

Revising Asymmetry? Specifying the EU-US Open Skies Agreement¹

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1 Introduction

This article first shows empirically that given conflicting actors' preferences over outcomes under consensus rules the initially biased distributive outcomes of a bilateral agreement cannot be corrected in the subsequent ten-year period when the agreement is specified in joint committee meetings at the implementation stage. By contrast, the specification of the treaty in win/win issues can successfully be dealt with. The article secondly investigates the causes of the respective veto-positions of the contracting parties in redistributive issues. Thirdly, it scrutinizes whether across level strategies can overcome the deadlock in the bilateral arena if the issues are brought to the international organisation level. The general argument is subject to a plausibility probe on the basis of the empirical development of the implementation of The Open Skies Agreement between the EU and the US of 2007/10 after its adoption until 2019 as reported in the Minutes of the Joint Committee meetings.

The Open Skies Agreement between the EU and the US of 2007/10 constitutes an important step in the liberalisation of transatlantic civil air services (Woll, 2012). It provides for several new traffic rights for European and American carriers from cities in the EU to cities in the US and vice versa. However, it does not extend the rights of European carriers to acquire American carriers and it does not include cabotage rights for EU carriers in the US.

The OSA also introduced a joint decision committee in which representatives of the EU and the US regularly meet to decide by consensus on questions of competition, safety, security and environmental regulation. For the first time the Open Skies Agreement (OSA) of 2007/10 brought progress as regards the liberalisation of traffic rights, competition issues, security and safety regulations, but leaves a lot to be achieved as regards the liberalisation of ownership and control, cabotage and coordinated environmental regulation.

2 Empirical results

Starting point: OSA 2007/2010

The EU–US Open Skies Agreement of 2007/2010 is an open skies air transport agreement between the European Union (EU) and the United States. For the first time the Open Skies Agreement (OSA) of 2007/10 brought progress as regards the liberalisation of traffic rights, competition issues, security and safety regulations, but leaves a lot to be achieved as regards the liberalisation of ownership and control, cabotage and coordinated environmental issues, in particular noise emissions and CO₂ emissions. The agreement allows airlines of the European Union and airlines of the United States to fly between any point in the European Union and any point in the United States. Because the EU is not treated as a state in the Agreement, the US airlines can fly between two points in the EU as long as that flight is the continuation of a flight that started in the US. Airlines of the European Union by contrast cannot fly between two points in the United States. EU and US airlines can operate all-cargo flights, meaning US

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airlines' all-cargo flights can be operated from one EU country to any other country (including another EU country) and EU airlines' all-cargo flights can operate between the US and any other country, but not within the US. As regards ownership and control, European airlines are not allowed to purchase a controlling stake in a US operator.

OSA also introduced a joint decision committee in which representatives of the EU and the US regularly meet to decide by consensus on questions of market integration, competition, safety, security and environmental regulation.

2.1 Structure of empirical data presentation

In the following we will first present the hypotheses guiding the structuring and the presentation of the empirical data. Then we will discuss the findings emerging from the empirical data in the light of our more elaborated theoretical arguments.

Given that the two involved actors in the negotiation of the treaty specifications have diverse preferences regarding the distributive issue, one party in favour of distribution, the other opposed, and given that they decide on the basis of a consensus rule, the decision-making process outcome represents the status quo policy issue.

H1.1 Rational institutionalist argument: “Redistributive regulatory policy issues lead to a deadlock in the decision-making process, hence to no policy change or status quo policy”

The repeated interaction and the explaining and legitimizing of arguments of the two sides over time induce the respective negotiating partners to make at least some concessions resulting in a compromise as regards the distributive conflicts.

H 1.2 Sociological institutionalist explanation: “If actors in negotiating the specifics of the agreement frequently over a long period of time, redistributive issues will eventually lead to a solution based on converging views.”

If both partners benefit from the proposed policy change, they will agree on the policy change in question. Hence the decision-making outcome under a consensus rule changes the status quo ante of the policy content.

H 1.3 “Win-win regulatory policy issues lead to a change of the policy issue.”

Analysing the causes for the rejection of redistributive claims in the bilateral arena we focus on national political economy explanations.

If a powerful domestic veto player of a formal or de facto nature expects to lose from a particular redistributive issue negotiated in the specification of the bilateral agreement it will oppose a policy change. It therefore exerts de facto pressure on the national government or imposes its formal veto which in turn mandates the representative of the government in the JC negotiations to reject such a redistributive policy change proposed by the other party. The outcome of the decision-making process is the status quo.

H 2 Domestic formal and de facto veto players hypothesis

“If a powerful domestic veto player expects to lose from an agreement in the bilateral negotiation, the decision-process will stall, and the outcome will be a status quo outcome”

To overcome the deadlock situation in the bilateral arena the case of redistributive issues, the partners of the bilateral agreement may deploy strategies across governance levels to influence the decision-making process at the multilateral international level. If an alliance of powerful actors in favour of a redistributive solution can be built in the multilateral context and, assuming the resulting decision in the multilateral context can influence the bilateral agreement actors, and in consequence may induce the previous partner in the bilateral agreement to make concessions in the sense of accepting a redistributive solution.

H 3 Multi-level strategy: Including the multilateral arena

“If a partner to the bilateral agreement builds support for a redistributive solution at the internal multilateral level, a redistributive decision may be taken at the bilateral level”

2.2 Methodology and methods

Our aim is to explain the outcome of policy decisions in a complex multi-level decision-making process. Since we assume that no one mono factorial explanation can account for the decision outcome, we use a multiple factors explanation we use several theories which are specific enough to derive hypotheses to explain the outcomes, i.e. “” partial in a composite modular explanation (Scharpf 1997) theories or more limited causal mechanisms at work” (Scharpf 1997:30) . “Since each causal mechanism is of only limited scope, we have to link various partial theories in a modular construct to account for a complex political phenomenon Scharpf 1997:31) “the links between the partial theories may be established by narratives, or – if possible – again by a partial theory” (Scharpf 1997:30).

In order empirically assess the plausibility of our hypotheses we engage in comparative case analysis for each hypothesis. We vary the value of the explanatory factor and argue that, ceteris paribus, the described causal mechanism will produce the outcome we expect to find. The empirical indicators measuring the values of the independent variable, and expected outcome/dependent variable, as well as measures for the causal mechanisms that we claim lead to the outcomes are specified in table 1.

The data collected are based on the analysis of the minutes of 18 JC meetings 2010-2019. We present empirical information on two redistributive issues: ownership and control and environmental regulation. Focusing on these two issues is of particular importance. They are conditionally linked in the agreement: if the EU makes concessions on environmental regulation (noise/night flight bans), the US in turn promises to make concessions as regards ownership and control and vice versa. In the OSA agreement of 2207/10 an explicit link was established between one party (the EU) making concessions on environmental (night flight) regulation and the other party (the US) making concessions regarding ownership and control (Article 21 para 4 ATA).

We present empirical information regarding the positions of the respective parties with respect to these two redistributive issues and the explanations for why the stances are negative, as collected from the minutes of the negotiations of the JC meeting from 2010 to 2019. We then proceed to the presentation of the outcomes of the negotiations regarding distributive or win/win solution issues and describe the underlying negotiation dynamics of why a progress came about. These issues are concerned with flight safety and security.

Table 1 Empirical indicators

Indep var	Causal mechanisms	Dep. Var. Outcomes
H1 redistr Rational inst. expl <i>(Dis)Confirming Indicators: ownership and control; Night flight bans; CO2 tax</i>	Consensus rule; veto player yes <i>(Dis)Confirming Indicators: Valid decision-making rule</i> <i>Statements US/ EU pro and contra resp issues</i>	<i>No policy change/status quo</i> <i>(Dis)Confirming Indicators: no own continuing night flight bans</i>
H1 redistr <i>Sociological institutionalism</i> <i>(Dis)Confirming Indicators: ownership and control; cabotage EU in US; Night flight bans</i>	frequent meeting of same actors over extended period of time Consensus rule; veto player yes <i>(Dis)Confirming Indicators: Valid decision-making rule</i> <i>Statements US/ EU pro and contra resp issues</i> <i>(Dis)confirming indicators :</i> <i>Number of meetings with same persons</i> <i>Deliberation, arguments giving reasons for why position and why position welfare increasing</i>	<i>(dis)confirming indicators</i> <i>No policy change / policy change</i>
Win/win <i>(Dis)Confirming Indicators: Safety and security issues</i>	Consensus rule. No veto player <i>Confirming Indicators: valid decision rule</i> <i>Statements US/ EU pro and contra resp issues</i>	Policy change <i>(Dis)Confirming Indicators: More security and safety measures...list</i>
H2 Dom. veto players Yes <i>(Dis)Confirming Indicators: associations; Formal veto players: parliaments; courts</i>	Domestic opposition to proposal <i>(Dis)Confirming Indicators: statements parliaments, courts, subnational political actors; associations</i>	<i>No policy change/status quo</i> <i>(Dis) Confirming Indicators: Policies as in original agreement</i> <i>No policy change</i>
No		
H3 launching multilat.str		
Yes <i>(Dis)confirming indicators</i> <i>Requests of EU for redistrib policies ownership and control; night flight ban</i> <i>US requesting opposite</i>	Multilateral Allianceinfluence of multilateral decision <i>(Dis)confirming indicators</i> <i>(un) Supporting statements of other states at ICAO</i> <i>ICAO decisions regarding request</i>	Policy change bilateral level <i>(Dis)confirming indicators: Decision pro;</i> <i>Widening ownership and control in US</i> <i>Widening night flight bans in EU</i>
	No multilateral support	No policy change bilateral level

2.3 Redistributive issue: ownership and control

In the empirical analysis we first turn to the redistributive issue of “*ownership and control*” access of carriers to international capital markets” and assess the plausibility of our hypotheses 1-3 in the light of the empirical evidence provided in the minutes of the JC negotiations 2010-2019. Under ATA Art 21 (b) “additional foreign investment opportunities; provision on ownership and control”. EU law requires that EU carriers be majority owned and effectively controlled by any EU member state. In the US foreign carriers are not allowed to acquire stock of US carriers (Article 21 para 4 ATA).

The delegations in the JC meetings represent the respective interests of the US carriers and EU carriers and the unions of the workers occupied by the carriers. In 2013 the US delegation points out that the US unions are opposed to a liberalization of ownership and control because they expect negative implications for the workers in the aviation industry. They therefore actively lobby Congress which would have to change legislation (of 1929) against a liberalization of ownership and control rights. The EU delegation, by contrast, refers to the importance of Art. 21 of the agreements which stresses that it is essential to remove barriers to airline access to global capital markets. The US delegation reemphasizes that changes in ownership and control of US airlines, as the EU is seeking, remain a sensitive topic and would require Congress to revise US law. They do not expect a change in the US political arena regarding investment policy (JC 12th meeting Jan 2013). In 2014 the two parties continue to disagree (15th JC meeting June 2014). The US restates its position year after year and argues that there is no development on Art. 21 as regards the link between liberalization of ownership and control and that there currently appears to be no political support to change US laws regarding ownership and control of airlines (JC 16th meeting 2015).

By contrast the EU argues with respect to the link between the liberalization of ownership and control of US carriers and the environmental/noise regulation of ATA art 21 para 4, that the conditions of ATA Art 21 para 4 are met in the EU with the adoption of the EU Noise Regulation 598/2014, i.e. that the Commission has the authority under the Regulation to take the appropriate legal action (in case of night flight bans). However, the US argues that in its view the Noise Regulation of 2014 does not trigger Art. 21/4 of the ATA. (21st meeting JC Sept 19th, 2019) (see letter of US 11 April 2018). This position remains unchanged until 2019.

In the light of our *hypotheses 1 and 2* we find here a lack of progress in market liberalization due to a veto position of the US; this veto position is explained on the basis of a political economic process in the US in which unions block the liberalization of ownership and control because they fear that foreign ownership would have implications for the US workforce of the US carriers. Since US legislation (which dates from 1929) would need to be altered for liberalization purposes, the unions with strong links to Congress are able to block such a legislation.

The empirical evidence in the minutes of the JC meeting 2012-2019 also disconfirm the *sociological institutional hypothesis* arguing that a regular and frequent meeting (16 between 2012-2019) delegates through a process of argumentation and persuasion in the light of the interest of all concerned did not produce concessions from either side that allow for a partial solution of the redistributive conflict.

Turning to *H3 international leverage*, it was in particular the EU which made attempts advance its objectives as regards ownership and control by resorting to the international level ICAO and TTIP as well as reaching out to the in EU-US High level working group on Jobs and Growth established in 2011. It proposed that *foreign majority ownership of voting shares* issues should be discussed in the EU-US High level working group on Jobs and Growth established in a summit in 2011, and to include the issue of liberalization of ownership and control in the TTIP negotiations. (11th meeting 2012). The US

disagreed on both issues. As regards TTIP it argued that it does not cover aviation services (11th meeting 2012).

The EU made another attempt in 2014 at the ICAO level referring to Art 51 which emphasizes that it is essential to remove barriers to *airline access to global capital markets*. This strategy failed because of the opposition of the US pointing to internal domestic opposition (H2) to a the necessary change of US legislation. (15th JC meeting June 2014). The EU made another attempt to put the regulation of economic aspects of aviation onto the ICAO agenda in the context of the *ICAO goals of a global framework for the regulation of economic aspects* of aviation. The US position, by contrast, stated that ICAO had a clear role to play in safety, security, and environment, but not necessarily in economic regulation. It also showed concern about the goal of establishing the four principles of fair competition at the ICAO level, pointing out that the discussion in the responsible working group (preparing ICAO meeting in Dubai) had arguably shifted to the definition of a fair competition clause that would be globally accepted; it emphasized that "...If so, an agreement on the text would not be reached any time soon." The EU responded that open and fair competition was very much part of the debate in the EU, "but it was not to impose anything on others. However, the EU thinks that ICAO is the right place to have a discussion on these matters" (17th JC meeting 2015).

In conclusion reaching out to the international level did not bring much leverage to the EU position regarding the liberalization of ownership and control vis-à-vis the US.

2.4 Distributive issue: Environmental regulation

The second very contested issue in the JC negotiations regarding ATA is environmental regulation, more specifically noise regulation. Analysing the negotiations on environmental regulation in ATA we again refer to Hypotheses 1-3 and empirically assess to what extent they are confirmed or disconfirmed by the empirical information on the course of the discussions as reported in the minutes of the JC meetings from 2010-2019. We distinguish the negotiations at the bilateral level EU-US, from the negotiations reaching across levels, the negotiations involving the international level, i.e., ICAO, and negotiations across levels involving as well the interactions with subnational actors in the EU. Empirically we focus on the most salient issue Noise regulation and Nox regulation.

2.4.1 Noise regulation at the bilateral negotiation level

From the very beginning since the conclusion of the agreement the conflict between the US and the EU centred around the wish of the US to reduce night flight bans at EU airports to facilitate around the clock cargo flights of crucial importance for value chain production. The EU during the negotiations sought to contain these demands because it has been under pressure from respective domestic actors concerned about cities suffering from noise emissions.

ATA provides that night flight bans must observe the principle of the so-called "Balanced Approach" defined by ICAO which requires that environmental gains and economic costs of night flight bans should be weighed against each other. ATA also provides that if the US sees this principle infringed upon on the EU side, the Commission can intervene². The conflict around what intervention means centres on the question debated in many JC meetings across the years. To this very day no compromise was found. The Commission interprets intervention as the right to the effect that it can bring national decisions and subnational decisions to impose night flight bans or taxes on noise as a possible infringement of the agreement to the ECJ to decide. The counter-argument of the US delegation is that

² This by itself constitutes which would be a very drastic curtailment of competences of member states vis a vis the Commission.

appealing to the ECJ is not enough to implement the right of the Commission to intervene in such national/subnational decisions.

More in detail the EU delegation states in each JC meeting that the proposed, then adopted noise regulation complies with Art. 15 and 21 of OSA and the ICAO Balanced Approach to Noise Management. The US delegation and criticizes that Barcelona, Paris Charles de Gaulle, Frankfurt, Helsinki and Cologne (11th meeting 2012) and the respective member states introduced new *noise-based operating restrictions* and had not followed the procedure required under ICAO's Balanced approach (11th meeting 2012; JC 12th meeting Jan 2013). The two delegations clearly have differing views on whether the EU Noise Regulation in the EU Airport package in front of EP in 2013 allowed the EU to apply the Balanced Approach of ICAO (JC 12th meeting Jan 2013). The US states that the definition of "marginally compliant" aircraft has no meaning under ICAO principles (JC 12th meeting Jan 2013). The EU delegation by contrast requests that progress on a new noise stringency standard is necessary for any successful attempt to forestall operating restrictions such as night flight bans. The US delegation responds that the US and the EU have different views on what stringency standards mean (JC 12th meeting Jan 2013). The two delegations continue to disagree on the Airport Noise Regulation and its compliance with ICAO balanced procedure (15th meeting JC June 2014),

In 2014, the US reproached the EU delegation that it had heard through the media about a new incentive program to reduce noise emissions at Frankfurt Airport which had recently been implemented and asked the EU delegation to provide more details. The German representative in the JC acknowledged the need for prompt notification of any new noise measures but pointed out that the incentive program had been implemented by the regional Hessen government and not the Federal government. It invited the US delegation to directly contact the German members of the delegation, pointing out that each member state is also a separate signatory to the Agreement. (14th JC session 2014)

The US restates in all subsequent JC meetings that the EU noise regulation does not give the Commission the authority to prevent member states from implementing noise-based operating restrictions, even where the Commission has expressed disapproval of the restrictions in question. It criticizes that restrictions would go into effect and remain in effect until an infringement proceeding is successfully concluded. EU delegation responds that the Commission has the necessary authority under regulation to take appropriate legal action (JC 16th meeting 2015).

The US begins and continues to engage in conflicts with subnational actors in various member states of the agreement. Thus it had an exchange with Norway for imposing an air passenger tax in 2015. Norway responded that the tax was not imposed for environmental reasons, but to balance the national budget, therefore not relevant under Art 15 (2) of ATA. The US also accused Spain for introducing an emission tax that was adopted by Catalonia in 2012. The Spanish government pointed to the competence of Catalonia to introduce such taxes. The case was brought to the ECJ. Similarly, the US accused Sweden of studying whether taxes could reduce the environmental impact of aviation. The same point was brought to the attention of the British government. The UK clarified that emission charges, not taxes, are being imposed at Heathrow Airport by the private company HALtd and US carriers should contact directly the latter (18th JC meeting 2016).

In the ongoing conflict, the US delegation in 2015 continued to criticize the Noise regulation. In Information note 2015 the Commission reacted by stating that the EU Noise regulation 598/2014 satisfies Art 21's conditions. US continues to disagree arguing that Commission does not have the power to prevent measures limiting operations to take effect in the first place. EU responds that appropriate legal action in this context means an infringement proceeding and restates that the Commission does have the authority under the regulation in question to prevent noise-based operating

restrictions from taking effect when appropriate procedures have not been followed. The US responds that the initiation of an infringement proceeding would not be adequate to meet requirement of Art. 21, but that only ‘appropriate’ legal action that would prevent the imposition of noise restrictions that do not follow the balanced approach would constitute an appropriate trigger for the exercise of ‘hard rights’ provided by Art. 21. (17th JC meeting 2016). The EU delegation responds that the EC has the authority to review the processes prior to the imposition of operating restrictions, and if not satisfied to impose appropriate legal action regarding the measure. It also adds that “nowhere in the ATA was it stated that the Commission must have the authority to ‘prevent the imposition of the restrictions in question...and that it had been clear throughout the second stage negotiations that the Commission did not have power under the treaties” (17th JC meeting 2016). Given the difference of opinions between the two delegations, the JC was not in a position to take a decision. (17th JC meeting 2015).

In 2016 the US reiterates its position from previous JC meetings (18th JC meeting 2016) and again criticizes individual national measures such as the Heathrow Airport proposal to impose environmental charges as part of its Noise Action Plan for Heathrow Airport without, as provided by the Balanced Approach, assessing other potential noise mitigation measures. The EU delegation confirmed that new noise related measures should be subject to the balanced approach. But the UK representative insisted that Heathrow Airport is the noisiest airport in Europe and airports may consider any charges that are reasonable, transparent, and just (18th JC meeting 2016). Other ongoing conflicts with individual member states were solved. In the case of Finland, Finland reports that there are consultations on operational restrictions at Helsinki airport after which the Finnish Civil Aviation authority will take a decision. (17th JC meeting 2015). In this case the authority concluded that according to the balanced approach no operating restriction was necessary at present time (18th JC meeting 2016). I

In the conflict with Italy where the US had seven pending lawsuits regarding a regional tax to reduce noise emissions IRESA (Imposte Regionali sulle emissioni sonore degli aeromobili) the EU had to make concessions and Lazio reimbursed part of a noise emission tax paid in excess of ½ euro per maximum take-off weight. (18th JC meeting 2016). As before US and EU continue to disagree on whether the Noise Regulation 598/2014 satisfies or not Art. 21 ATA (19th meeting JC 2016).

The US also reached out to the international /ICAO level (H3) in order to exert pressure on the EU and achieve lower restrictions on emissions at the international level. It argues at ICAO that those applied or proposed by Norway, Spain, Sweden and the UK, and Italy are inconsistent with ICAO policies on taxes and would undermine efforts to develop a global approach to reduce international aviation CO2 emissions (18th JC meeting 2016).

This international leverage strategy (H3) was also applied with respect to NOx emissions where the conflict between the US delegation and subnational actors of member states evolved in much the same way. Thus, the regional government of Catalonia imposed a NOx emissions tax on carriers. The US delegation argued that ATA provides that when a party is considering proposed environmental measures at the national, regional or local level, it should evaluate possible adverse effects on the exercise of rights contained in the ATA. The EU delegation acknowledges that local initiatives in Europe regarding NOx and other pollutants may raise concern for the US (JC 16th meeting 2015). The US delegation restates the concern about the Catalan NOx tax which it finds unreconcilable with provisions of ATA Art. 15.2 and the ICAO resolution on taxes. The proliferation of such local taxes could undermine the ongoing work in ICAO on global measures (17th JC meeting 2015). The EU delegation emphasizes that aviation taxes are a national competence in the EU, but also states that this does not prevent the Commission from taking appropriate action to the ECJ, if EU law is infringed by the mode such taxes are applied (17th JC meeting 2015).

In sum looking at the bilateral negotiation level and the mutual veto positions of the two partners as well as the national political dynamics underlying these veto positions (H1 and H2) we see that on the EU side the individual initiatives of the subnational levels in member states of levying taxes on carriers landing at their airports and imposing night flight bans/noise emissions as well as Nox restrictions (H2) constitute restrictions on the negotiation latitude of EU negotiators. There is no evidence in the data that the EU delegation instrumentalizes these local initiatives on purpose as a bargaining card in the bilateral negotiations, rather clarifies the formal institutional competences to the US delegation as regards local noise and Nox emission regulations. This distribution of competences in the EU is very hard to grasp for the US partners which wrongly assume that the Commission can impose top-down measures on member states and subnational actors. Nevertheless, the EU delegation insists that the mechanism put into place by the ATA agreement, i.e. that the Commission in case of infringement against the balanced approach principle can turn to the ECJ is a sufficient basis to warrant a further step of liberalization in ownership and control which is linked in a twin trigger to the liberalization of EU emission regulation. This, however, by the US is not considered to be enough of a central intervention into member states subnational initiatives, to warrant this step.

2.4.2 Noise regulation at the international negotiation level

As regards H3 leveraging the international level, we find that both parties reach out to the *international ICAO level* in order realize their respective policy objectives. This includes the conflict over the subnational measures. At the ICAO 2016 meeting the US expresses concern about “certain remarks” made at the Assembly of ICAO on operating restrictions at European airports and stresses that these should be taken as a last, not first, resort. The US delegation is concerned about any type of environmental taxes applied to international air services such as those applied or proposed by Norway, Spain, Sweden and the UK. It stresses that it considers them to be inconsistent with ICAO policies on taxes because they would undermine efforts to develop a global approach to reduce international aviation CO₂ emissions at ICAO (18th JC meeting 2016). The EU restates that in its view the balanced approach is firmly embedded in its recent Noise Regulation (19th meeting JC 2016).

To conclude: the empirical data regarding the redistributive environmental issues of noise and Nox regulation show a consistent opposition of the US towards restricting measures at the subnational and national levels in the EU while the EU consistently emphasizes that if these measures of national competence should represent an infringement against the bilateral treaty, the Commission can bring the issue to the ECJ and that it is up to the ECJ to rule on the issue. This option, however, is not considered enough by the US to induce it to liberalize in turn ownership and control, the other contested redistributive issue, which is linked in a trigger-mechanism with noise regulation in ATA. Throughout these years in the course of frequent meetings and discussions we basically find a stalemate in the respective positions. This also shows that the sociological institutionalist expectation (H 1.1) is disconfirmed. The regular discussions and argumentations across ten years did not bring about a convergence of preferences on these redistributive issues.

In the following we will assess the empirical information on the decision making processes and outcomes of win-win issues.

2.5 Win/win regulatory issues

In Hyp 1.3 we claim that “Win-win regulatory policy issues lead to a change of the policy issue.” The underlying causal mechanism is that both partners benefit from the proposed policy change proposal and therefore agree on the policy change in question. Hence the decision-making outcome under a consensus rule changes the status quo ante of the policy content.

Throughout the minutes of the ten years of JC meetings we find confirming evidence that security and safety issues produce many decisions that are shared and appreciated by both partners. In 2010 both delegations stress the value of the enhanced cooperation in security matters. (8th JC meeting 2010). In 2012 they repeat that the cargo security regimes EU and US are considered as equivalent as of June 1, 2012; in the same year the Mutual Recognition of cargo security requirements successfully starts implementation (11th meeting 2012). In 2013 a continuing excellent cooperation is underlined (JC 12th meeting Jan 2013), The satisfactory cooperation in cargo security is stressed year after year (15th JC meeting June 2014) (JC 16th meeting 2015).

Similarly, the delegations express satisfaction with the cooperation in aviation /passenger security. Progress was made by removing restrictions on the carriage of duty-free liquids, aerosols, and gels (LAGs) and replacing them with LAGs screening starting in 2014 (11th meeting 2012). A successful cooperation towards lifting of liquids screening at airports is underlined (JC 12th meeting Jan 2013). A continuing good cooperation was reported in subsequent meetings (15th JC meeting June 2014); (17th JC meeting 2015). The discussion and governing of Aviation security against terrorist threats is considered to function well (JC 16th meeting 2015). Thus, the Personal Name record cooperation is appreciated (11th meeting 2012). Sharing PNR data continues to be noted as an ongoing success in the following years. Some complications emerged regarding to data protection. The U.S. delegation noted concerns regarding other countries now requiring PNR data, due to the requirement by the EU that U.S. carriers may not share PNR data for EU citizens with a third country unless the EU and that third country also have an agreement on protection of personal information. In sum security and safety issues in the last ten years were successfully dealt with at the JC level to the satisfaction of both parties throughout the past 10 years.

3 Theoretical Discussion

Quite expectedly, the asymmetrical outcome of the 2007/2010 OSA negotiations did not lead to harmony, but to important grievances. Most notably, the EU has long regarded the pursuit of certain policies by the US as hindering the attainment of its own goals. And though attempts have been made to re-negotiate the terms of the original agreements, the actors' policies have not become significantly more compatible with each other's goals. The result has been discord.

In this section we first explain the different ways in which the concept of negative externalities sheds light to the nature of the grievances nursed by the two parties. We then consider the three different solutions proposed by international relations theory to overcome the problems created by negative externalities, namely (a) the delegation of powers to a benevolent international organization; (b) the creation of a regime; and (c) bilateral bargaining in the absence of a central authority. Although none of these solutions seems to have been part of the equilibrium path of the game played by the US and the EU, their consideration as counterfactuals allows us to gain a deeper understanding of the equilibrium path that we observe. In particular, the consideration of bilateral bargaining theory leads us to the identification of some potentially important explanatory factors that impede a revision of the OSA regime.

A negative externality is a cost of an action (or a transaction) that is incurred by members of a society but not considered by the party that takes that action (or the parties to the transaction), leading to an over-production of those actions relatively to their socially optimal level. In the case of the transatlantic OSA, 'society' consists of two members, namely the EU and the US. The problem of negative externalities seems to be ubiquitous, for both the EU and the US governments have been complaining about many costs arising from the actions of the other. For example, for each flight between two EU cities by a US airline, the social cost includes the private costs incurred by the US airline plus the costs

to European bystanders affected adversely by such practices – and unable to effectuate similar flights between US cities. Because they do not bear the entirety of the social cost of their actions, US airlines will tend to over-engage in such practices. The equilibrium quantity of intra-EU flights by US airlines will thus be larger than the socially optimal quantity. And, interestingly, that inefficient market equilibrium is due to institutional deficiencies.

The same logic can be applied to the international political marketplace on which the OSA rests. Every time the US government refuses to re-negotiate the OSA, the social cost of that refusal includes the private costs borne by the US government (which may in fact be zero or even negative) plus the costs to the by-standing EU. Thus, whereas a benevolent social planner whose sole goal was to maximize the total surplus derived from that market might only veto some re-negotiations, the US authorities will tend to exercise their veto power too often. Conversely, the social cost of EU regulations on night flights or harmful emissions includes the political costs of imposing such regulations within the EU plus the costs to US by-standing airlines adversely affected by such regulations but unable to exert much political pressure on the Commission. Because it does not bear the entirety of the social cost of its regulations, the Commission will end up producing more than the socially optimal amount of regulations.

The most intuitive way out of such problems of over-provision (of cabotage, vetoes, or regulations) is the delegation of powers to a hierarchically superior, politically neutral authority. A good example might be the delegation of powers by the governments of the EU's member states to the European Commission: when enough governments suffer from negative externalities arising from the actions of another government, they delegate monitoring and/or policy-making powers to the supra-national level (Franchino 2007). A similar "benevolent social planner" in the field of international aviation might be able to alter the incentives faced by each actor, pushing all actors to internalize their negative externalities. A US airline that engaged excessively in cabotage might be imposed a tax that shifted its supply curve upward by the size of the damage done to EU airlines. The US government and the EU Commission could also see their incentives altered in a way that would oblige them to regulate flight times, emissions, ownership and control, and other relevant issues as if they took the external effects of their actions into account.

Promising as that solution sounds, the positive fact of the matter is that no such benevolent international organization has been created in the field of transatlantic aviation. The reason seems rather simple: institutions, like the policies subsequently chosen under them, are not fixed exogenous constraints, but endogenous equilibria (Shepsle 2006). Either all veto players find it preferable to create such an organization, or the proposal does not cut it. Yet, a non-myopic actor who benefits from the status quo will not mistake an institution created to change that status quo for a neutral device. Given the distributive nature of many grievances under the OSA, the current net winner should be suspicious of the corrective policies of a more unbiased international organization – and thus veto it.

Students of international relations have long alluded to a second solution to the negative externalities problem, namely international regimes.³ A regime is a set of explicit or implicit "principles, norms,

³ Like the theory of the delegation of powers to international organizations, the theory of international regimes rests on the analogy between international politics (where the main actors are usually states) and markets (where the main actors are usually business forms). That analogy allows analysts to think of international politics in terms of markets, and thus to use the concepts of transaction cost economics (e.g. Williamson 1996). The main research question in transaction cost economics concerns the boundary of the firm – i.e. the make or buy decision. The principal insight is that, although buying may reduce production costs, it raises transaction costs. Transaction costs include the costs of (a) scanning the market for the best deal; (b) negotiating, drafting and registering contracts; and above all (c) post-contracting haggling costs, such as those arising from the hold-up

rules and decision-making procedures around which actor expectations converge”. Member states show “commitment to rules that constrain immediate, short-term power maximization” (Krasner 1982: 186 and 187). When such a commitment falters, the other members of the regime may enact sanctions, and those sanctions will often end up producing positive results and increased cooperation. Regime-based solutions are thought to be particularly appropriate when the impediment to greater international cooperation comes either from the high transaction costs surrounding legitimate bargains or from great uncertainty, such as information asymmetries or moral hazard (Keohane 1984/2005: 92-96).

Like delegation theory, this popular solution does not seem to have worked in the case at hand either. The OSA of 2007 did establish a regime. Article 18 established a Joint Committee that, if requested by one of the two parties, can meet several times a year. Similarly, according to Article 21.1 of the 2007 OSA:

“The parties share the goal of continuing to open access to markets, and to maximize benefits for consumers, airlines, labor, and communities on both sides of the Atlantic, including the facilitation of investment so as to better reflect the realities of a global aviation industry and the strengthening of the transatlantic transportation system.”

Such articles did not only extend the strategic time-horizon of the two parties in a way that fostered cooperation; they also defined the norms and the rules of the regime, while creating an expectation of more symmetrical rights and duties. At the very least, they created an expectation that the two parties would try to internalize their externalities. Yet, as we discuss above below this did not occur. The “ways in which a regime makes regime-supporting bargains easier to consummate” (Keohane 1984/2005: 100) are just too hard to see here.

Perhaps the least intuitive solution to the negative externalities problem is simple bargaining in the absence of a central authority – i.e. in our case, direct bargaining between the US and the EU. According to the Coase theorem, whatever the initial distribution of rights, as long as property rights are well-defined, information is perfect, and transaction costs are very low, decentralized bargaining can solve the problem of externalities in a Pareto-efficient way. Suppose, for example, that EU emissions regulations causes a negative externality for the US that the EU does not internalize. Should the EU be forced to abandon its policy, or should the US keep suffering from it? A benevolent social planner would compare the benefits the EU gets from the policy to the costs that the US bears from it, and s/he would opt for the solution that maximizes social welfare. According to the Coase theorem, decentralized bargaining between the US and the EU will reach the efficient outcome even in the absence of such a benevolent social planner. The US could simply offer to pay the EU to scrap or at least amend its policy. After some bargaining over the correct price, the US would acknowledge that the price it needs to pay must compensate the EU for the cost of amending its policy. Similarly, the EU would acknowledge that the price it is paid must be lower than the cost currently borne by the US. Hence, the two would strike an agreement that would make at least one of them better off without harming the other one.⁴

problem. The latter occurs when a buying firm adapts to the products of one of its suppliers to such an extent that the supplier then faces an incentive to extract monopolistic rents from it. In order to avoid the foreseeable sucker’s payoff, the buying firm proposes long-term contracting (in international relations, a “regime”), or even a merger (in international relations, the delegation of powers to an international organization or even the “pooling of sovereignties”).

⁴ It is entirely possible that there is no such price: there is no price that the US would be willing to pay and that the EU would accept in exchange for amending its policy. In that case the status quo would be the Pareto-efficient solution.

Of course, as mentioned above there is no such Coasian bargaining in the field of transatlantic aviation. This should not come as a surprise, for the point of the theorem is not so much to argue that, if the assumptions are true, Coasian bargaining will always lead to Pareto-improving outcomes, as to argue that *given that the assumptions are not so rarely true, we should seldom observe Coasian bargaining*. That leaves one important question unanswered: which of the assumptions of the Coase theorem are not true in our case?

For the most part, economists have focused on the unrealistic character of the assumption of perfect information. That makes sense in the analysis of interactions between players who are private businesses or individuals – e.g., radio stations arguing over interferences by one in the broadcasting of the other, or neighbors arguing about smoke created by one's chimney or the other's wall. In those circumstances, it may indeed be near-impossible to verify whether reported size of the alleged nuisance is real or whether it may not be blown up in an effort to extract rents. Yet there are good reasons to expect that information may be less imperfect in the case of international bargaining between two democratic systems such as the EU and the US. The public listing of many of the firms involved, and the close economic, political, diplomatic, and journalistic ties between the two governments make it less likely that one tries to extract undue rents from the other without the other noticing.

Based on the consideration above, we retain two potential explanations, or hypotheses, for the lack of progress in OSA re-negotiations:

1. The EU and the US do not attempt to re-negotiate the OSA because of the important transaction costs associated with such an endeavor. By transaction costs we do not mean so much the costs of negotiating at the level of the JC, as the costs of internal decision-making within the EU and within the US. That is, the cost of bargaining may exceed any potential benefits not so much because of its international element as because of its domestic element. In that case, there should be no attempt to re-negotiate the OSA.
2. The EU and the US do not attempt to re-negotiate the OSA because of the lack of clarity in property rights. By property rights we mean a party's legal right to engage in certain practices, such as the regulation of emissions or of night flights, the regulation (limitation) of foreign ownership and control, etc. Important lack of clarity into a party's property rights may create legal issues that cannot be resolved through Coasian bargaining.

Of course, our discussion above is based on rational choice assumptions. Although we did not go as far as adopting a completely methodologically individualistic position, and although we did not assume perfect rationality, we did assume that collective actors follow a consequentialist (or instrumental) logic of action, as well as that they hold fixed preferences over relatively extended moments in time. Yet it is entirely conceivable to adopt a rather different lens. Wearing the lens of sociological institutionalism, we can choose to de-emphasize the control exerted by national constituencies and leaders over members of the JC and highlight the collective processes that may occur inside the JC and the transatlantic aviation policy community. Seen in that light, the members of the JC are not mere agents of their respective governments with immutable identities and fixed preferences, but (also) actors in a transatlantic social environment that constitutes them. Much like British conservative commissioners at the European Commission used to "go native" and cause Margaret Thatcher many a chagrin, so too can aviation officials start to adapt their original preferences in a way that accommodates the ideas, the arguments, the needs, and the constraints of their transatlantic partners. Indeed, as Grodzky has argued, under certain conditions the Schelling conjecture may be reversed: national negotiators may not only claim at the international negotiating table that domestic constraints tie their hands; they may also argue in front of their home audience that international constraints limit their freedom (Grodzky 2011). Hence,

through sociological institutionalist lenses one would argue that in the course of the regulatory biannual meetings of the representatives of the two parties across a longer period of time due to the intensive discussions over the specifics of the implementation of the bilateral agreement their preferences may eventually converge and redistributive issues and due to the development of shared expertise, even redistributive issues may be solved.

4 Conclusion

The article shows empirically and explains theoretically why asymmetric bargaining results of the Open Skies Agreement of 2007/2010 have not been revised in the course of the subsequent years of the specification of the agreement.

The EU and the US do not attempt to re-negotiate the OSA because of the important transaction costs associated with such an endeavor, in particular the transaction costs of internal decision-making within the EU and within the US where important opposition against a liberalization of ownership and control on the one hand and a liberalization of noise emissions on the other prevent a compromise. That is, the cost of bargaining may exceed any potential benefits not so much because of its international element as because of its domestic element. Importantly, under the agreement progress on these two issues are conditionally linked. An advance on one of the issues triggers an advance on the other issue.

The lack of clarity in property rights regarding the link between these two issues constitutes a formidable obstacle to revising asymmetry. By property rights we mean a party's legal right to engage in certain practices, such as the regulation of emissions or of night flights, the regulation (limitation) of foreign ownership and control, etc. The lack of clarity into a party's property rights creates legal issues that cannot be resolved through Coasian bargaining. This is why the EU and the US do not attempt to re-negotiate the OSA.

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