

# Revisiting the European Convention: the origins of the EP veto over international commercial treaties

Péter Márton

Doctoral School of Political Science, Central European University, Budapest, Hungary

## ABSTRACT

The European Parliament had long tried and failed to gain a substantive role in the Common Commercial Policy. The Treaty of Lisbon brought a breakthrough for the EP by giving it a veto over international trade treaties. The rule change originated at the Constitutional Convention. While it is generally accepted that the Convention was steered by a desire to make the EU more legitimate, it is argued here that the rule change resulted from the complex agency of MEPs that participated at the Convention, who simultaneously appealed to ill-informed national participants' sense of appropriateness and employed obfuscation tactics. The piece also makes a concerted effort to develop process tracing as a transparent and powerful tool for single case research. The evidence used to update our confidence in the causal mechanism is presented and evaluated in a structured manner in the appendix.

## KEYWORDS

European parliament;  
institutional change;  
common commercial policy;  
Convention on the future of  
Europe; process tracing

## Introduction

The European Union's (EU) Common Commercial Policy (CCP) is one of the oldest common policy areas in existence. It has been characterized by a steady process of supranationalization of national competencies and streamlining of procedures based on the expected benefits of speaking with one voice during negotiations *vis-à-vis* third parties. In practice, this has meant empowering the European Commission (EC) to represent the policy consensus reached by Member States (Van den Putte, De Ville, & Orbie, 2015). Whereas the Treaty of Rome gave the EC limited negotiating powers expanding only to the trade in goods, the Treaty of Lisbon (ToL) provides the EC with negotiating powers in all WTO competence areas with the exception of transport (Gstöhl, 2013). The European Parliament (EP) had long been side-lined in the CCP. Breaking with this pattern the ToL gave the EP a veto over trade and investment agreements<sup>1</sup> effectively making it a co-principle of Member States in setting the EU's trading agenda.

This rule change has had far-reaching consequences. Trade negotiations have arguably become more transparent and accountable through the involvement and activism of the EP, as evidenced by recent high-profile negotiations with Canada and the U.S. (Roederer-Rynning & Kallestrup, 2017). And while it has been argued that the EP's increased role in

**CONTACT** Péter Márton  [marton\\_peter@phd.ceu.edu](mailto:marton_peter@phd.ceu.edu)  Doctoral School of Political Science, Central European University, Budapest, Hungary

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the CCP was indeed the result of a desire to balance the efficiency oriented CCP with more direct input legitimacy during the Constitutional Convention (Krajewski, 2013; Van den Putte et al., 2015) there has been limited attention dedicated towards the question of *how* exactly the EP came to obtain its veto power in the first place. To answer the question, this contribution revisits the Convention.

Taking place between 2001 and 2003, the Convention on the Future of Europe was an attempt at reforming the process of formal EU treaty change, ultimately producing a draft Constitutional Treaty which became the basis of the ToL (Barrett, 2008). By creating what was seen to be a more democratic and transparent venue for deliberation European elites sought to induce a constitutional moment in the hopes of spurring public attention and involvement in the affairs of Europe (Allen, 2003; Hoffmann, 2002). In this vein, the Convention consisted of 105 regular and (102) substitute members, who following some initial disputes on their exact status, participated on equal footing with regular members (Schönlau, 2007). The Convention was led by 1 chair, 2 vice-chairs, 56+(56) national parliamentary conventioners (NPC), 28+(28) government representatives (NGC), 16+(16) Members of European Parliament (MEP) and 2+(2) Commissioners (Closa, 2004, p. 192). Work took place in eleven working groups and a plenary chamber which was open to the public. The Convention was a far cry from the closed door deal making characteristic of previous intergovernmental conferences (IGC) resulting in previous treaty modifications.

With such a wide variety of participants, one would *prima facie* expect a wide spectrum of diffuse interests and opinions resulting in a clash of ideas on significant rule changes. Yet, as this contribution finds, there was remarkably little substantive debate on the role of the EP in trade making. Instead, the rule change is best explained by MEPs' complex agency. Participating in the proceedings, MEPs employed a mixture of consequentialist agency (obfuscation and bargaining) and an appeal to the standards of appropriateness set by the Convention venue to successfully push for the veto power, a change the EP had long advocated for. This finding is in line with recent literature that underscores the almost accidental nature of how the EU gained its competence over foreign direct investment at the Convention without participants fully understanding the ramifications of the rule change that was pursued by the Commission (Meunier, 2017).

Beyond employing a middle ground new institutionalist approach to illustrate how structure and agency can be reconciled for more analytical power the piece uses process tracing in a transparent manner in hopes of contributing to the development of this methodology. The remainder of this article is divided into three parts. In the first part, three middle ground expectations are proposed on the interplay between structure and agency during institutional change. In the second part, these are translated into a causal mechanism. In the third part the mechanism is tested against 135 working documents, final reports, participants written contributions and six elite interviews.<sup>2</sup> The contribution concludes with a discussion of the findings.

### **Finding the *aurea mediocritas*: structure and agency**

The new institutionalism and its various brands (Hall & Taylor, 1996) had an explosive effect on EU studies. These lenses of analysis initially focused on providing credible explanations for institutional stability (DiMaggio, 1998; Immergut, 1998). However, in recognition of the fact that institutions change, so did the focus of the new institutionalisms.

In order to better understand the intricacies of institutional change, authors have focused on bridging the ontological and epistemological divide between the different types of lenses to provide more complex explanations to the interplay of structure and agency (Aspinwall & Schneider, 2000; Checkel, 2005; Hay, 2006; Jupille, Caporaso, & Checkel, 2003; Rittberger, 2012; Schmidt, 2010).

If anything, the Convention was an intricate and unique venue for change. It opened the door for a number of previously excluded parties – MEPs, national parliamentarians and the Commission – to influence the process of EU treaty change (Christiansen, 2002). In turn, opening-up the Convention calls for a more nuanced toolkit to understand the interplay of structure and agency that this multitude of actors brought to the process of change. Past attempts to reach some sort of middle ground between the new institutionalism have overwhelmingly focused on reconciling rationalist – consequentialist understandings of agency with a normatively grounded understanding of structure. Historical institutionalism has largely been discounted owing to its ontological confusion and eclecticism (Hay, 2006; Immergut, 2006). I proceed accordingly.

### ***The interplay between agency and structure***

Rational choice institutionalist (RCI) and sociological institutionalist (SI) lenses operate under individualistic / non-individualistic actor assumptions, respectively. RCI approaches accept that collective action problems create institutional lock-ins and structural rules that limit the pursuit of self-interest (Farrell & Héritier, 2007; Héritier, 2007). In turn, SI approaches are in opposition to instrumentalist understandings of norms, yet acknowledge that norms may not be equally relevant under all circumstances for all actors (Checkel, 2005). But how exactly does the institutional setting constrain or enable agency by empowering or excluding norms?

RCI approaches have in the past equated norms with irrationality and non-consequentialist behaviour ordering normatively driven action at a lower level than the pursuit of Pareto-optimizing self-interest, or have regarded irrationality as a calculated bargaining tool (Elster, 1989). Norms have often been understood in a proceduralist fashion seen as standardized practices or customs in repetitive bargaining situations, creating more calculability and stability (Axelrod, 2006; Kreps, 2001) or as tools for practicing ‘rhetorical action’ (Schimmelfennig, 2001). Alternately, it has also been argued that certain actor’s might simply have increased sensitivities to normative arguments (Héritier, 2007). However, such black box understandings of norms seem to miss the point. Social learning has played an undeniable structural role in the evolution of the EU over time (Fligstein & Stone Sweet, 2002). After all, why else would have Member States decided to complement the traditional IGC venue with the Convention if not because of a learning curve that led to the realization that the norm of ‘integration by stealth’ (Majone, 2010) was unsustainable vis-à-vis electorates?

In turn, the main criticism levelled against SI is that its isomorph all-encompassing understandings of structure leave little room for meaningful acts of agency in the pursuit of preferences or indeed change (Hay, 2006; Immergut, 2006). In recognition of these shortcomings, there have been attempts to move beyond both instrumentalism and all-encompassing isomorphism. Relaxed rationality assumptions and thin readings on SI leave room for developing more structural understandings of norms while

maintaining basic assumptions of consequentialist behaviour. Importantly, here consequentialism is not synonymous with individualistic calculus but is rather the notion of agents consequentially pursuing what they perceive to be their best interests (Jupille et al., 2003; Norgaard, 1996).

In this vein it is generally accepted that through external triggers such as ruptures (Norman, 2015), societal interest aggregation (Moravcsik, 1993) or processes of socialization (Checkel, 2005) norms can come to constrain the tools that are available to consequentialist actors during processes of institutional change or can empower certain logics of appropriateness. Given that the Constitutional Convention was created to institutionalize the norm of democratic participation and transparency in formal treaty making, we can justifiably expect this norm to have some structural level effect on participants who are otherwise pursuing their self-interests.

Based on this literature, three rather unproblematic assumptions seem to stand out that fit the limits of both relaxed RCI and thin SI explanations without violating their ontological distinctiveness.

- *Agency requires pre-formulated preferences* – actors taking part in processes of institutional change need to possess pre-formulated preferences in order to meaningfully influence the process of change. These preferences can be individualistic or altruistic.
- *The venue matters* – Both proceduralist and substantive norms will impose limits to actors' preference maximization. Consequentialist behaviour will not unfold in a void, with actors having to take account of the normative environment they are in. The distribution of resources will also limit or enable actors.

By corollary:

- *Preference-maximizing action* – consequentialist behaviour can be expected of any agent with pre-formulated preferences. Given the constraint of the venue, primarily individualistic actors will have to appeal to the substantive norms set by the venue in order to ground their preferences in appropriateness. By extension, primarily altruistic actors will have to be prepared to bargain within the confines of appropriateness seeing that individualistic motivations cannot be ruled out.

Applying these specific expectations to the Convention, we can expect MEPs to pursue their pre-formulated preference of empowering the EP in the CCP in a consequentialist fashion so far as we acknowledge that the EP had consistently tried to gain more of a foothold in the CCP during past treaty modifications (Nicolaidis & Meunier, 2002). MEPs' pursuit of their institutionally defined goals nonetheless should appeal to the appropriateness of the day as set by the Convention venue in order to appear appropriate.

This expectation is based in the social psychology literature on cognitive processing tells us that in cases when an argument is not *prima facie* seen as problematic by individuals, they will be less likely to expend 'attentional and cognitive resources' (Weber, Kopelman, & Messick, 2004, p. 285) on interpreting the argument. Rather, if faced with 'believable conclusion' they will rely on their 'belief biases' (Evans, 2008) such as 'rules of thumb, heuristics, and habit than by deliberate utility-maximization' (Weber et al., 2004, p. 285) in making a decision on the validity of the argument. Lacking cognitive

triggers that would identify issues as problematic, individuals are not likely to argue and will adhere to something akin to a logic of appropriateness or cognitive shortcuts, belief biases.

Let us now turn to process tracing which will be of use in systematically ordering these theoretical and empirical expectations into a coherent causal mechanism.

### **Formulating a causal mechanism**

Causal mechanisms (Beach & Pedersen, 2013) are grounded in the belief that causal conditions (C) trigger an unbroken chain of events that lead to an outcome (O). Each step (S) of a mechanism should be formulated based on the principle of *productive continuity*; steps should deductively follow one another with no logical gaps in-between them. The steps of any given mechanism should be individually necessary but only jointly sufficient for explaining causality between C and O. Here we are seeking to identify the causal conditions and the ensuing mechanism that have resulted in O – the veto. Seeing that there is already ample literature on the Convention and on the roles played by various actors during the proceedings our causal conditions should be, at least in part, informed by this literature.

In this part, three peculiarities of the Convention are identified which can be translated into causal conditions. These allow for the formulation of a plausible causal mechanism (CM) as to why the veto was included. This CM is subsequently broken down into two steps. Expected observable manifestations are developed for these steps. Furthermore, to contribute to the development of process tracing as a methodology the evidence presented to (dis)confirm the CM is summarized and evaluated in the appendix. Evaluation takes place according to the intuitive concepts of ‘uniqueness’ and ‘certainty’ – as elaborated on by (Beach & Pedersen, 2013, Chapter 2).

The process tracing exercise relies on two types of empirical tests to (dis)confirm the CM. In short, ‘hoop tests’ (Van Evera, 1997) are empirical observations with a high degree of certainty but a low degree of uniqueness which are necessary theoretical conditions for a proposed CM to hold water. For instance, if we were to find no evidence of MEPs pursuing their pre-defined preferences our CM would be disconfirmed. A piece of evidence that would have a high degree of uniqueness but a low level of certainty would be considered a ‘smoking-gun’ (*Ibid*) towards (dis)confirming a CM. Table A1 in the Appendix reiterates and structures the evidence used to support the argument of the contribution.

### **Three causal conditions**

The *first causal condition* concerns the Convention as a structurally biased venue favouring European elites over NPCs. From a lack of adequate resources (offices & support staff) to a lack of adequate expertise in many cases, NPC’s were highly reliant on political group meetings that took place throughout the proceedings (Schönlau, 2007). These, however, were dominated by a few charismatic leaders and did not provide unbiased access to information for NPCs (Magnetic, 2004). This point is substantiated by (NPC1) when talking about the difficulties that he and many of his fellow Conventioneers faced in grasping the sheer scale of the exercise, admitting to having a narrow issue focus with his

opinions being overwhelmingly based on the political direction of the chairman of his political group. As Van Hecke (2012) points out, national parliamentarians were dominantly 'socialized' and 'co-opted' (p. 845) by MEPs in their respective political groups becoming reliant on not only their expertise but also their perceptions. The representatives of national governments and the EP did have agendas and were in much better positions to peruse them. Both because of their structural advantages (the Convention took place in the building of the EP and governments could rely on their institutional background) and because of their familiarity with EU jargon and legal texts (Schönlau, 2007). Albeit the EC was represented we can largely discount Commissioners ability to effectively pursue their institutional goals as in many cases they lacked institutional support for their agendas which were often at odds with the Commission's agendas (Beach, 2003). Also, there was a general disposition in the Praesidium – the Convention's governing body – and its Presidency, in particular, to push for more rather than less integration (PRES; Tsebelis & Proksch, 2007). This is the most certain of our conditions as there is no counter argument being presented in the literature (Allen, 2003; Closa, 2004; Magnette & Nicolaidis, 2004).

The *second condition* concerns the institutional agendas of the Member States, the EC and the EP with relation to modifying the institutional framework of the CCP. The EP was the only EU institution which had a clearly developed and stated aim in this regard before the Convention actually started. This was formulated in a 2001 resolution in the run-up to the Convention:

The [EP] Draws attention (...) to the pressing need for it to be more closely involved – as a factor for democratic participation and scrutiny – in the common trade and external economic relations policy, as regards both the framing of policy and the negotiation and conclusion of agreement (European Parliament, 2001).

Taken together with the well-grounded observation that there is a general tendency for most of the constituent political groups within the EP to coalesce around goals of Parliamentary empowerment (Hix, Kreppel, & Noury, 2003) we can be highly certain that the EP had a conscious agenda for changing the CCP.

The *third condition* concerns democratic traditions in European representative democracies where the ratification of external treaties – either to do with trade or other issues – is generally subject to parliamentary scrutiny and approval (Weiler, Haltern, & Mayer, 1995). Looking back at the evolution of the CCP the gradual empowerment of the EC as a negotiator had meant a simultaneous encroachment on these national parliamentary functions. Not fully eliminating their role but transferring more and more areas into the realm of community competence had meant taking more and more decisions on concluding agreements in the Council (Gsthöhl, 2013). Although national constitutional setups differ, this has in many cases meant that national governments could bypass their legislatures with greater ease. Informational gatekeeping and closed-door Council bargaining generally frustrates national legislatures (MacCarthaigh, 2007). Indeed, Crum (2005) argues that the Convention was underpinned by the general notion that the EP should 'step in' to assume responsibility for the democratic functioning of the Union where member state legislatures competences end. Participants of the Convention acted in this spirit endeavouring to make nothing less than a Constitution based on European democratic traditions (PRES).

Following this line of reasoning, we can assume that national parliamentarians would share an understanding, or would hold a belief bias that it is appropriate to have parliamentary scrutiny over executive-led trade negotiation. As such, we should expect NPCs to be sympathetic to arguments advocating for increased EP involvement in the CCP.

The causal conditions can be summarized as:

- **(C1)** The Convention was structurally biased to favour MEPs, Member States, and Commissioners in terms of resource availability and access to information.
- **(C2)** The EP had a – common – organizational level goal of modifying the CCP to include a veto.
- **(C3)** NPC's coming from different national legislatures shared a belief as to the appropriateness of having parliamentary scrutiny over executive powers of trade negotiation.

Taken together, these three empirically observable causal conditions are in line with the middle ground assumptions drawn from the new institutionalist literature on change. At the start of the Convention, MEPs came prepared with pre-formulated preferences while NPCs shared an ingrained bias. The venue itself, enabled MEPs while imposing high barriers to NPC participation. The third theoretical assumption, the consequentialist pursuit of preferences remains unaddressed. Yet the causal conditions allow for the formulation of a plausible causal mechanism to (dis)confirm the third theoretical assumption and explain the puzzling empirical outcome (O):

- **(CM)** *because of resource and informational asymmetries (C1) and a shared sociological foundation amongst NPCs (C3) MEPs were put in a privileged position to pursue the EP's institutional preference of self-empowerment (C2) through agenda setting at the Convention (S1) which they did through (S2) a mixed use of (rationalist) tools and an appeal to national conventioners' sense of appropriateness to reach the inclusion of the veto (O).*

The causal conditions the two steps and the outcome are theoretically and empirically conceptualized in [Table 1](#), and the expected observable manifestations for steps 1 and 2 (S1 and S2) are further developed in [Table 2](#). Observable manifestations are not developed for the causal conditions as we already have a high level of certainty here.

### ***Agenda setting and a mixed bag of tools: unpacking steps 1 and 2 of the mechanism***

As [Table 1](#) shows, the causal mechanism builds on the theoretical insights of the two brands of institutionalisms discussed above and the three causal conditions extrapolated above. As such, the first step of the CM assumes that MEPs, as consequentialist benefit maximizing agents of the EP at the Convention, will represent the EP's pre-stated goal of institutional empowerment. In order to do so they – MEPs as a cohesive group – need to set the agenda of the proceedings and push for the acceptance of the EP's empowerment. We can expect to see MEPs practice bargaining and a reliance on their informational and resource advantages *vis-à-vis* other conventioners.



**Table 1.** Causal Mechanism (CM) Elaborated.

Causal Conditions (C1 + C2) →		S1 →	S2 →	Outcome
<b>Convention's Structural Bias (C1) EP level goal of modifying CCP (C2) existence of a sociological foundation (C3)</b>	<b>Agenda setting entrepreneurship of MEPs.</b>	<b>Mixed use of (rationalist) tools and appeal to national conventioners sense of appropriateness</b>	<b>Inclusion of the veto in the ToL – institutional design paradigm change</b>	
Underlying Theoretical Process				
<b>RCI + SI</b> <ul style="list-style-type: none"> <li>• <b>(C1)</b> rational choice – some actors will have informational and resource advantages over others.</li> <li>• <b>(C2)</b> rational choice – rational actors will try to maximize benefits according to perceived interest</li> <li>• <b>(C3)</b> sociological inst. – unconscious agents will have sociological foundational beliefs on agenda pursued by MEPs.</li> </ul>	<b>RCI</b> <ul style="list-style-type: none"> <li>• Actors with advantages in <b>(C1)</b>, will use these to their advantages to pursue their perceived interests.                             <ul style="list-style-type: none"> <li>◦ Setting the agenda is the first step</li> </ul> </li> </ul>	<b>RCI + SI</b> <ul style="list-style-type: none"> <li>• MEPs exploit power advantages <b>(C1)</b> and appeal to the sociological foundations <b>(C3)</b> shared by the largest group of participants in order to shore up support for the EP's empowerment <b>(C2)</b>.</li> </ul>	<b>RCI</b> <ul style="list-style-type: none"> <li>• Convention includes veto in Draft Constitution.</li> <li>• Veto goes under the radar during subsequent IGCs because of limited resources and imperfect information of participants.</li> <li>• Veto included in the Constitutional Treaty, and subsequently into the ToL</li> </ul>	
Conceptualization of Process				
<ul style="list-style-type: none"> <li>• <b>(C1)</b> NPC: over-reliance on party group policies. Danger of getting 'lost in jargon'.</li> <li>• <b>(C1)</b> MEPs: more familiarity with jargon and EU rules, more capacity to stay informed.</li> <li>• <b>(C2)</b> Perceived interest clearly articulated in EP resolution in 2001.</li> <li>• <b>(C3)</b> Sociological foundation will be activated in NPC's by way of 'rules of thumb, heuristics, and habit' if MEPs agenda is not seen as conflicting.</li> </ul>	<ul style="list-style-type: none"> <li>• MEPs set the agenda to further EP's cause.</li> <li>• No other Convention delegation (EC, Member States or NPCs) have clearly set goal of modifying CCP according to pre-existing perception of what it should be.</li> </ul>	<ul style="list-style-type: none"> <li>• MEPs will employ different tactics to see what will work. Will try to build redundancies based on:</li> <li>• Use of resource and information advantages. – Trying to hide the issue by embedding it in a broader context, not keeping it on the agenda.</li> <li>• Appeal to foundational beliefs should take place through framing the issue in a way that would appeal to 'rules of thumb, heuristics, and habit'.</li> </ul>	<ul style="list-style-type: none"> <li>• Narrow issue focused member state aims / goals at the Rome IGC</li> <li>• Member States' acceptance of the democracy argument with regard to the empowerment of the EP as a general principle</li> </ul>	

However, theory tells us that strands of appropriateness – such as the expectation of having the formal rule-making process and its outcome be reflective of the norms of democratic accountability and transparency – do play a role next to rationalist bargaining. Indeed, the EP is seen to have used appeals to similar appropriateness during previous rounds of formal treaty change, well before the Convention venue made norms such a central consideration (Nicolaidis & Meunier, 2002; Rittberger, 2012). Therefore, it would be unreasonable to expect MEPs to not try to use a mixed bag of tools at the Convention. It is indicative that even the initial framing of the EP's desire to modify the CCP was based



**Table 2.** Operationalization of observable manifestations of S1 and S2 for CM.

Operationalization of observable manifestations	
S1	S2
<ul style="list-style-type: none"> <li>• MEPs will support the goal of empowering the EP in their interventions – no one will speak against it.               <ul style="list-style-type: none"> <li>◦ Institutional roles should trump national roles. MEPs should remain a coherent cohort.</li> </ul> </li> <li>• The proposal to give an explicit veto right to the EP will originate from MEP(s).</li> </ul>	<p><b>Rationalist Tools</b></p> <ul style="list-style-type: none"> <li>• Obfuscation of veto, embedding it in hard to understand jargon</li> <li>• Use of bargaining when legitimacy of veto is called into question</li> </ul> <p><b>Appeal to appropriates</b></p> <ul style="list-style-type: none"> <li>• Presenting (and repeating) syllogisms: democratic control over trade agreements is politically necessary + the EP provides democratic control functions = veto is needed.</li> </ul>

on the EP being an important ‘factor for democratic participation and scrutiny’ (European Parliament, 2001). So, we should expect MEPs to consciously frame an increase in the EP’s powers as a democratizing factor. This, in turn, should activate belief biases in NPCs that as a ‘rule of thumb’ favour Parliamentary control over executive-led trade negotiations. Agenda setting (S1) and (S2) are operationalized in Table 2.

Having grounded the CM in theory and having established the expected observable manifestations, in part 3 I go on to test for the presence of the CM during the Convention. While observable manifestations have only been developed for (S1) and (S2) in Table 2, evidence to further substantiate the presence of the three causal conditions (C1), (C2) and (C3) is also pointed out. This section also touches upon why the EP veto made its way past the two IGCs that were necessary to approve the Constitution and why the veto remained unchanged in the ToL.

### **Complex agency through obfuscation and an appeal to appropriateness**

The Convention was comprised of eleven thematic working groups (WG) and a plenary chamber. The working groups started their work between June and October of 2002. Each group was tasked with producing a final report which would then go on to be debated in plenary before being integrated into the Draft Constitution. This, in turn, was adopted by the Convention in July of 2003. There were three WGs that discussed topics relevant to the institutional structure of the CCP: WGIII on the Legal Personality, WGVII on External Action and WGIX on Simplification. Part 3 takes stock of the proceedings in all three working groups and the relevant plenary sessions.

#### ***Working group III on the legal personality: where shared ideas become apparent***

It was in this working group that the question of modifying the EP’s powers in relation to adopting international trade agreements first came up. Participants overwhelmingly agreed that giving the EP more power was desirable. A closer look at the observable manifestations highlighted in Table 2 lend credibility to the existence of the third causal condition (C3). Conventioneers shared a strand of appropriateness relating to the role of parliamentary involvement in trade policy making.

The initial tone of the discussion in WG III was set by contributions from legal advisors of the Council, Commission and the EP. All three pointed out the practical difficulties associated with having parallel legal personalities for the European Communities and the need for more effectiveness in speaking with once voice vis-à-vis negotiating partners (WG III, 2002b). The EP was only scantily mentioned. The head of the Council's Legal Service referred to the fact that granting legal personality to the EU, would not automatically modify the role of the Parliament in adopting trade agreements (*Ibid*, p. 10). Nonetheless, as soon as the Group discussions started, the German Government Conventioneer suggested granting the EP more involvement in the conclusion of agreements proposing that: 'the Council and, if necessary, the European Parliament, would decide once negotiations had been concluded whether the outcome (...) should be accepted (...)' (WG III, 2002d, p. 2). What the term 'decide' meant was not elaborated upon. The first draft resolution of the WG, however, seemed already to clarify this by asserting that there was a 'need to consult the Parliament' (WG III, 2002c, p. 11), as 'at the political level (...) it seems difficult to justify [the EP's] exclusion' (*Ibid*). Although the draft text also acknowledged that this was 'not directly linked to giving explicit legal personality to the Union' (*Ibid* p.11). No further discussion on the issue took place. The final resolution of the group recommended extending the Consultation procedure to the adoption of international trade agreements (WG III, 2002a).

While MEPs were present in the WG they did not submit written interventions to the issue. The German Government representative's agency, however, is in line with the literature's claim that there was a strong pro-supranationalizing bias amongst the German political elites in general (Kohler-Koch, 1999). Considering how the role of the EP was brought up – with specific reference being made to 'the political level' – and considering that Conventioneers recognized that modifying the rules of EP involvement was not linked to the question of the legal personality lends a great deal of credibility to the existence of (C3). Furthermore, NPCs were rather active on a variety of topics in WG III but did not raise objections to the expanding the EP's involvement. This also provides added confirmation to the argument that NPCs accepted the appropriateness of the belief that the EP should have a stronger role in overseeing international agreements. As (LA) recalls the need for some sort of Parliamentary control over trade was seen to be essential by members of the WG in recognition of the effects of previous rounds of treaty making which had 'reduced or even eliminated' (LA) national parliaments' involvement in the CCP. This was thought to be contrary to the aims of the Convention in proposing rules that would live up to expectations of democratic scrutiny and transparency (PRES) (NGC1).

### ***Working groups VII on external relations and IX on simplification: a use of distinct tools***

A closer examination of the developments in these two working groups reviles how MEPs agency in furthering the common organizational goal of empowerment built on rationalist tools and an appeal to NPCs shared belief of appropriateness (C3). On the one hand, MEPs exploited their resource advantages by embedding the EP veto in a complex jargon-laden rule change in WG IX. On the other hand, MEPs continued to garnish support for the EP veto through appealing to the same logic of appropriateness that became manifest

through discussions in WG III. A closer look at the developments here – through a focus on the observable manifestations highlighted in Table 2 – lend credibility to (S1) and (S2).

In late September of 2002, at the very start of the proceedings in WG VII, in a written contribution German MEP Elmar Brok asserted that: ‘The Council shall conclude agreements, after the assent of the European Parliament has been obtained, when the agreements cover a field for which the co-decision procedure is required for the adoption of internal rules’ (WG VII, 2002b, p. 5). Whereas the final report of WG III suggested consultation and a better flow of information to the EP, Brok’s suggestion of the use of the assent procedure – an up or down vote on a Commission proposal – was a call for a veto right. As such, it was Brok who placed the veto on the agenda. Rosén (2016) suggests that the veto was advocated for by a strong Commission – MEP alliance. While it is certain that the Commission subscribed to the normative foundation of the need to empower the EP (LA), Commissioner Lamy did not support the assent procedure. Speaking in mid-October – following Brok’s proposal he suggested Consultation powers, saying that the EP’s role should be modified ‘as Giuliano Amato’s group [WG III] suggested’<sup>3</sup> (WG VII, 2002c, p. 7). In other words, he called for consultation.

As (NGC1) recalls, the question of increased EP involvement was not a high salience issue during the initial discussions and national parliamentarians were mostly inactive and uninvolved (NPC2). This shows in the discussions leading-up to the first Draft Final Report of the WG VII, which were mostly concerned with the question of global leadership. In this light, it is unsurprising that the document did not make specific mention of the veto calling instead for a single legal personality for the EU in negotiations while underlining that the legal personality: ‘would not necessarily involve changes to the specific arrangements of the procedures’ (WG VII, 2002d, p. 11). Here again, Brok, this time supported by three other MEPs and a national MP, called for two amendments to the text. The first one asking for a drastic expansion of QMV decision making in the Council stating that: ‘QMV should be the norm in the field of external action of the Union, including the whole CFSP, with the unique exception of defence issues (...) the introduction of co-decision for legislative acts and assent for any international agreement’ (WG VII, 2002e, p. 12). The second one asking that the ‘EP assent on any international agreement concluded by the Union, at least for those having legislative or budgetary implications’ (*Ibid*, p. 15). Proposing a practical blanket extension of co-decision to CFSP – which clearly emerged as the most controversial issue of the discussions in WG VII – was bound to be rejected. Sure enough, it did not appear in the second Draft Final Report. Proposing a veto right for agreements entailing legislative or budgetary implications was also a blanket exigency. An extreme position seeing that any international agreement would have at least one of these two implications. This was also dropped from the second Draft Final Report.

However, expanding QMV voting in the council to the CCP and in turn linking co-decision to all areas of QMV and calling for Parliamentary control of treaties based on QMV decision by way of the assent was already being discussed in WG IX on Simplification by the time that Brok proposed these changes (WG IX, 2002b). The discussions in WG IX were steered by individual and group contributions made by Conventioneers at the start of the Convention. This expansion of QMV and its linkage to co-decision and the assent procedure for international agreements was placed on the agenda by Dutch Peoples’ Party (EPP) MEP Maij-Weggen based on an EPP discussion paper (EPP Group, 2002) that was elaborated by EPP MEPs and circulated throughout the Convention by

Brok. Here only the Finnish Government representative in WG IX called for an EP ‘opinion’ in place of the assent procedure. Nonetheless, the final draft remained unmodified. Similarly, in WG VII, only the Finnish and Swedish Government representative raised concerns about expanding the EPs powers to the assent procedure fearing that such a degree of EP involvement would make the EU more protectionist (LA). Nonetheless they ‘did not pursue the argument’ seeing that ‘nobody had valid arguments to contest such [an] alignment (...) of carrying over the principle of equal footing between the Council and EP for legislative matters’ to the CCP (LA). In its final report (WG IX, 2002a) WG IX adopted the Maij-Weggen approach in late November. This effectively provided the EP with the veto it sought as it proposed expanding co-decision to the CCP and required all international agreements relating to co-decision policy areas to be voted on by the EP.

Nonetheless, the Final Report of WG VII stated that: ‘some members pleaded in favour of an EP assent on any international agreement in matters of international trade policy’ (WG VII, 2001, p. 30). This, a narrower wording, made the veto in the case of trade agreements perfectly specific while dropping any reference to co-decision, legislative or budgetary implications. But seeing the developments in WG IX, this plea was effectively made redundant. This is something that Brok and fellow MEPs would undoubtedly have had to be aware of, seeing that the Political Group meetings took place throughout the Convention and that Brok and Maij-Weggen both belonged to the EPP. Nonetheless, led by Brok, MEPs consistently kept pushing for the explicit adaptation of ‘trade’ whenever the question of international agreements came up (WG VII, 2002a, 2002b, 2002e). As such, pushing for specific empowerment in trade agreements by Brok and fellow MEPs despite the proposed rule change already passing into the plenary by way of another WG lends credibility to S2’s claim that MEPs will employ different tactics in an effort to build redundancies. Brok’s constant reference to trade can be interpreted as an appeal to (C3). The degree of success that Brok and supporters had in making the issue of empowering the EP specifically in trade ‘stick’ becomes apparent by looking at what happened during the plenaries.

### **Plenary sessions**

By the time the plenary sessions had started NPCs felt that they could identify more with MEPs than their own government representatives. As (PRES) recalls there was a general feeling amongst NPCs that supporting MEPs and their proposals would make for a more democratic and transparent Draft Constitution. The developments during the Plenary debates highlight this point seeing that National Conventioneers coalesced around MEPs appeal to appropriateness when calling specifically for empowerment in the realm of trade agreements. Together with the fact that the eventual Draft Constitution reflected the proposals of WG IX on Simplification instead of spelling out trade agreements as such lend support to (S2)’s assertion that two sets of tools were employed by MEPs to reach their stated goal of attaining the veto.

It was in the Plenary debates that Conventioneers had an opportunity to discuss the Final Reports of the individual WGs. During the discussions on the final report of WG VII in December (on the 16th and the 20th), no substantive discussion took place on the role of the EP in adopting international agreements. Yet, while the summary of the debate on the 16th mentions *some* members, the summary from the 20th cites *many members* arguing for a larger role for the EP. Based on these debates the Convention

Secretariat proceeded to draft the relevant parts of the Draft Constitution. This was completed by early May. What is extremely telling are the proposals and amendments that Conventioneers tabled to the Draft Constitution following the meeting on the 20th.

The Draft Constitution proposed expanding the legislative procedure to include the 'framework laws required to implement the common commercial policy' (The European Convention Secretariat, 2003, p. 105) in Article 24. Here there was a clear lack of support for a concerted effort by the Swedish and Finnish Conventioneers to take the adoption of framework laws out of the legislative procedure. Only four Conventioneers signalled their support (*Ibid* p.106). However, there was a very clearly observable clustering of European and National Parliamentarians around the explicit exigency to give the EP the right to assent any international trade agreements. Even though article 33 (7) predicated on the Maji-Weggen approach already granted the EP the right to assent to agreements concerning policy where the legislative procedure applied (*Ibid* p. 135). Seeing the lack of support for changing Article 24 (2), the exigency of 61 (!) Conventioneers to include a specific reference to 'trade agreements' seems to carry particular importance (*Ibid* p. 139). Out of these 61 Conventioneers, 20 were MEPs, 39 NPCs while only 2 were representatives of national governments. Out of the 14 amendments tabled to modify 33 (7) – all of which proposed specifically adding 'trade agreements' in addition to 'agreements covering fields to which the legislative procedure applies' – 13 originated from MEPs, while only one was tabled by an NPC. This provides added credibility to the claims that MEPs had a resource advantage over NPCs (C1) and that they pushed for the same goal regardless of party affiliation (C2). Furthermore, the events that took place during the plenaries also support the assertion that MEPs were actively setting the agenda and that they tried hedging by effectively pushing for redundancies in the treaty in order to make sure that the desired institutional rule change would stick.

The notable exceptions here are the two-two NPCs from Finland and Sweden who opted to support the amendments of their government representatives in the effort to modify Article 24. However, two Finnish MEPs were among the 20 MEPs who pushed for adding 'trade agreements' to article 33 in opposition to the national stance. In the end, the Draft Constitution included – what later became Article 218 in the Lisbon Treaty (Consolidated Version) – in Article III-217 that: 'The European Parliament's consent shall be required for (...) agreements covering fields to which the legislative procedure applies.' (European Convention, 2003, p. 174). As such, 'trade agreements' were not separately enumerated as an item, where the assent/consent of the EP would be required. The Maji-Weggen approach that was already present in the Final Report of WG IX turned out to be the one that the Draft Treaty followed. Nonetheless, the conscious push by MEPs pursuing the specific agenda item of trade was by no means irrelevant, as they managed to rally a large amount of support, and practically no opposition towards it. This, in turn, is a highly unique and certain piece of confirmatory evidence towards confirming S2. National parliamentarians support a clear and unmistakable push towards granting the EP the veto because of the effects of (C3): their shared belief in the appropriateness of having parliamentary oversight.

Also, the lack of attention paid to the more legally complex jargon-heavy approach that was in effect elaborated in WG IX can be explained with the resource disparities of national conventioneers and the obfuscation caused by this. Even if any NPCs would have grasped what was being proposed in WGIX the absence of any substantive discussion can at the very least lead us to conclude that the issue was simply not seen to be problematic.

Nonetheless, rallying support behind the call to include trade agreements gave for an easier and more visible platform. The dominance of the institutional roles, as opposed to national allegiances, is also a noteworthy development which lends additional strength to the implicit assumption behind (C3), namely that the EP found a natural ally in disenfranchised national parliamentarians.

### ***IGCs and the member states***

Although the Draft Constitution was rejected by French and Dutch voters in popular referenda the eventual ToL is widely understood to be a demystified version of the Constitution, without the symbolic elements (Barrett, 2008; Piris, 2011). So, in order to answer the question of why the ToL included the veto, we have to ask the question of why Member States approved the Constitutional Treaty in the first place. Following the Convention, the Draft Constitution was out of the hands of the Conventioneers. It had to be ratified by a traditional closed-door IGC at Rome. Hence, there was no more room for Convention participants to actively influence the outcome as a unified body (PRES). At Rome, the Constitution was rejected due to a Spanish and Polish veto. Tsebelis (2005) identifies the debate on how to change the triple majority rules of QMW in the Council as the principle cause here. Héritier (2007) further points out that during the ensuing background discussions on how to salvage the Treaty, it was the EP's increased budgetary powers that were at the centre of concerns of more intergovernmental Member States, not the EPs increased role in ratifying international treaties. These issues persisted in remaining front and centre during the subsequent Brussels IGC in 2004 which ended up adopting the Draft Constitution with significant modifications in the area of QMV voting and curtailing the EP's budgetary rights. Nonetheless, the linkage between the QMV – co-decision and the EP's right to ratify international treaties relating to these policies remained untouched. We need not look far for a plausible explanation for this outcome.

Experience with past IGC has taught us, that these negotiations do not take place under perfect information due to limited resources and time constraints. This was also the case with the Rome and Brussels IGCs which were accompanied by a strong sense of urgency and political pressure (Desmond, 2004). Under such circumstances negotiating parties strive for outcomes that satisfy the concerns of all Member States, dealing with problematic issues once they come up. Yet formal treaty changes are best seen as incomplete contracts (Moravcsik, 1993) insofar as not all contingencies are addressed. The EP's veto right was simply not addressed and its ramifications were not fully comprehended by elites until the rejection of the ACTA agreement in 2012, some 3 years after the ToL took effect (Matthews, 2012). The point is substantiated by (M) who describes the IGC behaviours of Eastern-European members in particular as being focused on singular issues. For instance, in (M)'s home country there were absolutely no discussions about questions of institutional design. The role of the EP or indeed the issue of QMV were not discussed at all on a national level.

### **Conclusion**

The contribution aimed at providing a convincing and plausible explanation as to how the ToL came to empower the EP with a veto right over international trade agreements, against

past practice. The evidence presented here confirms the proposed CM as derived from the literature on institutional change. MEPs acting as consequentialist actors set the agenda of the Convention and resorted to both rationalist tools and an appeal to national parliamentary delegates' sense of appropriateness to reach the EP's organizational level preference.

Firstly, by embedding the EP veto in the complex rule change linking the expansion of QMV to the expansion of co-decision MEPs took advantage of obfuscation that resulted from resource and informational asymmetries that were in their favour. Secondly, by appealing to national Conventioneers' belief that there needed to be parliamentary control over the ratification of international trade agreements MEPs could build significant and credible support for the EP veto in the working groups and the plenary. The fact that there was a parallel push for the same institutional rule change in two distinct venues meets expectations of rational agency insofar as we would expect consequentialist actors to exploit all their comparative advantages to further their agenda.

This piece has accomplished three things. Firstly, the piece has better contextualize how the EP gained a more substantial role in the CCP. Understanding the origins of the EP' empowerment is perhaps even more relevant now than it has been before. Recent controversies around the EU-Canadian (CETA) and the failed EU-U.S. (TTIP) free trade agreements have tested and arguably confirmed the EP's capability to bring more input-legitimacy, accountability and transparency to the CCP making in the face of increased public contestation of trade. Secondly, the findings advance the study of institutional change in Europe by providing an example of how the insights of new institutionalism can be combined in a parsimonious and unproblematic manner for greater analytical purchase. Thirdly, the exercise in process tracing illustrates how this method, which is still often seen to be a buzzword, can be applied in a more rigorous and transparent fashion.

## Notes

1. EP assent was required for the ratification of the Uruguay Round in 1995, however this had no precedent setting value, and was more the manifestation of an inter-institutional competence debate between the Commission and the Council (Kuijper, 1995).
2. With: two national parliamentary delegates (NPC1 and NPC2), a national government delegate (NGC1), a member of the Praesidium (PRES), a senior Commission legal advisor during the proceedings (LA), and a former Member State foreign minister and signatory of the ToL (M).
3. 'J'espère que la Convention saura donner ce nouveau pouvoir au Parlement européen comme le groupe de Giuliano Amato l'a recommandé'(WG VII, 2002b, p. 7).

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## Interviews

- Former member of the Praesidium of the European Convention (PRES), Skype interview conducted in April of 2016.
- Former national parliamentary conventioneer (NPC1), personal interview conducted in April of 2016.
- Former national parliamentary conventioneer (NPC2), email interview conducted in March of 2016.
- Former member state foreign minister and signatory of the Treaty of Lisbon (M), personal interview conducted during April of 2016.
- Former national government conventioneer (NGC1), email interview conducted in June of 2017.
- Senior Commission legal advisor working in the field of the CCP during the Convention (LA), email interview conducted in April of 2016.

## Appendix

**Table A1.** Evaluation of evidence presented to support the CM.

Evaluation of evidence confirming causal mechanism		
Causal Conditions	S1	S2
<p><b>Convention's Structural Bias (C1) EP level goal of modifying CCP (C2) shared appropriateness (C3)</b></p> <p><b>(C1) Convention's Structural Bias</b>  <i>National Parliamentary Conventioneers (NPCs)</i>  <b>(LU/HC):</b> Uncontested assertion of lack of infrastructural support for NPCs in the literature (<i>secondary literature</i>).  <b>(LU/HC):</b> NPCs reliance on political groups for access to information and interpretation of policy questions (<i>secondary literature + corroborated through primary interview data –NPC1</i>).  <b>(LU/HC):</b> NPCs Lack of familiarity and comprehensive understanding of subject matter (<i>secondary literature + corroborated through primary interview data –NPC1</i>).  <i>Members of European Parliament (MEPs)</i>  <b>(LU/HC):</b> Uncontested assertion of MEPs home turf advantage in terms of infrastructural support (<i>Secondary literature</i>)</p> <p><b>(C2) EP level goal of modifying CCP</b>  <b>(LU/HC):</b> Stated organizational level preference: EP Resolution (2001/2022 (INI): '[The EP] Draws attention (...) to the pressing need for it to be more closely involved – as a factor for democratic participation and scrutiny – in the common trade and external economic relations policy, as regards both the framing of policy and the negotiation and conclusion of agreements; takes the view that its involvement is essential now that the national parliaments no longer have any powers in the sphere of EU trade policy;' (<i>primary document analysis</i>).</p> <p><b>(C3) shared appropriateness</b>  <b>(HU/HC):</b> WG III on the Legal Personality agreed that 'at the political level (...) it seems difficult to justify [the EP's] exclusion' (<i>primary document analysis</i>).  <b>(LU/HC):</b> No participants raised objections to the desirability of expanding the EP's involvement in CCP in WG III on the Legal Personality (<i>primary document analysis</i>).</p>	<p><b>Agenda setting entrepreneurship of MEPs</b></p> <p><b>(LU/HC):</b> General tendency for the EP to act as a unified actor when pursuing institutional self-empowerment (<i>secondary literature</i>).  <b>(LU/HC):</b> EPP Convention Group Discussion Paper from 2002 November: '... the conclusion of the agreements shall be decided on by the Council, acting by qualified majority on a proposal from the Commission and with the advice and assent of the European Parliament.' (<i>primary document analysis</i>).  <b>(LU/HC):</b> MEP Elmar Brok puts the EP veto on the agenda in WG VII in proposing an amendment to the WG's draft report: 'The Council shall conclude agreements, after the assent of the European Parliament has been obtained, when the agreements cover a field for which the codecision procedure is required for the adoption of internal rules' (<i>primary document analysis</i>).  <b>(LU/HC):</b> During proceedings in WG VII and IX, not a single MEP raises objection to EP agenda (<i>primary document analysis</i>).  <b>(LU/LC):</b> strong cohesion of MEPs – institutional role most important (<i>primary document analysis + corroborated through primary interview data LA, PRES</i>)</p>	<p><b>Mixed use of (rationalist) tools and appeal to national conventionneers sense of appropriateness</b></p> <p><b>WG IX on Simplification (HU/LC):</b> Framing, content and wording of the proposal of MEP Majj-Weggen conducive to obfuscation of the veto: 'Does the Working Group confirm the approach emerging from the meeting of the Convention on 12 and 13 September, namely to reserve, the assent procedure solely for the conclusion of international agreements (see article 300 (3) of the TEC)? (...) In the EPP Discussion Paper on the Constitution the procedure under article 300 TEC is modified so that it better reflects the institutional balance. This is especially clear with regard to the special committee assisting the Commission during the negotiations. The relating article in the EPP Discussion Paper reads as follows: (...) The Council shall act unanimously and with the advice and assent of the majority of the members of the European Parliament when (...) agreements entailing amendments of an act adopted under the procedure referred to in Article 95 [the codecision procedure]' (WG IX, 2002b, p. 5). (<i>primary document analysis</i>).</p>

**S2 (continued)**

Evaluation of evidence confirming causal mechanism

**Mixed use of (rationalist) tools and appeal to national conventioners sense of appropriateness***WG VII on External Action*

Outcome

**(HU/LC):** Elmar Brok, use of bargaining tactics when proposing extreme position at X, followed by small concessions at X1 and X2 (*primary document analysis*):

- **X:** 'QMV should be the norm in the field of external action of the Union, including the whole CFSP, with the unique exception of defense issues (...) the introduction of co-decision for legislative acts and assent for any international agreements'
- **X1:** 'EP assent on any international agreement concluded by the Union, at least for those having legislative or budgetary implications'
- **X2:** 'Some members pleaded in favor of an EP assent on any international agreement in matters of international trade policy'

**(HU/LC):** Constant referral to EP veto on trade deals in specific, as such appeal to (C2) (*primary document analysis*).**(HU/LC):** Swedish and Finnish Government Conventioneers abandonment of opposition to granting the EP the veto in WG VII in absence of 'a valid argument to contest [the veto]' (*interview with LA*).*Plenary***(LU/HC):** Lack of support for Swedish and Finnish Government Conventioneers proposal to exclude the EP from assenting international commercial agreements.**(HU/LC):** Amendments tabled to Article 33 of the Draft Constitution: 'Extend the requirement for the European Parliament's assent: To trade agreements' which was supported by 61 Conventioneers, 20 of which were MEPs, 39 NPCs and only 2 Government representatives.**(HU/LC):** Remarks of Presidium Member on general dynamics of Conventioneer participation: 'At the end of our works (...) you could draw a line among us, and on the one side you found the representatives of governments, and on the other side representatives of national parliaments and the European parliament [at the start of the proceedings] positions were mostly by country and there was a distance between national parliaments and the representatives of European parliament. But little by little the institutional role became more and more relevant (...) representatives of national parliaments, sympathized more with positions of the members of the EP.' (*interview with PRES*).