

The Convention on the Future of Europe

How States Behave in a New Institutional Context of Negotiation

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CHAPTER I

Introduction

This book is about the origins and functioning of the Convention on the Future of Europe that took place between February 2002 and July 2003. More specifically, it looks at how this new institutional context of negotiation has influenced the behaviour of the Member States' governments. Since its foundation in the 1950s, the EU has incrementally evolved from an intergovernmental organisation to a supranational polity with a quasi-constitutional order. Its constant geographical expansion and the growing number of policy areas of competence brought to the fore of the EU political debate issues of constitutional character that were negotiated during the Amsterdam (1996) and Nice (2000) intergovernmental conferences (IGCs). However the two conferences failed to propose the reforms needed and the list of "leftovers" generated a long decade of continuous constitutional changes¹. The Nice IGC was the turning point showing the limits of this method of treaty reform, criticised for the inflexibility of Member States governments' positions, the lack of transparency and the marginal involvement of institutions like the European Parliament, the European Commission and the national Parliaments.

Despite the reticence of the some governments², the Laeken European Council³, through a decision-making technology transfer, decided to convoke the Convention on the Future of Europe with the aim of proposing a comprehensive reform of the European Union Treaties. The new body was modelled on the previous Convention that drafted the Charter of Fundamental Rights of the European Union in 1999-2000⁴. The main features of this body were: the inclusive membership that gathered European institutions, European Parliament, National Parliaments and National governments representatives; the absence

¹ De Witte, B. (2001). "The Nice Declaration: Time for a Constitutional Treaty of the European Union?", *International Spectator*, Vol. 3, pp. 21-30.

² Magnette, P. (2004). "La Convention Européenne: argumenter et négocier dans une assemblée constituante multinationale", *Revue Française de Science Politique*, Vol. 54(1), pp. 5-42.

³ Laeken European Council Presidency Conclusions, 14-15 December 2001 (SN 300/1/01 REV 1).

⁴ See the text of the Charter of Fundamental Rights of the European Union (2000/c 364/01) in *Official Journal of European Communities*, 2000/c 364/01.

of voting procedure, replaced by the use of interactive consensus; and the full publicity of all documents and working sessions⁵. For the first time, the governments, acknowledging the quasi failure of Nice, agreed to share their power to define the fundamental rules with other actors⁶. The Convention on the Future of Europe⁷, chaired by Valéry Giscard d'Estaing, started its work in February 2002 and after eighteen months of work, managed to reach a consensus on a single text: the Draft Treaty establishing a Constitution for Europe. However, the Member States' Governments regained their decisional power autonomy because the Draft Treaty issued by the Convention had to be approved by a classic intergovernmental conference that was to take place in 2004.

The research question and the theoretical divide

The European Convention is an example of the EU ability to invent new form of governance structures that uneasily fit into national conceptual categories. Because of its hybrid nature, it cannot be easily defined as a real constitutional assembly nor as a preparatory working group aimed at preparing the Intergovernmental Conference⁸. The book has a threefold line of inquiry: first, understanding why and how the Members States' governments decided to share their constituent and reform treaty power with other actors; second, understanding how this new context of negotiation might have affected governmental actors behaviour and strategies; third, discovering to what extent the new method of treaty reform was an effective remedy for lowest common denominator outcomes. The research concentrates the attention only on the Member States' governmental actors because of two important reasons: historically the treaty reform process has always been their exclusive domain of competence throughout the last fifty years of existence of the EU; and secondly, they have always had a cardinal role during the ratification process of all EU treaties.

The European Convention was an international constitutional negotiation, multilateral, multi-issue and involving a large set of actors.

⁵ See Tampere European Council Presidency Conclusions, 15-16 October 1999, Tampere.

⁶ Dehousse, R. and F. Deloche-Gaudez (2005). "The making of a transnational Constitution: an institutionalist perspective on the European Convention", *Cahiers européens du Centre d'études européennes*, No. 1/2005.

⁷ The Convention on the Future of Europe will be named throughout the text European Convention.

⁸ Reh, C. and B. Scholl (2005). "The Convention on the Future of Europe: Extended Working Group or Constitutional Assembly?", *Research Papers in Law* 4/2005, Brugge: College of Europe.

Such kind of complex negotiations are still scarcely conceptualised because of the difficulties of finding the relevant variables to be taken into consideration⁹.

The European Convention has generated a lively academic debate about the process of domestic preference formation of Member States, how they negotiate and reformulate their initial preferences in light of finding an agreement, and about the deliberative democracy and constitutional design of the EU¹⁰.

The theoretical divide when studying the European Convention echoes a wider debate that is taking place also in political science and negotiation analysis between approaches adopting a strategic-choice and instrumental actor perspective of analysis and those based on cognitive and social processes or ideas¹¹. The disagreement is often on few key questions like how do state actors form and change their preferences. Are those preferences exogenous or endogenous to the negotiating context? Is there any relevant role for institutions, norms and culture? Are governments rational and unitary or fragmented actors? Is there any relevant role for supranational institutions in treaty reform negotiations? Are cognitive processes such as learning, persuasion, deliberation relevant in shaping preferences? Which are the scope conditions that might favour the emergence of such processes?

In our case, the rationalist oriented approaches show the marginal role played by the institutional context of negotiation and the supranational

⁹ For a discussion on the necessity to conceptualize multilateral negotiation and on the lack of a systematic analysis of the EU cases of negotiations see Meerts, P.W. and F. Cede (2004) *Negotiating European Union*. Houndmills: Basingstoke Hampshire; Hopmann, P. T. (1996). *The negotiation process and the resolution of international conflicts*. Columbia: University of South Carolina Press; Zartman, W. and J. Z. Rubin (eds.), (2002). *Power and Negotiations*. Ann Arbor: The University of Michigan Press.

¹⁰ Reh, C. (2008). "The Convention on the Future of Europe and the development of integration theory: a lasting imprint?", *Journal of European Public Policy*, Vol. 15(5) August 2008, pp. 781-794.

¹¹ Some of the articles that were at the origin of this debate are: Risse, T., C. Ulbert, *et al.* (2004). "Arguing and bargaining in Multilateral negotiations", Conference Report on "Empirical approaches to deliberative politics", 21-22 May 2004, EUI Swiss Chair, EUI, Florence; Checkel J. and A. Moravcsik (2001). "A Constructivist Research Program in EU Studies?" (Forum Debate), *European Union Politics*, Vol. 2, pp. 219-249; Jupille, J., J. A. Caporaso, *et al.* (2003). "Introduction: Integrating Institutions Rationalism, Constructivism, And The Study Of The European Union", *Comparative Political Studies*, Vol. 36(1/2), pp. 7-40; Pollack M. A. (2006). "Rational Choice and EU Politics", *ARENA Working Paper Series* No. 12/2006, Oslo: ARENA; Muller, H. (2004). "Arguing, bargaining and all that: communicative action, rationalist theory and the logic of appropriateness in international relations", *European Journal of International Relations*, Vol. 10(3), pp. 395-435.

institutions because largest Member States dominated this kind of decision-making processes¹². Therefore the European Convention, despite its participative and open structure, reproduced to a great extent the old intergovernmental logic of action and bargaining¹³. The persistence of national interests relies as the major explaining factor of the governmental actors' behaviour and of the final outcome¹⁴.

Neo-institutionalist approaches emphasise how rational governmental actors were confronted with limitations imposed by the context in which they did negotiate. They highlight for example the importance of the leadership and agenda setting power of Valéry Giscard D'Estaing¹⁵, but also the pertinence of Member States size in shaping the negotiations dynamics¹⁶. Historical-institutionalist approaches, demonstrate how the Member States did not have fixed preference and strategies that on the contrary were endogenous to the negotiating context¹⁷ and driven by past institutional choices¹⁸ or even influenced by their domestic structures¹⁹. More constructivist or discursive oriented approaches demonstrate that a densely institutionalised setting of negotiation at the European Convention provided actors with a common life-world that facilitated the process of arguing²⁰. They show how the exposure of governmental actors

¹² Moravcsik, A. (1999). "A new statecraft? Supranational entrepreneurs and international cooperation", *International Organization*, Vol. 53(2), Spring 1999, pp. 267-306.

¹³ Moravcsik, A. (2005). "The European constitutional compromise and the legacy of neo-functionalism", *Journal of European Public Policy*, Vol. 12(2), pp. 1-37.

¹⁴ Moravcsik, A. (1999). *Op. cit.*

¹⁵ Tsebelis, G. (2006). "Agenda setting in the EU Constitution: from the Giscard plan to the pros ratification", in König, T. and S. Hug (eds.), *Policy-making processes and the European constitution: a comparative study of Member States and Accession Countries*. London: Routledge.

¹⁶ Magnette, P. and K. Nicolaidis (2004). "Coping with the Lilliput syndrome. Large vs. Small Member States in the European Convention", *Politique Européenne*, Vol. 13, pp. 69-95; Leuffen D. and S. Luitwieler (2006). "Domesticated Wolves? Length of Membership, State Size and Preferences at the European Convention", in Holzhaecker R. and M. Haverland (eds.), *European research reloaded: cooperation and europeanized states integration among europeanized states*. Netherlands: Springer.

¹⁷ Dimitrakopoulos, D. and Kassim, H. (2004). "Deciding the future of the European Union: preference formation and treaty reform", *Comparative European Politics*, Vol. 2, pp. 241-260.

¹⁸ Jabko, N. (2004). "The importance of being nice: an institutionalist analysis of French preference on the future of Europe", *Comparative European Politics*, Vol. 2, pp. 282-301.

¹⁹ Closa, C. (2004). "The Formation of Domestic Preferences on the EU Constitution in Spain", *Comparative European Politics*, Vol. 2, pp. 320-338.

²⁰ Risse, T. and Kleine M. (2010). "Deliberation in negotiations", *Journal of European Public Policy*, Vol. 17(5), pp. 708-726.

to new ideas and information generated a learning process leading to the re-conceptualization of their self-interest²¹.

Research methodology and sources

Taking stock of such a plurality of approaches, this research has the aim of finding a way to reconcile such a theoretical divide. The book adopts a multi-theory framework for promoting the integration of rationalist and constructivist approaches in which each theory is considered to explain some sub-set of empirical reality²². Theories might also be complementary in a temporal sense when they best explain different sequential phases in process of international co-operation and negotiation²³. In addition to that, the research makes an attempt to bring into the picture also concepts of negotiation analysis and conflict management²⁴ that might enrich the number of tools available to answer our research questions.

The first step to reconcile the divergent theoretical approaches can be taken through the empirical observation of the European Convention. Despite the institutional stability of the context of negotiation (rules of procedure, institutional arrangements and structures of the assembly), the Member States' governments manifested significant changes in their negotiation behaviour and strategies. If during the first phase of the European Convention they were rather open to new ideas and were keen to listen to the opinions expressed by supranational and national parliaments' representatives, during the last phase the governments' representatives held the centre stage of negotiations and resorted to tough bargaining²⁵.

This exponential variation shows that the interests of rational governmental actors or the institutional context of negotiation alone

²¹ Goler, D. (2003). "Between deliberation and bargaining: The influence of the institutional setting of the Convention on the mode of interaction", Paper presented at the CIDEL Conference "Deliberative constitutional politics in the EU, Albarracin, Zaragoza, September 2003; See also Eriksen E. O. and J. E. Fossum (eds.), (2000). *Democracy in the European Union: integration through deliberation?*, London: Routledge.

²² Jupille, J., Caporaso, J. A. *et al.* (2003). "Introduction: Integrating Institutions Rationalism, Constructivism, And The Study Of The European Union", *Comparative Political Studies*, Vol. 36(1/2), pp. 7-40.

²³ Tallberg, J. (2010). "Explaining the institutional foundations of European Union negotiations", *Journal of European Public Policy*, Vol. 17(5), pp. 633-647.

²⁴ Zartman, I.W. (2002) "What I want to know about negotiations", *International Negotiations*, Vol. 7, pp. 5-15.

²⁵ Magnette, P. and K. Nicolaidis (2004). "The European Convention: bargaining in the shadow of rhetoric", *West European Politics* Vol. 27, pp. 381-404.

cannot carry the entire explanatory workload²⁶. Building on the analytical framework of Lowi²⁷, Cox²⁸ and Pollack²⁹, the research hypothesise that the characteristics and properties of the policy issues over which the EU Member States negotiate and the way those issues are linked together influence their behaviours³⁰.

Dividing the policy issues negotiated during the European Convention into four categories (constitutional, boundary, distributive and regulative issues), the research compare the negotiations of two policy issues showing the greatest difference in their properties: first, the reform of the institutional architecture, that was of constitutional nature, characterised by high stakes in terms of power and that could generate a highly competitive bargaining behaviour because of its zero-sum game nature; and second, the simplification of the legal framework of the EU, that could generate a high degree of cooperation and problem-solving behaviour during the negotiations because of its technical and positive game nature.

In order to go beyond the well-known dichotomy between integrative and distributive negotiation³¹ or bargaining and problem-solving³², it seems necessary to take into consideration two other dimensions that play a key role in the EU multilateral context of negotiation: the creativity, that is to say the capacity of the actors to depart from the status quo with the view of achieving an innovative solution; and the justification criteria on the basis of which the solutions are negotiated. The first factor helps understanding the challenges of a decision-making system in which complex rules (unanimity, QMV or consensus) give to the *status quo* a strong force of attraction³³. The second factor helps understanding the

²⁶ Panke, D. (2006). "More Arguing Than Bargaining? The Institutional Designs of the European Convention and Intergovernmental Conferences Compared", *Revue d'intégration européenne*, Vol. 28(4), pp. 357-379.

²⁷ Lowi, T. J. (1972). "Four system of policy, politics, and choice", *Public Administration Review*, Vol. 32(4) pp. 298-310.

²⁸ Cox, R. W. and H. K. Jacobsen (1973). "The Anatomy of Influence – Decision Making in International Organizations", London: Yale University Press, pp. 1-36.

²⁹ Pollack, M. A. (1994). "Creeping Competence: The Expanding Agenda of the European Community", *Journal of Public Policy*, Vol. 14(2), pp. 95-145.

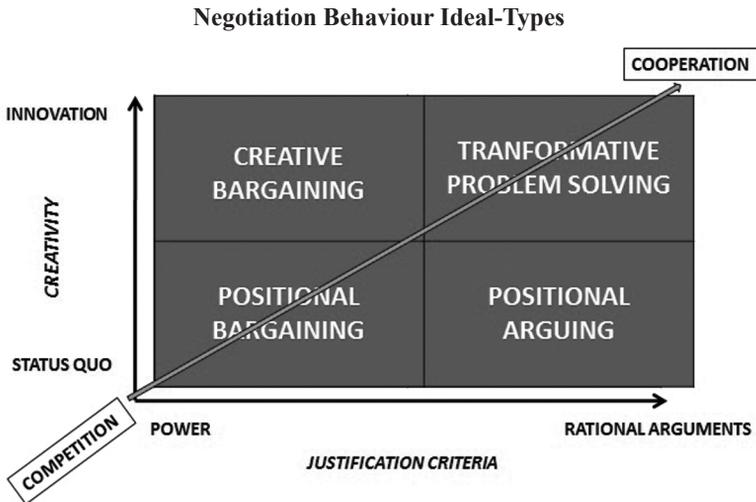
³⁰ McKibben, H. E. (2010). "Issue characteristics, issue linkage, and states' choice of bargaining strategies in the European Union", *Journal of European Public Policy*, Vol. 17, pp. 694-707.

³¹ Walton, R. and R. McKersie (1965). "*A Behavioral Theory of Labor Negotiations*", New York: McGraw-Hill.

³² Hopmann, P.T. (1995). "Two Paradigms of Negotiation: Bargaining and Problem Solving", *Annals of the American Academy of Political and Social Science*, Vol. 542, pp. 24-47.

³³ Scharpf, F. (1988). "The Joint-decision Trap: Lessons from German Federalism and European Integration", in *Public Administration*, Vol. 66, pp. 239-278.

structural difficulty of finding common and shared justification criteria that allow for integrative outcomes in the EU.



The two additional dimensions allow building four ideal-types to explain additional nuances of the classic tension between cooperative and competitive negotiation behaviour. These four are: **Positional bargaining** in which actors defend the status quo through power resources such as a veto threats; **Creative bargaining** in which actors move towards an innovative solution justified on the basis of power arguments; **Positional arguing**³⁴ in which actors defend the status quo because of diverging policy paradigms or rational arguments; and **Transformative problem-solving** in which actors arrive at an innovative solution on the basis of shared rational arguments that generate a shift in their preferences and thus allow for departing from the status quo.

This new matrix of negotiation behaviour allows checking how the properties of the two policy issues under exam (the reform of the institutional architecture and the simplification of the legal framework) were driving the Member States governments' negotiation behaviour towards any of the four ideal-types.

³⁴ Olekalns and P. L. Smith (1999). "Social Value Orientations and Strategy Choices in Competitive Negotiations", *Personality and Social Psychology Bulletin*, Vol. 25, pp. 657-668.

In line with process-tracing³⁵ methodology and following Zartman's³⁶ recommendations, the analysis will adopt a sequential approach by identifying the variation of the negotiation behaviour during the different phases³⁷ of the European Convention that lasted nearly 18 months.

The European Convention was fully transparent and all the documents were public and available on a web site that was constantly updated. Given the difficulty of having direct access to the governmental representatives, and given the quantity and reliability of the primary sources available, we opted to rely almost entirely on the analysis of the official documents of the European Convention, included the *VERBATIM* of the plenary sessions. Such a choice was also adopted for the historical analysis of the previous EU constitutional experiments in which we preferred to use official documents from public archives and libraries other than secondary literature. As a result we carried out a very limited number of semi-structured interviews with key actors from the Member States governments' representatives, the Praesidium, the national and European parliaments' representatives.

The structure of the book

Chapter I discusses in depth the existing academic literature on the European Convention and links it to the current theoretical debate about the European integration process. Taking stock of the different approaches and their underlying assumptions, it develops a multitheory framework with the aim of reconciling these divergences. This chapter presents the new analytical framework and the development of a four ideal-types matrix of negotiation behaviour that goes beyond the classic divide between cooperation and competition.

Chapter II compares in an historical perspective the different EU constitutional episodes in order to understand the structural context of negotiation of the European Convention. The diachronic approach allows demonstrating the impact of previous rounds of treaty reform, the influence of past decisions and also the role of ideas in shaping the Member States

³⁵ Bennett, A. (2010). "Process Tracing and Causal Inference", in Henry E. Brady and David Collier (eds.), *Rethinking Social Inquiry: Diverse Tools, Shared Standards*, 2nd ed., Lanham: MD. Rowman and Littlefield, pp. 207-219.

³⁶ Zartman, I. W. (1991). "The Structure of Negotiation", in Victor A. Kremenyuk (ed.), *International Negotiation: Analysis, Approaches, Issues*, San Francisco: Jossey-Bass Publishers, pp. 65-77.

³⁷ Dupont, C. (1994). "La négociation: conduite, théorie, applications", Paris: Dalloz (4^e édition); Dupont, C. and G. Faure (2002). "The Negotiation Process", in Victor A. Kremenyuk (ed.), *International Negotiation: Analysis, Approaches, Issues*, 2nd ed., San Francisco: Jossey-Bass Publishers, pp. 39-63.

governments' choice to convoke the European Convention on the Future of Europe.

Chapter III focuses on the features of the context of negotiation represented by the set of organisational and institutional rules of the European Convention. By studying its sociological composition and membership (age, education, professional qualification, institutional affiliation, party affiliation and expertise on EU Affairs), it identifies the major cleavages and demonstrate the importance of institutional constraints in determining the range of actions available to its members.

Chapter IV analyses the rule of consensus and the characteristic of the European Convention mandate. The focus is on the vertical differentiation by examining the role of the President, the Presidium, the Secretariat and their relationship with the plenary assembly. Then this chapter explores the negotiation sequence and the agenda-setting dynamics of the three distinct working phases of proposal, working groups and amendment of the draft text.

Chapter V and Chapter VI undertake the empirical test of the hypothesis according to which the different properties of the policy issues under negotiation affects the negotiation behaviour of the Member States' governmental actors. **Chapter V** analyses the negotiations about the simplification of the EU legal framework. It shows how the highly technical nature of the issue and the legal expertise played an important role in generating a situation of transformational bargaining in which innovative solutions were justified on the basis of shared rational arguments. **Chapter VI** focuses on the negotiations about the reform of the EU institutional architecture. It demonstrates how this policy issue, because of its a zero-sum game nature, generated a positional bargaining dynamic in which powerful governmental actors were able to defend the status quo on the basis of power considerations.

Taking stock of the previous parts, **Chapter VII** presents the conclusion of the research showing the utility of using several theories for explaining different items and different phases of a complex negotiation process such as the European Convention. By reconciling the divergent theoretical approaches of political science, it presents possible avenues for further empirical work to be undertaken for the study of European Union process of integration. It also argues about the advantages of using a cross-disciplinary approach by including concepts from negotiation analysis as an additional tool for researchers in social sciences.