"The EU's 'External Action' according to The Lisbon Treaty: Institutional Choices and Their Explanations"

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Introduction[1]

The Lisbon Treaty formally abolished the pillar structure introduced by the Maastricht Treaty and gives the whole union legal personality. It also has a section on 'external action' in the part referred to as the Treaty on European Union (Title V, TEU). This part includes general provisions on 'external action' but is most specific on Common Foreign and Security Policy (CFSP), including Common Security and Defence Policy (CSDP). The Treaty on the Functioning of the European Union also has a section on 'External Action by the Union' (Part Five, TFEU). This section has general provisions as well as more specific provisions on common commercial policy, cooperation with third countries and humanitarian aid, restrictive measures, international agreements, the Union's relations with international organisations and third countries as well as a solidarity clause.So it quickly appears that the old distinction between external economic relations (pillar 1) and CFSP (pillar 2) is still there despite the abolition of the pillars.

The treaty creates a new position of High Representative (HR) for Foreign and Security Policy who will chair the Foreign Affairs Council and be a Vice-President of the Commission (Art. 27 TEU). The HR will be assisted by a new European External Action Service (EEAS), a kind of diplomatic service. But there will still be Commissioners dealing with some important aspects of external action, such as trade, development and neighbourhood policies. How can such a mixed bag of institutional changes be explained?

It will be argued that the Lisbon Treaty is the outcome of a difficult interstate bargaining process, where power mattered. Various bargaining exchanges have created a very complex system. The state actors were constrained by previous decisions, including the outcome of the Convention on the Future of Europe (2002-03), but they made the final decisions, first in the Intergovernmental Conference (IGC), 2003-04, which followed the Convention, and subsequently at the European Council meeting in June 2007 during the German Presidency

[1] This chapter relies on earlier writings on the Lisbon Treaty by the author, especially the introductory and concluding chapters of two forthcoming books that he has edited. One on the *TheMaking of the EU's Lisbon Treaty* will be published by PIE Peter Lang in Brussels in November 2011. The other on *The Lisbon Treaty: Institutional Choices and Implementation* will be published by Ashgate in early 2012.

which outlined the mandate for the ensuing IGCwhich produced the final version of the Lisbon Treaty.

Despite novel provisions the Lisbon Treaty is in reality a relatively minor reform when it comes to CFSP.CFSP, including CSDP,was ring-fenced by the minimalist member states, Britain in particular. There was no breakthrough for a more *communautaire* foreign policy. Despite all the rhetoric about the EU playing a more efficient and coherent international role CFSP remains intergovernmental cooperation based on consensus among the 27 member states.

Existing studies of EU treaties have tended to be legal (ex. Piris 2010) or based on specific political science approaches, such as liberal intergovernmentalism (Moravcsik 1998), rational choice institutionalism (ex. Beach 2005) or social constructivism (ex. Christiansen and Reh 2009). This chapter argues that a fuller understanding of EU treaties require a combination of different approaches using comparisons over time as well as across policy areas. On the latter point the way CFSP has been treated differs fundamentally from external economic relations, and yet both are part of what the Lisbon Treaty calls 'external action'.

After looking at the making of the Lisbon Treaty and its 'external action' provisions I shall discuss how we can explain the Lisbon Treaty by combining approaches in a novel way.

The Making of Lisbon

The European Union (EU) is based on a number of treaties, some of which go back to the 1950s, especially the Rome 'Treaty establishing the European Economic Community' (EEC). Prior to the Lisbon Treaty, which entered into force in December 2009, the EU was based on the treaty framework that emerged when the Treaty of Nice entered into force in 2003 (European Union 2003). The Constitutional Treaty—elaborated during the Convention on the Future of Europe, 2002-2003, and finally negotiated during the Intergovernmental Conference (IGC) of 2003-2004—proposed a number of changes in that framework (Council of the European Union 2004a and 2004b; European Convention 2003). But the treaty was rejected in referendums in France and the Netherlands in May and June 2005, respectively (Laursen 2008). After a reflection period, it was decided that a so-called 'reform treaty' should be negotiated. The German presidency played an important role in securing agreement on a mandate for a new IGC in June 2007 (Council of the European Union 2007a and 2007b). During the Portuguese presidency in the autumn of 2007, this IGC finalized a new treaty, the Lisbon Treaty (European Union 2007).

The first post-Lisbon consolidate version of the EU treaty was published in early 2008 (European Union 2008).

The Lisbon Treaty mostly delineates a number of institutional changes. In the end the product has to be evaluated against the standards established at the outset. Will the treaty improve the efficiency, democratic legitimacy "as well as the coherence of its external action," as the mandate from June 2007 claimed it should? (Council of the European Union 2007a, 2).

To explain the institutional choices of the Lisbon Treaty, we should study the institutional choice of the Constitutional Treaty (Laursen 2008). If we were to fully explore the origin of the Lisbon Treaty we would have to go back to the post-Nice agenda established at the Nice meeting of the European Council in December 2000 (Laursen 2006). This agenda included yet another reform process, which first produced the ill-fated Constitutional Treaty. If we focus on Lisbon as such the decision by the European Council in June 2007 to abandon the Constitutional Treaty and go for a new treaty, initially referred to as the 'Reform Treaty' was the most important. It was in the run-up to this decision, which included a detailed mandate for a new IGC, that we saw the German presidency, Chancellor Angela Merkel in particular, playing a role of leadership. The coming to power of Nicolas Sarkozy in France in May 2007 was also an important factor in the process.

Finding a solution to the constitutional impasse produced by the negative referendums in France and the Netherlands in 2005 was the most important point on the agenda of the German presidency in the first half of 2007. Seventeen of the 27 member states had ratified the Constitutional Treaty and in Germany the parliamentary part of the ratification had been completed. The treaty had been rejected by referendums in France and the Netherlands. The remaining member states had put the ratification process on hold.

Those countries that had ratified the Constitutional Treaty wanted something as close as possible to that treaty. French presidential hopeful Sarkozy had suggested a 'mini-treaty,' which would only include the essential elements of the Constitutional Treaty. The Netherlands and the UK also wanted some kind of minimal reform that would allow them to avoid a referendum. Sweden and Denmark had sympathy for such an approach. Poland had big problems with the new double majority, which meant at least 55% of the member states representing at least 65% of the population would constitute a qualified majority vote (QMV) (Kurpas and Riecke 2007; Seeger and Emmanouilidis 2007).

In April Chancellor Merkel sent to the member governments a letter with 12 questions that implied a pragmatic approach. While wanting only to do what was absolutely necessary to satisfy the sceptical governments—especially the UK, Poland and the Czech Republic, but also France and the Netherlands—the questions suggested the possibility of reverting to the classical method of amending the existing treaties, doing away with the 'foreign minister' title and removing the various symbols of a constitution which had been included in the Constitutional Treaty (flag, hymn and logo) (Mahony 2007).

The presidency adopted a strategy of bilateral negotiations behind closed doors, very different from the relatively open Constitutional Treaty approach. Heads of state or government were asked to appoint personal representatives ('focal points' or Sherpas). Through bilateral consultations, the presidency could get information about the bottom lines of the member states and consider possible solutions. The chancellor had meetings with her counterparts and the Sherpas were also involved in bilateral consultations. There was only one plenary meeting of the Sherpas on 15 May 2007; however, there were two additional meetings just prior to the European Council meeting in June and at that time there was also a meeting of foreign ministers. Interestingly enough, the whole process was controlled in Berlin, not Brussels. This also meant that the Council Secretariat was largely excluded at this point (Herma 2008).

The only official report from the negotiations emerged on 14 June 2007. It claimed that all member states were united in the aim of agreeing on a new treaty before the European Parliament elections in 2009. Some issues were discussed: on one hand, there was a "need to preserve the substance of the innovations agreed upon in the 2004 IGC" (Council of the European Union 2007a, 3). On the other hand, it was felt necessary to "return to the traditional method of treaty change through an amending treaty" (ibid., 5). There was a "concern to underline the respect for the identity of the Member States," and also "a clear demand from some delegations to further enhance the role of national parliaments" (ibid., 4). The report finished by listing six issues for further discussion including 'the specificity of the CFSP' (ibid.)

Just prior to the June summit, UK Prime Minister Tony Blair made a statement outlining four British 'red lines':

> First, we will not accept a treaty that allows the charter of fundamental rights to change UK law in any way.

> Second, we will not agree to something that replaces the role of British foreign policy and our foreign minister.
>
> Thirdly, we will not agree to give up our ability to control our common law and judicial and police system.
>
> And fourthly, we will not agree to anything that moves to qualified majority voting something that can have a big say in our own tax and benefit system. We must have the right in those circumstances to determine it by unanimity (BBC News 2007).

So retaining an autonomous British foreign policy was one clear bottom line for the UK.The Prime Minister added: "If we achieve those four objectives I defy people to say what it is that is supposed to be so fundamental that could require a referendum" (ibid.).

After difficult negotiations the summit adopted a 16-page mandate for an IGC, which then started early during the Portuguese presidency, on 23 July 2007. Given the detail of the mandate for the IGC, it was possible to conclude the IGC quickly during the Portuguese presidency (Herma 2008, 59).

The European Council met in Lisbon, on 17-18 October. This was where the IGC settled the remaining issues. Poland was again a *demandeur*, then joined by Italy. Poland secured a stronger wording of the Ioannina compromise that deals with voting in the Council as well as a permanent Polish advocate-general in the European Court of Justice (ECJ). This was done by increasing the number of advocates-general from 8 to 11. Italy, moreover, secured an additional seat in the European Parliament by an increase in the number of MEPs to 751 (Hans 2007; Herma 2008).[2]The treaty was signed in Lisbon on 13 December 2007.

'External Action' according to Lisbon

As mentioned earlier, the Lisbon Treaty formally abolishes the pillar structure. CFSP, the old second pillar, however, will largely remain intergovernmental despite the abolition of the pillar structure.

The old pillar structure created problems for coherence among external relations of the Community (first pillar) and CFSP (second pillar). In the past, only the Community had legal

[2] The texts of these final agreements can be located at the Council's website: http://www.consilium.europa.eu/showPage.aspx?id=1317&lang=EN

personality. The Lisbon Treaty attributes legal personality to the Union as a whole (Art. 47 TEU). Thus, in the future, the Union will also be able to enter into international agreements under CFSP. The new HR will deal with both external economic relations of the Union, in his/her capacity of Vice-President of the Commission, as well as CFSP, in his/her capacity of HR and as Chair of the Foreign Affairs Council (Art. 27(1) TEU).

If we look at the details of 'external action' there is still a big difference between what used to be in the first pillar, including especially the Common Commercial Policy (CCP), and CFSP. So I will compare the two parts

Common Commercial Policy

The CCP remains a central part of the Union's external action. It has been an exclusive competence since the Treaty of Rome (Art. 113 EEC). The Commission negotiates trade deals multilaterally within the GATT – and now WTO – as well as bilaterally with third countries. Decisions can be made in the Council by a QMV. The ECJ has jurisdiction. In other words, the Community method is applied for commercial policy. Interestingly enough, the original Article 113 did not mention the European Parliament. But with Lisbon CCP will fall under 'the ordinary legislative procedure' which means that the EP is getting a right of co-decision (Art. 207 TFEU). This is an extremely important change.

Further, the definition of trade is expanded. The original Treaty of Rome basically covered trade in goods. But some international treaties included matters where the member states remained competent. They were so-called mixed agreements. For such agreements, procedural rules were rather complicated. Such agreements, for instance, also require national ratification.

The Uruguay Round of GATT extended the international trade agenda to include services and trade related aspects of intellectual property (TRIPS). The ECJ in 1994 decided that these new areas were partly national competence.

In the treaty reforms that followed the Uruguay Round, there were efforts to extend the definition of trade to include services and intellectual property. They were included by the Treaty of Amsterdam, but decisions had to be by unanimity. The Treaty of Nice introduced QMV for services and intellectual property. But the sensitive areas of 'cultural and audiovisual services, educational services, and social and human health services' would still require unanimity (Art. 133 TEC).

The Treaty of Lisbon retains QMV for services and intellectual property and extends it to the new category of foreign direct investment. However, it retains unanimity for cultural and audiovisual services ('where these agreements risk prejudicing the Union's cultural and linguistic diversity') as well as social, education and health services ('where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them').

Overall then, it is clear that the scope of trade policy has expanded and the role of Community institutions, especially the EP, has been reinforced.

Common Foreign and Security Policy (CFSP)

The Union's CFSP competence, on the other hand, remainslimited in various ways in the Treaty of Lisbon. According to Article 24 TEU, there are 'specific rules and procedures' for CFSP. Unanimity will remain the normal decision rule. Adoption of legislative acts is excluded. And the ECJ normally has no jurisdiction. There are two exceptions: The ECJ will 'be empowered to referee disputes over the interface of the Union's general authority and its specific authority relating to the CFSP' (Sieberson 2008: 180). The other exception concerns restrictive measures involving individuals. The Maastricht Treaty had introduced procedures for adopting sanctions involving both CFSP (the political decision) and the Community (the actual sanctions, often involving trade measures). These sanctions were aimed against states. This created a problem for sanctions against individuals, so-called 'smart sanctions', which the EU may want to use against terrorists (see Wouters et al. 2008: 193). The Lisbon Treaty has a new article that allows restrictive measures 'against natural or legal persons and groups or non-State entities' (Art. 215(2) TFEU). Article 275 TFEU gives the ECJ jurisdiction to review the legality of such restrictive measures against natural or legal persons.

CFSP is not designated in the treaty's lists of either exclusive or shared competences, which, for instance, mention common commercial policy as an exclusive competence of the Union (Art. 3(1) TFEU). Development cooperation and humanitarian aid are mentioned among shared competences (Art. 4(4) TFEU). CFSP is mentioned separately as a competence without giving this competence a specific name (Art. 2(4) TFEU).

These various provisions of the Lisbon Treaty show that despite the formal abolishment of the pillar structure, there is still an important difference between external (economic) relations,

falling under the old first pillar, and CFSP, the old second pillar. The Member States were not ready to extend the 'Community method' to the latter. So a *de facto* separate CFSP pillar remains.

Although the basic decision rule for CFSP is unanimity, there is formally the possibility of some decisions being made by a QMV. Of the four possibilities for QMV mentioned, three already existed before Lisbon. The new possibility mentioned by the treaty is the one where the HR proposes a decision following a 'specific request' from the European Council (see Art 31 TEU).

The idea that the Council can make implementing decisions by a QMV is not new, but the Member States have so far hesitated to use this possibility. In Article 31 TEU, the possibility is linked with a so-called 'emergency brake'. A state that has 'vital' reasons for opposing a decision can request that the decision be moved from the Council (of Ministers) to the European Council (of Heads of State or Government) for a decision by unanimity. There is a tightening here since it used to be 'important' reasons (UK, House of Commons 2008: 42). On the other hand, the article in question also includes a bridging clause – or *passerelle*– whereby it can be decided by unanimity in the European Council to move some area of decision-making, beyond the four listed, from unanimity to QMV. This does not include defence matters, though. So all in all a complex set of rules. Most likely unanimity will remain the norm.

It should also be noted that the UK secured two declarations during the IGC 2007, Nos. 13 and 14, which stress the intergovernmental nature of CFSP. Declaration 13 says that the creation of the office of the HR and the establishment of an External Action Service 'do not affect the responsibilities of the Member States as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations'. Declaration 14 specifically mentions the Security Council of the United Nations and says that the CFSP provisions of the treaty 'do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament'.

Common Security and Defence Policy (CSDP)

Common Security and Defence Policy (CSDP), which used to be called European Security and Defence Policy (ESDP), gets a more prominent place in the new treaty. The basic definition does not change much, but there is now a new emphasis on operational capacity including both civilian and military assets (Art. 42 TEU).

The so-called Petersberg tasks, defined at a meeting of the Western European Union (WEU) in 1992, and included in the EU treaties by the Amsterdam Treaty, are extended to include joint disarmament operations, post-conflict stabilization as well as 'fight against terrorism, including by supporting third countries in combating terrorism in their territories'. Both civilian and military means can be used (Art. 43 TEU).

Flexibility Provisions in CFSP and CSDP

The Lisbon Treaty will introduce more flexibility in CFSP, including CSDP. This is an important aspect of the treaty, arguably an effort to deal with vetoes of recalcitrant member states. If member states are not willing to accept majority voting they have to come up with other ways of circumventing veto points.

First, the Lisbon Treaty allows for 'enhanced cooperation' in all areas, including CFSP and CSDP (Art. 20 TEU). The previous treaty did not allow for 'enhanced cooperation' in defence. Establishing enhanced cooperation will require a minimum of nine Member States (Art. 20(2) TEU), against eight previously. Enhanced cooperation in CFSP, including CSDP, further requires unanimity in the Council (Art. 329(2) TFEU).

The Lisbon Treaty also introduces the new concept of 'permanent structured cooperation' in the defence area (Art. 46 TEU). This is considered an important innovation by many observers. Contrary to 'enhanced cooperation', it does not require unanimity to be established, but a QMV. The idea is that member states with greater willingness and capacity in the area of defence 'shall' go together in some kind of closer cooperation of a more permanent kind. This cooperation is geared towards increasing the military capabilities of the member states and thus the Union.

'Constructive abstention' which was already in the treaty since Amsterdam can also be seen as a kind of flexibility, but more ad hoc. It allows states to stay out of specific activities as long as they explain why and allow the other member states to go ahead.

Further, for the expanded Petersberg tasks, the Lisbon Treaty mentions the possibility of entrusting 'the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task' (Art. 44 TEU). Such a group is often referred to as a 'coalition of the able and willing'.

All in all, there are now a number of flexibility provisions that can be applied in the areas of CFSP and CSDP.

Mutual Defence and Solidarity

A somewhat controversial new mutual defence or mutual assistance clause has been added to the treaties by the Lisbon Treaty (Art. 42 TEU). The language can resemble the collective defence articles of the WEU and NATO treaties. Notice theprovisos though. The obligation of assistance 'shall not prejudice the specific character of the security and defence policy of certain Member States', read nonaligned member states. Further, commitments must be consistent with NATO commitments, a stipulation considered important by the more pro-Atlantic Member States, including the UK. This kind of language was actually introduced by the Maastricht Treaty when it included defence policy in the TEU.

Finally, the new mutual solidarity clause, which is part of the TFEU, should be mentioned. This deals with terrorist attacks against Member States or natural or man-made disasters in Member States. The article asks for solidarity and mobilization of all instruments, including military resources (Art. 222 TFEU). This is the Union's response to events like 9/11 in general and the terrorist bombings in Madrid in 2004 and London in 2005.

The High Representative (HR)

The new High Representative (HR) for Foreign Affairs and Security Policy shall conduct CFSP and be a Vice-President (VP) of the Commission. This has been referred to as double-hatting. Since he or she will also chair the Foreign Affairs Council (Art. 18(3) TEU) the HR/VP will actually have three hats. The position is a major innovation. The new HR should become a central figure in 'external action' of the Union. However, the new post-Lisbon Commission still has Commissioners for trade, development policy and neighbourhood policy, so in these areas the HR will need to cooperate with colleagues in the Commission. Some turf battles, also with the new semi-permanent President of the European Council as well as the President of the Commission, can be expected. Further, there will be a General Affairs Council that will still be chaired by the rotating presidency. Much will depend on the personalities of those appointed and whether some memorandum of understanding about the respective roles is worked out or emerges as unwritten rules.

The HR will be assisted by a new European External Action Service (EEAS) composed of officials from the Council Secretariat, the Commission and seconded by officials from member state Foreign Ministries. This is another important innovation. The EEAS is expected to reduce duplication and facilitate the development of a more effective external policy of the EU (UK, House of Commons, 2008: 63–66). There is the hope that the EEAS can help develop common perspectives on international issues.

It is also worth mentioning that the previously existing Commission Delegations in third countries and at international organizations become EU Delegations. Diplomatic missions of Member States are required to cooperate with Union Delegations (Art. 32 and 35 TEU).

Will Lisbon make the EU a more efficient and coherent international actor?

'Institutions matter' we are told by institutionalistscholars. The officials who have negotiated successive treaties believe this to be a correct statement. Otherwise they would not engage in the kind of battles about institutional choices which have been seen in successive IGCs.

The Lisbon Treaty has made important institutional changes, but when it comes to CFSP the changes have been limited by the unwillingness of the member states to pool and delegate sovereignty. In table 1 some general institutional provisions in the treaty are compared with those that apply to CFSP post-Lisbon.

Table 1: Institutional Provisions of Lisbon in general and for CFSP in particular

Institutional provisions	Lisbon Treaty in general	CFSP/CSDP
QMV	Extended to 18 existing and 31 new legal bases	Very limited QMV; Unanimity the norm
Democracy	EP gets co-decision (ordinary legislative procedure) for 30 existing and 14 new legal bases; Increased role for national parliaments in controlling subsidiarity	EP role still very limited
Flexibility	Closer cooperation	Closer cooperation; Constructive abstention;

		Permanent structuredcooperation; Entrustment of task to group of states
Leadership	Commission initiative extended in areas of Justice and Home Affairs (JHA); 'Permanent' president of European Council	HR/VP proposal upon request from European Council; Creation of EEAS; 'Permanent' president of European Council

Source: Compiled by the author

A comparison of column two and three shows the great difference between CFSP and the rest. The question then is: Why such a dismal institutional choice for CFSP after a decade of efforts to make the EU a more efficient and coherent international actor?

Explaining Lisbon

There is an increasingly large literature focusing on reforms of the constitutive treaties of the original European Communities (EC) and the later European Union (EU). The Lisbon Treaty (2007/09) is only the most recent reform in a long sequence of reforms. Particularly since the Single European Act (SEA) in 1986, scholars have shown great interest in these reforms (see, for example, Beach 2005; Mateo González 2008; Moravcsik 1998; Smith 2002). The SEA was also the reform in which intergovernmental conferences (IGCs), foreseen by the founding treaties of Paris and Rome, started playing an important role. In the cases of the SEA and the later Maastricht, Amsterdam and Nice treaties, the IGCs were the central institutional settings for member state negotiations of new treaties. Focusing on the IGCs in those reforms will therefore tell a fair part of the story of the treaty reform in question.

However, Lisbon is different, to some extent, and particularly in two ways:

1. It includes much of what was already in the Constitutional Treaty, which went through a long preparation in the European Convention, with important participation of members of national parliaments as well as the European Parliament.

2. When the Constitutional Treaty was abandoned, the new Reform Treaty, as the Lisbon Treaty was initially called, was largely negotiated at the level of heads of state or government under German leadership; the IGC played a small role at the end of the process, during the Portuguese presidency, although a few changes did take place at this stage, especially to satisfy recurrent Polish demands.

So the question remains: how different was Lisbon? Weren't the member states the main actors during most of the process? After all, even the Constitutional Treaty was finalised through an IGC from October 2003 to June 2004, with tough inter-state bargaining. The bottom lines of a few minimalist member states determined the outcome on important issues, including CFSP. Furthermore, towards the end, the European Convention anticipated the IGC where the member states would make the final decisions.

When, after a reflection period, negotiations resumed on a new, different treaty, member states were clearly the central actors. After the debacle of the Constitutional Treaty the member states were very eager to control the process fully, this time at the level of heads of state or government. The European Council thus became an even more important actor than it had been in earlier treaty reforms.

The central concern of the member states in the spring of 2007 was to avoid referendums as much as possible. This included France and the Netherlands, which had gone through negative referendums on the Constitutional Treaty in 2005, as well as the UK, where Prime Minister Blair had promised a referendum on the Constitutional Treaty before it was put on hold after the French and Dutch rejections. Denmark, which had voted 'no' to Maastricht in 1992 as well on as the euro in 2000, was also a concern. In the end Ireland was the only member state requiring a referendum to ratify the Lisbon Treaty. Due to the 'no' vote in the first referendum in June 2008 this prolonged the process. Some opt-outsas well as a more proactive government were required to get a 'yes' vote in the second referendum in October 2009.

National Preferences

Based on the assumption that the member states have been the decisive actors, I shall discuss the main national preferences that made the adoption of the Lisbon Treaty difficult. I shall then look

at the interstate bargaining and institutional choice, following the stages outlined by liberal intergovernmentalism (Moravcsik 1998).

There were basically three groups with varied interests that interacted during the European Council and IGC negotiations that led to the Lisbon Treaty. First, there were the 18 member states that had already ratified the Constitutional Treaty. They were the 'friends of the Constitutional Treaty'. Second, there were France and the Netherlands, which had experienced the negative referendums. They wanted something different to avoid another referendum. The third group was composed of the states that had not yet ratified the Constitutional Treaty. A number of these—the Czech Republic, Denmark, Ireland, Poland, Portugal and the UK—had announced that they would have a referendum on the Constitutional Treaty. They thus needed a different treaty to avoid a referendum in order to increase the chance of getting a treaty reform adopted.

The negotiations leading to the IGC mandate in June 2007 essentially became a referendum avoidance game. The new treaty should not be called a constitution, even if the Constitutional Treaty was arguably not really a constitution as normally understood in the member states. So the label had to go and, with that, all the state-like symbols of the hymn, motto and flag as well as the minister title for the new foreign affairs chief. Furthermore, there was a reversion to the old way of treaty reform—a treaty amending various provisions in existing treaties and adding new provisions instead of drafting a completely new treaty to replace the earlier ones. These changes in approach and content did the trick of avoiding referendums in all member states except Ireland.

In this process, a small group of minimalists—or 'difficult partners,' according to some—reopened some issues. The UK once again announced 'red lines,' which presumably had been respected in the negotiations of the Constitutional Treaty but needed to be (re)confirmed. Poland reopened the issue of Council voting. Since the old Treaty of Nice weighting of votes in the Council could not be accepted by the other member states, Poland then battled for a formula based on the square root of the population, which would increase Poland's formal influence, particularly compared to Germany (Wilga and Karolewski, forthcoming). In the end, Poland had to drop that demand, getting in exchange a later entry into force of the new double majority and a new version of the Ioannina compromise; this allowed a certain minority in the Council to

request continued discussion of an issue beyond 2014, when the double majority would enter into force.

During the IGC a few issues lingered. Poland secured a post of advocate-general in the European Court of Justice (ECJ) and Italy secured one additional seat in the European Parliament.Most of the last-minute, sensitive issues concerned influence in the new institutional setting. Many Irish voters who voted 'no' in the first referendum thought that Ireland would have no vote in the future Union if there was no Commissioner from Ireland. Poland worked against the so-called double majority because it meant a formal loss of influence in the Council compared with the Treaty of Nice voting weights.

Other sensitive issues, which had largely been sorted out during the Constitutional Treaty negotiations, concerned the functional scope of policy competences and the use of qualified majority voting (QMV). To what extent should certain issues continue to be considered national issues? How intrusive should the Union be allowed to be? On these issues, the UK has continuously had 'red lines' and some other member states have been able to hide behind the British positions as free riders. Social policy, taxation, foreign and defence policy are areas where the Union still has limited capacity to act because of the 'red lines' of minimalist member states.

These preferences tend to be material in nature. How far should integration go and how much influence should different actors have? Ideational factors can also play a role. The continuous extension of co-decision, which has become the ordinary legislative procedure, cannot be explained by efficiency or power considerations. The European Parliament has been empowered over time, and further empowered by the Lisbon Treaty, because of legitimacy considerations (Rittberger 2005). The Dutch also fought for an increased role for national parliaments in the Lisbon Treaty negotiations. The debate about the 'democratic deficit' had an effect. As argued by social constructivists, the way the issues are framed by rhetoric does matter. And, of course, the involvement of many members of national parliaments (MPs) and members of the European Parliament (MEPs) in the European Convention played a role in the further empowerment of parliaments, both at the European level and nationally, which we now see in the Lisbon Treaty.

Inter-state Bargaining

Grand bargains like the Lisbon Treaty involve two kinds of issues. The first is the question of efficiency—that is, the extent to which a bargain realises all the potential gains. The second incorporates the notion of the fairness or equity of a certain solution. Obviously there is always the possibility that some actors gain more than others. A package solution is one approach that can be used, making sure that there is something for everybody in a deal. Issues can be linked. Losers can be compensated. In the end, however, much depends on the relative power of the member states (Moravcsik 1998).

These issues of efficiency and equity create collective action problems among the member states, which can be difficult to solve. Basically, there are two approaches to solving issues of collective action: the creation of special institutions to assist the process or a reliance on leadership. In the EU, both of these approaches have been used. In the Union's day-to-day policymaking, the common EU institutions play various important roles: the Commission makes proposals, and the European Parliament has increasingly become a co-legislator, together with the Council of Ministers, the ECJ adjudicates and other bodies play other roles. Traditionally, the Commission was expected to take on supranational leadership as a mediator and broker (Lindberg and Scheingold 1970). In the case of the Council, the presidency has increasingly also played similar roles (Tallberg 2006).

In treaty reforms, the roles of Community institutions have varied over time. The Commission played an important role in the SEA negotiations in the 1980s, but arguably has had less influence since then. The Council Secretariat, primarily because of its institutional memory, has also been able to play important roles on some occasions (Beach 2005). It is fair to say, too, that legal experts played a particularly important role in the case of the Lisbon Treaty (Herma 2008). But the main actors in the IGCs are the member states. That leaves the presidency with a role that can be decisive in overcoming collective action problems.

The fact that the decision rule in IGCs is unanimity of course gives all member states influence. They can all use threats of veto. But are such threats necessarily credible? A group of member states can threaten to go ahead through bypassing the recalcitrant member. Counter-threats of exclusion can be used, as happened against Poland in June 2007. Poland caved, but kept complaining during the IGC and eventually secured some additional sweeteners.

It is probably fair to say that the bigger member states have more influence than the smaller member states. When France voted 'no' to the Constitutional Treaty in 2005, it was a EU

problem. When Ireland voted 'no' to the Lisbon Treaty in 2008, it was largely an Irish problem—as Denmark had a problem when the Danes voted 'no' to Maastricht in 1992. But the influence of member states also depends on factors other than size. First, it has been argued that the more a state depends on a certain solution, the more it may be willing to compromise to get that solution. Different intensity of preferences creates what Moravcsik calls 'asymmetrical interdependence' (Moravcsik 1998). The biggest member state, Germany, arguably has often ended up giving more than what could be considered the country's fair share. In the case of Chancellor Helmut Kohl and Economic and Monetary Union(EMU), this may partly have been due to a pro-European ideology. In the case of Chancellor Merkel and the Reform Treaty, the duty of running the presidency may have played a role. There is an expectation that the presidency works for the common good. Reputation is also a valued asset.

Institutional Choice

According to Moravcsik, there has been a "pooling and delegation" of sovereignty in the EC/EU to secure "credible commitments" (Moravcsik 1998, 67-68). 'Pooling' refers to the use of majority voting in the Council, whereby member states give up the right of veto, which they would possess as long as the decision rule is unanimity or consensus. 'Delegation' refers to the autonomous powers given to Community institutions, especially the Commission and the ECJ, whereby they can make certain binding decisions. The powers delegated to the Commission and ECJ include surveillance and enforcement, making sure that the member states implement decisions and legislation.

The process of pooling and delegating sovereignty, which was important in the original Community treaties, continues with the Lisbon Treaty. According to Jean-Claude Piris, 18 existing legal bases have been switched to qualified majority voting (QMV) and 31 new legal bases will apply QMV. Overall, however, there are still 61 policy provisions where unanimity or common accord will apply, including taxation, social policy, passports and identity cards, and some issues relating to police cooperation, own resources and the multi-annual financial framework, certain trade agreements in sensitive fields and Common Foreign and Security Policy (CFSP). Further, the European Council will still require unanimity or consensus for about 20 cases (Piris 2010). Concerning the roles of the Commission and ECJ, the changes are minor in

the Lisbon Treaty, apart from the ECJ's and Commission's new competences in Justice and Home Affairs that followed from the abolition of the pillar structure.

But there are still serious limitations in the Lisbon Treaty when seen from the point of view of getting 'credible commitments.' In particular, CFSP as well as CSDP remain largely intergovernmental. Unanimity or consensus will persist as the dominant decision mode and member states will continue to be the dominant actors. It remains to be seen how much difference the new HR of the Union for Foreign Affairs and Security Policy will make. The same can be said about the new EEAS, which will assist the HR. To the extent that there is an element of delegation to the HR and EEAS, it seems to be a rather minor. A fuller degree of delegation would have placed the HR and EEAS exclusively in the Commission, as the European Parliament had wanted.

Moravcsik focused on pooling and delegation in his discussion of institutional choice. However, Lisbon involves more than that. The process of empowering the European Parliament has also continued. The co-decision procedure introduced by the Maastricht Treaty for internal market legislation, subsequently extended to other policy areas by the Amsterdam and Nice treaties, has been further expanded. According to Piris, 30 existing legal bases will be switched to co-decision and 14 new legal bases will require co-decision, which is now called "the ordinary legislative procedure" (Piris 2010, 118). This includes the area of freedom, security and justice (AFSJ), as well as agriculture and commercial policy—policy areas long considered too sensitive by the member states for the European Parliament's involvement.

Other institutional innovations include the creation of the 'permanent' presidency of the European Council as well as the position of the aforementioned HR. The latter will be in charge of the EEAS, an emergent foreign policy bureaucracy set up as a hybrid institution.

Theoretical Debates

If we accept the argument that studies of treaty reforms cannot just focus on IGCs and member states but must take a longer view and include other actors (see, for example, Christensen and Reh 2009), we should at least go back to the Treaty of Nice IGC in 2000, the Laeken meeting of the European Council in December 2001 and the European Convention of 2002-03 (see table 2). Extending our study to a decade in the past would show that the weight of different factors and actors has changed over time. The explanatory power of different theories may therefore also

have varied over time. Clearly we would have to study the impact of deliberation in the European Convention, and the roles of MPs and MEPs in the same. The Convention did accept ideas that had been rejected by the member states in the Treaty of Nice negotiations (Beach 2005). Arguably, this would give social constructivist theories some explanatory power. Still, it can be argued that the member states largely remain the 'masters of the treaty' and that, in the end, a new treaty must always be accepted by all the member states. Towards the end, the European Convention did anticipate the IGC that followed and started taking national positions into account (see Laursen 2008, especially chapter 18). Furthermore, in the negotiations for the Reform/Lisbon Treaty, the member states took over as completely as possible.

Table 2: Lisbon as a Decade-Long Process

	Nice IGC 2000	European Convention 2002-03	IGC 2003-04	The Lisbon bargain 2007
Characterization	Tough inter-state bargaining about weights of votes in Council and other institutional issues; Weak French presidency leadership; Origin of post-Nice agenda	Deliberation about a new treaty, more democratic, more efficient; Important roles played by MEPs and MPs	Inter-state bargaining constrained by the choices made by the European Convention; Important Irish presidency leadership	Referendum-avoidance game; Tough inter-state bargaining; Strong, focussed leadership by German presidency
Best theories	Liberal inter-governmentalism and rational choice institutionalism	Social constructivist theories	Liberal inter-governmentalism and rational choice institutionalism	Liberal inter-governmentalism and rational choice institutionalism

Source: Compiled by the author

Obviously, the states are constrained by international developments on one side and domestic developments on the other. As such, they are caught in two-level games (Laursen 2004; Putnam 1988). They must go through negotiations with their international partners and, in the end, the agreement they reach must be ratified back home, most often by the national parliament, but sometimes by the citizens through a referendum.

Many of the treaty reform debates have developed between Andrew Moravcsik and other scholars. According to Moravcsik, states are the main actors, their preferences are material, mostly economic, and institutional design is a rational choice to get 'credible commitments' (Moravcsik 1998).

It seems fair to say that next to the member states there are other actors. The Commission has been involved in IGCs and treaty reforms from the very first reform, the Merger Treaty, in the 1960s (Laursen 2010). The European Parliament, although only more recently associated with the formal process, has also often played at least an agenda-setting role from early on. The roles played by business and non-governmental organisations (NGOs), however, can be more difficult to assess. Some business groups may have played important roles in connection with the internal market plans—and the SEA—and some NGOs may have tried to influence successive reforms, especially during the more open European Convention, but what do their efforts add up to? Moreover, some of these demands are aggregated at the member state level, as Moravcsik would emphasise.

Concerning preferences, I have already suggested that those concerning the functional scope as well as decision procedures can be considered materialist preferences. The former can be explained by functional theories, the latter by some power-oriented realist theories. But political leaders are also driven by ideas. How can we explain the different positions of Jean Monnet and General de Gaulle? They did have very different ideas despite both being French citizens who lived during roughly the same time period. A materialist view of preferences cannot explain these differences. Indeed, identity is a factor, too. Most nations have deep-rooted identities, sometimes split identities.

Finally, concerning institutional design, the 'pooling and delegation' of sovereignty that Moravcsik focuses on can be seen as rational decisions by member states seeking 'credible commitment,' to avoid defection and sub-optimal outcomes. Overcoming 'collective action problems,' the argument goes, requires good institutions. But one can imagine efficient

institutions that are not democratic. As the EC/EU started becoming a political system, where authoritative decisions were made above the member state level, politicians started comparing the emerging European polity with national political systems. The Common Assembly—created by the Treaty of Paris establishing the European Coal and Steel Community (ECSC) in 1951, which subsequently also became the Assembly of the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) in 1957—eventually became the European Parliament. Composed initially of national parliamentarians, it has been directly elected since 1979. Over time, its powers increased—first, it got budgetary powers in the 1970s; later it became a real co-legislator, practically on par with the Council of Ministers. This development continued with the Lisbon Treaty. Rational theories like Moravcsik's liberal intergovernmentalism cannot explain this empowerment of the European Parliament. We need to understand prevailing ideas of legitimate governance. Here, sociological institutionalism has more explanatory power than rational choice theories (see Rittberger 2005).

In connection with the European Convention, a number of political scientists became interested in the Convention method. Many scholars thought—and many politicians hoped—that the greater involvement of different actors, the greater transparency, and a process focused more on good ideas and arguments than power, more on deliberation than bargaining, would have a positive effect on legitimacy in the EU. Moravcsik has argued against such a view, claiming that the premises of this reasoning were dubious (Moravcsik 2006). Given the negative referendum votes in France and the Netherlands—and later in Ireland—it is tempting to agree with Moravcsik.

Table 3: Summary on Explaining Lisbon

Theory	**Central propositions**	**Lisbon in general**	**Lisbon's CFSP**
Realism	Centrality of national interests; International institutions tend to be weak	Cannot explain continued integration in Europe	Helps explain limited change ('logic of diversity')
Liberal intergovernmentalism	Pooling and delegation of sovereignty if sufficient demand	Can explain continued integration, including the expanded use of QMV (efficiency)	Insufficient and diffuse demand explains limited CFSP integration

	from societal actors		
Rational institutionalism	'Community' institutions can help overcome 'collective action' problems	Can explain creation of 'permanent' presidency of European Council (leadership) Can explain increased role of Commission in JHA (leadership)	Can explain creation of HR/VP position (leadership in CFSP)
Sociological institutionalism	Transfers of authority to supranational institutions create a 'democratic deficit' which can be filled by empowering the EP; Interaction within common institutions can create common identities	Can explain extension of co-decision (legitimacy)	Can explain the creation of the EEAS (actor socialisation, learning)

Source: Compiled by the author

So why was the institutional choice for CFSP overallso dismal? Realists will not be surprised. Stanley Hoffmann predicted already in the mid-1960s that a 'logic of diversity' existsin 'high politics' areas. Integration, including 'pooling and delegation of sovereignty' might be possible in 'low politics' areas but when it comes to foreign and security policy member states prefer to stay in full control (Hoffmann 1966). Moravcsik's explanation would be that demand from societal actors for CFSP integration was too limited and diffuse to get politicians to supply that kind of integration.

Short of a full 'communitarization' of CFSP is there any hope of the EU becoming an efficient and coherent international actor? Rationalist institutionalists can point to the creation of the post of HR/VP as an effort to provide leadership to overcome 'collective action' problems in CFSP. And sociological institutionalists may mention the possibility that the new EEAS will lead to actor socialisation of diplomats, including learning processes that will create collective European identities.

Concluding Remarks

Moravcsik has argued that a constitutional settlement or equilibrium has been reached in the EU (Moravcsik 2005). Seeing the relatively modest reforms in the Lisbon Treaty, it can also be tempting to agree with him on that point. However, it has now been decided to have yet another reform, to create a permanent mechanism for enforcing euro zone rules and assisting euro zone countries with financial difficulties. This suggests that the EU is still incomplete or a work in progress (Church and Phinnemore 2010). There will still be demands for change in the future. As problems emerge, political leaders look for solutions. Among interdependent European countries, those solutions will often have to be found at the Union level.

Most likely the reform process will slow down. There is reform fatigue. Leaders want to focus on results, as some of them have announced. But in the end, the member states may not be in full control. As historical institutionalists tell us, there are unanticipated consequences of past decisions and gaps in the member states' control (see Pierson 1996). Structural developments cannot be controlled fully through agency.

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