

The Impact of EU Treaty Reform on Transatlantic Relations: The cases of Open Sky and the EU-US extradition agreement

Klaus Bachmann

1. Introduction

In the good old world of realist International Relations' Theory, international negotiations were conducted by states as unitary actors, and the outcome was seen as the result of the dynamics of a readjustment of the balance of power: Big and rich states, with more resources at their disposal than others would achieve more than small, poor and less resourcefully states. Smaller states would therefore form coalitions in order to compensate their disadvantage, attempting to contain the bigger ones. Liberal IR Theory questioned the assumption, that such coalitions and readjustments between states be only a function of their environment, but also accepted the presumption of state interests being centrally aggregated and fuelled into governments' positions, presented as national interest in international bargaining. Institutions were shaped by state preferences and altered or abolished, when they ceased to serve states' interests. In other words: They were dependant variables of states' preferences.¹

It was Robert Putnam's "two level" approach, that became one of the most prominent and influential challenges to the assumption of centrally aggregated state interests and states acting as unitary actors in international negotiations.² Putnam showed how politicians could take advantage from a "two level game" and enlarge their autonomy. His approach shed light on the impact of internal factors of a political system, which could influence the outcome of interstate negotiations and vice versa, where former approaches had focused only on one direction: either on the impact of domestic restraints on international bargaining or on international restraints for domestic change. Others have stressed the influence, institutional design of international organizations exercises on states' behavior and how supranational organizations reshape states' preferences. In other words: These institutionalists treat institutions as independent variables and state preferences to a certain extend as dependant variables. This is also the approach of this paper, which tries to assess the impact of institutional design, decision making rules and the number of veto players on the outcome of international bargaining between the EU and the US.

Putnam's "two level" approach can be easily combined with recent works on the role of veto players in political systems, as developed by George Tsebelis³ and the older, but very influential work of T. C. Schelling about the paradox of weakness.⁴ All the three approaches together form a perfect framework for the analysis of interstate bargaining, that goes beyond state centric theories and gives deeper insight into the interaction between actors of both the internal and external side of international negotiations and help to explain the outcome of bargains between asymmetric negotiation parties.

Negotiations between the European Union and the United States are a uniquely fruitful example for such an evaluation. Because of her sui generis character as an international organization and a block of states with supranational institutions the EU can negotiate as one actor as well as a

¹ As an example: Andrew Moravcsik: New Statecraft? Supranational entrepreneurs and international cooperation. In: International Organization 53,2, spring 1999, pp. 276-306.

² Robert D. Putnam: Diplomacy and Domestic Politics: The Logic of Two Level Games. In: International Organisation 42 (3), pp. 427-460.

³ George Tsebelis: Decision Making in Political System. Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism. In: British Journal of Political Science, vol. 25, no 3, July 1993 pp. 289-235.

George Tsebelis: Veto Players. How Political Institutions work. New York, Princeton: Princeton University Press 2002.

⁴ Thomas C. Schelling: The Strategy of Conflict. Harvard University, Cambridge Massachusetts, London, England 1980, pp. 21-52.

group of states. Depending on the issue at stake, negotiations with third parties may fall under the first (communitarian) pillar, where majority voting in the Council is the rule and unanimity the exception or under the second or third pillar, where unanimity is the rule and majority voting the exception. In the first case, an agreement is negotiated by the Commission and approved (or rejected by the Council and the European Parliament) but needs no further ratification in the member states. In the latter case, a third party negotiates with the Council, acting with unanimity, because the final outcome has to be ratified according to the constitutional regulations of every member state. The latter may even include ratification by popular referenda or qualified majority voting in one or two chambers of parliament.

This makes an evaluation of the efficiency of the EU as a bargaining party extremely difficult. Depending on the kind of pillar, under which a negotiated issue falls, one has either to assess the outcome of the bargain for the different member states (concerning issues where the EU has no competences) or for the EU and the member states (in cases where the EU does have competences). In the latter case, the assessment may differ: A negotiation outcome may be advantageous from the perspective of the whole EU and its institutions, but disadvantageous for some of the member states – and the other way round. Therefore, I develop a different approach, by assessing only the outcome from the perspective of the third party, which for the purpose of this paper means the US. This perspective makes it much easier to assess the bargaining outcome, because the US' character as a negotiation party (the internal structure, the competences, the actors and thus the number and character of potential veto players) does not change. However, it should be clearly mentioned here, that such an assessment should not be regarded as the result of a zero-sum game: Gains for the US from a bargain can, but need not necessarily amount to losses on the other side and losses for the US' should not be regarded as gains for the other side. There is neither reason to exclude a situation, where both sides obtain more at the end, than they would have been able to achieve without the bargain. Gains and losses also may be asymmetric. However, the purpose of this study is not to assess, if supranational or intergovernmental negotiations are more advantageous for the EU or / and her member states, the aim is to find out, if the US can expect a better deal when negotiating with a communitarian or an intergovernmental EU.

I will evaluate this question by developing one main hypothesis, based Schelling's "paradox of weakness" theorem and referring to methodology developed by me and drawing partly on Tsebelis works. Those theoretical assumptions are explained in the first chapter. Chapter two and three introduce the two case studies, I use to falsify the hypotheses from Chapter one: The EU-US negotiations about an extradition agreement and a Mutual Legal Assistance Treaty (MLAT) overarching the then existing bilateral treaties the US had with the EU's member states and the EU-US negotiations on air transportation, which led to a new (and typical "first pillar") agreement replacing the existing bilateral treaties. Chapter four discusses the implications of the recent Treaty Reform in the EU for future negotiation with the US: Are future asymmetric gains for the US more (or less) likely after the shift from intergovernmental to communitarian decision making in the Lisbon Treaty (also called Reform Treaty)? Based on these two cases (Open Sky and Extradition/MLAT), the paper then will give an answer to the main question, if an "ever closer Union", with more supranational decision making is desirable from the point of view of US interests.

1. Chapter: Theory and Methodology

Social Science theories have made different assumptions about the potential outcome of inter state negotiations and how to measure them. One can apply game theory, try to predict equilibriums, win-sets and define potential win-win, zero-sum or mutual disadvantageous outcomes and determine the conditions, under which one of them may occur. But how can one measure empirically if one side has won, or gained more than the other side? Social psychology and discourse analysis can help to find out, who regards himself a winner or looser, economists can measure the financial impact of a settlement for the relevant parties, sometimes political events help us to identify the winner and the looser: A government, which

is overturned by the opposition or loses the next election round because it has not obtained enough in negotiations can hardly be regarded as a winner – even if historians later find out, that there wasn't much more to achieve. But can we compare the result of negotiations between a state and an international organization (like the EU) in one area to the negotiation results in another area – if both results include costs, we cannot quantify in financial terms, because their financial and economic impact is not yet known and maybe never will?

This is the challenge of the present approach: How to operationalize a comparison between the outcomes of the EU's negotiations with the US on extradition on one hand and the outcomes of the Open Sky negotiations on the other hand? How to quantify political and economic costs? The latter are not yet known, and maybe never will, since they have never been calculated for the extradition agreement and are very difficult to calculate for the Open Sky agreement, which will come into force in 2008. Financial forecasts exist, but only from the perspective of the relevant airlines – the consequences of more competition, easier access of airlines to cabotage, lower prices etc. for national budgets, consumers, regional budgets are unknown.

The cases, this paper deals with, allow measuring the outcome of the negotiations by comparing the initial positions of both partners (EU and UE) with the final outcome of the bargain (the extradition agreement and MLAT as one package and the Open Sky agreement as the second). In order to be able to compare both results, certain abstractions are necessary. In every case analyzed, the point of reference is the status quo, which means in the case of MLAT and Extradition Treaties the existing legal status, based on the bilateral treaties between the US and different EU member countries. In the case of "Open Sky", status quo means the legal status based on the bilateral "Open Sky" agreements between the US and some EU member countries preceding the judgment of the European Court of Justice.

- a) In the case of the Open Sky negotiation, the basic criteria for measuring the outcome will be the question, if the US managed to protect their market and their air carriers and regulations from expansion by the EU. In this case, the US negotiation goal was very close to the status quo, whereas the EU strived for a much far reaching reform, further away from the status quo.
 - b) In the case of the extradition negotiations, it was the EU, who tried to preserve as much from the status quo, as possible, whereas the US tried to go further beyond the status quo and get larger and easier access to suspects in the EU. The basic criteria here is, if the US managed to get easier, quicker and less expensive (in terms of resources) access to suspects it would not have had access to under the status quo.
1. In order to conduct this analysis, it is necessary first to establish the number of potential veto players according to the first and third pillar procedure. On the side of the US, the number of veto players does not change, neither does their character.
 - a) The EU and its first pillar

The so called pillar structure of the EU was introduced by the Maastricht Treaty and then reinforced in the Maastricht and the Nice-Treaty. According to this method of analyzing the EU's legal framework, pillars differ with respect to policies, decision making rules, and legal instruments. Issues concerning the Single Market, Trade, the Schengen agreements are subject to the so called "communitarian method" of decision making, which means, that a regulation or directive (a legal act that is directly binding for the member states) cannot come into force without the assent of the European Parliament. In this area the European Commission has the sole right of initiative and the European Court of Justice possesses jurisdiction over the implementation (or

lack of implementation) of the relevant legal instrument. In many cases, the Council of the EU decides with qualified majority.⁵

In the case of the Open Sky agreement, the articles 80 (2) and 300 (2) and 300 (3) of TEC describe the following decision making procedure for the EU: First, the Commission makes a proposal to the Council about the conclusion of an agreement with the US on air passenger transport. Then the Council adopts a mandate for the Commission, which is the basis of the Commission's negotiations with the US. The final outcome of those negotiations will then be evaluated by the Council acting under the qualified majority rule, but – differently to the standard codecision procedure of Art. 251 – only after consultation with the European Parliament. Hence, the EP can neither veto nor influence the final provisions of the agreement. It may, however (and has done so) bring the agreement to the European Court of Justice. The final agreement does not need ratification by member states; it is directly binding for the EC's institutions and the member states. Neither member states nor the European parliament are hence potential veto players in the process. The Council acts as an institutional and collective veto player under the qualified majority rule, whereas the European Court of Justice may act as another institutional collective veto player, acting under a simple majority rule.

b) the EU and its third pillar

Under third pillar provisions, the situation becomes much more complex. Here, the initiative for a decision may come from the Commission or from member states. Negotiations are conducted by the Council, which means the presidency including, where necessary, the so called "Trojka". The final outcome needs unanimous approval by the Council, because it also has to be ratified by the relevant institutions of every member state. The extradition agreement with the US was no exception: It had to pass the legislative procedure in the parliaments of the member states. There was even more effort necessary: Since the EU/US agreements on extradition and MLA provided only for basic conditions of cooperation, they had to be supplemented by additional bilateral agreements, either called instruments, agreements or treaties. Those bilateral instruments had to pass the legislation process together with the EU/US agreements. Without the approval of only one national parliament, the EU/US agreements would not have been able to enter into force and would have required renegotiation.⁶

The agreements on extradition and legal assistance were negotiated before May 2003, which means, between the US and 15 EU member states. However, the ratification process was so extensive, that it finally included also the 10 new member states, which entered the EU in 2004 and 2007. For them, the US/EU agreements became "acquis communautaire", they accepted as European Law during the accession negotiations, and then they also had to negotiate the relevant bilateral instruments with the US. This increases the number of potential veto players in the process even more dramatically.

According to data from the General Secretariat, the agreements and bilateral instruments had to be ratified by the parliaments of 20 of the 27 member states. In two member states, additionally, the assent of the president was necessary. The communication does not specify, where the assent of a parliament meant approval by one or two chambers. In some countries, the second chamber can only delay a bill (ratifying an international agreements or treaty), in other countries, it can effectively veto it. In order to be considered as collective veto player, a second chamber

⁵ From a legal perspective, the differences between the pillars are much easier to establish: The EC Treaty contains the whole 1. Pillar, whereas everything which is regulated in the EU Treaty belongs either to the second (Common Foreign and Security Policy) or the third pillar (police cooperation and juridical cooperation in criminal matters). However, for this paper it is not the legal contents, but the decision making process and the number of veto players in this process which matter most.

⁶ A letter from the General Secretariat of the Council of the EU to the member states' governments stipulates, that "it appears, that all bilateral instruments which have been negotiated between the Member States and the United States contain a provision which stipulate that the bilateral instruments will, after completion of the necessary internal procedures, only enter into force at the same time as the EU-US agreement. This implies that all ratification procedures with regard to the bilateral instruments will need to have taken place as well before the exchange of ratification instruments for the EU-US Agreements can take place." (And without such an exchange, they cannot enter into force, KB) General Secretariat to delegations, 5916/07 LIMITE CATS 8 COPER 15 USA 8, 1.2.2007.

should have effective veto rights with respect to international agreements. In order to assess the number of veto players, I conducted research on the website of the relevant parliaments (in countries with bicameral systems). In some cases, also presidents could effectively veto an agreement. Including the Council of the EU itself, which acted as a collective veto player, the number of potential veto players, the US were confronted with, amounted to 36 in 27 EU member states.

Under the provisions of the third pillar of the EU, a multitude of different (collective and individual) veto players can block the decision making process, the Council of the EU acts as an institutional, homogenous veto player with unanimity.

c) the US

The number and character of veto players on the EU-side of the negotiation table varied, but the US' veto player team stayed the same: The US government (here: the Department of Justice and the Department of Transport) negotiates on behalf of the president, who concludes treaties with foreign powers and then has to send them to the Senate, who approves them with a 2/3 majority.

Theoretical predictions about the outcome of bargaining

As Tsebelis demonstrated, the number and the character of veto players in a political system has important consequences for the stability of the system as well as its flexibility – reforms are more likely if the number of veto players is low, a high number of veto players decreases the likelihood of political change. Homogenous veto players increase policy stability, heterogeneous veto players are more likely to allow for reform.⁷ Adopting this approach to negotiations between states, we may predict, that a party with many veto players will be less flexible and less inclined to compromises than a party with few veto players.

Schelling, and later Hug and Koenig, have argued, that it is not necessarily the difference in power and wealth of the negotiation parties, which accounts for the final outcome. The question, how homogenous or heterogeneous a party is internally also may influence the result.⁸ Popular reasoning would lead us to the conclusion – as it is often described in the media – that a strong, united and homogenous party, which does not disclose any internal frictions and conflicts, is likely to achieve more than a weak, scattered and instable party, whose negotiators are publicly criticized by internal actors. However, if a party can credibly demonstrate, that a certain negotiation result, which this party regards as unfavorable, may not be ratified at home after the negotiations, the other party may be more likely to step back.

This would mean that the number of potentially dissenting, autonomous veto players, that may question the negotiations' outcome, may paradoxically increase the scope of concessions that party can expect from the other side. This mechanism has been observed frequently in the EU's treaty reforms, where the number of involved veto players always was quite high, because treaty reform often requires qualified majorities in parliament, assent of constitutional courts and even popular referenda. Specifically negative referenda outcomes (and the prospect of such) have frequently led to additional concessions for countries with many veto players, like Denmark during the ratification of the Maastricht Treaty and Ireland after the signing of the Nice Treaty. In these cases, referendums have been regarded as a kind of "popular veto players". Governments, which can credibly present the danger of being faced with a popular referendum on the outcome of a negotiation, are more likely to obtain concessions from their partners than governments, which

⁷ George Tsebelis: Veto Players. How Political Institutions work. New York, Princeton: Princeton University Press 2002, pp. 17-64.

⁸ Simon Hug, Thomas König: In View of Ratification. Governmental Preferences and Domestic Constraints at the Amsterdam Intergovernmental Conference. In: International Organization 56/2 (spring 2002), pp. 447-476.

are not confronted with such a danger (or cannot present it credibly). Therefore, a situation, where a party gets more, because of its heterogeneous character and the high number of veto players involved, is called the “paradox of weakness.” According to this “Schelling conjecture”, the power to bind oneself – in a transparent and credible way – can be a source of strength instead of weakness for a negotiation party.

According to this paradox, we can expect the US government to obtain less concessions in negotiations with the EU, when the EU negotiates according to rules, which foresee many veto players and a more favorable outcome, when negotiating with a unified, homogenous EU. Paradoxically this would mean that we can expect the US to be better off when negotiating first pillar issues with the EU than in cases, where the EU speaks with many voices and the result has to be ratified according to the constitutional provisions of the member states. If these assumptions are true, we should expect the result for the US to be better in “Open Sky” negotiations than in the bargaining about extradition and MLAT. This assumption, based on Tsebelis veto player theory and Schelling’s “paradox of weakness” – theorem, contradicts not only common sense, but also public opinion.⁹ According to many nongovernmental organizations, human rights organizations, media and members of the European Parliament, the outcome of the MLAT/extradition negotiations have to be regarded as a surrender of European interests and a victory for the logic of US Home Security.¹⁰

Chapter three: The negotiations about the extradition agreement

The political process leading to the negotiations of an extradition agreement and an agreement about mutual legal aid between the US and the EU started a few weeks after 9/11 with a letter from US president George W. Bush to the Belgian EU presidency and the President of the European Commission.¹¹ It may not be a surprise, that the efforts to conclude an extradition treaty between the US and the EU were publicly presented as a response to the 9/11 attacks. Despite the fact, however, that the provisions, which both sides wanted to negotiate, did cover much more than only terrorism, the argument concerning terrorism is overwhelmingly present also in the internal documents of the EU-Council. It doesn’t matter, if we look at the EU council’s mandate for the presidency or at the provisions of the consecutive draft agreements or at the final outcome: Everywhere, the need for an extradition agreement is justified as a reaction to terrorism. However, most of the provisions in the agreement cover areas much vaster than only terrorist offences. The provisions of the agreement can be used (and are designed to be used) for any kind of offence punishable by at least a one-year-sentence according to the legal systems of both contracting parties. Both parties already at the beginning agreed, not to define (as was the case in most bilateral treaties before) a list of offences for extradition, but a penalty threshold.

⁹ It is, however, reinforced by findings indicating, that government uncertainty about the voters behavior in nearing elections and divisions in the cabinet constrain negotiations and make trade negotiation more protectionist. On this basis, we also can expect the EU’s negotiators to be more prudent and reluctant to agree to compromises the higher the number of EU veto players. Helen V. Milner, B. Peter Rosendorff: Democratic Politics and International Trade Negotiations: Elections and Democratic Politics and International Trade Negotiations: Elections and Divided Government as Constraints on Trade Liberalization. In: The Journal of Conflict Resolution vol. 41 No1, February 1997, pp. 117-146.

¹⁰ Compare the harsh criticism of Human Rights NGOs during and after the negotiations about the Extradition and MLA Treaties. Susie Alegre: Justice Briefing on Extradition to the US. The US/UK Treaty of March 2003 and the EU/US Agreement of June 2003. www.justice.org.uk

Amnesty International: The USA. No return to execution. The US death penalty as a barrier to extradition. 29.11.2001. www.amnesty.org

¹¹ During the September summit in Washington, Belgian Prime Minister Guy Verhofstadt had made a request, asking Bush to submit a list of measures the EU could do to assist the US in the fight against terrorism. Letter from George Bush, president of the US to the president of the European Commission. United States Mission to the EU, 26.10.2001, <http://www.statewatch.org/news/2001/nov/06Ausalet.htm>

Similarly to the emergence of the European Arrest Warrant (EAW) on the political agenda, the extradition agreement was not a new project, which had been provoked by 9/11, but had been prepared much earlier. After 9/11 it appeared much more convincing and legitimate in the new political climate.¹² And exactly as the EAW, it comprised many provisions, which aimed much more at ordinary crime than at terrorism. This was later criticized by some of the oppositional speakers in national parliaments during ratification, but the documents of the Council do not reveal any traces of such doubts. The ministers of the EU-15 seemed to be convinced to fight terrorism by mandating the presidency to negotiate an agreement with the US.

Although there was no legal obligation to do so, the Council agreed to conduct the negotiations confidentially and also to keep its own mandate and the consecutive draft agreements under seal. This was strongly criticized by members of the European Parliament and nongovernmental organizations. They feared, secrecy would allow the Council to sacrifice too much citizens' rights in change for tougher security regulations. Since, however, some of those anxieties were shared by governments represented in the Council,¹³ it was easy to predict, what would happen: The draft agreement leaked out to the British citizens' rights watchdog "Statewatch", was published and became subject to heavy criticism in national parliaments and the European Parliament.¹⁴ Under this pressure, the Secretariat of the Council finally released the draft officially, publishing also the presidency's mandate.¹⁵

Official documents do not allow to quote precisely the negotiation mandate of the American delegation (which was as confidential as the EU mandate), but it is possible, to reconstruct it on the basis of the presidency mandate, which quotes it. Both positions show that both sides (the EU and the US) wanted to achieve a policy change going further than the status quo. These fields of common interest in leaving the status quo behind were:

- a) The establishment of so called "contact points" in the EU, which could coordinate extradition demands of the US in cases, where those demands required the engagement of several EU member states.
- b) There also was, from the beginning of the negotiations, a mutual interest in cooperation in confiscation and asset forfeiture.
- c) The EU also agreed to replace the lists of offences, which entitled the member states and the US to extradite a person, by a punishment threshold.
- d) There was also a mutual interest in simplifying extradition procedures, although there were no precise proposals to be dealt with at the start of the negotiations.

However, most of the points described in the EU mandate remained controversial, especially concerning the role of Human Rights' safeguards in the future agreement. On top of the EU's mandate, the presidency was reminded to safeguard the protection of Human Rights and fundamental freedoms. The document also demands reciprocity and equality among the partners. The mandate also stipulates that issues concerning data protection should be discussed at a later stage. Some delegations also argued in favor of introducing special safeguards against discrimination of suspects and conditions of imprisonment, but the presidency dismissed these claims as already included in the formulas about "Human Rights and fundamental freedoms".

¹² There had been earlier plans for the ENA as well as for the extradition agreement, but the Commission had not presented them to the Council, convinced, there would not have been consent for it. The Commission presented a new and detailed proposal two days after 9/11, which clearly shows, that it must have been prepared much earlier.

¹³ Council of the EU, 8296/1/03 Rev1 LIMITE CATS 21 USA 30, 14.4.2003.

¹⁴ Statewatch: Secret EU-US agreement is being negotiated.
www.statewatch.org

¹⁵ Council of the EU,
Draft Agreement between the EU and the US on Extradition and Mutual Legal Assistance
2.5.2003. ST8295/1/03 Rev1 CATS 20, USA 29.

Tab. 1: US' and EU's negotiation positions on extradition and mutual legal assistance at the start

Issue	US position	EU position	Outcome
Polices' and magistrates' direct cooperation ¹⁶			
Revise EAW in order to avoid discrimination for extradition requests from the US ¹⁷	Yes	Rejects	EU did not revise EAW, but put US requests on an equal foot to EAW
Remove political offense defenses in terrorism ¹⁸	Yes	Was left to member states and their bilateral instruments	Not mentioned in EU agreement
Make possible to transmit MLAT ¹⁹ requests orally and send paperwork afterward	Yes	No direct answer	Not mentioned in EU agreement
Overcome dual criminality obstacle	Yes	No direct answer in EU mandate	Dual criminality remains (art 9 of EU agreement)
Enable temporary surrender and send back for trials abroad	Yes	May be optional (some member states may include that, others may not)	Member states "may" surrender (art. 9 of EU agreement)
Make possible asset sharing...	Yes	No	Not included in EU MLAT
...asset seizure and forfeiting	Yes	Yes	Not included in EU MLAT
Establish contact points	Yes		Not included in EU MLAT
Make extradition of	Yes	Mandate: "Some	Not included in EU/US

¹⁶ This proposal shows up only in the Bush letter. The EU did not directly respond to it in the available documents about the extradition and MLAT agreements.

¹⁷ Means: European Arrest Warrant. EAW obliges EU countries to swift and rapid "surrenders" of persons, to whom the judiciary of a member state has issued an extradition request. ENA lifts the political control from extradition procedures and reduces them to a mere administrative measure. It speeds up the procedure to two months. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. See: Council Decision of 13. June 2002 on the European Arrest Warrant and the surrender procedures between Member States. 2002/584/JHA. http://www.eur-lex.europa.eu/pri/en/oj/dat/2002/l_190/l_19020020718en00010018.pdf

¹⁸ "Political offense defense" means the reservation of a country not to extradite a person, when it is likely for that person to be persecuted or discriminated for political reasons in the requesting country. According to the legal systems of some EU countries, extradition may be refused, even if there is enough evidence to conclude, that the person has committed a crime punishable under the law of the requested country. However, there have been cases, where suspects were neither prosecuted nor extradited, because the laws of the requested country did not allow for prosecution of a crime committed abroad. This happened several times between Spain and Belgium, when Belgian judges refused to extradite persons suspected by the Spanish authorities to have committed crimes in Spain on behalf of ETA, the Basque separatist organization. See: Cedric Ryngaert: Het Europees aanhoudingsbevel lastens Moreno – Garcia: de aanhouder wint. In: Instituut voor Internationaal Recht, working paper 59 / 2004.

According to the Bush letter to Prodi, the initial formula was "remove" political offence defense. In the US position of the department of justice this was amended to "narrow down" political offence defense.

¹⁹ MLAT means Mutual Legal Assistance Treaties.

(own) nationals possible		member states have constitutional constraints in this field"	extradition agreement
Make possible joint investigation teams	No direct answer	Yes	EU agreement on extradition allows them in art. 5
Enable video conferencing (instead of sending suspects and witnesses abroad)	No direct answer	Yes	Now possible according to art. 6 of EU extradition agreement
Establish common approach to searches, seizures and interception of communication	No direct answer	Yes	Not included in EU/US agreement
Specify cost sharing of above actions	No direct answer	Yes	Included in art. 5 of MLAT
Enhance confidence building ²⁰	No direct answer	Yes	Not further mentioned in treaty
Speciality clause ²¹	US position unknown	Presidency shall inform US that member countries which have the clause in their bilateral treaty, will keep it	Speciality may be waived if suspect voluntarily agrees Art. 11 of extradition agreement
Re-extradition	US position unknown	Member states which have this clause in their bilateral treaty will keep it	Not mentioned in EU/US agreement
Death penalty	*)	Death penalty may not be imposed, if imposed, may not be carried out	EU clause fully endorsed in art. 13 extradition agreement
Life sentences	*)	Some member states may introduce evaluation clauses	Not mentioned in EU/US treaty
Extradition to special courts	*)	Should be excluded	EU/US Agreement emphasizes, that art. 10 does not affect their rights as state parties to the ICC (EU) or as non state parties to the ICC (US) (art. 10 and explanatory note)

*) There is no trace in the documents, that those issues were raised by the US. Of course, not mentioning them in the agreement would have been in the US' best interest, because then there would have been fewer restrictions on extraditions.

²⁰ Means: exchange officials, periodic consultations, invite magistrates etc.

²¹ Speciality rule means, a person can only be prosecuted for those offences, on which the extradition was based (which does not exclude prosecution for offences committed in custody in the receiving country).

From the beginning there was a tension between confidentiality and the fact, that the agreements finally had to be ratified and hence debated in national parliaments. Keeping them confidential contributed even to the suspicion, the EU would surrender basic human rights safeguards and interests to the US. This also was the way, the MLAT and the extradition agreement later were analyzed and evaluated. However, as the table above clearly shows, the EU enforced most of its points of interest, whereas the US did so only with respect to a few points – which were compatible with EU preferences.

From the start of the negotiations, capital punishment, surrender to extraordinary (martial) courts in the US and possible competition between extradition requests based on the EAW and US demands belonged to the major conflict points, on which public attention focused. Art. 13 of the EU/US extradition agreement stipulates, that a member state may not surrender a person to the US, if the latter can neither guarantee, that a death penalty will not be imposed or, if imposed, not be carried out. Protest arose mainly because of the verb “may”, which, according to the opinion of human rights campaigners and members of the European Parliament, should have been replaced by “must”.²² However, the protest is based on a misunderstanding: A “must” would not have changed anything, since the obligation, not to surrender persons to a country, where they are menaced with capital punishment, already exists in the constitutions of those countries and emanates from the fact, that all EU member countries have ratified the European Convention of Human Rights, which contains a ban on capital punishment.²³ The verb “may” was introduced into the agreements, in order to leave member states room for maneuver in their negotiations with the US on the bilateral instruments. All member states, which, according to the EU/US agreement “may” refuse extradition in cases of pending death penalty, de facto have to refuse it according to their own constitutions and the ECHR. Therefore, according to the international obligations of EU member states, the “may” in the US/EU agreement only opens the door for refusing extradition to the US, it does not open the door for surrender.

If we take the basic criteria for measuring, if the US/EU extradition agreement changed the status quo for the US and enhanced the US chances to subjugate EU citizens to regulations of the US legal system, we see, that the agreement did not change anything: Before and after the agreement comes into force, EU member states are obliged to refuse extradition if there is no safeguard against imposing or executing capital punishment on the relevant person.

The same applies to the issue of the EAW. The US starting position was to achieve a solution, which would have set an US extradition request on an equal foot with a EAW request. Initially, the US wanted the EU either to revise the EAW, or become a member of the EAW mechanism. Both was rejected. The solution set out in art. 10 of the EU/US extradition treaty contains a list of criteria, the contracting states have to take into account when deciding, which extradition request has to be given priority. In his letter of transmittal, the President of the United States informed the Senate, that art. 10 warrants, that an US request for extradition is “not disfavored” by a EU member states, which receives a competing EAW request.²⁴ This, however, does not mean, that US requests are absolutely equal to EAW requests. First, EU member states are obliged to fulfill EAW requests on the basis of their internal law²⁵, whereas the obligation to extradite a person to the US stems from international law. Second, a EU member country cannot reject an EAW request for an own national, whereas it can do so with respect to a request under the US/EU agreement. The US did neither manage to abolish the “political offense defense” clause, nor the reservation not to extradite own nationals. The consequence is, that, for example, Spain has to

²² Susie Alegre, op. cit.

²³ Compare the synopsis of Amnesty International: The USA. No return to execution. The US death penalty as a barrier to extradition. 29.11.2001. www.amnesty.org

²⁴ Message from the President of the United States. 109. Congress, 2d session, Senate, Treaty Doc 109-14. 28.9.2006.

²⁵ The EAW is no Community Law, it is national law, implemented on the basis of a so called “Framework Decision”, a typical third pillar instrument.

surrender an own national to a German court on the basis of a EAW request, but it can reject surrender of an own national to the US. Even more: Spain would not have the right to check for human rights safeguards in Germany before surrendering a Spanish person sought by German justice, whereas a Spanish court would have this right in the case of an US extradition request. Therefore, art. 10 of the extradition agreement provides a de jure equal footing for EAW and US requests, but the legal structure of the EAW and the obligations it imposes on EU member states account for a de facto difference that in reality disfavors US requests.²⁶

If we look now at the overall balance of the bargain, we notice, that the US achieved only 2 of 7 major points it mentioned at the start of the negotiations. The balance becomes even more depressing for the US when we include demands included in the letter of President Bush to the EU Presidency and the Head of the European Commission. It is, as mentioned in the beginning, not the aim of this paper to assess the outcome of the negotiations for the EU, but it may be mentioned here, that the result for the EU Presidency looks much more favorable: The EU/US extradition agreement and MLAT contain 4 points of interests, the EU wanted to get into the agreements.

This result contradicts clearly the opinions of many media and Human Rights campaigners, who accused the EU to sacrifice Human Rights to US Home security interests. In fact, there is no need to construe a contradiction between a weak US negotiation balance and a negative judgment about the Human Rights impact of the above mentioned agreements. Both sides, the US and the EU, shared a basic approach, according to which the fight against crime should become more effective and extradition procedures more swift and streamlined even if this could lead to negative consequences for Human Rights and citizens' rights. In some cases, the disappointment of Human Rights campaigners also may have been due to exaggerated hopes, that the agreements would be able to change the US attitude towards the ICC. Actually, the extradition agreements does not change anything, neither for the US nor for the EU. The negative comments, the agreements provoked, are the result of applying a different point of reference. Whereas non governmental organizations took a hypothetical "ideal point" as reference, at which Human Rights would be perfectly protected, and compared the agreements provisions to it (finding them far from ideal), this papers tries to compare the outcome to the initial positions of the US.²⁷

For the purpose of this study, the most important point is, that the US were not able to increase their chance to subjugate EU citizens beyond the reach of their legal system to it. Where the agreements provide easier access to suspects from the EU, the approach is reciprocal and also facilitates the EU's member states' access to US citizens. Both sides keep the possibility to check against the "political offense defense" and to reject an extradition request if they regard it as politically motivated. Also the dual criminality obstacle remains, which means, that no country is forced to surrender a person for an offence that is not punishable in the sending country. The speciality clause may be waived – in the US and the EU - only with the consent of the person under request.

Summarizing, it has to be stated, that in negotiations, where the US were confronted with an enormously heterogeneous EU, comprising 36 potential veto players,²⁸ they did not manage to

²⁶ EAW also abolishes the dual criminality clause between member states, which means that a person Has to be surrendered even if the offence, for which one is to be extradited, is not punishable in the sending country. The dual criminality clause has been maintained in the US/EU agreements.

²⁷ Some of the Human Rights Protectors criticism also comes from analysis of the bilateral instruments, which – before and after the conclusion of the US/EU agreement – in some countries were asymmetric. One example are the asymmetric requirements for evidence in the UK/US bilateral instruments, which force the UK to present *prima facie* evidence to the US, but does not oblige the US to something similar. The reason is the difference in veto players (here: Constitutional Courts). In the US, there are constitutional constraints against surrendering a person abroad without evidence, whereas there are none in Britain, since Britain does not have a constitutional court!

²⁸ The number of 20 is based on the information from the EU's Secretariat General, which collects information about the ratification process. According to this information, in 20 of 27 member states parliaments had to ratify the agreements, in two countries additional the consent of a president was necessary. Theoretically, the number of potential veto players

enlarge the scope of access to potential suspects from the EU and achieved only 2 of their 7 initial goals. This alone does not allow for far reaching conclusions. We should therefore look at the outcome of another bargain, where the US were confronted with a homogenous EU, speaking with one voice, represented by one central player. How will the US then be off?

Chapter Four: Open Sky

The way to a new Open Sky agreement reads like a textbook chapter on European integration and the impact of supranational entrepreneurship in the EU. In the absence of a common regulation in the EC, the US, which had deregulated their passenger transport in the end of the seventies, began to conclude a number of bilateral treaties, partly opening markets for US carriers and the national carriers of some of small member states of the EU. This was advantageous for the large US companies, who thus could enlarge their network and carry passengers from North American Hubs to several European destinations. It was profitable for the companies of little member states, which did not serve internal destinations, but now gained access to the US market.

The European Commission insisted from the beginning on its sole competence for negotiating an agreement on behalf of the whole community, a position which was firmly contested by the big member states, who feared, such an agreement would bring asymmetric disadvantages for their national carriers by opening up transatlantic traffic to all competing European airlines.²⁹ The situation resembled a classic collective action dilemma – all stakeholders acted according to their best interest as individuals, but achieved an outcome suboptimal to the result, which could be achieved by acting together and sacrificing the short term profits.

The situation changed, when in 1998 the Commission launched a case against eight member states, which had concluded bilateral “Open Sky” agreements with the US. The Commission argued, that the conclusion of bilateral agreements infringed the Unions external competence in trade negotiations and the impact of the agreements distorted the competition in the internal market, with discriminative consequences for carriers, whose governments had not concluded bilateral agreements with the US. Under the patchwork of bilateral treaties, US carriers could not only fly from different home airports in the US to the majority of major European airports, but also exercise their so called “fifth freedom” right, which means the right to carry passengers from one point to another one and beyond that point to a third airport (for example from Boston to Paris and onwards to Vienna). European partners of the Open Sky agreement were restricted to flying from their national base to one US airport (since they had no chance to conclude a similar “patchwork of treaties” with different states in the US). The consequence was asymmetric: US carriers could compete with European carriers on internal European destinations (f.e. between Paris and Vienna), but European carriers could not compete with US carriers in the US. Access to the US market remained more restricted for European carriers than was the access to the EU for American carriers. The Commission also criticized the exclusion clauses on national criteria contained in the bilateral agreements, which prevented other airlines from taking advantage of the agreements. Only Air France could link a French airport with the US, only a British company could link Heathrow to the US. Company take over and consolidation between European airlines were hampered by the national exclusion clauses in the “Open Sky” agreements, because the privileges of the agreements were reserved for “national carriers” – companies owned and controlled by nationals of the relevant member state. The Commission argued, that this was an infringement of Common Market competeting and antidiscrimination rules. Commissioners also were positive, that an overarching US/EU deal, brokered by the Commission, would be more favorable for all EU carriers and give them more access to the US market, than the existing bilateral agreements.

would be even bigger, if we also included bicameral parliaments, where both houses can act as institutional veto players and national constitutional courts in some countries.

²⁹ Meunier: What single voice?, pp. 129-131.

In a famous ruling in 2002, the European Court of Justice shared the overwhelming bulk of arguments of the Commission and ordered the Union to negotiate a new agreement, which should replace the existing bilateral agreements. Whereas the Court did not share the competence argument of the Commission, it agreed, that the national exclusion clauses were incompatible with Common Market rules. However, the Court ruling was no blueprint for new agreements, the problem could have been solved by a renegotiation of the “Open Sky” agreements. The Commission then introduced a draft mandate and received the assent of the Council to start negotiations – together with a special committee, whose task was the surveillance of the negotiation on behalf of the Council. During the negotiations on MLAT and extradition, the EU’s negotiation goal had been closer to the status quo than the goal of the US. Now, the situation changed: The US wanted to preserve as much advantages, the bilateral “Open Sky” had granted them, whereas the EU tried to go much beyond the status quo, striving to open the US market for EU carriers.³⁰

There were several strategic points, the EU tried to reach: to remove the “national preference clauses” on both sides, open the US market for EU carriers cabotage flights, to facilitate European investment in US air carriers. The first point was mainly an issue of internal EU redistribution of resources and market access between EU carriers and airports. The bilateral agreements all had contained restrictions, which required a carrier to be owned in majority by nationals of the relevant country. A Belgian company could therefore fly to the US only, if it was owned by Belgian citizens or companies. A French company, although registered in Belgium, would not have been able to use the Open Sky agreement between France and the US. There was no similar restriction on the US side, because US legislation limited the access of foreign investors to US carriers to 25 percent of voting shares, anyway. In times, where on both sides of the Atlantic, large, state owned or state dominated national carriers ruled on the market, this mechanism limited competition, helped to secure high prices (and high employment) for the national companies and was only contested by consumer organizations. This, however, changed with the liberalization in Europe and the rapid expansion of low cost carriers, who were excluded from the transatlantic traffic by the nationality clauses and the fact, that the bilateral “Open Sky” agreements included only “traditional” carriers. Ryanair, as an Irish company, could not fly from Heathrow to New York, since it was not a British carrier in the light of the British-US “Open Sky” agreement and it was not mentioned in the treaty as carrier entitled to fly the transatlantic route. This already shows, that tackling the first point (abolish national restrictions), had to lead to a redistribution of market shares between carriers and airports within in the EU.³¹ In this field, EU/US negotiations actually became internal EU negotiations. And here, most changes occurred.

³⁰ In the meantime, the EU’s documents containing information about their starting position and the mandate of the Commission had been released, but nearly all information about the mandate have previously been erased. The US position was confidential from the beginning, but it is possible to deduce the goals of both sides from other documents and the behavior of the delegations. See: Trevor Soames, Geert Goeteyen, Peter D. Camesasca:

European Aviation Law. New Wings Unfolding.

In: Air and Space Law vol. XXIX/2 (April 2004),

European Parliament: Motion for Resolution on the conclusion of Air Transport Agreement between the US and the EU, 7.3.2007 RE/656664EN

Selected Committee on European Scrutiny (of the British House of Commons). Seventeenth Report: Aviation Agreement 22.3.2007

Council of the EU, 9922/03 ADD1 LIMITE Aviation 115, Relex 2001, Codex 738, USA 54 (annexes deleted), 28.5.2003.

³¹ The British case was special. Air traffic between the US and Britain was regulated on an older agreements (called “Bermuda II”), which was even more restrictive than the “Open Sky” agreements. It limited access to London Heathrow (which handles 40 percent of transatlantic passenger aviation between Europe and the US) to four companies: British Airways, Virgin Atlantic, United Airlines and American Airlines. Abolishing this monopoly and opening the “national exclusion clauses” for other European airlines, had to lead to a weakening of Heathrow as a transatlantic hub and increase competition between European airlines fighting for transatlantic passengers. Therefore public opinion was very reluctant and suspicious towards a new deal and finally obtained a delay: The new agreement would enter into force on March, 30rd 2008, later than other European stakeholders would have had it. See: Selected Committee on European Scrutiny (of the British House of Commons). Seventeenth Report: Aviation Agreement 22.3.2007.

Changes on the transatlantic front were comparably marginal. The EU did not manage to get larger access to the US market. The US blocked the EU efforts to remove the 25% clause for foreign investment in US air companies and also rejected the demands, to allow EU carriers to carry out cabotage flights within the US. In terms of liberalization, the negotiation even brought a set back in some fields: Because the EU was not able to lift the 25% ban for foreign investment, it introduced the same threshold for US investors, with respect to shares in EU airlines. US carriers can now (as they could under the bilateral agreements) extend transatlantic flights to a second European airport, but not within the same country (which means, that United can f.e. fly from Washington to Paris and further to Munich, but not Washington – Paris – Nice).

During the negotiations, the US used veto playing tactics more efficiently than the EU. In December 2006 Congress opposed a draft agreement, which would have given European investors more possibilities to take over and run US air carriers.³² The EU – negotiating under 1. pillar rules – could not do the same. The threat, that an agreement not containing certain crucial provisions, would be rejected by a blocking minority in the Council or a negative vote in the European Parliament, would not have been credible. However, the in June 2004, the Council of the EU rejected a draft agreement negotiated by the Commission, demanding “a more balanced market access provision”. The phrase was interpreted by the US negotiators as a demand for more EU access to the US market.

However, the move did not cause the expected result.³³ The reason for the failure was the fact, that it was transparent, that the only provisions, which could be contested by a EU member country, where those about Heathrow, which would lose its monopolistic position in transatlantic air traffic. But the British government alone and the British MEPs together were not able to veto such an agreement efficiently under qualified majority voting. For all other countries, their carriers and airports, the agreement was potentially profitable, since it redistributed resources from Heathrow to their airports, and increased the opportunities for new transatlantic destinations. With the ECJ, the EP and qualified majority voting in the Council, the EU had a bigger number of potential veto players, but none of them could credibly threaten the US with a veto, since the distribution of interests was transparent for the US negotiators and showed clearly, that there was no real menace of veto.³⁴ The US had fewer veto players (only one), but could efficiently threaten with non-ratification.

The EU failed to reach its goals. The Commission did not admit this, but it becomes clear, if one studies the documents concerning the debate in the European Parliament and if one takes into consideration the negotiators declaration, that the agreement would be followed up by a “second stage negotiation”, which would begin not later than 60 days after the provisional application of the agreement. The treaty clause, foreseeing this “second stage” became a major “face savior” for the EU negotiators: At the “second stage”, more market access would be possible, they repeated when confronted with the disappointing result of the “first stage”.³⁵

Conclusion

³² For the criticism about the draft agreement, the Senate finally rejected, see: Statement of Captain Duane Woerth, president of the Air Line Pilots Association before the Committee on Commerce, Science and Transport of the US Senate. 9.5.2006. There was a major concern, that easing nationality clauses would lead to takeovers of highly indebted American airlines by European competitors, which also would cause higher unemployment of service personal and pilots.

³³ United States Government Accountability Office: Transatlantic Aviation. Effects on Easing Restrictions on U.S. European Markets. July 2004, p. 7.

³⁴ There was also no way for the ECJ, to veto an agreement. More access to the US market was desirable from the EU's point of view, but it was not a condition sine qua non for compatibility with Common Market rules. Therefore lack of access to the US would not have been a reason for the ECJ to reject the deal.

³⁵ European Parliament: Motion for Resolution on the conclusion of Air Transport Agreement between the US and the EU, 7.3.2007 RE/656664EN

The US were efficiently blocked by a high number of (credible) EU veto players in the case of MLAT and Extradition Treaties and did not manage to go beyond those points of mutual interests, that exceeded the status quo. In the case of the transatlantic air traffic, it was the US who had the higher number of credible veto players, which helped them to preserve the status quo against the farer reaching goals of the EU.

Both negotiations confirm the relevance of Schellings “paradox of weakness” and demonstrate, that the number of veto players, who can credibly threaten with non-compliance, explains bargaining outcomes much better than the difference in resourcefulness of the negotiating parties. It seems, that a high number of credible veto players especially enhances the changes of a party to prevent outcomes that go far beyond the status quo – although one should be careful in generalizing the analysis of two cases only.

The same prudence should apply to attempts to generalize the impact of Treaty Reform for the future position of the US in bargaining with the EU. European politicians, members of Commission and the Parliament, intellectuals and researchers of think tanks have often argued, that the EU would be far better off if speaking “with one voice” to third parties and especially to the US. It was not the purpose of this paper, to find out, if the EU may be better off when speaking with “one voice” instead of using veto playing. However, the analyzed cases seem to indicate, that a heterogeneous EU can reach better results at least in defending a status quo and when trying to prevent results which are situated beyond a field of mutual interests. “Speaking with one voice” may be purposeful, when the EU tries to put forward own concepts, but it is certainly no efficient way of defending own interests against an opponent who strives to change the status quo.

This study does not provide evidence for generalization about how first and third pillar procedures affect the EU’s negotiation efficiency. The “Open Sky” example shows, that participants of the Common Market are better off with a centrally brokered agreement than with bilateral agreements, in which the US can achieve a kind of “patchwork gains”. However, the negotiations on air transport also demonstrate, that the distribution effects of gains of a centrally brokered agreement between the Commission and the US government are stronger within the EU than between the EU and the US.

From the perspective of the US – which this study is emphasizing – it seems to be more profitable, to negotiate with a “one voice EU”, with few veto players and supranational institutions involved. Especially when bargaining situation tend to affect internal relations in the EU, the US can achieve outcomes laying beyond the status quo with an EU acting by qualified majority voting. This is consistent with findings of other authors.³⁶

Since the European Constitutional Treaty and the subsequent Reform Treaty considerably increase the scope of issues falling under first pillar rules (qualified majority voting, codecision between Council and European Parliament and the jurisdiction of the ECJ), it may be expected, that in the near future, more and more transatlantic agreements will be negotiated between the US government and the European Commission. This study shows, that this is more likely to create advantageous outcomes for the US than negotiations under third pillar rules. There are, however, two reservations to this statement. First, one should keep in mind, that this assumption is based only on an analysis of two cases. Second: Even if it proves right in other case studies, one should not conclude, that negotiating under first pillar rules would automatically be disadvantageous for the EU. Especially in cases, where both sides try to overcome the status quo, mutually beneficial outcomes may be easier and cheaper to achieve under first pillar rules than under third pillar rules. This studies does not decide, if the shift to more supranational decision making in the Reform Treaty is beneficial for the EU in its relations with the US, but it shows, that it might be beneficial for the US. From this point of view, the signing of the Reform Treaty by 27 heads of states and governments of the EU member states should also be welcomed by the US

³⁶ Menier, op. cit., Tsebelis, Veto Players, pp. 38-64.

government. In the near future, negotiating with the EU will probably become easier, less expensive and more expeditious than it used to be.
 Klaus Bachmann

Annex 1:

Number of veto players per EU member country

The following table shows the number of legislative veto players in EU member countries, which had to ratify the MLAT and Extradition Treaties (EU/US and bilateral instruments). The table is based on a communication of General Secretary of the Council of the EU from the beginning of 2007, and on own research on the website of the parliaments of the relevant countries. It has to be mentioned, that veto player theory may include also Constitutional Courts as veto players, since some countries – like Germany, Poland, France – have strong constitutional courts which can veto international treaties. However, their initiation as veto players is dependant on other actors, who have to bring a matter before the court in order to enable the court to exercise its veto power. Since it was clear during the negotiations, that the new treaties would not cause any constitutional concern (and neither party threatened the opponent with such a scenario), I omitted constitutional courts from the list of veto players. If one includes them, the number of veto players in the 3. pillar of the EU rises even more dramatically.

It also should be mentioned, that the final number of veto players on the side of the EU was larger than the sum of all national legislative veto players, since the Council itself acted as a collective veto player, acting by unanimity.

Country	Number of potential legislative veto players	Remarks
Germany	2	
United Kingdom	1	
France	1	
Spain	1	Senate can only delay decision
Belgium	2	
Netherlands	2	
Austria	1	Bundesrat can only delay decision
Denmark	1	
Sweden	1	
Finland	1	
Luxemburg	1	
Italy	2	

Greece	1	
Portugal	1	
Ireland	1	
Poland	3	President has veto power
Czech Republic	3	President has veto power
Slovakia	1	
Hungary	1	
Lithuania	1	
Latvia	1	
Estonia	1	
Slovenia	1	
Bulgaria	1	
Romania	2	
Cyprus	1	
Malta	1	

The overall number of EU veto players amounts to 36. On the side of the US, the number was 1 (the Senate, acting by qualified majority voting of 2/3)

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