

2002

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### Recommended Citation

Thomas D. Grant, *An End to Divide And Conquer - EU May Move toward More United Approach in Negotiating Open Skies Agreements with USA*, 67 J. Air L. & Com. 1057 (2002)  
<https://scholar.smu.edu/jalc/vol67/iss4/3>

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**AN END TO “DIVIDE AND CONQUER”?  
EU MAY MOVE TOWARD MORE UNITED  
APPROACH IN NEGOTIATING “OPEN SKIES”  
AGREEMENTS WITH USA**

THOMAS D. GRANT\*

**A**N ERA OF bilateral air transport agreements between the United States and individual European Union Member States—along with the benefits this brought the American air transport industry—may well have just witnessed the beginning of its end. Countries party to the European Treaty have been ceding more and more of what was once thought of as inalienable “sovereign” competence to the super-national Community. This process of entrusting important responsibilities to the Brussels-based European Commission was by the early 1990s already well advanced in the dimension of *intra*-Community affairs. Now, however, the EU seems to be poised to take a major step toward “pooling” the competence of its Member States on matters of external affairs, at least in the commercially vital and politically sensitive realm of civil air transport. In the first instance this will be done mainly by identifying matters of internal competence that give rise to “parallel” external competences; however, a direct and even more substantial power appropriation by the EU over foreign trade policy may be in the offing.

On January 31, 2002, Advocate General Antonio Tizzano of the European Court of Justice (ECJ) delivered an opinion the (“Opinion”) in a series of cases brought by the Commission against the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, and Germany for alleged infringements of the Community’s exclusive competence in matters concerning regulation of air transport with non-EU

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members ("third countries").<sup>1</sup> Opinions of the Advocate General serve as guidance to the ECJ and generally offer the parties and the public a preview of the final decision—or at least of the areas of chief focus ahead.

The Opinion, in addition to carrying implications for the constitutional structure of the EU, may well herald a new chapter in EU-U.S. relations on matters of air transport.

## I. SUPERPOWER NEGOTIATES WITH LESSER LIGHTS

The Commission, executive organ of the EU (or "Community" for short), throughout the 1990s sought a mandate to form treaties with the United States on behalf of all the EU Member States in the matter of air transport agreements. Such agreements are vital to the air transport industry. Under the Chicago Convention on International Civil Aviation of 1944, every sovereign jurisdiction has the exclusive right to permit (or deny) foreign air carriers access to its air space.<sup>2</sup> International air commerce therefore rests on agreements between countries setting forth where and how often one another's air carriers may operate.

The United States has long enjoyed a formidable advantage in the negotiation of air transport agreements. The United States, under a single jurisdiction, possesses the largest market in the world for air transport services. For virtually every airline in the world operating long haul international services, access to that market is a coveted prize. The smaller internal markets of countries like Japan, the Netherlands, or the United Kingdom present far less tempting a prospect to American air carriers. However, access to landing slots on international routes into those countries and rights to use those slots in as liberal a fashion as possible are goals American air carriers do very much seek.<sup>3</sup> The United States has thus been able to negotiate bilat-

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<sup>1</sup> Joined Cases C-466/98 (*Comm'n v. United Kingdom*), C-467/98 (*Comm'n v. Denmark*), C-468/98 (*Comm'n v. Sweden*), C-469/98 (*Comm'n v. Finland*), C-471/98 (*Comm'n v. Belgium*), C-472/98 (*Comm'n v. Luxembourg*), C-475/98 (*Comm'n v. Austria*), and C-476/98 (*Comm'n v. Germany*), 2002 E.C.R. 0 (2002) (Opinion of the Advocate General Tizzano) [hereinafter Tizzano Opinion].

<sup>2</sup> Chicago Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 180, 15 U.N.T.S. 295.

<sup>3</sup> I discussed some of these matters at an earlier stage in the history of EU-United States air transport relations. See Thomas D. Grant, *Foreign Takeovers of United States Airlines: Free Trade Process, Problems, and Process*, 31(1) HARV. J. ON LEGIS. 63-151 (1994) (including recommendation to pursue more "Open Skies" agreements with European countries).

eral air transport agreements that pry open access to many markets for American air carriers, while ceding relative crumbs to air carriers of the counter-parties to the agreements, or so the European Commission has complained.

In the Commission's view, the final straw was the conclusion of a series of separate "Open Skies" agreements with individual EU Member States.<sup>4</sup> The Commission repeatedly had asked the Council, a high-level policy-making body consisting of the governments of the Member States meeting at ministerial level, to grant it a mandate to take over all air transport negotiations with the United States, and thus prevent this patchwork approach.<sup>5</sup> The Council declined to do so, granting the Commission a mandate to deal only with certain limited aspects of EU-United States aviation relations. Moreover, the Council explicitly stated that it did not wish to extend the mandate to the full scope of competences the Commission had sought.

Member States, in the absence of Community activity on the matter of negotiating air transport agreements with the United States, began negotiations individually and on a bilateral basis. A number of agreements between the United States and individual Member States resulted. These arguably reflected the superior position of a continental superpower bargaining with small and medium-sized countries and achieved a sweeping liberalization of the air transport markets between the United States and the Member States party to the agreements. The most valuable provision that the United States achieved in its bilateral negotiations is the so-called "Fifth Freedom"—the right to operate air services from one country to a second country and then on to a third, with the freedom to pick up passengers in the second country.<sup>6</sup> When the second and third stops on the route are both Member States of the Community, the Fifth Freedom

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<sup>4</sup> The expression "Open Skies" was given substance in U.S. Department of Transportation Order No. 92-8-13 (1992) (*In the Matter of Defining "Open Skies"*). The Order established the model that U.S. air transport negotiators have sought to implement in bilateral agreements.

<sup>5</sup> The Commission has been persistent in this, pursuing the mandate while also litigating the "Open Skies" matter. Loyola de Palacio, the Commissioner responsible for transport, stated in March 2001 that she was confident the Council would grant a full negotiating mandate to the Commission by June of that year. Reuters, March 23, 2001. *E.U. Transport, Energy Chief Meets U.S. Counterparts*, DEUTSCHE PRESSE-AGENTUR, Mar. 23, 2001.

<sup>6</sup> Five "freedoms of the air" were proposed by the Canadian delegation to the 1944 Chicago Conference. ANDREAS F. LOWENFELD, *AVIATION LAW: CASES AND MATERIALS* 2-6 (1981).

amounts to a license to carry out internal flights within the Community.<sup>7</sup> Such license—akin to permission for “cabotage” (carriage of goods or passengers from point to point within one jurisdiction)—is a prerogative that sovereigns historically guarded with utmost jealousy. Among the seven Member States with which the United States concluded “Open Skies” agreements (Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, and Germany), the United States secured its air carriers this Fifth Freedom and thus, in the Commission’s view, a major inroad to the intra-Community market in air transport services.

A further provision that the United States was able to secure, again in the Commission’s view owing to the superior leverage it possesses as a superpower dealing with lightweights and welterweights, is a set of “nationality” clauses. Each agreement contains a nationality clause, following a similar basic model. The clause provides that the terms of the bilateral agreement apply only to air carriers, the majority ownership and control of which lies in the hands of citizens of the country party to the agreement. This raises a problem of Community law because Article 52 of the European Treaty guarantees the “right of establishment,” that is any citizen of any Member State may establish, own, or control a business entity in any Member State, and no Member State may shape its own legal framework in a way biased against citizens of other Member States.<sup>8</sup> Thus, the Commission identifies another adverse result of a process of negotiation that pits the small constituents of the Community against their giant transatlantic trade partner. In sum, that process permits the United States something like a “divide and conquer” strategy, running against the goal of a unified internal market in the Community.

## II. COMMUNITY COMPETENCE: DIVISION OF POWERS IN THE EU

Students of the United States federal system will recognize the debate taking shape in Europe. How to divide competence between a federal central government and the governments of the units of the federation (in the American case, the “several states”) has held center place in the legal and political history of the United States. A similar debate, though with its own particular contours, is taking shape in Europe, the implications of

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<sup>7</sup> *Id.* at 2-7.

<sup>8</sup> 1992 O.J. (C224/21).

which may prove substantial for trade relations between the EU and the United States.

In the "Open Skies" cases, Member States took on obligations toward the United States which have become part of the law of those Member States concerning transatlantic air transport. As such, the obligations undoubtedly have *some* impact on law, or at least commerce, within the Community. Expressed in broad terms, the question at issue is whether the impact impinges on some area of Community competence—internal or external—in ways that contravene the constitutionally-prescribed distribution of powers between Community and Member States.

The Commission advances two related but distinct lines of argument against the Member States:

- 1) the Community has established its exclusive external competence on matters concerning air transport with third countries, and thus, the Member States are barred from negotiating separately with third countries on those matters; and
- 2) flowing from the *AETR* judgment, the Community, exercising an exclusive internal competence, has set forth common rules governing in its entirety the internal aspect of air transport policy, and therefore, the Member States no longer have the right to "undertake obligations with third countries which affect those rules."<sup>9</sup>

With respect to the first line of argument, much hinges on whether the Community has determined through proper means that a "necessity" exists to exercise an external competence on air transport matters.<sup>10</sup> "Necessity" in this sense is a touchstone, defined in Opinion 1/76.<sup>11</sup> Within the constitutional order of the Community, according to Opinion 1/76, "necessity" can be recognized only by the actual exercise of an external competence by the Community.<sup>12</sup> Once exercised, the competence becomes exclusive, that is, the individual Member States are then barred from exercising it independently.<sup>13</sup> But, before its exercise, the competence cannot be "necessary", and thus, cannot be exclusive. Opinions 2/92 and 1/94, according to the Advocate General, emphasize this arrangement as well.<sup>14</sup>

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<sup>9</sup> Case 22/70, *Coom'n v. Council*, 1971 E.C.R. 263.

<sup>10</sup> Case 1/76, 1977 E.C.R. 741.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See* Case 2/92, 1995 E.C.R. I-521; Case C-1/94, 1994 O.J. (C386/1).

The Council, in the scheme of Community law institutional relations, is responsible for determining whether to exercise the external competence in question. The Commission repeatedly has approached the Council to request a mandate of omnibus scope to carry negotiations out on behalf of the Community leading to an air transport agreement with the United States. In June 1996, the Council granted the Commission only a limited mandate that fell considerably short of the mandate requested. The mandate allowed the Commission to negotiate with the United States on a number of air transport matters but, explicitly, these matters did not include issues of market access, capacity, carrier designation, and pricing. The external competence that the Council determined was a "necessity" through its granting of a mandate thus had quite definite limits.

The Advocate General makes short work of a line of Commission argumentation concerning past findings of "necessity" in connection with Community-level air transport agreements with third countries other than the United States. "[T]he very fact that the Council has behaved differently in this instance," the Advocate General writes, "could be seen as a negative assessment of the 'necessity' of the agreement with the United States."<sup>15</sup>

The Advocate General suggests that the proper course for the Commission might have been to allege improper conduct on the part of the Council rather than of individual Member States, since the Member States acted properly in the absence of an exclusive Community competence on the instant matter of external relations.<sup>16</sup>

The Commission, in developing its second line of argument, advances that two breaches occur when Member States negotiated "Open Skies" agreements with the United States. First, the agreements include "Fifth Freedom" rights—rights to operate flights from the United States to a Member State and then beyond to another Member State (or vice versa).<sup>17</sup> Thus, a flight might originate in Philadelphia, land in Brussels, and continue on to Berlin—having picked up new passengers in Brussels. The result is that a United States air carrier is operating an air service on an intra-Community route, despite the lack of a Community agreement with the United States permitting such ser-

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<sup>15</sup> See Tizzano Opinion, *supra* note 1, para. 56.

<sup>16</sup> See *id.* sec. B.

<sup>17</sup> See *id.* para. 81.

vice. Second, the "Open Skies" agreements contain "nationality" clauses, excluding from their provisions air carriers owned by citizens of third countries.<sup>18</sup> Thus, an air carrier of Belgian corporate citizenship but owned by citizens of other Community Member States would be excluded from the benefits of the Belgium-United States agreement in contravention, the Commission argues, of the principles of a single market.

The ECJ in the *AETR* judgment held that the exercise of the Community's internal power, established by the Community adopting common rules, makes exclusive a parallel external competence over the relevant subject matter and takes from the Member States the freedom to undertake obligations with third countries which affect those rules.<sup>19</sup> The parties to the instant case differ in their interpretation of this case law. The Member States argue that the exclusive external competence means the Member States may not make agreements with third countries if those agreements conflict or potentially conflict with the common rules adopted. The Commission argues for a more expansive interpretation, namely, that the exclusive external competence means the Member States may not make agreements with third countries on any matter falling within the same sphere as that covered by the common rules whether or not the agreements produce a substantive conflict.

According to the Advocate General, the Commission gets *AETR* right; the Member States may not assume obligations that "may even merely 'affect' the common rules."<sup>20</sup> However, the Advocate General goes on to explain that it is not clear that the Member States in the instant case have assumed an obligation likely to "affect" the common rules.<sup>21</sup> The Advocate General examines *AETR* and other judgments (Opinion 1/94 and Opinion 2/92) for guidance as to the question.<sup>22</sup> A possible distinction between the earlier cases and the instant case is that the common rules in question in the earlier cases contained express provision relating to negotiations with third countries or established the complete harmonization of the relevant sphere.<sup>23</sup> The Opinion emphasizes that "a specific assessment is required in each

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<sup>18</sup> See *id.* para. 118.

<sup>19</sup> See Case 22/70, *Comm'n v. Council*, 1971 E.C.R. 263.

<sup>20</sup> See Tizzano Opinion, *supra* note 1, para. 67.

<sup>21</sup> *Id.* para. 68.

<sup>22</sup> *Id.* para. 69.

<sup>23</sup> *Id.*



case to determine if the agreement conflicts in some respect with the common rules."<sup>24</sup>

In the guidance that the Advocate General provides for determining whether common rules have been "affected", a much narrower principle is suggested than that developed in American constitutional case law from the Commerce Clause.<sup>25</sup> "[I]t is not enough," the Advocate General writes, "to cite general effects of an economic nature which the agreements could have on the functioning of the internal market."<sup>26</sup> Instead, specific and detailed indications are necessary, as to which Community legislation would be prejudiced by the agreements.<sup>27</sup>

### III. COMMUNITY LEGISLATION POTENTIALLY SUFFERING AETR 'AFFECTS' UNDER THE DISPUTED AGREEMENTS

The Commission argues two pieces of Community legislation that the Commission argues, would be prejudiced by the agreements: Regulation 2407/92 (on licensing air carriers) and Regulation 2408/92 (on access for Community air carriers to intra-Community air routes).<sup>28</sup> The Advocate General doubts, however, whether the common rules established by the two Regulations are common rules "affected" by the "Open Skies" agreements. The Advocate General notes that the Regulations contain no provision whatsoever concerning non-Community air carriers.<sup>29</sup> Therefore, the agreements could not have directly "affected" the common rules set forth in the Regulations:

[I]n the absence of Community legislation governing relations in a given area with third countries, the disparities which could hypothetically result from the conclusion of different international agreements by Member States in that area and the economic consequences that might ensue for the internal market do not *in themselves* suffice to preclude the right of Member States to enter into such agreements.<sup>30</sup>

Regulations 2407/92 and 2408/92 say nothing about third country air carriers, thus agreements with third countries about air transport cannot "affect" the Regulations. In any event, the

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<sup>24</sup> *Id.* para. 75.

<sup>25</sup> U.S. CONST. art. I § 8.

<sup>26</sup> Tizzano Opinion, *supra* note 1, para. 77.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* para 81.

<sup>29</sup> *Id.* para 82.

<sup>30</sup> *Id.* para 87.

Advocate General proposes that whether the agreements "affect" the Regulations, in the sense of "impinging on their correct application or altering their scope" is beside the point, for the Commission adduces no evidence that they do.<sup>31</sup>

Though skeptical of much of the Commission's pleading, the Advocate General finds that complaint against the Member States might well be justified in two limited but not unimportant fields.

Regulation 2409/92 provides that only Community air carriers may introduce "new products or lower fares" on intra-Community air routes.<sup>32</sup> The Fifth Freedom rights, contained in the agreements between Member States and the United States, would allow American air carriers to set lower fares on intra-Community routes. The agreements, in this respect, "affect" a common rule of the Community and thus violate the Treaty. Denmark, Sweden, Finland, Austria, and Germany, in their agreements with the United States, provided that American air carriers could not undersell Community carriers on intra-Community routes. However, such protection, however, does not salvage this part of the agreements, for Community law is that *any* "affect" is impermissible if it impinges on an exclusive external competence,<sup>33</sup> the concept of exclusive external competence precludes the Member States from taking on an obligation by treaty or agreement, if the obligation even relates to the competence. Even if the obligation is substantively identical to the relevant Community rule, it is no less an infringement.

Regulation 2299/89 establishes a code of conduct for computerized reservation systems ("CRSs") and applies to third countries.<sup>34</sup> The Advocate General finds that the agreements may "affect" that Regulation as well, and thus violate the Community's external competence on the matter of CRS codes of conduct.<sup>35</sup>

#### IV. RIGHT OF ESTABLISHMENT AND "NATIONALITY" CLAUSES

The Advocate General also takes the view that the "nationality" clauses violate the right of establishment, set forth in Article

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<sup>31</sup> *Id.* para 83.

<sup>32</sup> Council Regulation 2409/92, art. 1, 1992 O.J. (L240/15) 3.

<sup>33</sup> Tizzano Opinion, *supra* note 1, para. 67.

<sup>34</sup> Council Regulation 2299/89, art. 7, 1989 O.J. (L220/1) 1, 2.

<sup>35</sup> Tizzano Opinion, *supra* note 1, para. 104.

52 of the European Treaty.<sup>36</sup> The agreements allow the United States to refuse route access to air carriers based in one of the Member States with which a bilateral agreement is in force, but owned or controlled by citizens of another Member State. Member States, under Article 52, are obliged to give “national treatment” to all businesses under their jurisdiction—that is, they must treat all businesses as they treat businesses owned or controlled by their own nationals.<sup>37</sup> According to the Advocate General, the bilateral agreements, although, strictly speaking, it is in the United States that they vest a right to discriminate, potentially place the Member States party to them in the position of violating Article 52.<sup>38</sup> The Opinion accepts the Commission’s view that the “nationality” clauses are contrary to Community law.<sup>39</sup>

## V. COMMERCIAL AND OTHER IMPLICATIONS

Following the Opinion of January 31, 2002, the press declared that the Advocate General’s guidance previews commercially significant changes in air transport relations between the United States and the Member States in question.<sup>40</sup> Notwithstanding the importance of the Opinion, such assessments may well have been premature.

The Advocate General’s guidance, if it becomes the basis of the final decision of the ECJ, might re-work in radical ways the commercial reality of EU-United States air transport relations. But it similarly leaves open, at least in the commercial dimension, the chance for continuity. The commercial outcome depends on whether the ECJ, in its final judgment, takes a narrowly circumscribed approach to correcting the flaws in the disputed bilateral agreements, or a more expansive approach.

The Advocate General concluded that the Member States were indeed within their competence when they agreed to grant United States carriers the right to furnish intra-Community service.<sup>41</sup> The defect was in furnishing the United States carriers

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<sup>36</sup> *Id.* para. 120-126.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* para. 132.

<sup>40</sup> See, e.g., Paulo Prada, *EU Commission Wins Round in Opening Air Routes to U.S.; Ruling Says Bilateral Pacts Violate Union Law*, WALL ST. J. EUROPE, Feb. 1, 2002, at 1; Barry James, *Turbulence Ahead for ‘Open Skies’: Top EU Legal Aide Argues that U. S. –European Air Pacts are Illegal*, INT’L HERALD TRIB., Feb. 1, 2002.

<sup>41</sup> Tizzano Opinion, *supra* note 1, para. 44, 45.

the right to introduce new products and set prices below those charged by Community carriers. Much therefore depends on the scope of the remedy that the ECJ prescribes in its final judgment. A judgment that requires the Member States to denounce in their entirety the disputed bilateral agreements will have an immediate and substantial commercial impact. United States air carriers will lose the international legal basis for their transatlantic services to eight European countries, and the United States government will have to set about in haste to reach new agreements, if a serious disruption in air transport is to be averted. The Advocate General hardly excludes that a total scrapping of the existing treaties might be necessary, and specifically draws attention to provisions concerning denunciation.<sup>42</sup> The Treaty addresses the problem of bilateral international obligations that predate accession of a Member State to the Treaty and that conflict with the common rules of the Community.<sup>43</sup> It also requires each Member State to address the problem by seeking to re-negotiate the obligations.<sup>44</sup> Denunciation of agreements may be required when suitable re-negotiation proves impossible.

On the other hand, the ECJ, in its final judgment, might find a way to sever from the agreements those of their parts that contravene Community law. The "nationality" clauses are free-standing language and conceivably could be removed without wrecking the agreements as a whole. It would remain to be seen, however, whether the United States would wish to remain party to an agreement that permitted air carriers owned by citizens of Member States not party to an "Open Skies" agreement with the United States to have "Open Skies" levels of access to the American air transport market. The United States, like most sovereigns, has carefully regulated the right to ownership of airlines with access to its market, with majority ownership and control requirements commonplace. The granting of the privilege of access to one country therefore cannot be assumed to evince an intent to grant the same privilege to a carrier owned or controlled by citizens of another country, even if the carrier, as a legal entity, itself is a citizen of the country granted the privilege.

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<sup>42</sup> *Id.*

<sup>43</sup> Treaty Article 234, para. 2.

<sup>44</sup> *Id.*

The other aspect of the agreements that contravene Community law and that would have to be removed are the products and pricing implications associated with the Fifth Freedom clauses. The Advocate General leaves unclear whether a change is possible along these lines but does distinguish between a permissible result of the disputed agreements—access for United States carriers to intra-Community routes—and an impermissible result—freedom to introduce new products and price services on those routes below the rates charged by Community carriers. The Advocate General is quite plain that Regulations Nos. 2407/92 and 2408/92, governing access of Community air carriers to intra-Community routes, in no way restrict Member States from granting access to those routes to non-Community air carriers.<sup>45</sup> A further Regulation, however, Regulation 2409/92, provides that “[o]nly Community carriers shall be entitled to introduce new products or lower fares than the ones existing for identical products.”<sup>46</sup> The setting up of a common rule for the Community on pricing and products by Regulation 2409/92 in turn gives rise, under the rule of the ECJ judgment in *AETR*, to a “parallel” competence over external affairs.<sup>47</sup> In other words, the Community acquires, through the internal common rule established by Regulation 2409/92, competence to regulate external affairs to the extent necessary to preserve and effectuate the internal common rule. The ECJ might well take the view that that external competence is narrowly circumscribed in that it reaches only the products and pricing issue; for the products and pricing issue is the only relevant issue for which an internal common rule of the Community exists, and thus, the only issue possessing a basis for a relevant parallel external competence.

If it takes this circumscribed view, the ECJ could excise the products and pricing elements from the disputed agreements, leaving the Fifth Freedom (route access) clauses otherwise intact. The Community rule on products and pricing would then prevail in place of those elements of the bilateral agreement, but the access to intra-Community routes created by the agreement would remain.<sup>48</sup> And, as a matter of practical commercial

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<sup>45</sup> Tizzano Opinion, *supra* note 1, para. 82.

<sup>46</sup> *Id.* para. 89.

<sup>47</sup> [cite]

<sup>48</sup> A challenge may be presented, however, in attempting this severance. The bilateral agreements provide expressly for Fifth Freedom rights. The products and pricing liberties that they grant United States air carriers stem, it seems, by *implication* from the Fifth Freedom rights. If in the agreements there is no readily

application, the situation with regard to products and pricing would remain unchanged. A Community rule would simply take over the field from a Member State obligation under the bilateral agreement and the Community rule that would supplant the obligation is identical, or nearly identical, in substance to the obligation. (Recall that the Member States incorporated limits into the "Open Skies" agreements, so as to avoid results contrary to the substance of the Community products and pricing regulation.) In this scenario, the final judgment in the "Open Skies" cases would work little change in the commercial relations of United States air carriers to their European markets.

The constitutional nature of the case takes on commercial significance here. Community law reaches the disputed agreements through parallel external competence not a direct exercise of external competence. In light of the twisting path that brings the matter under Community purview, the Court might well exercise some restraint in fashioning its remedy. A circumscribed approach that permit the Member States to salvage the route access provisions of the Fifth Freedom clauses, would demonstrate that the Court recognizes the need for caution in attributing to the Community powers not explicit in existing law. It would also preserve, at least in part, existing commercial relations.

However, under either a circumscribed or an expansive approach, the judgment likely will change the way the United States negotiates with Community Member States on issues of air transport. Advocate General Tizzano, in his analysis of Member State responsibilities under the second paragraph of Article 234, is overtly critical of the approach taken to negotiations with the United States.<sup>49</sup> Article 234, second paragraph, requires

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identifiable clause, distinct from the clause conferring Fifth Freedom rights, in which the products and pricing liberties can be said to reside, then it may be difficult to sever the products and pricing liberties from the Fifth Freedom. A possible answer would be for the ECJ to require the Member States to seek negotiation of side agreements clarifying that the matter of products and pricing is governed by Community law and is in no way affected by anything express or implied in the agreements themselves.

<sup>49</sup> The Opinion also addresses the first paragraph of Treaty Article 234, which allows a Member State to continue to honor some international obligations that conflict with common Community rules, where those obligations pre-date accession by the Member State to the European Treaty. The Member States cite the first paragraph of Article 234 and argue it renders the dispute bilateral agreements permissible. The Advocate General would deny Article 234 exemption to the nationality clauses in the disputed agreements. Treaty Article 234, para. 140.

each Member State to “take all appropriate steps” to eliminate “incompatibilities” between Community law and agreements with third countries pre-dating accession to the European Treaty. The provision also requires Member States to adopt a “common attitude” *vis-à-vis* the third country, coordinating their approach so as better to bring their external obligations in line with Community law. The Advocate General states that the Member States failed even to attempt to establish a “common attitude.”<sup>50</sup> If the ECJ takes this line up in its final judgment, then part of the remedy in the “Open Skies” cases may well be an injunction to re-open negotiations with the United States but either at Community level or with the Member State respondents moving forward as a single negotiating team. The contrast to past United States-Member State negotiations, where the United States has sat opposite individual European countries, is clear enough. It seems inevitable under an injunction pursuant to Article 234 that the dynamic of United States-European negotiations in the air transport sector would change. The way might be opened to a pairing of equals in an arena in which a heavy weight has long prevailed.

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<sup>50</sup> Tizzano Opinion, *supra* note 1, para. 144.