

## The Treaty on Open Skies in Force: European Security Unaffected

Arms control initiatives have their own fate. The idea of Open Skies has been the longest-lived arms control initiative in modern times. It has lasted over nearly half a century from the mid-1950s to the beginning of the 21st century. A study of Open Skies thus tells a lot about the history of the second half of the 20th century and it also reflects the changing role of arms control in the international system. It is fascinating to see how Open Skies has been capable of adapting to the changing structure of international relations. This article gives a short overview of the history of Open Skies from the emergence of the idea to Treaty signature and then focuses on the relevance and potential of the Treaty under current conditions. It is the preliminary assumption of this article that Open Skies might have lost its relevance as an instrument of European security policy, but that for verification purposes and confidence-building it has unquestionably retained some residual importance. It can be used for certain military as well as non-military purposes in this region and can be offered to other continents, as a mechanism applicable to their emerging security needs.

### *From the Emergence of the Idea to the Signature of the Treaty*

The idea of Open Skies emerged as an element of military transparency in the mid-1950s and was the first, somewhat vaguely formulated proposal that wanted to end the bipolar system based exclusively on confrontation between the Soviet Union and the United States. Even though the term “arms control” was non-existent at the time Open Skies was first proposed, it has been regarded as an arms control initiative for most of the period it has been familiar to the international community. It was in fact the first non-nuclear arms control initiative in the nuclear age.

It was presented at the height of the Cold War in 1955 at the Geneva Conference of Heads of Government. The contours of the proposal made by President Dwight D. Eisenhower were fairly vague, which is not surprising and could be due to the fact that little advance work was conducted. In any case, there is no record of any major preparation of the proposal or any indication that it had been thoroughly prepared in US government circles. It may well be, however, as in many cases with top-level initiatives, that it was intentionally vaguely defined leaving the details to later lower-level negotiations. It is also possible that, as most often is the case, it was drafted specifically to gauge the other side’s reaction to the initiative. Why would one make a de-

tailed proposal if one cannot assume realistically that it will be accepted? President Eisenhower actually stated the following in his speech: "Surprise attack has a capacity for destruction far beyond anything which man has yet known. So each of us deems it vital that there should be means to deter such attack. Perhaps, therefore we should consider whether the problem of limitation of armament may not best be approached by seeking - as a first step - dependable ways to supervise and inspect military establishments, so that there can be no frightful surprises, whether by sudden attack or by secret violation of agreed restrictions. In this field nothing is more important than that we explore together the challenging and central problem of effective mutual inspection. Such a system is the foundation for real disarmament."<sup>1</sup>

If one takes a closer look at the idea, it is clear that Open Skies was conceived as a verification measure to contribute to future disarmament. Thus one could say it intended to provide the necessary transparency for the verification of arms control measures to be agreed upon later. This means one had opted for the reverse order from that of regular arms control initiatives put forward later in the history of the Cold War. The latter usually focused on reductions (or limitations at the least) and were supplemented by information exchange and verification.

Aerial observation can, of course, serve multiple objectives. As President Eisenhower said shortly after the Geneva meeting in a radio and television address: "Our proposal suggested aerial photography, as between the Soviets and ourselves by unarmed peaceful planes, and to make this inspection just as thorough as this kind of reconnaissance can do. The principal purpose, of course, is to convince every one of Western sincerity in seeking peace. But another idea was this: if we could go ahead and establish this kind of an inspection as initiation of an inspection system we could possibly develop it into a broader one, and especially build on it an effective and durable disarmament system."<sup>2</sup>

Of course, there was the opportunity to use aerial photography for reconnaissance purposes. Moreover, there was also the potential to apply it as part of an inspection system to monitor disarmament. It is essential, however, to pay attention to the sequence of events: The disarmament "edifice" which would have been monitored was not yet in existence and was not even recognizable in vague contours. Thus at the time, it would have been completely impossible to carry out any inspection of disarmament. Therefore, there was from the outset an imbalance between the two possible applications and this gave the advantage to reconnaissance.

One could consider another motive to justify Open Skies, that is building confidence. However, this aspect appeared only on the margins of the initia-

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1 Statement by President Eisenhower, in: The Geneva Conference of Heads of Government, July 18-23, 1955, Washington 1955, p. 21.

2 Radio-Television Address by President Eisenhower, Washington, 25 July 1955, printed in: The Geneva Conference of Heads of Government, cited above (Note 1), p. 86.

tive at the time. In his post-summit news conference, Secretary of State John Foster Dulles called it “President Eisenhower’s dramatic proposal that the United States and the Soviet Union should agree that peaceful planes would fly over each other’s territory to take photographs so that each could be sure that the other was not planning a massive surprise attack”.<sup>3</sup> Not to mention that we know little about how confidence-building works in practice and we knew even less in 1955. We don’t know “(...) whether the process needs to be ‘triggered’ by an initial collection of modest CBMs (...) or whether the process ‘somehow’ starts and then benefits from the positive effects of appropriate CBM agreement”.<sup>4</sup> Therefore, in the absence of measures to be monitored and initiated, the two ideas above, disarmament and confidence-building, provided relatively weak legitimacy.

On the other hand, however, there was a lot to do on the reconnaissance side. As it was noted, “(...) in 1955 the United States possessed all the necessary weapons for a counter-force nuclear attack against the Soviet Union. The major obstacle to confidence that such an attack could be carried out without a massive Soviet counter-attack was the lack of accurate and complete targeting data. The US Strategic Air Command was faced with a rapidly expanding target list (...) In this context the Open Skies plan can be seen as a military intelligence measure of the highest importance, one which would strengthen the weakest link in US nuclear war-fighting plans.”<sup>5</sup>

It is open to doubt whether any American politician ever planned a nuclear attack, not to mention a first strike, against the Soviet Union. It is certain, however, that the idea of Soviet-US Open Skies could have been used to acquire more knowledge about the Soviet Union, particularly about its military. Here we arrive at an important juncture: namely, that the level of transparency in the two societies showed a significant discrepancy throughout the Cold War. This was the fundamental reason why the increase in transparency could be regarded as more important and/or dangerous for one side than for the other. The US would have had more advantages from “opening” the Soviet Union than the other way round. Therefore it was in the understandable national interest of the United States to put forward such a proposal even if it was masked as an initiative that could, in the end, lead to disarmament.

It is correct to assume in light of the above that “the Open Skies proposal was made with the knowledge that it would be rejected by the Soviet Union”.<sup>6</sup> Bearing in mind that the Soviet Union was a closed society and there was some paranoia about increasing transparency in every respect, and particularly in areas with military relevance, this did not come as a surprise. The So-

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3 News Conference Statement by Secretary of State Dulles, Washington, 26 July 1955, printed in: *The Geneva Conference of Heads of Government*, cited above (Note 1), p. 87.

4 James Macintosh, *Open Skies as a Confidence-Building Process*, in: Michael Slack/Heather Chestnutt (Eds.), *Open Skies - Technical, Organizational, Operational, Legal and Political Aspects*, Toronto 1990, p. 49.

5 Allan S. Krass, *Verification: How Much Is Enough?* London/Philadelphia 1985, p. 118.

6 *Ibid.*

viet Union did in fact reject the US initiative, thus the reaction was in accordance with the perceived expectations of at least some in the US. If one accepts as an assumption that the US wanted to table an initiative which would not be found acceptable by the Soviet Union, the test was certainly successful. It is interesting, however, how Premier Nikolai A. Bulganin argued at the session of the Supreme Soviet: "At the Geneva meeting, US President Eisenhower put forward a proposal to organize an exchange of military information between the Soviet Union and the United States and to carry out mutual aerial photography of both countries' territory. If one gives the necessary attention to the initiative in which an attempt has been made to find a solution to the fairly complex problem of international control, it has to be said at the same time that the real effect of such measures would not be great. In the unofficial exchanges with the leaders of the US government we noted directly that aerial photography could not offer the expected results as our countries are both located on immense territory on which everything can be hidden away as necessary. It has to be taken into account that the plan initiated affects only the territory of the two countries and does not consider military forces and armaments located on the territory of other states."<sup>7</sup> Interestingly, the attitude of the Soviet leadership was not particularly confrontational. This was not only reflected in the tone of the statement, but also in the fact that President Eisenhower's entire Geneva speech was published in the Soviet press. The last sentence raised a constant concern of the Soviet Union, namely encirclement. Interestingly, this concern reappeared again twenty-five years later during the early phase of Open Skies negotiations.

US documents show Eisenhower had also been informed about the coming breakthrough in surveillance capabilities in the form of a high-altitude aircraft (U-2) that would "open" skies with or without Soviet acceptance and gave approval to the U-2 programme. When the Soviet Union shot down a U-2 aircraft in the spring of 1960 near Sverdlovsk (now Ekaterinburg) the first phase of Open Skies history came to an end. The US denied the existence of U-2 until it was faced with solid Soviet evidence to the contrary in this case. With the coming to power of Leonid Brezhnev shortly thereafter, the Soviet leadership's willingness for military transparency decreased even more. The dynamics of the "good old" Open Skies initiative were gone.

In the 1960s and 1970s, two major series of developments affected the monitoring of arms control arrangements. 1. The emergence of satellite technology: "The information collected by satellites ultimately became an essential element of bipolar stability, in much the same way that Open Skies information could have done earlier, had it been available."<sup>8</sup> 2. The US and the

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7 Itogi Zhenevskovo Soobsheniya Glav Pravitelstv Cheteryekh Derzhav: Doklad Predsedatelya Soveta Ministrov SSSR tovarishcha N. A. Bulganina 4 Avgusta 1955 na tretey sessii Verkhovnoy Soveta SSSR, in: Pravda, 5 August 1955, p. 3 (this and all other quotations from foreign-language sources have been translated by the author).

8 John A. Hawes, *Open Skies: Beyond "Vancouver to Vladivostok"*, Washington 1992, p. 2.

Soviet Union concluded bilateral arms control agreements followed by several European accords whose adequate verification had to be guaranteed. Thus two factors appeared which fundamentally affected Open Skies. At least the two leading nuclear powers had the technology available that could, in any case partially, replace aerial monitoring. Moreover, the arms control arrangements that made verification necessary were now in existence as well. The question open was whether in light of the above-mentioned factors, aerial monitoring, or more precisely, the Open Skies regime would find its niche. The rigidity of the bipolar regime did not open any possibilities for Open Skies as the international system was dominated by those states that had the most extensive, and for some time nearly exclusive, access to National Technical Means (NTM) for verification purposes. Most other countries did not play a role in this process. The two nuclear powers were able to provide the necessary monitoring through space technology.

The US administration, at the beginning of 1989, planned the relaunching of the Open Skies concept as a remake of the bilateral Soviet-American measure. In this form it would have shown that the US as a status quo-oriented power lacked the vision to understand how important processes could gain more substance through the multilateralization of European affairs. While Washington was still thinking of adding one or the other additional element to the bilateral agenda, others had gone further. They were of the opinion that multilateral talks could give backing to the emancipation of the smaller members of the Warsaw Treaty Organization (WTO). Beyond this, it could make information available to countries that did not have their own satellite monitoring system nor did they have access to the data of those systems that other states had. The dissolution of the WTO meant that a number of countries emerged, which were *de facto* non-aligned and where it was highly unpredictable how their political orientation would evolve. Would they remain non-aligned or become members of an alliance where data from military satellites would be made available? In the case of the former, an arrangement under which information could be gathered through available technological means and at affordable costs would be in their best interests.

Canadian Prime Minister Brian Mulroney in consultation with US President George Bush called attention to the importance of seeking a multilateral arrangement.<sup>9</sup> Fortunately, the US leadership was receptive, which was reflected in the President's speech at Texas A&M University on 12 May 1989: "Now let us again explore that proposal, but on a broader, more intrusive and radical basis - one which I hope would include allies on both sides. We suggest that those countries that wish to examine this proposal meet soon to work out the necessary operational details, separately from other arms control negotiations. Such surveillance flights, complementing satellites, would provide regular scrutiny for both sides. Such unprecedented territorial access

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9 Cf. Joe Clark, Foreword: Open Skies, in: Slack/Chestnutt (eds.), cited above (Note 4), pp. vi-vii.

would show the world the true meaning of the concept of openness. The very Soviet willingness to embrace such a concept would reveal their commitment to change.”<sup>10</sup>

The Bush proposal differed from his predecessor's in two important respects: First, it aimed at initiating multilateral negotiations with the involvement of all the members of NATO and the WTO, i.e., the idea of bilateral talks was replaced by multilateral negotiations. Second, Bush proposed beginning separate negotiations, thus de-linking Open Skies from other fora in which aerial observation could be used as an associated measure of an arms control regime, e.g. at the ongoing Negotiations on Conventional Armed Forces in Europe (CFE). This meant that confidence-building rather than arms control verification became the primary function of Open Skies. This in turn was in line with the CSCE Stockholm CSBM Document of September 1986 that codified aerial observation in a politically binding document. The move from arms control verification to confidence-building has been evident despite a certain amount of hesitation in including an aerial inspection protocol in the forthcoming CFE Treaty. These changes taken together represented the first major adaptation of the Open Skies idea.

The initiative, due to the lack of advance co-ordination with the NATO allies of the United States, faced a lukewarm reception. This was reflected in the choice of words of the NATO declaration at its next top level meeting: “It will be the subject of careful study and wide-ranging consultations.”<sup>11</sup> Half a year later, NATO presented its common position on Open Skies. NATO's internal discussions focused on several issues, among others whether the future treaty should be a bloc-to-bloc arrangement or not. Unquestionably, the internal cohesion of the Warsaw Treaty had practically disappeared, whereas NATO, on the other hand, was alive and well. A bloc-to-bloc arrangement opposed by France and increasingly by other Western European countries would have meant that those states formally belonging to the same alliance would not be able to monitor each other under the treaty. This was contrary to the political reality according to which “the westward-leaning members of the Warsaw Treaty might be more interested in overflying the Soviet Union than Western Europe”.<sup>12</sup>

Since the Canadian Prime Minister's very important contribution to the multilateralization of Open Skies, his country had a special interest in the process. It was for this reason that Canada hosted the first round of the talks in February 1990. The negotiations took place amidst turbulent changes in Europe. When the foreign ministers met in Ottawa there were two prominent

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10 George Bush, Notes for an Address to the Graduating Class of Texas A&M University, 12 May 1989.

11 Declaration of the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Brussels, 29-30 May 1989, in: NATO Final Communiqués 1986-1990, Brussels 1990, p. 35.

12 Jonathan B. Tucker, Back to the Future: The Open Skies Talks, in: Arms Control Today 8/1990, p. 21.

matters on the agenda, neither of them related to Open Skies: German unification and the stationing of foreign troops in Europe under the CFE Treaty negotiated in Vienna. Attention to Open Skies was confined to a meeting of experts. The changes in the international environment also impacted upon the talks, however. Whereas NATO - although with some difficulty - was able to unite forces and table a proposal based on its so-called "Basic Elements" paper<sup>13</sup>, the negotiations within the WTO, even though it presented a paper at the last minute, must be regarded as largely unsuccessful. The Soviet Union was so displeased it was obliged to make concessions to its Warsaw Treaty partners that after the paper had been presented it returned to its earlier position on several substantive, controversial matters. The Soviet delegation did indeed take advantage of its "newly gained" independence. It understood that the disadvantage of being *de facto* "non-aligned" and thus no longer obliged to respect the formal rules of an alliance is accompanied by certain advantages. Namely, there was no need to seek further compromise with the WTO allies<sup>14</sup> so that it was possible for Moscow to react swiftly to the position of the other side.

The conference could not achieve a breakthrough, but rather it reflected the difficulty of negotiating arms control during sudden and fundamental changes in the international environment. However, it did resolve a few minor issues. Experts agreed upon the *structure of the talks*, i.e., they identified those major issues that were to be regulated by the treaty. These were: A) aircraft and sensors, inspection of aircraft and sensors, the role and status of inspectors on board observation aircraft; B) quotas, geographical scope and limitations; C) conducting observation flights, flight safety, transit over third States Parties; D) the nature of the agreement, the Consultative Commission, liability, status of personnel, further measures.

The process continued in Budapest two months later. In light of the experiences at the Ottawa Conference, there was little hope that one would now arrive at an agreement there. These limited expectations were also reflected in the fact that experts were making efforts to explore different possibilities in detail and prepare options for political decision. The US had started to modify its stance and, based on a combination of "sticks and carrots", was putting the Soviet Union under increasing pressure. Among the "sticks", the most important factor was to make the Soviets understand that they had been increasingly isolated at the talks. The US consolidated East Central European support behind NATO positions. Among the "carrots", NATO countries expressed their readiness to address the problem of the inferiority of Eastern

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13 Annex to the Communiqué of the North Atlantic Council Meeting in the Ministerial Session on 14 and 15 December 1989, in: NATO Final Communiqués, cited above (Note 11), pp. 128-132.

14 It is a fact that the Soviet Union was practically never obliged to seek compromise in the Warsaw Treaty on arms control issues until the late 1980s. Major efforts to compromise were necessary, however, at the end of the 1980s and the beginning of the 1990s during the period between the *de facto* and the *de jure* end of the Warsaw Treaty.

technology. It was understandable that a technologically inferior East, whose situation was further aggravated by increasing fragmentation, intended to get some guarantee that the West would not take advantage of its technological superiority. After the end of the second round, the talks arrived at an impasse. Attention was focused on more prominent and pressing matters of international politics, most importantly upon German unification. In European arms control, priority was given to the conclusion of the CFE talks and to signing the CFE Treaty before this was so overtaken by the events that certain major players would lose interest in it completely. It was doubtful whether Open Skies could be brought back to life through further adaptation or whether it would never be realized at all.

“Events in Europe between May 1990 and the summer of 1991 fundamentally changed the Open Skies dynamic but in a very complex manner. While it was clear that NATO no longer faced the same threat from the USSR, the failure to obtain an aerial inspection regime in the CFE treaty and the Soviet decision to move large numbers of forces and CFE treaty-limited equipment out of the ‘Atlantic-to-the-Urals’ zone, made an Open Skies agreement appear more urgent to many in the Alliance. As a result, it became possible for NATO countries to offer serious concessions (...)”<sup>15</sup>

The summer of 1991 was again not the most suitable to deal with Open Skies, though four events reconfirmed the need to achieve an agreement: First, there was the firm commitment of the parties to continue the negotiations until the process was completed by adopting a multilateral Open Skies agreement. Second, Hungary and Romania had signed a bilateral Open Skies agreement during the recess of the multilateral talks in May 1991. This was a breakthrough for the Open Skies approach on the practical level. Third, the CFE Treaty was signed in November 1990 without an aerial inspection protocol. There was a commitment, however, to agree upon aerial inspection later. The CFE Treaty stipulated that after the end of the 40 months reduction phase under the CFE Treaty “each State Party shall have the right to conduct, and each State Party with territory within the area of application shall have the obligation to accept, an agreed number of aerial inspections within the area of application. Such agreed numbers and other applicable provisions shall be developed during” follow-up negotiations.<sup>16</sup> Fourth, by the summer of 1991 an accord was achieved concerning the 57,300 (!) pieces of heavy

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15 Ralph J. Lysyshyn, *Open Skies Ahead*, in: *NATO Review* 1/1992, p. 23-26, here: p. 24.

16 *Treaty on Conventional Armed Forces in Europe*, Paris, 19 November 1990, Article XIV, para. 6, in: Arie Bloed (Ed.), *The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993*, Dordrecht/Boston/London 1993, pp. 1223-1253, here: p. 1248. Interestingly enough, the adapted CFE Treaty signed in November 1999 that has not entered into force yet does not refer to aerial inspection. It mentions “inspection” generally. This is an indirect admission that no further effort will be made to introduce aerial inspection into the CFE regime and eventual aerial inspections will be carried out under the Open Skies Treaty. Cf. *Agreement on Adaptation of the Treaty on Conventional Armed Forces in Europe*, CFE.DOC/1/99, at: [www.osce.org/docs/english/1990-1999/cfe/cfeagreg.pdf](http://www.osce.org/docs/english/1990-1999/cfe/cfeagreg.pdf).

armaments, which the Soviet Union had relocated east of the Ural Mountains and which, in accordance with the Soviet announcement made at an extraordinary conference of the States Parties, required a certain amount of monitoring. As the area of application of the CFE Treaty was limited to the territory between the Atlantic and the Urals, it was necessary to agree upon verification methods that would be extended to the territory where those armaments were located. Open Skies could be used to cover Siberia as well.

In sum, the “critical mass” to complete the Open Skies negotiations was present by the summer of 1991. It remained to be seen how the parties would break the deadlock. The impetus came from Germany. The then Foreign Minister Hans-Dietrich Genscher sent a letter to his Soviet counterpart shortly after the Soviet Union had agreed to the conditions concerning the excess equipment relocated east of the Urals initiating a restart of the Open Skies talks. He wrote the letter on behalf of the WEU the presidency of which he had taken over in July 1991.<sup>17</sup> The initiative was skilfully prepared in two senses: First, the letter came formally from an organization that was not as heavily disliked as NATO in the Soviet Union. Second, it was written by the German Foreign Minister at a time when during the unification process Germany and Genscher personally had acquired a certain credibility in Moscow. This was still not enough to relaunch the negotiations. A change was again triggered by an important historical event and the subsequent political decisions. As a result of the Moscow coup of August 1991, the Soviet position became far more conciliatory. When the negotiators met in September 1991 in Vienna the Soviet delegation indicated its readiness to sign the Treaty in March 1992 at the beginning of the CSCE follow-up meeting in Helsinki. It would not be correct, however, to assume that the remaining months that led to signature represented a simple technical exercise. As has often been experienced in history, prompt decisions that follow cataclysms are superseded by periods of consolidation. The history of the last months of the talks demonstrated again that it is extremely difficult to negotiate under fast-changing conditions and adapt the process to a reality that is constantly changing. Furthermore, it became clear that genuinely multilateral negotiations are often far more time-consuming than those between two alliances, where alone the existence of another presumably hostile bloc guarantees cohesion. The complications did not arise due to the regulation of further technical details of inspections, although some issues were still pending. They were primarily related to the dissolution of the Soviet Union and the status of the successor states in the continuing negotiations. Another problem was the status of the neutral and non-aligned countries in the talks. The original edifice which differentiated between members of alliances and other European states was no longer sustainable as the Warsaw Treaty in the meantime had also been formally dissolved. It would be impossible to enter into details of some of the

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17 Cf. Rüdiger Hartmann/Wolfgang Heydrich, *Der Vertrag über den Offenen Himmel*, Baden-Baden 2000, p. 19.

delicate legal matters here. Let it suffice to give a summary of the solution. Russia took the seat of the Soviet Union on the basis of the *mutatis mutandis* application of the Almaty Agreement of the successor states.<sup>18</sup> Belarus and the Ukraine participated in the talks, although it caused some problems that they were not participating States of the CSCE until the end of January 2002. These three Slavic successor states were granted the right to sign and ratify the Treaty; the other nine states<sup>19</sup> were able to decide unilaterally on their accession without the approval of the other Parties to the Treaty in the case they decide to join it.<sup>20</sup>

### *The Main Rules of the Treaty*

Although the Treaty on Open Skies has a fairly complex structure, the number of those important provisions which caused differences in opinion among the negotiating states is limited. Some differences can be attributed to changing conditions, others to genuine strategic differences of opinion stemming from the variety of interests of the Parties.

*The States Parties:* When the idea of Open Skies reappeared in 1989 it seemed clear that negotiations would be conducted by the member states of the two alliances. The participating states were willing to overlook the fact that the Atlantic Alliance was far more cohesive than the WTO. The above working hypothesis was maintained until the Warsaw Treaty was formally dissolved in 1991. Certain countries which had no doubt that *de facto* dissolution would be brought to a *de jure* end, made several attempts to gradually open up the closed structure of the future Treaty. In the end, although the Treaty was signed nine months after the end of the WTO, apart from the special treatment of the three Slavic successor states of the Soviet Union, the changes in the composition of the States Parties are reflected only in those rules that regulate the right of accession. By codifying a semi-open regime, three categories of States Parties were established: 1. the former or current members of military alliances, i.e. the WTO or NATO, including Belarus, Russia and the Ukraine, which participated in the talks and had the right to sign the Treaty before its entry into force; 2. the other nine successor states of the former Soviet Union; they did not participate in the negotiating process but have the option to sign and ratify the Treaty if they so wish; this is laid down in the Treaty and cannot be prevented by other Parties; 3. other OSCE participating States and non-European countries whose request for accession is to be approved by the Open Skies Consultative Commission (OSCC).

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18 With the Almaty Agreement of 21 December 1991, the Commonwealth of Independent States (at that time without Georgia) was officially established.

19 The three Baltic states Estonia, Latvia and Lithuania do not belong to the CIS and are not considered successor states to the Soviet Union.

20 Contrary to other OSCE participating States whose accession is subject to approval by the other States Parties in the Open Skies Consultative Commission.

On point 1: This category does not require any further explanation; Belarus, Russia and the Ukraine signed the Treaty. On point 2: The other nine successor states of the Soviet Union gained preferential status in two respects. First of all, they were given the opportunity to sign the Treaty before its entry into force. Apart from these states, this possibility was only made available to those states who participated in the negotiations. In spite of this, it took over nine years for all those signatories whose instrument of ratification had to be deposited in order to bring the Treaty into force to ratify the Treaty. During this long period only two of the nine (non-Slavic) successor states (Georgia, Kyrgyzstan) signed it. This left the possibility that the other seven countries accede to the Treaty after its entry into force. It is important to emphasize once again that this may occur *unilaterally* and thus cannot be prevented by any other Party. On point 3: Other OSCE participating States have the following possibility. "For six months after entry into force of this Treaty" they "may apply for accession by submitting a written request". "The matter shall be considered at the next regular meeting of the Open Skies Consultative Commission and decided in due course."<sup>21</sup> At first sight, the text seems neutral. Two constraints are introduced: According to this rule, only OSCE participating States may accede to the Treaty.<sup>22</sup> This, in light of the regional character of Open Skies, is understandable. The other constraint is more subtle. It states that one of the conditions of accession to the Treaty is that the OSCC will decide on the matter. However, the Treaty does not set a deadline for such a decision, but merely lays down that a request for accession "shall be considered at the next regular meeting" of the OSCC. The OSCC, however, has unlimited freedom on the timing of such a decision. There can be no doubt, as will be demonstrated later, that political considerations will prevail as the OSCC is composed of representatives of the States Parties. This also means that the procedural rule of the Treaty, according to which the OSCC "shall take decisions or make recommendations by consensus"<sup>23</sup> applies. *The area of application:* This comprises the entire territory of the States Parties, i.e. their land, including islands, internal and territorial waters and airspace under state sovereignty.<sup>24</sup> This laconic wording does not seem to require any explanation at first sight. However, it must be emphasized that the entire territory of the States Parties is subject to the Treaty. Thus this definition of the area of application differs from that of the CFE Treaty as well as OSCE documents on confidence- and security-building measures. It extends to the territory of the US and Canada as well as the non-European part of Russia. As soon as other former Soviet successor states whose territory is

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21 Treaty on Open Skies, Helsinki, 24 March 1992, Article VII, para. 4, in: Arie Bloed (Ed.), cited above (Note 16), pp. 1271-1311, here: p. 1306.

22 However, this condition lost its relevance as by 24 March 1992, the day of the signature of the Treaty on Open Skies in Helsinki, all successor states to the Soviet Union had joined the CSCE.

23 Treaty on Open Skies, Article X, para. 2, cited above (Note 21), p. 1301.

24 Cf. Treaty on Open Skies, Article II, para. 8, *ibid.*, p. 1273.

partly (Kazakhstan) or entirely (Kyrgyzstan) in Asia join the Treaty, it will be extended to their entire territory as well. This means that there are territories that are subject to on-site inspection only under the Open Skies Treaty, which increases its potential strategic relevance. The other comment on the area of application relates to the history of negotiations. At an early phase of the talks, the Soviet Union raised the problem of overseas territories under the control of States Parties, in particular the overseas military bases. There is no doubt that such an extension of the area of application would have been unacceptable to the country, which has the largest number of overseas military bases, the United States. Furthermore, it would have caused enormous complications in the implementation process, as the overflight of such bases would have required the approval of the territorial states, in most cases, countries which are not States Parties to Open Skies. Hence, one can state that only those who were against Open Skies would have had reason to advocate such regulation.

*The observation aircraft:* The Treaty identifies it as “unarmed, fixed wing aircraft designated to make observation flights, registered by the relevant authorities of a State Party and equipped with agreed sensors”.<sup>25</sup> The requirements mean that an aircraft must have the capacity to carry sensors, the flight crew, mission team and escort team. It must be equipped to be able to carry out its mission, i.e. be furnished with windows facing downward. Because the flight distances vary from country to country, it is necessary to have observation aircraft with adequate range. This is of lesser importance, however, bearing in mind that refuelling is permitted. It may have more practical significance that the plane be able to fly below cloud cover, as without this, times when observation flights could be carried out effectively would be restricted. If it were not possible to carry out observation flights under cloud cover, an important advantage of aerial monitoring vis-à-vis satellite observation would disappear. The most important controversial issue in this area was in deciding whose aircraft to use. Can the observing Party use its own observation aircraft or can the observed Party insist on using its own plane? The matter is no doubt historically burdened. The Soviet secrecy paranoia collided with US willingness to use superior observation technology for illegal aerial observation in the late 1950s and early 1960s. Hence the Soviet Union insisted upon having its own observation aircraft flown in its own airspace. Most of the other states also preferred using their own planes. Bearing in mind that observation is a co-operative exercise where the observing and observed Parties co-operate and the plane carrying out the observation flight is inspected thoroughly beforehand, I do not think that this matter carries as much importance as was attributed to it. Finally, the wording of the Treaty allowed the observed Party to provide its own aircraft. In the case the observed Party does not claim this right, the observing Party may use its own (certified) aircraft or that of another Party. It is open to question what the out-

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25 Treaty on Open Skies, Article II, para. 4, *ibid.*, p. 1272.

come of this process will be under the current highly co-operative conditions, particularly, as it is probable that many of the Parties do not even have their own observation aircraft. In this case, it remains to be seen whether the Parties will prefer to use the aircraft of the observed Party or whether they will relinquish the use of part of their active quota.

*Quotas:* There are two types of quotas in the Treaty. The *passive quota* is “the number of observation flights that each State Party is obliged to accept as an observed Party” whereas the *active quota* is “the number of observation flights that each State Party has the right to conduct as an observing Party”.<sup>26</sup> In Annex A, the Treaty lays down the passive quota of each Party<sup>27</sup> and specifies that the total active quota cannot exceed the passive quota of a State Party.<sup>28</sup> When the original concept of the Treaty was drafted it was based on the existence of two alliances and thus it was not entirely unrealistic to expect that the active quotas would be used so that they were spread out among the other Parties. Shortly thereafter, as East Central European countries unambiguously leaned to the West, the potential problem emerged that too many Parties would be willing to carry out observation flights in the airspace of one single State Party. Even though the dissolution of the Soviet Union reduced this concern slightly, it is realistic to assume that there will be a concentration of requests for observation. In order to avoid this, no Party may carry out more than half of its observation flights over the territory of another State Party. Last but not least, the parties wanted to guarantee that those countries which are of particular strategic importance would be among the States Parties when the Treaty comes into force. This was achieved through the provision that those countries with a high passive quota must be Parties to the Treaty for it to come into force. This, on the one hand, has made the participation of the large European countries indispensable but, on the other, delayed the entry into force of the Treaty significantly.

*Sensors:* During the negotiations on the Open Skies Treaty the participating States were not always in agreement on the types and resolution of different sensors. Whereas the West put forward a proposal with a fairly comprehensive list of sensors, the Soviet Union tried to limit it. Behind this was the idea of preventing the West from profiting from its superior technology and ultimately superior financial resources. The two sides found a compromise according to which the sensors had to be available commercially. This has prevented that some of the Parties to the Treaty take advantage of their superior technology. The resolution of sensors was calibrated so that, on the one hand, they could not be used for military espionage, but on the other, would contribute to military transparency. It seems that sensor resolution still carries the original arms control-related objective of Open Skies, namely to be able to

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26 Treaty on Open Skies, Article II, para. 9 and 10, *ibid.*, p. 1273.

27 Treaty on Open Skies, Annex A, Section 1, para. 1, in: OSCE, Documents 1993 to 1997, Compiled and produced by the OSCE, 1998, 1st edition (CD-ROM), p. 31.

28 Cf. Treaty on Open Skies, Article III, para. 5, cited above (Note 16), p. 1276.

identify large military objects through observation flights. This is somewhat astonishing as the objective of Open Skies seemed to have moved from associated arms control measures in the direction of confidence-building during the course of the negotiations, not to mention that during the decade that had passed since the talks the emphasis moved further in the direction of other objectives.

### *The Road to Entry into Force*

In order for the Treaty on Open Skies to enter into force, it had to be ratified by at least twenty countries, including those ten countries whose individual allocation of passive (and hence active) quotas is high, i.e. eight or more overflights - Canada, France, Germany, Italy, Russia and Belarus (the latter two as one group of States Parties), Turkey, the Ukraine, the United Kingdom, and the United States -, and the two Depositaries.<sup>29</sup> One of the two Depositaries, Canada, was thus obliged to ratify in two capacities whereas the other, Hungary, was made indispensable in its function as the second Depositary. There was no doubt, however, that these two signatories would not cause any problem in the ratification process due to, on the one hand, their prominent role in the preceding process and as they had no interests running counter to this, on the other. Likewise, most other signatories had no objections to ratification. The number of ratification instruments deposited had already reached 22 by mid-1995. Hence, a bit more than three years after Treaty signature, the only question was whether the three Slavic successor states of the Soviet Union, Belarus, Russia and the Ukraine, would ratify the Treaty. Due to the difficulties in the ratification process in Kyiv and Moscow, it took another six years before Open Skies entered into force.

The ratification process in Kyiv succeeded in the Rada on 2 March 2000 after three failed previous attempts. Although some in the Ukrainian establishment had certain reservations about Open Skies based on their traditional fear of espionage, these were not serious. Previous attempts to ratify the Treaty had either failed due to poor organization of the vote or certain concerns of the deputies. The Ukraine was worried about the cost factor in preparing its own airfields to host observation flights. It was of the view that it would not be able to use its active quota fully due to the high costs of observation flights. Whereas the former concern is legitimate, the latter is not. No country is obliged to use its active quota to the full extent, but rather they have the authorization to do so. It is up to each individual country to decide how many flights it intends to carry out dependent upon circumstances, for example, the assessment of the military importance of observation flights, the changes in the international environment and last but not least the resources available for the implementation of Open Skies. Of course, the Ukraine was in a favour-

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29 Treaty on Open Skies, Article XVII, para. 2, *ibid.*, p. 1306.

able position as Russia and Belarus had not ratified the Treaty and thus it was not exclusively due to Kyiv that Open Skies did not come into force. In the case of ratification by the latter two countries, the attention focused on Moscow. Observers were of the view that if Russia ratified, Belarus would follow. There was strong Russian opposition to the ratification of Open Skies in the Russian military establishment for historical reasons. There were vivid memories that President Eisenhower's proposal had been followed by the U-2 incident and US efforts to implement technical means for espionage. However, airspace ceased to be the primary area of such activity as satellite observation gradually took over this role. The resistance by the military was accompanied by the actually more important deadlock between the Russian Parliament, the Duma, and President Yeltsin. This was the reason that although the President submitted the Open Skies Treaty for ratification on 13 September 1994, it was only ratified on 18 April 2001 well after Yeltsin had resigned. Interestingly, during the ratification process, Russia's attitude towards the matter changed significantly, and after 1997, the country became far more co-operative on Open Skies. This was reflected, among others in the fact that Russia participated in trial inspections. A look at the analytical note on the Treaty on Open Skies prepared for the Duma is illuminating. There are two important factors the document analyses: first, the volume of information on other countries, collected both directly through observation flights and indirectly through access to information gathered by other States Parties and made available to, among others, Russia. In this respect, the analysis comes to the following conclusion: "The Treaty entering into force (...) will allow Russia to increase its volume of information on the US and NATO (...) The additional volume of information, just on the 0.3-0.6 m spectrum (information which Russia essentially does not possess) will comprise six to seven per cent of the total Russian information volume and complement space observation resources Russia is in a position to 'obtain' (...)"<sup>30</sup> In "summary, we can conclude that the Treaty on Open Skies is advantageous to Russia, and allows for some compensation of Western superiority in obtaining information with minimal expenditures".<sup>31</sup> Second, according to Russia, the costs of implementing Open Skies could be reduced significantly through leasing Russian observation aircraft to countries who do not possess their own and selling Open Skies aeronautical, special and technical nomenclature overseas.<sup>32</sup> The cost-benefit analysis that Russia made was positive and it ratified the Treaty as soon as the political conditions were ripe. Two weeks later, on 3 May 2001, Belarus also ratified the Treaty. There was some speculation among

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30 Federal Assembly of the Russian Federation, Excerpts from the Minutes of the 5th Council Meeting of the State Duma with Attachments, manuscript, 10 February 2001, p. 4 (in Russian). It is interesting to note that Russia, due to the lower resolution of its satellites, assessed the situation such that Open Skies provides particularly valuable information on resolutions of between 30 and 60 centimetres.

31 Ibid., p. 7.

32 Cf. *ibid.*, p. 6.

experts whether Belarus's ratification of the Treaty was necessary at all for its entry into force. Bearing in mind, however, that Russia and Belarus formed a group of States Parties and neither country had a passive quota of its own, I think those experts and States Parties were justified in regarding Minsk's ratification as indispensable.<sup>33</sup> After the two countries deposited their instruments of ratification at the beginning of November and 60 days had passed, the Treaty entered into force on 1 January 2002.

The nearly ten years between Treaty signature and entry into force have not been in vain. While national bureaucracies were working on bringing the Treaty into force, military professionals had already been preparing for implementation. Their activities encompassed, among others: 1. the establishment of operational units dealing with the implementation of Open Skies; 2. the selection and retrofitting of suitable aircraft for Open Skies applications or a state decision on not wanting to own observation aircraft; 3. trial certification of observation aircraft; 4. trial inspections.

Most signatories established Open Skies units in their Ministries of Defence; these were usually set up as a part of their on-site inspection departments responsible for verification within the framework of CSBM and the CFE Treaty, which were already in existence in most of the States Parties.

One of the most delicate matters was deciding whether a State Party should have its own observation aircraft or not. The States Parties have come up with a variety of solutions. Some former members of the WTO and their successor states as well as the UK have decided to use medium range observation aircraft (An-26, An-30, Andover), Germany and the US decided to retrofit existing long-range aircraft for Open Skies use whereas the so-called Pod-group consisting of many other NATO member states use Lockheed C-130 Hercules transport aircraft that can carry a sensor container under one of its wings. Other states will probably take advantage of leasing the plane of another State Party or by making appropriate arrangements with the state to be overflown. The costs of purchasing and equipping a plane of this type and keeping it in service are considerable, particularly in light of the small active quota that most States Parties have, not to mention that the Russia-Belarus group of countries, which has the highest passive quota, will definitely want to be overflown by its own aircraft, which would further limit the use of the observation aircraft of many other States Parties. Due to changes in the security relations in Europe, most States Parties are not interested in carrying out observation flights in the airspace of most other States Parties. If the purposes, for which Open Skies observation flights are to be used, are not broadened, the dilemma of whether to purchase observation aircraft nationally or not, only to be able to fly one's own plane for quotas that on top of that are small, will definitely get worse. Consequently, this is an area where co-operation among the Parties may result in a positive-sum game and reduce expenses without any disadvantage to the activity of the Parties. The European

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33 Cf. Hartmann/Heydrich, cited above (Note 17).

Union, which has embarked upon creating a European Security and Defence Policy, has not yet addressed this issue. Dealing with this issue would make perfect sense, however, as there are several EU members who do not plan to purchase observation aircraft and would certainly react positively to pooling resources.<sup>34</sup>

During the ten years that passed between Treaty signature and entry into force, more than 400 trial inspections were carried out. It is interesting to note that all signatories except Iceland and Kyrgyzstan participated in such inspections.<sup>35</sup> Furthermore, several demonstrations were organized in order to show the advantages of Open Skies to countries who are not Parties to the Treaty, in particular in Bosnia and Herzegovina. The demonstrations have shown that Open Skies can be used for post-conflict monitoring. In the case the Parties would be willing to modernize the Treaty, one avenue may be to explore its application for conflict and post-conflict monitoring. It was also demonstrated during the period of trial inspections that Open Skies could be used for other non-military activities, like monitoring floods, as was the case on the Oder in 1997, or the damages caused by the hurricane in Central America in late 1998.<sup>36</sup>

In sum, the ten-year period that passed between signature and entry into force was used to the advantage of the Parties to prepare for implementation and also to explore some new avenues where Open Skies or the observation methods regulated and used by it could be applicable. However, the question remains open whether these are going to be adequate enough to maintain the interest in Open Skies in light of the fundamentally changed security environment in the Euro-Atlantic area.

#### *The Implementation of Open Skies at the Beginning of the 21st Century*

The entry into force of the Treaty presented some new challenges and placed certain old ones in new light. As was mentioned above, entry into force opened the door for the accession of other OSCE participating States. The OSCC, the decision-making body established by the Treaty, prepared for entry into force, contributing, among others, through its decision on the initial certification period, to a smooth transition till Treaty implementation. During

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34 Probably to the amazement of many, the list of countries who do not intend to purchase their own observation plane includes large countries as well. The Federal Republic of Germany, after it lost its observation aircraft in mid-air collision in September 1997, decided not to replace the plane and was thus left with one single Tu-154 aircraft that could be retrofitted for this purpose. For more details and the argument that Germany should have its own observation aircraft see Klaus Arnhold, *Der Vertrag über den Offenen Himmel: Ein Konzept zur Aktualisierung des Vertrages* [The Treaty on Open Skies: A Concept for Updating the Treaty], SWP-Studie, Berlin 2002, particularly pp. 15-16.

35 Cf. Ernst Britting/Hartwig Spitzer, *The Open Skies Treaty*, in: *Verification Yearbook 2002*, London 2002, pp. 223-228.

36 Cf. Rüdiger Hartmann, *Inkrafttreten des "Vertrags über den Offenen Himmel"* [The Entry into Force of the "Treaty on Open Skies"], SWP-Aktuell 25, December 2001, p. 25.

the period after entry into force, it will be possible to assess to what extent Open Skies has retained its relevance in light of the steadily improving resolution of commercial and military satellites. These three issues are presented and discussed briefly below.<sup>37</sup>

The accession to the Treaty, as was mentioned above, was permitted for three different categories of states. The most important for us is the third: the “non-privileged” group of OSCE participating States. As aforementioned, in most cases there would not be any problems as the Consultative Commission would easily achieve the necessary consensus. This assumption was confirmed at the beginning of 2002 when first Finland and Sweden, followed by five other states, applied for accession to the Treaty. These two countries have asked for a quota of five and seven observation flights, respectively. The OSCC accepted these two applications a month later. Sweden deposited its instrument of accession at the end of June and thus became a Party to the Treaty at the end of August 2002. A number of other states used these first six months after entry into force to declare their intention to join the Treaty. These included two Yugoslav successor states, Croatia and Bosnia and Herzegovina, two Baltic states, Latvia and Lithuania, as well as Cyprus. The application of the first two was a reflection of two factors: First, Open Skies is applicable to monitoring post-conflict areas like the former Yugoslavia. Second, it demonstrated the interest of these countries in Open Skies after the so-called Article V negotiations under the Dayton Accords ended without agreement on aerial inspection. In the case of the Baltic states, their general pro-European integration stance and their upcoming NATO membership can be considered as motivating factors. The application of the Republic of Cyprus represented the only problem case. Turkey vetoed the request for accession in the OSCC. As the OSCC makes decisions by consensus, there could be no doubt this was Turkey’s legitimate right. It was also known that Turkey was adamant in its refusal to accept Cyprus’s accession to the Treaty. There had already been indications of this during the Open Skies talks. One of these was the insistence upon consensus on decisions on the accession of a country in the OSCC. The other was that Turkey insisted that not every country be allowed a quota and that quota distribution should take place by consensus when a country joins the Treaty. Hence even after accession it would be possible to prevent a Party from having a passive and thus active quota. In the absence of a quota, there might be Parties who would not be allowed to overfly others.

It was interesting at the time to follow closely how the OSCC dealt with this first little “crisis” in its history. For a short period, it seemed it would not be able to separate the individual applications from one another and push

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37 The article does not address those temporary constraints which were introduced to limit the number of observation flights in the first three years after the entry into force of the Treaty and the capabilities of the sensor set in the same period of time. Most papers published after entry into force address these matters extensively. See, for example, Arnhold, cited above (Note 34), Britting/Spitzer, cited above (Note 35).

through the applications of those whose accession was not opposed by any State Party. In the end, the OSCC rightly separated the uncontroversial cases from the Cyprus case. The accession of Bosnia and Herzegovina, Croatia, Latvia and Lithuania only requires ratification by the four national Parliaments whereas the case of Cyprus seems to be deadlocked. The accession of Cyprus to Open Skies depends on the solution of the larger problem surrounding the island.

In its decision of 17 December 2001, the OSCC agreed upon an initial certification period from 1 January (the entry into force of the Treaty) to 31 July 2002. This was a regulated process in which other Parties could certify that the characteristics of the observation aircraft designated by a State Party and its sensors were in concord with the requirements of the Treaty. These seven months were made available for the Parties to certify the type (model) of aircraft they would be willing to use for observation flights. During this period, observation flights were able to be conducted on an agreed bilateral basis. 17 States Parties in four separate groups carried out certification on time. In September 2002, the Czech Republic announced that it would certify its observation aircraft after this deadline. As it had not certified its planes before the required deadline mentioned above, it will have to allow observation flight missions over its territory. As during the certification period overflights under the Treaty could not be carried out, the utilization of the active quota of the States Parties was deferred to the period between 1 August and 31 December 2003.

The Treaty on Open Skies contains strict rules concerning the technical characteristics of sensors used on the observation aircraft. The most important reason for this is to prevent observation flights from being used for espionage, which would be unacceptable to any Party, as well as guaranteeing that sensors are commercially available. During the period of more than one decade that passed between the negotiations of the Treaty and its entry into force, the resolution of both the commercial and military satellites improved significantly. Thus the gap between the resolution of satellite imagery and that of sensors on Open Skies aircraft has narrowed and in some cases disappeared completely. On this basis, arguments have been put forward that aerial monitoring under the Treaty on Open Skies no longer makes sense as it does not provide information that would not also be available from satellite data. Reference is usually made to hypermodern military and commercial satellites. Those who argue along these lines are not taking important aspects of the problem into consideration: 1. They disregard that pieces of information gained from Open Skies observations flights are available to all State Parties to the Treaty whereas this is far from the case for military satellites. 2. They ignore that there are certain limitations on the accessibility of information derived from the data of commercial satellites.

With respect to the first problem, one must consider that it is by far not all State Parties that have access to such data. Moreover, a state cannot be guar-

anteed the access to data that do not originate from a sensor under its own control. Hence, countries which have access to information for a certain period of time may not have access to it forever. Political allegiances may change and states may thus be deprived of information once guaranteed. With regard to the second problem, the situation is not fundamentally different. Although the argument is put forward that “with the marketing of satellite images (...) outer space is not only opened to satellite operators, but also to all states who can afford and want to acquire satellite images. Thus, satellite intelligence is, thanks to the global distribution of satellite images by several operators, in principle, available to all states independent of whether they belong to an alliance or are party to a particular treaty.”<sup>38</sup> The weakness of this point is that it vaguely refers to the assertion that satellite photographs are “in principle, available to all states”. This is not convincing because it is common knowledge that during hot conflicts, it is precisely in the conflict zones that commercial satellites regularly suspend their operation upon “the kind request” of certain states. If Open Skies desires to gain importance by monitoring conflict zones, this cannot be weakened with the argument that commercial satellites provide sufficient information. It is on these grounds that I find it important to emphasize the residual relevance of the Open Skies regime. It is a separate issue that it might make sense to modify the Treaty in order to permit sensors with higher resolution and thus temporarily recreate the gap between information available from satellites and that gained from observation aircraft under the Treaty on Open Skies. The community of military experts and diplomats should use the increased attention being paid to Open Skies after its entry into force in order to give serious consideration to the modifications it requires.

### *Conclusions*

Open Skies has successfully adapted to changing conditions a number of times from its beginning as an idea to its adoption as a Treaty. This adaptation process was necessary and will have to continue if Open Skies intends to retain (or rather regain) its relevance. This adaptation may occur explicitly or tacitly. In either case, it must reflect the needs of international relations at the beginning of the 21st century. This means that certain goals of Open Skies may continue to lose significance. In particular, its importance for the verification of structural arms control has practically vanished and there is no reason to be particularly concerned about this development. This was recognized in the adapted CFE Treaty, which no longer mentions aerial inspection among its associated measures. Its other original purpose, military confidence-building has retained a certain relevance, although its current role is not entirely clear. After having achieved such a high level of transparency in

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38 Arnhold, cited above. (Note 34), p. 20 (author's translation).

Europe, it is questionable whether Open Skies could add to that. The fact that the Treaty on Open Skies has made territories accessible for overflights both in North America and in North Asia makes it a valuable contributor to expanding confidence-building. Although one of its former elements has vanished and another has retained only residual importance, there are areas where the contribution of Open Skies may gain significance. This can be attributed partly to the needs of post-conflict monitoring as well as to the vision of the “Founding Fathers” of Open Skies, who introduced the “possible extension of the Open Skies regime into additional fields, such as the protection of the environment”.<sup>39</sup> There have already been occasions when methods familiar from Open Skies were applied to environmental monitoring, including natural catastrophes. The Treaty could be more specific on such “additional fields” or the States Parties should develop consistent practice to this effect. Open Skies also carries the potential to be used as a model for other regions whether this occurs soon or when the conditions are ripe.

There are also those who ring the alarm bell by pointing out the irrelevance of Open Skies. Their arguments are based upon technological developments, mainly upon the availability of data gained from commercial satellites or through the multilateralization of the access to military satellite data and also upon the fact that satellite resolution has improved. Although these factors play into the declining interest in collecting data from Open Skies observation flights, this is not the prime reason for this change. This is due far more to those changes that have occurred in the international environment, the atmosphere in Europe which is largely free of threat. This and the high costs related to overflights will most probably result in a situation in which the active flight quotas of the Parties will not be exhausted. This is burdened further by the fact that apparently interest is concentrated on flying over only a few States Parties (e.g. Russia, Ukraine). When the passive quotas of those countries have been exhausted, there will be a steep decline in the number of overflights.

As there are States Parties to the Treaty which have a strong preference for being overflown by their own plane, i.e. the observation aircraft of the observed, rather than that of the observing State Party, it is open to question whether it is worthwhile acquiring an observation aircraft. The fact that many observation flights will be carried out by the aircraft of the observed Party - even though this will increase the costs somewhat - should, nevertheless, not reduce confidence or interest in the regime. The stringent certification requirements, the presence of flight monitors and other rules of the Treaty guarantee that the observing Party will be able to gather the same information irrespective of whose observation aircraft is being used.

The adaptability and the actual adaptation of Open Skies to changing conditions have already been mentioned above. It would be a good idea to continue this process and eventually modify the Treaty to be able to address the real

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39 Treaty on Open Skies, cited above (Note 21), p. 1271.

needs of our times. For instance, one could consider allowing sensors with better resolution than the Treaty presently permits. This would again give a temporary advantage to Open Skies as compared to the resolution achieved with satellite imagery. The importance attributed to Open Skies would not change, however, as the declining interest in aerial observation is not due to technical factors, but to political changes. It is unlikely, however, that the Parties are sufficiently determined to carry out a formal revision of the Treaty. Therefore, I find it more realistic to continue the *de facto* adaptation of Open Skies either through the OSCC or through agreement by the Parties. This could contribute to maintaining a certain relevance for the Treaty as a constitutive element of international relations in a larger Europe.