Open skies, closed markets: Future games in the negotiation of international air transport

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Open skies, closed markets:
Future games in the negotiation of international air transport

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ABSTRACT
How can we explain an international agreement that appears to run counter to the declared objectives of one of the key players? This article examines the US–EU Open Skies agreement signed in 2007 and asks why Europeans accepted the agreement after having rejected a comparable version three years earlier. Theoretical approaches that explain time inconsistency in international negotiations tend to focus on reasons why states can be constrained to accept suboptimal solutions. In multi-level bargaining, principal–agent and bureaucratization theories focus on loss of control and constructivists suggest that governments can become trapped in rhetoric. This article shows that paradoxical agreements can be voluntary and explains them by showing the rationale behind multi-games that include ambiguity about the future. In particular, increasing the flexibility of the agreement allowed negotiators to escape present-day constituent pressures by remaining ambiguous and betting on shifting coalitions.

KEYWORDS
International aviation; European Union; United States; multi-level games; ambiguity; historical institutionalism.

1. INTRODUCTION
In April 2007, the United States (US) and the European Union (EU) concluded a transatlantic open skies agreement set to liberalize air traffic on any route between the two markets. The agreement is not only significant in its scope: what is probably most remarkable is that it has been concluded at all. Indeed, the agreement that went into provisional effect in March 2008
fell short of the one thing the EU negotiators most wanted to achieve: an authentically ‘open aviation area’ that includes greater access to domestic markets. Most importantly, the negotiating mandate granted to the European Commission in 2003 was conditional upon these objectives and member states had sent very strong signals that they would not accept a mere extension of the existing open skies agreements. Stakes were particularly high for the United Kingdom (UK), who contributed the most valued asset to the negotiation table: Heathrow airport. And yet, the European negotiators agreed to liberalize traffic and open up Heathrow to competition without significant concessions from US negotiators. Foreign ownership of American carriers continues to be capped at 25 per cent and it will not be possible for European airlines to operate flights between two points within the US, even though American carriers can choose to serve intra-European routes. With respect to bilateral arrangements, the US–EU Open Skies agreement represents a significant liberalization of traffic rights, but the domestic US market remains as closed to foreign competition as it was before. The 2007 agreement contained a commitment to further negotiations until 2010 and a suspension clause that member states could use if they considered progress to be insufficient. Although cited as an important innovation, this suspension clause was not used and, in fact, eliminated in 2010, even though the US did not change its position during the second-stage negotiations.

How come European transport ministers unanimously accepted what appeared to be an uneven agreement in 2007, after having rejected the original negotiation proposal presented by the European Commission in June 2004 because it was not ambitious enough? Why did the UK, in particular, not make use of its veto right and choose to support the agreement? Put in more theoretical language, how can we explain the signature of an international agreement that falls outside of the declared win-set of one of the two negotiating parties?

In essence, the question is whether this decision is due to voluntary or involuntary time inconsistency of the international negotiators between 2004 and 2007. Did the EU choose to go against what it has previously declared or was it constrained to approve an outcome that it considers suboptimal? The literature on multi-level bargaining provides several potential explanations for agreements that appear to be based on time-inconsistent preferences. A first strand focuses on the loss of control due to delegation and specifies causal mechanisms according to principal–agency theory and bureaucratization theory. A second strand rooted in constructivism highlights the unforeseen consequences of rhetorical commitments. Finally, multi-level game perspectives highlight the complexity of veto points in international negotiations. This article builds on a multi-level game perspective but insists on the importance of time and the conscious use of ambiguity as a strategy to build consensus.
In particular, I argue that the EU and, in particular, UK negotiators chose to sign what appeared to be a suboptimal agreement once they obtained the suspension clause in 2007, because this future option allowed them to introduce a sufficient amount of ambiguity to reassure their domestic stakeholders. Through the insertion of a suspension clause, the 2007 agreement became a win–win strategy for negotiators at all levels: for the Commission, because it helped them to sign some agreement; for the member states with split constituencies, because they could reassure opponents and supporters that their interests would be preserved; and for the hesitant domestic constituents, because the suspension clause was preferable to an inflexible agreement and conferred additional urgency to their demands during later negotiations. Afterwards, the 2007 agreement created new opportunities that enlarged the coalition in support of transatlantic open skies. As a consequence, ambiguity was no longer needed in 2010.

The empirical analysis draws on primary documents and semi-structured interviews with government representatives, airlines, trade associations and other observers in the US and Europe. The following analysis divides into five parts. The second section presents theoretical approaches to changing bargaining positions in apparently stable settings. The empirical discussion begins in the third section with a brief presentation of the stakes that determined the initial negotiating position in the third section. The fourth section then analyzes the transatlantic talks from initial failure on both the EU and the US side to the eventual conclusion of a first- and second-stage agreement. The fifth section returns to the theoretical literature and analyzes the EU negotiation strategy from a perspective of multi-level bargaining. The conclusion discusses the theoretical contribution of the case study.

2. EXPLAINING TIME INCONSISTENCY IN INTERNATIONAL NEGOTIATIONS

When should we expect a party of an international negotiation to agree to something that they have previously refused? Such behavior is particularly puzzling when we have reasons to believe that the underlying preferences of negotiators and their stakeholders are stable over time. For such cases, there are several perspectives that can help to analyze time inconsistencies in international bargaining. A first one focuses on the loss of control due to delegation. A second one is centered on ideology and the constraining effect of rhetorical commitments. To this, I add a third perspective, centered on ambiguity in multi-level bargaining.

**Loss of control**

One could suspect that delegation of external aviation authority from the member states to the European Commission led to a loss of control over the
negotiation outcomes. Theoretically, this possibility has been spelled out by principal–agent theory. To reduce transaction costs, principals decide to delegate authority to an institution, an agent, which will act on their behalf. However, the agent has a different self-interest and private information, which can make it difficult for the principals to monitor the agent’s choices or sanction deviant behavior effectively. This creates room for opportunistic behavior known as ‘shirking’ where the agent pursues her own interests rather than the ones imposed in the initial delegation contract. In addition, the principal–agent relationship might also create perverse incentives that cause the agent to behave contrary to what was initially agreed upon. This second problem is known as ‘slippage’. To avoid these problems, delegation of political authority comes with administrative procedures that define the scope of admissible activity ex ante, and oversight procedures, which allow for ex post monitoring and sanctioning (Calvert et al., 1989; Moe, 1984). Principal–agent analyses of delegation in the EU have underlined the continuous struggle between the supranational institutions and the member states (e.g. Franchino, 2007; Pollack, 1997). Concerning external negotiations, the role and self-interests of the European Commission are particularly relevant. Depending on the issues and the institutional rules that apply the Commission can, indeed, gain autonomy from the member states and pursue its own interest, be it competence expansion, further integration or consumer-orientated liberalization policies (see Dür and Elsig, 2011).

From a more institutionalist perspective, we might also expect such a loss of control due to the increasing bureaucratization of external relations in the EU. Barnett and Finnemore (1999, 2004) use organizational sociology to point to the sources of power that such institutions can obtain far beyond the mandate granted through the delegation of their constituents. This perspective is echoed in neo-functionalist theories of European integration, which also stipulate that member states do not have full authority over supranational institutions (e.g. Fligstein et al., 2001). Although principal–agent theories, bureaucratization approaches and neo-functionalism disagree on many counts, they all suggest that the member states might have lost control over the negotiations led by the European Commission.

**Rhetorical traps**

In the constructivist literature, changing positions without underlying preference changes can occur when negotiators fall into what Frank Schimmelfennig (2001; 2003) has called ‘rhetorical traps’. According to this argument, self-interested actors need to justify their political goals with reference to common values and norms, if they want to gather political support. Arguing, defined as a strategy to defend one’s interests through rhetorical
action, thus needs to appeal to notions of legitimacy and appropriateness (Habermas, 1981; Risse, 2000). The initial use of specific arguments might be purely instrumental, but deviation from a declared value will become more difficult later, because group members can shame the opportunistic actor into compliance with previously declared goals. Especially in communities where reputation is important, rhetorical action can, therefore, become binding for those who initiate it.

In line with this argument, one could suspect that the UK found itself trapped in a liberal discourse after the failure of the 2004 agreement and was afraid of being accused of protectionism. In many internal negotiations in other policy domains, the UK has an interest in making other member states comply with its liberalization objectives, so the costs of opportunistic behavior could have been important.

**Future games in multi-level bargaining**

Both the loss of control explanations and the rhetorical trap hypothesis theorize cases where the party in question is somehow constrained into accepting a suboptimal agreement. Adopting a multi-level game perspective, however, helps to see that negotiators can consciously chose to remain ambiguous about desired outcomes in order to shift coalitions among domestic stakeholders over time.

Multi-level games are staggeringly complex: negotiators have to face their foreign counterparts and pressures from their constituents, as in two-level games, but the constituent interests are aggregated through lower-level governments, who also bargain among themselves (Patterson, 1997). Still, the fundamental dynamics highlighted by Putnam (1988) apply: (1) greater domestic (i.e. lower-level) constraints can be a bargaining advantage, because the win-set that the negotiator can signal to its international bargaining partner is relatively small. (2) However, the smaller the win-set, the greater the risk that negotiations break down, because there might be no overlap between the two partners. (3) Internal divisions of domestic constituents create greater autonomy for international negotiators, because they can choose sides by reference to the international constraints (ibid.: 437–439, 444–445). Moreover, win-sets do not remain fixed over time, especially since the chief negotiators can affect the cost-and-benefit calculations of their constituents (ibid.). Schmidt (2000) has theorized the capacity of the Commission to shift positions in the Council and this also applies to external negotiations (see also Woll 2006).

Whether constituent interests approve of the international bargain or not is signaled through endorsement and ratification procedures. Failed ratification of an agreement that the negotiators had presented to their partners as politically feasible is referred to as ‘involuntary defection’: negotiators cannot delivery on their bargained deal because their constituents did not
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ratify it (see Putnam, 1988: 438–439). Note that this is different from a negotiator who simply refused to come to an international agreement, which constitutes ‘voluntary defection’ in game theory language.

To avoid involuntary defection, negotiators have to employ strategies to strengthen the support of their members, who, in turn, face domestic stakeholders. One such strategy is the introduction of flexibility into international agreements. Introducing exceptions or suspension clauses leads to greater commitment because they help signatories to contract around uncertainty (Koremenos, 2005; Kucik and Reinhardt, 2008; Rosendorff and Milner, 2001). In the following, I will argue that this conclusion is valid not just for ‘true’ uncertainty, but also for cases where the conscious use of ambiguity is central. Ambiguity helps to build coalitions by deferring important decisions to later points in time. If negotiators have reasons to expect that an initial agreement will lead to new conditions that may shift the preferences of domestic stakeholders in the future, such ambiguous agreement can produce change over time in relatively stable settings (Palier, 2005). I will refer to such strategies as future games.

3. THE STAKES OF LIBERALIZING TRANSATLANTIC AVIATION

The US–EU Open Skies talks had a simple objective – liberalization of transatlantic air travel – but complex implications, which combined international, European and national regulatory issues (Havel, 2009; Kassim and Stevens, 2010). To clarify the positions of the negotiating partners, this section gives a brief overview of the most relevant stakes at each level before discussing the origins of the transatlantic negotiations.

A brief history of civil aviation

National regulation of air transport has historically been very tight, because aviation has defense and universal service aspects that governments sought to control. After decades of public ownership, the post-war period saw a move toward the deregulation of domestic markets, starting with the US in 1978 and the UK in the 1980s. At the European level, the Commission seized a European Court of Justice ruling and slowly prepared the basis for EU-wide liberalization with the help of the UK and the Netherlands, who had begun to implement more liberal air transport bilaterally. The European aviation market was integrated through three packages in 1987, 1990 and 1992. European airlines started operating as ‘community carriers’ and traffic within Europe began to resemble the US market from 1997 onward (Holmes and McGowan, 1997; Kassim, 1996; Kassim and Stevens, 2010; O’Reilly and Stone Sweet, 1998; Staniland, 2003).
However, the EU integration package did not include air traffic control or external air transport negotiations, which each member state continued to negotiate on behalf of ‘its’ airlines. The Commission had asked to be granted the competence for external aviation negotiations since 1990, but member states continuously refused for over a decade. And yet, external competences were crucial for the successful integration of the European market, because of the ways in which the domestic and regional frameworks are linked to the international aviation regime.

The international regime for air transport dates back to 1944. The initial post-war order was composed of an intergovernmental International Civil Aviation Organization, a bilateral regime for the exchange of commercial rights and a multilateral price-fixing mechanism. Often referred to as the ‘bilateral regime’, international aviation thus consists of very detailed country-by-country negotiations. The traffic rights negotiated between governments in traditional bilateral air service agreements cover points to be served, routes to be operated, types of traffic to be carried, capacity, tariff conditions, designation of airlines as well as the effective national ownership and control of airlines (Jönsson, 1987; Richards, 1999, 2001; Sochor, 1991).

Starting in the 1970, the US government pushed for change, notably by undermining the price-fixing mechanism and negotiating more liberal bilateral agreements (see Yergin et al., 2000). In the 1990s, this led to the interconnected development of strategic airline alliances and the US policy of ‘open skies’. Beginning in 1992 with Northwest and the Dutch airline KLM, the US government granted antitrust immunity to alliances between foreign and national carriers in exchange for a more liberal intergovernmental agreement. Open skies agreements proved to be hugely attractive for airlines that wished to enter into alliances and governments keen on increasing traffic for consumer benefits. By 2010 well over 100 open skies agreements had been signed, 95 of them with the US.

Despite these attempts to make the international regime less rigid, liberalization only happened within the fundamental bilateral architecture. In particular, agreements continue to stipulate that a government can only designate ‘its own’ airlines. Effective ownership is defined in the US as less than 25 per cent foreign ownership, across the EU as less than 49 per cent. This implies that foreign carriers cannot provide domestic services and only airlines owned and controlled by nationals of the signatory countries can operate within the framework of an open sky agreement.

Transatlantic negotiations

Because of these provisions, several observers have criticized the US open skies policy, arguing that they are biased in favor of American interests. Not all European countries accepted to enter one, because they felt that
they were giving away too much for too little in return. The negotiations between the US and the UK on this matter were particularly difficult. Europeans acknowledged the advantages of the initial open skies agreements, but considered them none the less as ‘the crutch’ of the bilateral system. In particular, they created several advantages for US carriers, due to the fragmentation of the European market. While European carriers can fly to the United States only from their home countries, US carriers can fly from any open skies country in the EU to any US point and can fly from one open skies country to another, which is effectively a form of providing ‘domestic’ flights within the European market. Most importantly, the ownership and control clause prohibits consolidation within Europe, because a transnational merger might not obtain the same traffic rights for its international flights. In the eyes of European observers, the bilateral liberalization championed by the US government was a ‘divide and rule’ strategy (Meunier, 2005: 150–154).

Eager to expand and operate more freely, European airlines began to press for more comprehensive liberalization, in particular with the US in the mid-1990s. Led by airlines from the most liberal countries, such as British Airways (BA), the Association of European Airlines (AEA) proposed a plan for a so-called Transatlantic Common Aviation Area in 1995 (Association of European Airlines, 1995; 1999). The European Commission enthusiastically supported the AEA project, but did not have formal negotiating capacity. In order to press for external competences, it therefore brought cases against the open skies agreements of its member states in 1998. It argued that the nationality clause in these agreements ran counter to the notion of community carriers and that the Community should have exclusive competences over external aviation (see Woll, 2006; Havel, 2009). On 5 November 2002, the European Court of Justice ruled largely in favor of the European Commission, but emphasized that the negotiation of traffic rights with third countries remained in the hands of the member states. The Commission was none the less able to exploit the ruling to give the question real urgency (European Commission, 2002) and the Council of Ministers finally granted an external negotiating mandate for talks with the US on 5 June 2003. The Commission immediately scheduled appointments with the US delegation for the transatlantic negotiation that would last for eleven formal negotiation rounds in Brussels and Washington DC.

4. TIME IN NEGOTIATING TRANSATLANTIC AVIATION

For the US negotiators, the objective was simple: get the existing open skies agreements in line with Community legislation, in particular by modifying the nationality clause in order to accommodate the notion of community carriers. In order to do so, the open skies framework would have to be extended to all member states, including the UK, which would mean opening
up Heathrow to all American and European airlines. The goals of the European negotiators were more ambitious: they pressed for liberalization beyond open skies by establishing a transatlantic ‘open aviation area’, where both markets would be opened up to carriers from the trading partner, even for intra-European and US domestic traffic. In particular, they argued that airlines should be allowed to establish a new carrier in the US market (‘right of establishment’), which meant reducing the restrictions on foreign ownership, and that non-US carriers should be allowed to provide domestic services (‘cabotage’). The following section shows how the involuntary defections of the EU and the US negotiators made an agreement within the stated goals of both parties impossible and demonstrates how tightly member states controlled the EU negotiators. Understanding the final outcome, therefore, necessitates studying why the UK voluntarily signed on to what they had previously called an unacceptable agreement.

The reduction of the EU win-set

In the initial rounds, the European Commission’s negotiating team, led by the Directorate General for Transport and Energy under Commissioner Loyola de Palacio, with Michel Ayral as the chair of the EC delegation, had to learn how to interact not only with the US, but also with the member states and its stakeholders. Member states followed the EC negotiating team closely through a Special Committee. Although the member states had granted the negotiating mandate to the Commission, they continued to be concerned about the consequences of this decision and repeatedly underlined that the mandate was conditional upon the added value that the Commission had yet to prove.

But the EC delegation also realized in the first two negotiation rounds how difficult it would be to make the US move towards the liberalization of their domestic market. The US was not a demanding party and uninterested in the European open aviation proposal. In his opening speech, US chief negotiator John Byerly from the US State Department declared jokingly that the EU should not consider the US ‘as the next member state’ to join the internal European aviation area (Buyck, 2004). Instead, the US was keen on finding a community designation clause and willing to accept several scenarios, going from either a comprehensive open skies agreement or a Eurozone policy with 11 open skies countries on the one hand and the remaining four on the other.

Concerning the right of establishment and cabotage, the US government was firm: only US airlines can fly domestic routes. Increasing foreign ownership limits for voting stock from 25 per cent to 49 per cent would require congressional approval. The chances that it would pass this scrutiny were minimal. The airline unions were opposed to increased competition and Congress was very concerned about security issues after the 9/11 attacks.
and the potential bankruptcy of several US carriers. Attempts to bypass the requirement by slight changes in the proposal were unsuccessful. US Secretary of Transportation Norman Mineta (cited in Knight, 2004) explained how difficult negotiations were with Commissioner Loyola de Palacio: “She said, “What about doing it this way?” and I said, “No, Loyola, that’s cabotage”. Then she said, “What about doing it that way then?” and I said “No, Loyola, that’s still cabotage”.

Despite the lack of progress, negotiators were eager to come to a conclusion in 2004. In the fall, the US would hold elections and the term of the Prodi Commission was going to end. Each side wanted to present a successful agreement beforehand. Stressing the advances that have been made, the Commission presented a proposal to the European Transport Council in June 2004. Upon reading its details, the UK government made clear that it considered the proposal to be a totally unacceptable deal. They criticized that it did not include any objectives of the open aviation area and merely extended the open skies format. The UK government rallied the other member states for support. A representative of the UK government remembers:

Many were very angry and frustrated with us, because they felt that we had single-handedly stalled the negotiations. We only learned after the fact that the European Commission had told their US counterparts that this was an acceptable deal and that the member states would just agree to it. This was absolutely not true."

On 11 June 2004, the European Transport Council refused to accept the proposed deal (Council of the European Union, 2004). In the theoretical language of principal–agent theory, the European Commission had attempted to gain autonomy from the member states in order to conclude an agreement in 2004, but member states reaffirmed their authority and withdrew their support. This involuntary defection experienced by the European negotiators in 2004 signaled that the European win-set was not as large as they had initially communicated to the US negotiators. Only an aviation agreement that would provide a more ambitious plan for leveling the transatlantic playing field was going to be acceptable to the member states and, in particular, the UK in exchange for opening up its London airports.

The reduction of the US win-set

The message that came out of the June 2004 débâcle was that Europeans were unwilling to accept a deal that did not make headway on foreign ownership and cabotage. The Commission also realized that it had to involve the member states more closely to avoid repeating such an awkward situation (Delreux, 2011). The new head negotiator, Daniel Calleja, working under Commissioner for Transport and Energy Jacques Barrot who took
office in fall 2004, tried his utmost to consult closely with member-state representatives and to communicate on the stakes on both sides and the most realistic expectations. According to member-state representatives, this greatly increased their confidence in the Commission officials and most refer to the relationship in terms of ‘before and after June 2004’.

Although they might not do away with restrictions in the US market altogether, Europeans wanted to move at least the limit of voting stock in US carriers up to 49 per cent, which corresponded to their own external boundary. When negotiations recommenced in the fall of 2005, the US Department of Transportation (DOT) suggested an alternative procedure that would avoid statutory change. It proposed to interpret administratively what constitutes the ‘actual control’ of airlines, which would give it some room to open up to foreign investment and control (see Havel, 2009: 155–162). Based upon this declaration of intent, the Commission and the member states signaled that they would accept such an agreement. On 18 November 2005, the US and the EU came to a new agreement that the Council of Ministers ratified in December 2005, conditional upon congressional approval of DOT’s Notice of Proposed Rulemaking, to be examined in 2006.

US negotiators John Byerly from the State Department and Jeffrey Shane, Under Secretary for Policy in the Department of Transportation, went to a series of hearings before the House and the Senate in 2006 and urged Congress not to block the proposed rulemaking procedure. But unions continued to be fiercely opposed to any change in foreign investment that might alter competition in their domestic market and lobbied heavily. In February 2006, Dubai Ports World, a state-owned company from the United Arab Emirates, proposed buying six major US seaports. The issue quickly turned into a major debate about national security, which eventually precluded the deal and made foreign investment one of the most difficult issues at the time. Although most American carriers were interested in more access to foreign capital, some were not, which weakened the supporters.

Right around the most important hearings, an anonymous campaign began, where unsigned documents circulated in Congress. One of the most controversial ones suggested, ‘the Department of Transportation is handing over the keys to American cockpits to terrorists’. At a hearing in front of the US Senate Subcommittee on Aviation on 9 May 2006, Chairman James Oberstar referred to the Notice on Proposed Rulemaking as ‘one of the most important aviation policy decisions since de-regulation was enacted in 1978’ and argued that it ‘would trade away the crown jewel of American transportation – our nation’s airlines – at their most vulnerable moment, to their foreign competitors’ (Oberstar, 2006). One observer describes the emotionally charged exchange as ‘one of the scariest hearings’ she ever went to and summarizes,
It all came together: the union opposition, the Dubai Ports issue, the smear campaign. Then Senator [Ted] Stevens stood up and said: ‘I cannot support this on the grounds of national security.’ That’s when we knew we had lost the Senate. We knew we did not have the House, but that’s when we knew we had lost the Senate as well.14

On 5 December 2006, the Department of Transport withdrew the Notice on Proposed Rulemaking it had issued in November 2005 and amended in May 2006 (US Department of Transport, 2006). In its December session, the Council of Ministers expressed its ‘deep disappointment’ (Council of the European Union, 2006). With two involuntary defections, one from the EU negotiators in June 2004 and one from the US negotiators in December 2006, no bargaining solutions remained that would appear to please both sides. A great number of observers feared that this second breakdown would bring the negotiations to a definite stand-still.

Ambiguity about the future

Still, negotiators were not willing to let go and resumed talks quickly to determine the remaining common ground. Since the beginning of negotiations, it had been foreseen that full transatlantic liberalization might take several steps, so they focused on finding a first-step agreement that was acceptable to all. During intense and often bilateral discussion, the Commission and the UK developed a solution that allowed deferring the most ambitious requests to a second stage of negotiations: a roll-back clause. If no further progress could be obtained during the second stage, each party could withdraw the rights granted in the first-stage agreement. Importantly, EU member states could also decide individually to suspend rights, which gave the UK the possibility to shut Heathrow back down after a review period fixed between 2010 and 2011.15

In only three months, US and EU negotiators furthermore agreed on a list of points. European carriers can establish US subsidiaries, which can carry domestic traffic if they meet a number of stringent requirements, and it will be easier to buy up to 100 per cent of non-voting shares in US airlines. Inversely, and out of principle, it will be more difficult for American airlines to invest in European carriers, since negotiators agreed on a reciprocal 25 per cent limit on foreign voting stock (EurActiv, 2007). European airlines obtained the right to wet-lease and gained some access to the Fly America program, which controls the designation of carriers for transport funded by the US government. Finally, the agreement foresaw closer co-operation on competition policy and stipulated the mutual recognition of security systems. With these new items and the safeguards negotiated with the Commission, the UK signaled that it would accept a first-stage agreement, even if it did not include changes in foreign ownership in the US.
This came as a relief to several other member states who were very eager to see an agreement signed, in particular those that did not yet have an open skies agreement with the US, most notably Ireland and Spain. Germany, one of the big three who dominated the internal negotiations, held the EU Presidency in early 2007 and wanted to finalize negotiations so that they could be presented at the US–EU Summit in April. Moreover, the EU Commission continuously reminded member states that it had suspended infringement proceedings against the bilateral agreements of the member states, which it would not hesitate to follow up on if no agreement was signed. With this selection of carrots and sticks and as a result of the close co-operation with member states, the Commission obtained a consensus: it proposed a first-stage agreement, which was approved by the Transport Council in March 2007.

The US–EU Open Skies agreement was formally signed on 30 April 2007 and entered into force a year later. With two EU enlargements, the list of final signatories had grown to 27 member states. Eleven member states did not have open skies previously and thus obtained it with the signing of the agreement. At London’s Heathrow Airport, five new airlines began offering services – Air France, Continental, Delta, Northwest and US Airways – and at least five additional US destinations will be linked by direct flights to Heathrow (US Department of State, 2008). Profiting from the right to fly from new European locations to the US, British Airways set up a new transatlantic carrier to operate first class flights between Paris and New York. In a rare mix of marketing and governmental affairs, it decided to name its airline ‘OpenSkies’ to remind regulators how eager they are to see further US concessions and to create a sense of urgency for continued negotiations.

Indeed, British Airways was highly critical of the first-stage agreement. British Airways’ CEO Willie Walsh complained that the Commission had ‘thrown away the kitchen sink without getting anything in return’ (EurActiv, 2009). Together with Virgin, the two traditional Heathrow carriers complained bitterly about the agreement and criticized the UK government for its bad judgement. Both airlines insisted that suspending the rights if no progress is made during the second stage is imperative. The UK government was well aware that it would earn this criticism from the Heathrow carriers, which is why the suspension clause is so crucial. As an observer explains, ‘BA and Virgin have historically called the shots: they thought that by making a lot of noise, they would be able to kill the proposal’. A representative of the government confirms that ‘the UK government had different voices whispering in their ear – well in the case of BA, I should say shouting in their ear’. In fact, the most important effect of the roll-back option is not towards the US for the UK government, it is towards its own constituents. Through the possibility to suspend the agreement the UK government could make a commitment that was
sufficiently vague to be acceptable to everybody. The UK government itself had competing opinions on the first-stage agreement: while the transport authorities and the Department of Transportation were critical of the lack of reciprocity, the Treasury Department was very interested in the consumer benefits. In the end, Alistair Darling, then UK Transport Secretary, concluded that it was not a great deal, but it was the best that was on the table.

For the UK government, the suspension clause was thus a way to remain ambiguous in the present and to buy time in order to see if domestic opposition would shift in the future. In particular, both opposed airlines had stakes that were likely to lead to shifting preferences. British Airways had applied for the recognition of its alliance with American Airlines, which would be costly for them to lose if the open skies rights were suspended in the future. Virgin had invested in Virgin America and, although its CEO Richard Branson would like to see further liberalization of the US market, he was also aware of the costs a full suspension of the US–EU Open Skies might have on these operations. In addition, the distribution of political support from other stakeholders is affected by the signing of the agreement. Consumer groups and airlines that have benefited from the agreement, such as British Midlands, would be hurt by a suspension of rights in ways that would be much more visible than prior to the agreement. All in all, the UK government had good reasons to believe that a suboptimal agreement with a suspension clause served its interests well: its open-ended nature allowed all domestic stakeholders to acquiesce to it in 2007 and its aggregate effect on individual domestic preferences were likely to work in support of the agreement in the future.

Reducing ambiguity in the second-stage agreement

Arguing that the UK government together with the European Commission chose to remain consciously ambiguous and to defer decisions to the future requires showing that they were aware of what they were doing. If not, one might simply counter that the change over time is due to a shift in the UK position between 2004 and 2007. It is notoriously difficult to ‘prove’ negotiation strategies, but the following section analyzes interview material and then turns to the second-stage negotiations to illustrate the validity of the assumption that the intention to roll-back the agreement was minimal. Indeed, there was little progress on ownership during seven rounds of further talks between 2008 and 2010, but the EU and the US none the less signed a second-stage agreement on 25 March 2010. This second-stage agreement ended the validity of the suspension clause and was said to fulfil the initial mandate. Why did the UK not invoke the suspension clause to stop the outcome they had declared as inacceptable in 2004 and 2007?
To begin with, most participants concur that the threat to roll-back the 2007 agreement was never a serious one. A Commission official summarizes,

"The roll-back provision was inserted somewhat at the last minute to reassure everybody on the EU side. [But] it will be very difficult for the UK to go back on the previous compromise, because it will begin to have very real effects."¹⁹

Others put it more bluntly: ‘Does anybody tell you it is a credible threat? No, it is ineffective. The costs [are too high]’²⁰ A US negotiator even states, ‘The clause was important to get the UK to accept the deal [because of the opposition of BA and Virgin]. The UK decided to roll these two carriers, frankly, and was able to do that with that clause’.²¹

Of course, UK negotiators might have genuinely hoped that the US changed its position, but they were also realistic about such prospects. The US had signaled clearly that there would simply be no agreement on cabotage and it was clear that Congress would not move on ownership and control. A UK government representative remembers,

"During our meeting in September 2008, the US opened the discussion and fired a series of questions at us. ‘Do you really need cabotage?’ The answer is no. On ownership and control, they proposed a gradual approach instead of an all or nothing approach. ‘How about the right of establishment instead of ownership and control?’ We did not have the answer, so we simply signaled that we would get back to them."²²

During the seven negotiation rounds that followed, the US and the EU advanced on regulatory co-operation, in particular on environmental matters, labor rights, security and joint monitoring. In addition, the US expanded the access of EU carriers to the Fly America program (United States and the European Community, 2010). On traffic rights and ownership and control, all commitments were conditional upon legislative change, and thus put off into the future.

As late as February 2010, a cable informed the US government that the UK was unsatisfied with the lack of commitment on ownership and control. Citing two UK officials, the cable stressed that the UK Department of Transport had gone ‘out on a limb when they pushed [the government] to agree to open Heathrow Airport’ and that they did so with the ‘understanding that the US would make concessions on ownership and control in the second stage’. Moreover, ‘political pressure to renegotiate the entire agreement was mounting in both houses of the British parliament’. However, the cable concluded that this UK stance ‘was expected’ and ‘is virtually the only card they can play’ (Anonymous, 2010).

Only a month later, the UK consented to the second-stage agreement that was approved by the Council on 24 June 2010. The European Commission
hailed the agreement as the ‘balanced agreement’ that responded to the mandate granted by the member states in 2008 (European Commission, 2010). Indeed, the agreement insisted on the need for further liberalization, but did not add a precise timetable. The European Parliament regretted this lack of progress and took until March 2011 to grant its consent, underlining that one of the main benefits of the agreement was avoiding the risk that someone might trigger the suspension clause (European Parliament, 2011). This did not keep representatives from the international airline industry associations from expressing how disappointed they were to see merely a process toward reform ‘without any deadline or commitment’ (EurActiv, 2010).

The second-stage agreement thus confirmed the conclusions of the first-stage agreement and concentrated on further regulatory co-operation rather than the opening up of domestic markets. At the same time, it eliminated the ambiguity of the 2007 agreement by deleting the roll-back option entirely. As observers had expected early on, this did not lead the UK to trigger the suspension clause in order to block the 2010 agreement. Rather, the behavior of the UK government and its main stakeholders indicates that negotiations evolved mostly as planned. Even in the absence of substantive changes in the US position, the UK government had been able to rally its main domestic opponents – BA and Virgin – behind the agreement through the changes induced by the 2007 agreement. BA had begun to successfully operate its OpenSkies airline between Paris and New York, the Oneworld alliance between BA and American Airlines was granted anti-trust immunity in February 2010, and Virgin benefitted from several Open Skies conditions for operating its subsidiary Virgin America. The ambiguity kept up in the first-stage agreement had thus become unnecessary and the suspension clause could be eliminated.

5. AMBIGUITY IN MULTI-LEVEL GAMES

As the empirical discussion demonstrates, it is difficult to argue that the UK was constrained to accept a suboptimal agreement. Neither loss of control nor rhetorical entrapment seems to capture adequately how the internal negotiations in the EU evolved between 2004 and 2007.

With respect to the hypotheses of principal–agency theory, we find evidence that administrative procedures and oversight was particularly tight (cf. De Bièvre and Dür, 2005). Not only were the negotiations bound by a unanimity requirement for the mandate and the ratification, the negotiating mandate granted by the member states in June 2003 was also issue-specific – concerning only the negotiations with the US – and could thus easily be revoked. The involuntary defection of 2004 proved the efficiency of these mechanisms and obliged the Commission to work with, not
against, the member states. We can, therefore, not attribute the 2007 agree-
ment to shirking on behalf of the Commission, nor to the bureaucratization 
of external negotiations, since the stakes remained intergovernmental and 
salience was consistently high.

Ideology and by consequence the possibility for rhetorical entrapment 
also played a minor role. To begin with, the UK had a reputation for protec-
tionism in international aviation ever since the signature of the Bermuda II 
agreement, and was not very concerned about the effects of aviation talks 
on other EU policy debates. From the very beginning, the UK government 
has argued that it needed to protect Heathrow airport in order to press the 
US government for more complete liberalization. Protection was never up-
held as an end in itself, it was an instrument to achieve reciprocity in order 
to advance on further liberalization. This meant that there was no logical 
 inconsistency between the UK position and its calls for liberalization more 
generally. Put differently, the UK could afford to be highly pragmatic about 
its own self-interests throughout the talks, because there was no rhetorical 
trap that could be used against it.

The key to understanding the paradoxical signature of the 2007 agree-
ment lies in the way the different negotiations – transatlantic, European, 
domestic – were linked. If one considers the negotiation spatially, the 
US–EU Open Skies agreement is only surprising if one examines the in-
ternational level in isolation. Once we consider the European and the 
domestic level as well, it becomes clear that the suspension clause had a 
crucial effect on the potential win-sets on the EU side. Causally, this is due 
to the ambiguity the suspension clause granted the UK negotiators and 
they way it allowed them to shift coalitions over time.

Figure 1 represents only the international negotiations spatially on an 
axis from restrictive regulation (left) to greater liberalization (right). It in-
dicates the status quo (SQ) and the negotiating positions of the US and the 
EU. The final agreement is marked with an X. The preference ranking of 
the US negotiators is US > SQ > EU, for the EU it is EU > SQ > US. In other 
words, the axis does not correspond to a transient preference ordering, be-
cause the distribution of costs can vary for each stakeholder. Although the

(1) International Level

SQ  X  US

US win-set after 2006

EU

EU win-set after 2004

Figure 1  No possible overlap after the involuntary defections.
final agreement is closer to the EU win-set than the status quo, it is less attractive than either the status quo or complete liberalization, because it disproportionately favors US stakeholders and thus implies adjustment costs for European airlines. Situating the positions of the different stakeholder on an axis none the less helps to clarify the potential overlap of the respective win-sets.

In the initial phases of negotiation, one could have imagined a potential overlap of the EU and the US win-set somewhere in the middle. After the involuntary defection of the EU in 2004 and the US in 2006, however, it became clear that this overlap did not exist. If we only consider the international level, the agreement X is irrational for the EU.

However, the European position was in turn composed of two additional lower levels, with member states facing a diverse set of interests. For the sake of simplicity, figure 2 focuses on the European Commission (EC) and the UK. Other member states (MS) held positions which spread relatively evenly across the spectrum. The Commission preferred any agreement over the status quo, whereas the UK was willing to accept only an ambitious agreement or the status quo.

The UK preference, in turn, is the result of its own constituent interests and, in particular, the intense lobbying of BA and Virgin Atlantic, who sought to protect their privileged positions at Heathrow airport. However, competitors such as British Midlands (BMI) had a different position and were also willing to accept a less ambitious agreement, if it might allow them to obtain slots at Heathrow. Consumers could furthermore benefit from increased competition in the UK, if it brought a reduction in transatlantic airfares. During the talks, pressure from consumers and other potential competitors (CC) were weaker than those from the

![Figure 2 European and domestic UK win-sets in 2004.](image-url)
Heathrow carriers, so the UK position at level (2) reflected the ambitious position of its big carriers. As one can see, the final agreement X is clearly outside the declared win-set of the UK government. One would, therefore, expect the UK government to veto the 2007 proposal as they did in 2004.

However, the first-stage agreement submitted to the European Transport Council for approval in March 2007 contained a dynamic element: a roll-back option. With this clause, the UK government was handed a way to act on behalf of both sides of their constituent interests and not become responsible for the looming breakdown of the talks (Figure 3). For consumers, new entrants and non-Heathrow carriers like BMI any agreement was better than the SQ T1. For BA and Virgin, the agreement X was still undesirable, but the UK government could now reassure them that a lack of progress on liberalization in the US during the second stage would lead to a reversal of the agreement. This, in other words, lowered the costs of an agreement X for the most opposed constituent interests and allowed the UK to defend a more comprehensive position, which included X as an acceptable outcome. With the UK on board, the European Commission could thus finally sign a deal with the US, even though it was much less ambitious then the EU declared negotiation position.

Put differently, although all domestic stakeholders had the same preferences in 2004 and 2007, Europeans were able to agree on a first-stage agreement once there was a suspension clause. The case of transatlantic open skies thus demonstrates that ambiguity can lead to paradoxical turn-arounds in multi-level bargaining.

(2) European Level

SQ T1 \[\times\] EC \[\times\] UK

EC win-set

UK win-set

(3) United Kingdom

SQ T1 \[\times\] CC \[\times\] BMI \[\times\] BA/Virgin

Figure 3 European and domestic UK win-sets in the context of a suspension clause.
Ambiguity about the future was key to the successful conclusion of the US–EU Open Skies agreement. EU negotiators, together with the UK government, consciously integrated future options into a deal that appeared to lie outside of their stated win-set. This allowed them to respond to diverse sets of constituent pressures but none the less sign an agreement, which in turn had lasting effects on constituent pressures in the future. Put differently, the final US–EU Open Skies agreement was not against the aggregate interests of Europeans. It was a future game that the EU and the UK government consciously played, because it allowed them to respond to competing imperatives.

As early as the seventeenth century, the French churchman and political activist Cardinal de Retz coined the phrase ‘one leaves the realm of ambiguity at one’s peril’. Indeed, ambiguity has long been central to political strategies (see Connolly, 1987). In historical institutionalist analysis, authors have demonstrated how ambiguity can trigger policy change (Palier, 2005). However, these findings have not yet influenced international relations theory (but see Jabko, 2006). Rather, theories of international negotiations emphasize the importance of flexible agreements to contract around uncertainty about future developments (Koremenos, 2005). The case study of international aviation has demonstrated that flexible agreements will increase the likelihood and depth of commitments even in the absence of true uncertainty. Rather, it is the conscious use of ambiguity that enabled negotiators to conclude an agreement and to affect the positions of its domestic stakeholders.

My conclusions thus concur with the recent historical institutionalist literature on international relations (e.g. Farell and Newman, 2010) and speak to the links between political continuity and change. First, we see that paradoxical agreements can occur even if neither external factors nor the internal preference distribution change. Second, through the calculated effects of such ambiguous commitments, important changes can then arise from very stable political settings.

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NOTES

1 Anonymized transcripts of 38 interviews are available upon request. A first set of interviews took place between 2002 and 2003, a second one between 2008 and 2009, which allows reconstructing the positions of the stakeholders before and after the EU–US Open Skies talks.

2 With the exception of soft rights covering auxiliary services and negotiations with Norway, Sweden and Switzerland.

3 For a full list and further information, see the website of the US State Department: www.state.gov.

4 In 2003, four of the fifteen member states did not have open skies agreements with the US: the UK, Ireland, Spain and Greece.

5 Interview with a representative of the British government in Washington DC, October 2008. Aviation between the two countries followed the Bermuda II agreement of 1977, which the US government considered to be the most restrictive bilateral agreement they had ever entered into. In particular, it restricts access to Heathrow airport to two airlines from each country – BA, Virgin, American and United – and limits service from Gatwick airport in terms of frequencies and points to be served.

6 For further discussion, see Woll, 2006.

7 The so-called ‘5th freedom right’ that allows carriers from a foreign country to connect to a third country is rarely used by passenger airlines in the transatlantic market, but it does facilitate cargo operations by US carriers within Europe, because they can establish a European service network.

8 Other minor demands concerned the ability to lease an aircraft with its crew (‘wet-leasing’) and to participate in a government-sponsored program (‘Fly America’).

9 Interviews with government and airline representatives, 21 December 2003, 1 June 2009.

10 However, European member states were strongly opposed to the latter solution, which effectively constituted a carve out of the London airports from a future agreement.


12 This change of style is confirmed by all European observers, both from the government and the private sector. A UK representative underlines ‘we would often sit alongside Calleja, not behind him’, as was previously the case. Interview, Washington DC, 21 October 2008.


14 Ibid.

15 In addition, the UK also achieved a delay in the application of the agreement until 30 March 2008, in order to complete the fifth terminal at London Heathrow.

16 Bulgaria, Cyprus, Estonia, Greece, Hungary, Ireland, Latvia, Lithuania, Slovenia, Spain and the UK. Furthermore, EU airlines will be allowed to fly between the US and non-EU countries that are members of the European Common Aviation Area (ECAA), such as Norway, Iceland and Croatia.
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17 UK aviation lobbyist, telephone interview, 1 June 2009.
19 Interview, Brussels, 9 September 2008.
20 UK lobbyist, phone interview, 1 June 2009.

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