead to compromise agreements. *CONFIRMED*
- H3.2.a Persuasion: Cases where the following IGC did not change the draft are a sign of effective agreement. With regard to effective arguing this would be best shown quantitatively if bargaining positions diminish over time and qualitatively if the speakers succeed in establishing common values or standards on which to base their agreement. Persuasion could thus be traced by showing that speakers change their position over time and agree to proposed solutions. *NOT CONFIRMED*
- H3.2.b Non-persuasion: Changes in the next IGC should have occurred in cases where arguing was picked up by the presidium while there were still bargaining against this particular point. This would indicate that no real persuasion had taken place and that the governments used their power in retrospect to correct that point. *CONFIRMED*

The third set of hypotheses with regard to the relationship between the negotiation mode and the negotiation output formulated that more arguing in the negotiation leads to consensus (true consensus) and that persuasion would have occurred if bargaining positions diminished over time or if bargaining actors adopted the arguments of arguing actors. Effective compromise building would have occurred if the positions of the actors converge over the course of the debate.



QMV: Arguing and bargaining throughout the debate

The patterns and frequency in the occurrence of arguing and bargaining over time support the confrontational negotiations and the failure to reach agreement. The arguing and bargaining lines are parallel like in the other cases but with the difference that the bargaining line is above the arguing line indicating the dominance of positional bargaining. The failure to reach agreement or any change of preferences is further shown by the lack of decline in any of the two curves. If bargaining had been efficient, arguing would have diminished over time and the arguing actors would have accepted the offers of the stronger bargaining actors. However, this was not the case with regard to the QMV definition, arguing and bargaining both remained ineffective throughout the debate.

Besides this quantitative visualization of the speech acts, the most striking characteristic of the case of QMV was the general lack of plenary debate on the topic. The little debate that took place at the plenary discussion revealed that there was no real dialogue and no real exchange of arguments. The argumentation patterns were consistent throughout the debate and did not change and the actors kept on repeating their rigid positions.

The definition of QMV was a highly contentious issue and very important for some member states. This importance showed itself in the contributions to the debate where almost 50 percent of all speakers on QMV were government representatives. This number is higher than the ratio of government representatives within the three other cases. In the debate there was a clear distinction between the government representatives

which mainly bargained from opposite positions with neither side moving towards the other. The member states who thought they had something to lose from a redefinition of the QMV formula bargained purely based on a “done deal” logic and refused to even consider any arguments of efficiency or simplicity. The ‘national’ importance of the QMV issue to some member states also showed itself in the positions of national parliamentarians, who adopted the same bargaining arguments as their governments and were especially active in pointing towards a rejection of any revision to the QMV formula by the next IGC.

The European representatives were the only actor group that tried to argue for simplicity, efficiency and democracy as guiding principles for the discussion. It can be argued that the QMV formula proposed by the convention was ‘more simple’ than the Nice formula and would have been easier applicable in the case of further enlargements, however, the arguing speech acts undertaken by the European actors were not able to establish ‘simplicity’ (or any other norm) as a shared and overarching principle which could have helped to bridge the differences between the parties and shift the discourse away from a purely power oriented exchange towards a principle of making decision making within the Union more efficient. Such a shared principle had clearly been formulated for the case of the legal personality of the Union. This shared norm was defined as simplicity and helped the parties to agree on a legal personality of the Union, conveying upon the Union the competency to sign treaties on behalf of the member states.

No change of preferences could be observed during the discussions on QMV if there was any change in the positions at all it only consisted of a further polarization of the positions as can be seen by the increase of bargaining acts and especially of threats issued during the last debate on the institutions. In the QMV debate, the argumentations on the basis of different principles made a convergence of the positions and the agreement on a compromise impossible. The discussion dynamic of this case confirms Panke’s (Panke 2006) hypothesis that agreement is less dependent on the particular mode of communication, arguing or bargaining, but much more on the consistency of speech acts that are used by the negotiators. If both negotiators use the same communication mode, either bargaining or arguing, agreement is much more likely rather than if one of them

uses one mode of speech acts and the other one a different mode. In this case, national actors and European actors were not able to come to an agreement because they used different languages and thus could not communicate efficiently. The stalemate in the discussion was manifested by the lack of substantial new propositions or compromise suggestions. At the end even the Convention President had to acknowledge the disagreement in the Convention and ascertain non-agreement on the QMV issue. Therefore, it should not have come as a surprise to the Convention members that the following ICG reopened the QMV issue and changed the formula once again.

“It is not a question of a democratic election, but of proposing, listening, concerting, changing one’s opinion, in order to form in common a common will.”

--Sieyès, *Archives Parlementaires. Série I: 1789-1799* (Paris 1875-1888), 8: 595,
quoted in Elster 1998: 3.

6. Conclusion

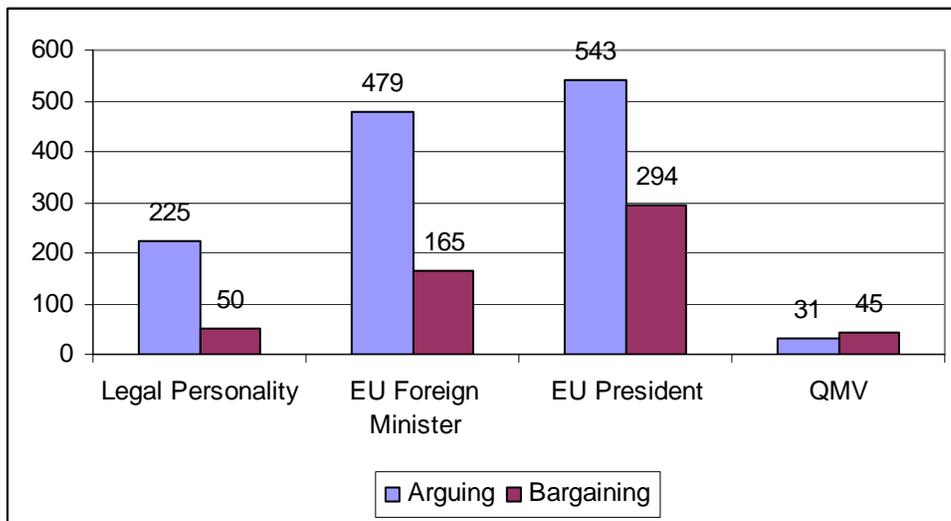
Empirical Results

Over the course of this study, empirical speech act analysis and coding has been used to test a series of hypothesis with regard to the relationship between individual frequencies of arguing and bargaining and the three variables of to the conflict type, the institutional setup, and the output of the negotiation.

Throughout the seven plenary debates altogether, 1832 relevant speech acts were identified and coded. As expected, arguing was prevalent overall throughout the debate. Almost 70 percent of the coded speech acts were arguing acts and 30 percent were bargaining acts. Furthermore, the definitions of the two speech acts also were confirmed. Arguing had been defined as being about justifying, giving reasons and bargaining was defined as being mostly about making demands. accordingly, throughout the debates arguing speech acts mainly consisted of the speech act “A_argue, justify, give reasons, explain”, 767 speech acts which amounts to 60 percent of the arguing speech acts, followed by claims as the second largest group of arguing speech acts (159) and approvals as the third largest group of arguing speech acts (103). Bargaining mainly consisted of the speech act “B_demand, call for, desire”, 239 speech acts which amounts to 43 percent of the overall bargaining speech acts, followed by suggestions (95) as the second largest group and by endorsements (66) as the third largest group of overall bargaining speech acts.

The different types of conflict and institutional setup were represented within the four selected cases. Case 1 on the legal personality of the Union and case 4 on the definition of QMV are clear cut cases representing a value based and a distributional conflict and respectively one case with a working group, and one without. The patterns of arguing and

bargaining were as expected very clearly discernable within these cases: arguing was dominant in case 1 and bargaining was dominant in case 4. The other two cases represent mixed conflicts displaying constitutional, i.e. value-based, but also distributional aspects. The difference between the cases was that one of them, the case on the Foreign Minister, had a working group, and the other, the case on the EU President, did not. As expected, arguing was dominant in both cases, while the percentage of arguing was much higher for case 2 (74% arguing, 26% bargaining) than for case 3 (65% arguing, 35% bargaining). The chart below shows the overall distribution of arguing and bargaining with regard to the four cases.



Arguing and bargaining distribution throughout all four cases

A comparison of the expected and revealed outcomes based on the hypotheses to the actual empirical findings shows the following results:

Case	Conflict Type	Institutional Setup	Arguing/ bargaining	Output/ consensus type	Evaluation
Legal Personality	Value-based	WG	Arg > barg	True consensus	H1a expected value (+)✓ H2.1a expected value (+)✓

					<p>H2.2 expected value (-)✓</p> <p>H3.1a expected value (+)✓</p> <p>H3.2a expected value (+)✓</p>
Foreign Minister	Mixed	WG	Arg > barg	integrative compromise	<p>H1.c exp. value (+)✓</p> <p>H2.1a exp. value (+)✓</p> <p>H2.2 exp. value (-)✓</p> <p>H3.1a exp. value (+)✓</p> <p>H3.2a exp. value (+)✓</p>
EU President	Mixed	No WG	Arg > barg	minimum compromise	<p>H1.c exp. value (+)✓</p> <p>H2.1b exp. value (+) compared to case 2 ✓</p> <p>H2.2 exp. value (+)✗</p> <p>H3.1b exp. value (+)✓</p> <p>H3.2a exp. value (-)✓</p> <p>H3.2b exp. value (+)✓</p>
QMV	Distributional	No WG	Barg > Arg	False agreement	<p>H1b exp. value (+)✓</p> <p>H2.1b exp. value (+)✓</p> <p>H2.2 exp. value (+)✓</p> <p>H3.1b exp. value (+)✓</p> <p>H3.2a exp. value (-)✓</p>

					H3.2b exp. value (+) ✓
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Case 1 on the legal personality of the Union was defined as a value-based conflict that was negotiated within a working group and resulted in an effective agreement in the form of a consensus. The expectation of the predominance of effective arguing was confirmed and fits well into both hypotheses. Firstly, it confirms that the conflict type has an influence on the conflict resolution mode (consensus through arguing) and secondly, it confirms that the institutional setup of the convention (including negotiation in working groups, the participation of experts etc.) enables effective agreement.

Case 2 on the European Foreign Minister was defined as a mixed conflict including value-based and distributional aspects that was negotiated within a working group and resulted in an effective agreement in the form of an integrative compromise. In this case the conflict type variable is ambiguous and more emphasis can be put on the institutional setup variable in arguing that the institutional setup (working groups etc.) was conducive to the establishment of an effective agreement.

Case 3 on the EU president was also classified as a mixed conflict which was not negotiated within a working group and produced an inefficient lowest-common denominator agreement. It was therefore argued that this case further strengthens the conclusion drawn from case 2 that the institutional setup can play an enabling role for efficient agreement building.

Case 4 on the definition of Qualified Majority Voting was defined as a distributive conflict which did not involve working groups and failed to produce an efficient outcome. This case showed the inefficiency of communication when different actor groups use different modes of communication.

This empirical analysis covers the first and descriptive research objective of the identification of modes of arguing and bargaining in the negotiation process. The case studies helped to clarify the occurrence of both modes within negotiations as well as their

relationship to each other and overall confirmed the hypotheses as formulated based on the arguing and bargaining literature. The case studies do not give enough evidence to exactly define or to quantify the relationship between the different variables and the negotiation outcome, however, the case studies and the theoretical literature applied to this research point to interdependence between the conflict type and the negotiation process on the one hand and the negotiation outcome on the other.

Theoretical implications based on the empirical results

The fourth research objective formulated for this study aimed at the evaluation of the negotiation process in light of the negotiation output. The patterns revealed in the case studies showed that the process of argumentation determines which formula for agreement emerges and how its details are specified in negotiation.

The theoretical part of this study developed that within a value-based conflict arguing should be predominant over bargaining. This was confirmed in case 1. It was further defined that within a distributive conflict bargaining should be predominant over arguing. This was confirmed in case 4. Cases 2 and 3 were qualified as mixed conflict cases, which both resulted in some form of agreement. Therefore, arguing was expected to be dominant. This was empirically confirmed as well. Especially the comparison of cases 1 and 4 have revealed the influence of the conflict type on the use of arguing and bargaining and their respective effectiveness in resolving the conflict at hand as had been formulated as the second research objective.

The second set of variables aimed at isolating the importance of the variable of the institutional setup for the negotiation mode and tested the theoretical assumption of when arguing is more effective for consensus building. The empirical analysis concentrated on two major components: first, the existence or non-existence of working groups in the negotiation process, and second, the power composition of the speakers, i.e. arguing and bargaining issued by national government representatives in comparison to national

parliamentarians and European actors. The cases confirmed that when working groups are involved (sequenced negotiation) like in cases 1 and 2 arguing is more effective. When working groups are not involved like in cases 3 and 4 arguing is less effective in diminishing bargaining. The comparison of the two similar conflict types in case 2 and 3 which resulted in different types of agreement has been revealing for the third research objective which aimed at the influence of the institutional setup on the negotiation output. The evidence collected from these two cases confirms that the institutional setting can have an enabling influence on the effectiveness of one communication form or the other and thus promote effective agreement.

This finding was contrasted through the comparison of the usage of arguing with regard to the various actor groups (government representatives, national parliamentarians, European actors). The differences in the arguing patterns of the different actor groups based on working group membership do not provide clear evidence. For case 1 and 2 there were no big differences in the arguing patterns of working group members to non-working group members. While government representatives argued less than the other actor groups with regard to case 1, with regard to case 2 and case 3 overall all actor groups displayed roughly the same percentage of arguing and bargaining. Significant differences in arguing and bargaining patterns could be discerned in case 4; only European actors used more arguing than bargaining while government representatives and national parliamentarians used more bargaining than arguing. This suggests that with regard to purely distributive issues the hypothesis applies that actors that are in power positions exert it while those that are not in a power position try to gain influence through arguing.

The third set of hypotheses aimed at the dependent variable, the existence or not of effective agreement and examined whether the empirical indicators translated into the actual negotiation results. This hypothesis required a combination of a quantitative and a qualitative analysis of the argumentation patterns. The increased use of arguing speech acts alone does not allow to make inferences about their effectiveness in shaping

outcomes and in reaching effective compromise or consensus and thus additionally the occurrence of persuasion as a prerequisite for effective consensus building was analyzed. The quantitative analysis of the linear evolution of the speech acts for the debate on the legal personality showed that both curves declined over time and that the bargaining curve almost disappeared towards the end of the debate. While persuasion in form of preference change could not be shown since there was only one plenary debate, the evolution of the working group reports and the high degree of endorsements and acceptances issued by the speakers during the debate indicate that preference change must have occurred. The pattern of arguing and bargaining for the EU foreign minister throughout the debates resembled the chart of case 1, here too, both curves declined over time while the bargaining positions diminished significantly towards the end of the debate. Additionally, clear preference changes by representatives of all actor groups could be demonstrated through the qualitative analysis of the substantive positions throughout the debates on the Foreign Minister. For case 3, the chart on the arguing and bargaining timeline showed a declining arguing curve and a constant bargaining curve which led to a crossing of the curve towards the end of the debate. The qualitative analysis of the substantive positions further showed that very few actors changed their positions over the course of the debate. Therefore, the quantitative and qualitative analysis of the debate on the EU president confirm that arguing was not effective within the debate in diminishing bargaining positions and that the bargaining positions prevailed in forcing a minimum compromise agreement. The curve for case four was distinct from all other cases in that bargaining was throughout the debate dominant over arguing and that both curves increased through the course of the debate. This chart confirms the parallel nature of the debate in which arguing and bargaining speakers did not refer to each other but led parallel discussions. The qualitative analysis further strengthened this finding by underlining that no change in preference occurred throughout the debate. The analysis of case 4 confirmed that no agreement was reached with regard to the redefinition of QMV.

The findings with regard to the arguing and bargaining patterns and especially the finding on the necessity of the pre-dominance of one mode over the other towards the end of the debate in order to reach effective agreement are important conclusions to further the empirical and theoretical foundations of the arguing and bargaining debate.

Consequences for EU convention decision-making processes

Many studies stressed that much of the success of the convention lies in the fundamentals. Fundamentals are principally about clarifying the relationship between the Union and the Member States, and the structure of the union itself. They include the decision to reorganize completely the existing treaties, to institute a single “Union” in place of rather than alongside, the existing European Community, to define in simple terms the powers of the Union, to simplify its instruments and procedures, to improve the efficiency and legitimacy of its decision-making, and to give the end product the title of Constitution (Milton/Keller-Noellet, p. 47-48). The convention’s results were much more mixed with regard to the policy issues such as justice and home affairs or foreign and security policy and no lasting solutions were achieved with regard to the institutions. The empirical analysis of arguing and bargaining speech acts has proven helpful to demonstrate the negotiation dynamics within each case.

Overall it can be subsumed that the case on the legal personality was a value based conflict on which consensus was facilitated through the institutional setup of working groups, intensive exchange and the participation of experts. The Foreign minister was a mixed conflict where the institutional setup helped to find an integrative compromise through the definition of common principles and values. The case of the EU president was also a mixed case but arguing was not successful in diminishing bargaining positions through the establishment of a joint value or principle thus resulting in a minimum compromise agreement. The differences between case 2 and 3 can be mainly attributed to the institutional setup. The findings support the arguments of deliberation theory which argues that the lack of time, intensive exchange, expert involvement, and neutral mediation made the enlargement of the pie through the agreement on common values and

standards much more difficult and resulted in missed opportunities for generating options and finding more integrative compromises.

Furthermore, the cases on the EU Foreign Minister and the EU President show that the predominance of either arguing or bargaining alone does not say anything about the quality of the agreement reached. Especially the analysis of arguing and bargaining throughout the debates suggest that one of the curves, either arguing or bargaining needs to diminish over time so that either a consensus agreement can be reached or an integrative compromise if arguing prevails or a minimum compromise if bargaining prevails can be struck.

The examination of the usage of arguing and bargaining based on actor groups did not prove sufficient to reinforce the institutional setup variable. Other aspects such as the role of the Presidium or the involvement of expert emerged during the qualitative analysis as vital factors for the construction of efficient agreement. While the facilitative and expertise role of the working group presidents were commended by convention participants with regard to case 1 and 2, the convention president who moderated the discussions with regard to case 3 and 4 showed a more directive role and received a lot of critique by the convention participants for being too directive and for not stimulating enough debate. On the other hand, the opposition voiced by government representatives during the debates on the QMV were a clear sign on the lack of agreement within the debate which was ignored by the Convention President. Overall, participation by independent experts and those that are affected by the decisions thus seem to be positive for the effectiveness of the Convention method both in a positive way to provide new solutions but also in a negative way, i.e. in case of the QMV to manifest disagreement when the conflict had not appropriately been addressed. These specific variables of the influence of the Presidium and the involvement of experts do not fit into a mainly quantitative arguing and bargaining analysis and should be further investigated in future research.

The literature on the relationship on conflicts and their modes of resolution indicated that value based conflicts are more easily solved by consensus than distributive conflict and that consensus is more easily achieved in technical or factual conflicts (Risse 2000, Holzinger 2005). These assumptions explain well why the Convention was able to

produce consensus with regard to the constitutional issue of a legal personality of the Union. But the case studies have shown that the Convention also produced consensus with regard to the Foreign Minister which was a conflict which also had substantive distributional aspects. Therefore, it can be argued that effectiveness of decision making does not depend on conflict mode alone and that the convention process played a role. This process dependency is even more apparent if we compare the two cases of the Foreign Minister and the EU President, which showed from the selection criteria a lot of parallels: both cases were mentioned in the Laeken declaration, both were previously not solvable because of the federalist-intergovernmentalist divide, both aimed at more coherence and visibility of European external representation through the creation of a new post. Despite these similarities, the output in both cases was very different. While the negotiations on the Foreign Minister reached an innovative, problem solving deal, the EU President discussion polarized the member states along traditional cleavages and resulted in an IGC-like minimal consensus which did not address the underlying problems it tried to resolve.

While reiterating the principle of the non-predictability of decisions it can be formulated that the Convention setup can have an enabling but not deterministic influence on the effectiveness of the negotiation output. More specifically it can be concluded that both the negotiation process as well as the conflict type determine the communication mode and that the communication mode impacts consensus building. A value based conflict e.g. should lead to an argumentative interaction modus and this interaction modus can be reinforced through a process design which reinforces further arguing such as observed in the case of the legal personality of the union. In cases where the conflict type is mixed, the negotiation mode should be mixed as well and could lead to either efficient consensus building or to a compromise solution. The case of the Foreign Minister has shown that an argumentation friendly process design can strengthen effective consensus building while case 3 showed that persistent bargaining results in compromises. Therefore, interdependence between the conflict type and the institutional setup variables can be observed in that if one of the variables adopts a negative value the other variable can counterbalance its effect.

The main value of the Convention can therefore be especially seen in the positive influence it had on consensus building for the cases in which one of the variables adopted such a negative value such as for the Foreign Minister. However, if and how the convention could help to conduct more efficient negotiations with regard to purely distributional aspects such as the QMV case remains a question mark and it needs to be stated that there was no case within the Convention where a purely distributional case was solved efficiently. Such cases involving pure power considerations might not be appropriate for an argumentative setting, as arguments will not change the power interests of the states. When power dynamics are dominant, issue linkages, trade-offs and compensation deals are better ways to solve distributional issues in a way that creates more value for all participants.

The Convention method seems to produce more efficient results with regard to value-based conflicts but also with regard to mixed-conflicts. As there has been no purely distributive issue, that was dealt within a working group it is not possible to determine whether the convention method would be more efficient for those conflicts as well. The frequent allusions of speakers during the debates on other issues, i.e. talking about the QMV definition in combination with the size of the Commission, indicate that classical ways of better trade-off deals and value creation through issue-linkages could be an alternative for these kinds of issues.

Elements of efficient process design for a future convention

From the conclusions derived from this analysis six principles can be formulated that should make future treaty negotiation within the European Union more effective:

1. Conduct a first 'listening phase' during which all actors have the opportunity to express their concerns and main opinions with regard to the subject at hand (surface arguments, generation of ideas, hear about main aspects of conflict, assess range of ZOPA, set realistic assumptions for working group)
2. Formulate clear and shared principles to guide the convention's decisions on the issues under debate. This should include the clear definition of the conflict type, i.e. the specification of the value-based and distributive aspects of it, in order to

map potential value hierarchies as well as possible issue-linkages and trade-offs with regard to the various aspects.

3. Establish working groups with the involvement of experts and concerned actors which conduct an in depth discussion on the topic and come up with a single recommendation (in case of a clear consensus within the working group) or with a set of options which address the main concerns while highlighting the implications of each choice.
4. Designate a mediator to guide the discussions who is perceived as fair and neutral by all parties. The mediator could be elected by the convention members in order to establish trust. The mediator should have editing functions in summarizing the debates and in pointing out issues of consensus whenever they arise and in structuring and presenting the options developed by the convention members during the debate. The mediator should refrain from making his/her own suggestions on how to solve the issue in order not to lose its neutrality. The mediator should further encourage all participants to justify their demands, suggestions and objections and to clearly voice why they support or reject a position.
5. Allow for sufficient time to discuss and elaborate the various options and only adopt a recommendation when a clear consensus or compromise has emerged that is agreed to or at least tolerated by all participants.
6. For purely distributive issues, where preferences are clearly polarized the convention method and extensive argumentation might not be the best solution. In this case issue-linkages and trade-offs should be undertaken among the parties in order to avoid decision blockage.

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http://www.europarl.eu.int/europe2004/index_en.htm

All working group documents, written proposals and other Convention procedural documents can be found on the Convention webpage:

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