

V. The withdrawal of the United States from the Treaty on Open Skies

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In May 2020 the United States announced that it would formally withdraw from the 1992 Treaty on Open Skies, citing the failure of Russia to adhere to the agreement. It had been threatening to do so since at least October 2019.¹ The US withdrawal came into effect on 22 November 2020 and added to existing tensions between Russia and the USA and its European allies.²

The treaty was signed in March 1992, entered into force on 1 January 2002 and, prior to the US withdrawal, had 34 states parties across northern Asia, Europe and North America, with territories stretching ‘from Vladivostok to Vancouver’.³ It established a regime of unarmed aerial observation flights over the entire territory of participating states on a reciprocal basis. It was the only part of the European conventional arms control system to include Canada and the USA within its area of application.

This section first reviews the nature and scope of the outstanding treaty disagreements and allegations of non-compliance. It then discusses the US withdrawal decision and the international reaction to it.

Treaty implementation, disputes and alleged violations

The 97-page Treaty on Open Skies is highly technical. It details how the states parties may fly unarmed fixed-wing observation flights over each other’s territory to enhance mutual transparency, build trust and lower potential military tensions. Yearly flight quotas apply. A party can conduct these flights with its own aircraft or it can join the observation mission of another state party. States cannot declare any area or military installation to be off limits—flights can only be restricted or changed for weather or safety reasons.

Russia (jointly with Belarus) and the USA each had an annual quota of 42 observation flights, while the other participating states had quotas of 12 or fewer flights.⁴ The treaty is sometimes criticized for its reliance on outdated equipment now that military or commercial reconnaissance

¹ Browne, R., ‘Trump administration expected to announce exit from “Open Skies” treaty’, CNN, 9 Oct. 2019.

² US Department of State, ‘Treaty on Open Skies’, Press statement, 22 Nov. 2020. On these tensions see chapter 5, section I, in this volume.

³ For a summary and other details of the Treaty on Open Skies see annex A, section II, in this volume.

⁴ On the quota system see Graef, A. and Kütt, M., ‘Visualizing the Open Skies Treaty’, Institute for Peace Research and Security Policy at the University of Hamburg (IFSH), 27 Apr. 2020.

satellites can often provide imagery with comparable or better quality.⁵ However, satellites also have limitations (related to fixed orbits, inclinations and cloud formations) and most states parties have limited or no access to them. Moreover, the equipment used under the treaty has been the subject of an ongoing modernization process, with a transition to digital cameras and the acquisition of new dedicated aircraft. Both Germany and Russia have acquired new Open Skies aircraft and, prior to its withdrawal, the USA had budgeted for two new long-range aircraft.⁶ For small and medium-sized European states without satellites, Open Skies flights provide an independent tool for collecting intelligence and specific data in particular circumstances.⁷

Since the treaty's entry into force in 2002, the parties have conducted over 1500 surveillance flights.⁸ Disagreements about treaty implementation and compliance have been a persistent feature, including debates about flight safety, conflicts over territorial status and national security concerns.⁹ Most of these disagreements are normally resolved in the Open Skies Consultative Commission (OSCC). This body holds regular plenary meetings in Vienna and has several informal working groups of experts, mainly to deal with technical issues such as sensors, notification formats, aircraft certification, and rules and procedures.¹⁰ Since at least 2014, however, the USA has raised a number of persistent concerns, principally about Russian restrictions on flights over the Russian exclave of Kaliningrad and an exclusion corridor along Russia's border with Abkhazia and South Ossetia—two regions of Georgia supported and recognized as independent by Russia.

The Georgia–Russia border dispute

The disagreement between Georgia and Russia over implementation of the Open Skies Treaty centres on the status of the disputed territories of

⁵ Martin, S. and Reynolds, N., 'The Open Skies Treaty and prospects for European confidence-building measures', Commentary, Royal United Services Institute (RUSI), 22 May 2020; and Trevithick, J., 'Air Force is down to one tired old jet to fly Open Skies surveillance flights', *The Drive*, 28 Apr. 2020.

⁶ Spitzer, H., 'Cooperative transparency—Modernization of Open Skies sensors in tense times', eds C. Reuter et al., *Science Peace Security '19: Proceedings of the Interdisciplinary Conference on Technical Peace and Security Research* (TUprints: Darmstadt, 2019), pp. 141–61; and Insinna, V., 'The Air Force cancels its Open Skies recapitalization program after US pulls from treaty', *Defense News*, 16 July 2020.

⁷ Reif, K. and Bugos, S., 'Critics question US Open Skies complaints', *Arms Control Today*, vol. 50, no. 6 (July/Aug. 2020). On European perspectives see also Richter, W., 'Attack on the Open Skies Treaty', German Institute for International and Security Affairs (SWP) Comment no. 29, June 2020.

⁸ Pifer, S., 'The looming US withdrawal from the Open Skies Treaty', Brookings Institution, 19 Nov. 2020; and Graef and Kütt (note 4).

⁹ Graef, A., 'The end of the Open Skies Treaty and the politics of compliance', *Lawfare*, 6 July 2020.

¹⁰ For a brief description of the OSCC see annex B, section II, in this volume. See also Organization for Security and Co-operation in Europe, 'Open Skies Consultative Commission', [n.d.].

Abkhazia and South Ossetia.¹¹ Since 2010 Russia has prohibited observation missions over its border area with these two regions, claiming that following the August 2008 Georgia–Russia conflict they are now independent states.¹² To justify this, Russia cites the provision of the treaty that forbids flights over territories within 10 kilometres of a border with a country that is not party to the treaty.¹³ The USA and other parties to the treaty have not accepted this interpretation of the status of Abkhazia and South Ossetia.¹⁴

In order to protect its territorial integrity, since 2012 Georgia has banned all Russian observation flights in Georgian airspace and suspended its own observation flights in Russian airspace.¹⁵ In 2018 Russia indicated that it would be willing to lift the ban on flights within 10 km of its borders with Abkhazia and South Ossetia if Georgia were to accept Open Skies overflights by Russia, but no solution had been agreed by the end of 2020.¹⁶

Restrictions over Kaliningrad

Kaliningrad Oblast is a relatively small but heavily militarized area that is geographically separate from Russia, lying between Lithuania and Poland. In 2014 Russia limited the total length of observer flights over this region to 500 km. It justified this as a reaction to a Polish overflight in 2014 that allegedly endangered the safety of civil aviation.¹⁷ Other treaty parties maintain that the limit both violates provisions of the treaty and decreases coverage of a militarily significant area.¹⁸

In February 2020, however, Russia allowed a joint flight by Estonia, Lithuania and the USA with a range of 505 km over the region, the first since it introduced restrictions in 2014.¹⁹ The motives for Russia's apparent policy change are unclear, although it may have been timed to influence public debate over the proposed US withdrawal from the treaty.

¹¹ On the broader territorial dispute between Georgia and Russia see Georgia and Russia see Davis, I., 'Key developments in the region', SIPRI Yearbook 2020, pp. 115–17.

¹² Grigalashvili, M., 'The Treaty on Open Skies and the causes of Russian–Georgian confrontation', Commentary, Georgian Institute of Politics, 19 June 2018.

¹³ Treaty on Open Skies (note 3), Article IV(II.2).

¹⁴ Woolf, A. F., US Congressional Research Service, Statement before joint hearing on 'The importance of the Open Skies Treaty', US House of Representatives Committee on Foreign Affairs Subcommittee on Europe, Eurasia, Energy and the Environment and US Commission on Security and Cooperation in Europe, 19 Nov. 2019, p. 6.

¹⁵ Grigalashvili (note 12).

¹⁶ Woolf (note 14), p. 6; and Yermakov, A., 'Darkened skies: The US might withdraw from the Treaty on Open Skies', Russian International Affairs Council (RIAC), 14 Nov. 2019.

¹⁷ Yermakov (note 16); and Kelin, A., 'Open Skies clouded by sham and ambiguity', Commentary, Royal United Services Institute (RUSI), 2 July 2020.

¹⁸ Graef, A., *Saving the Open Skies Treaty: Challenges and Possible Scenarios after the US Withdrawal*, Euro-Atlantic Security Policy Brief (European Leadership Network: London, Sep. 2020), p. 10.

¹⁹ 'US, Estonia, Lithuania observe Russian, Belarusian military sites under Open Skies Treaty', *Baltic Times*, 26 Feb. 2020.

Further Russian and US restrictions

In 2017 the USA announced restrictions of its own, including a limit on the length of Russian observations flights over Hawaii, a US island group in the Pacific Ocean that hosts the US Pacific Fleet among other military facilities, and removal of overnight accommodation at two of the US Air Force bases that Russia used during its missions over the USA.²⁰ In retaliation, Russia limited the number of its airfields available to US surveillance aircraft within the Open Skies framework.²¹

In 2018, as a result of the Georgian–Russian dispute, the states parties were unable to reach consensus on the annual quota distribution and no regular quota flights took place.²² Flights resumed in 2019. However, the USA asserted that Russia violated the treaty by refusing to authorize a Canadian–US observation flight over a Russian military exercise.²³ According to Russia this restriction was due to concerns about flight safety and a proposed alternative flight slot was rejected by the USA.²⁴

Assessing alleged violations

Assessing compliance with the treaty is difficult and even the annual compliance reports published by the US Department of State acknowledge the normative ambiguity.²⁵ From 2005 to 2017 the unclassified versions of the reports, while expressing serious concerns about compliance, did not formally find Russia to be ‘in violation’ of the treaty. This changed in the 2018 report—the first fully drafted by the administration of US President Donald J. Trump.²⁶ These accusations were repeated in the 2019 and 2020 reports.²⁷

The US treaty withdrawal and the international reaction

In a written statement on 21 May 2020, the US Department of State announced that the USA would notify the treaty depositaries of its intention to leave the Open Skies Treaty on 22 November. In the statement the US secretary of state, Michael R. Pompeo, said that the USA could reconsider

²⁰ US Department of State, *Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments* (Department of State: Washington, DC, Aug. 2019), p. 52.

²¹ US Department of State (note 20), p. 52.

²² Bell, A. and Wier, A., ‘Open Skies Treaty: A quiet legacy under threat’, *Arms Control Today*, vol 49, no. 1 (Jan./Feb. 2019).

²³ US Department of State, *Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments* (Department of State: Washington, DC, June 2020), p. 66.

²⁴ Kelin (note 17).

²⁵ See the discussion in Graef (note 9).

²⁶ US Department of State, *Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments* (Department of State: Washington, DC, Apr. 2018), pp. 31–34.

²⁷ US Department of State (note 20); and US Department of State (note 23). See also Graef (note 9).

its withdrawal during the six-month notice period ‘should Russia return to full compliance with the Treaty’.²⁸ Russia denied being in violation of the agreement and none of the other parties indicated that the Russian transgressions were enough to endanger the treaty.²⁹ President Trump asserted that ‘There’s a very good chance we’ll make a new agreement or do something to put that agreement back together’.³⁰

By starting the six-month notice period in May, the Trump administration ensured that the USA would leave the treaty irrespective of the outcome of the US presidential election in November. In so doing, the administration also ignored preconditions for a withdrawal established in US domestic law months earlier.³¹

The Open Skies Treaty was the third arms control agreement that the USA withdrew from during the Trump presidency, after the 2015 Joint Comprehensive Plan of Action (JCPOA, or Iran nuclear deal) in 2018 and the 1987 Intermediate-range Nuclear Forces Treaty (INF Treaty) in 2019.³² The future of the 2010 Strategic Arms Reduction Treaty (New START) was also in doubt ahead of its last-minute renewal in February 2021.³³

International reaction

The North Atlantic Treaty Organization (NATO) met at ambassadorial level on 22 May 2020 to discuss the US decision to withdraw from the Open Skies Treaty.³⁴ In a statement after the meeting, the NATO secretary general, Jens Stoltenberg, blamed Russian ‘flight restrictions inconsistent with the treaty’ for undermining it.³⁵ He also noted that the USA would reconsider its withdrawal if Russia respected the treaty’s terms and said that NATO members were engaging with Russia to seek its early return to compliance. A number of NATO member states reportedly expressed concerns during the NATO meeting about the planned US withdrawal.³⁶ In a joint statement

²⁸ Pompeo, M. R., US Secretary of State, ‘On the Treaty on Open Skies’, Press statement, US Department of State, 21 May 2020.

²⁹ E.g. German Federal Foreign Office, ‘Foreign Minister Maas on America’s announcement that it intends to withdraw from the Open Skies Treaty’, Press release, 21 May 2020. For a Russian perspective see Kelin (note 17).

³⁰ Cited in Borger, J., ‘Trump to pull US out of third arms control deal’, *The Guardian*, 21 May 2020.

³¹ National Defense Authorization Act for Fiscal Year 2020, US Public Law 116–92, signed into law 20 Dec. 2019, section 1234. See also Anderson, S. R. and Vaddi, P., ‘When can the president withdraw from the Open Skies Treaty?’, *Lawfare*, 22 Apr. 2020.

³² On developments in the JCPOA see chapter 11, section II, in this volume. On the INF Treaty and the US withdrawal see annex A, section III, in this volume; and Topychkanov, T. and Davis, I., ‘Russian–United States nuclear arms control and disarmament’, *SIPRI Yearbook 2020*, pp. 399–409.

³³ On developments in Russian–US arms control, including New START, see chapter 11, section I, in this volume. For a brief description of New START see annex A, section III, in this volume.

³⁴ For a brief description and list of members of NATO see annex B, section II, in this volume.

³⁵ NATO, ‘Statement by the NATO Secretary General on the Open Skies Treaty’, Press Release no. (2020) 047, 22 May 2020.

³⁶ ‘European NATO allies voice concern over US plan to quit Open Skies’, Reuters, 22 May 2020.

read out during the meeting, 10 NATO member states and 2 NATO partners expressed regret for the USA's intention to withdraw, while sharing 'concerns about implementation of the Treaty clauses by Russia'.³⁷ Nonetheless, the 12 said that they would 'continue to implement the Open Skies Treaty, which has a clear added value for our conventional arms control architecture and cooperative security'.

The European Union (EU) also urged the USA to reconsider its plan to withdraw.³⁸ The EU high representative for foreign affairs and security policy, Josep Borrell, said that 'Withdrawing from a treaty is not the solution to address difficulties in its implementation and compliance by another party'.³⁹ Stanislav Zas, secretary-general of the Collective Security Treaty Organization (CSTO), said the US decision to withdraw was 'deeply regrettable' and would 'cause serious damage not only to the system of control over military activities but also to the entire system of international security'.⁴⁰

In a joint statement on 12 May 2020 a group of 16 retired European military commanders and defence ministers, including a retired NATO military commander and a former head of the Russian Foreign Intelligence Service, also argued in favour of protecting the Open Skies Treaty.⁴¹ They said that the USA leaving the treaty would lead to weaker international arms control and to asymmetry in Russian-US surveillance, since Russia would still be able to oversee US military activities within Europe while the USA could no longer overfly Russia. In the case of a US withdrawal, the group recommended that the remaining member states make a serious effort to persist with the treaty.

Addressing the consequences of the US withdrawal

Preservation of the treaty without US participation depended on finding agreement in three areas: treaty implementation and compliance; quota distribution; and technical challenges, including a shortage of certified aircraft equipped with sensors, the risk of unauthorized data sharing by

³⁷ Statement of the foreign ministries of France, Belgium, Czechia, Finland, Germany, Greece, Italy, Luxemburg, the Netherlands, Portugal, Spain and Sweden, Government Offices of Sweden, 22 May 2020; and Schultz, T., 'NATO allies alarmed, annoyed by US Open Skies exit', *Deutsche Welle*, 22 May 2020.

³⁸ For a brief description and list of members of the EU see annex B, section II, in this volume.

³⁹ Cited in Cook, L., 'EU urges US to reconsider military overflight treaty pullout', *AP News*, 22 May 2020.

⁴⁰ [CSTO secretary general comments on US withdrawal from the Open Skies Treaty], *RIA Novosti*, 3 June 2020 (in Russian). For a brief description and list of members of the CSTO see annex B, section II, in this volume.

⁴¹ European Leadership Network (ELN), 'Saving the Open Skies Treaty', Group statement, 12 May 2020.

NATO members with the USA, and the loss of US expertise and funding for the OSCC.⁴²

Under the terms of the treaty, within 30–60 days of receiving a withdrawal notice, the two depositary states—Canada and Hungary—are required to convene a conference of states parties to review the consequences of the withdrawal.⁴³ Such a conference was held online (due to the Covid-19 pandemic) on 6 July 2020. According to an OSCC statement issued after the meeting, the representatives of all 34 states parties discussed ‘the overall impact on operational functionality of the treaty, the impact on the allocation of observation quotas and on financial arrangements within the treaty, and other potential effects on the treaty’.⁴⁴ While the statement gives no indication of any outcomes being agreed, the meeting reportedly agreed to set up a special informal working group chaired by Finland to prepare proposals on the future of the treaty.⁴⁵ These were to be considered at the Fourth Review Conference of the treaty, scheduled for October 2020.

Prior to the Review Conference, the states parties successfully agreed a distribution of quotas on 5 October, which included Russia shifting its previously US-bound flights to Europe.⁴⁶ The Fourth Review Conference of the treaty, held in Vienna on 7–9 October, was chaired by Belgium.⁴⁷ The parties agreed a final document that reportedly emphasized, among other things, that they continue to value the treaty.⁴⁸ However, this document was not made public, no official statement was released at the end of the conference and the states parties made few public statements.

Future outlook

A full flight quota distribution was agreed for 2021—effectively compensating for the US withdrawal from flight activity—and the remaining states parties seem determined to continue implementing the treaty, even if the pandemic or a temporary shortfall of aircraft might limit the number of

⁴² Graef (note 18); and ‘Moscow certain NATO will share information about flights over Russia with US—ambassador’, TASS, 6 June 2020.

⁴³ Treaty on Open Skies (note 3), Article XV(3).

⁴⁴ Open Skies Consultative Commission (OSCC), ‘Conference of States Parties to the Open Skies Treaty discusses US intent to withdraw from Treaty’, Press release, 7 July 2020.

⁴⁵ Graef (note 18).

⁴⁶ Eodmo (@EodLuc), ‘Quota allocation 2021 has been successful. [Clapping hands sign]’, Twitter, 5 Oct. 2020; Reif, K. and Bugos, S., ‘Russia highlights unresolved Open Skies issues’, *Arms Control Today*, vol. 50, no. 9 (Nov. 2020); and Graef, A., ‘The skies are closing in’, Riddle, 20 Jan. 2021.

⁴⁷ Belgian Federal Public Service Foreign Affairs, Foreign Trade and Development Cooperation, ‘Belgium chairs the Conference of the “Open Skies” treaty, a cornerstone of the European security architecture’, 7 Oct. 2020.

⁴⁸ Graef, A., Researcher, Institute for Peace Research and Security Policy at the University of Hamburg (IFSH), Correspondence with author, 1 Feb. 2021.

flights. However, at the end of 2020 the longer-term future of the treaty remained uncertain.⁴⁹

In November 2020 the Russian foreign minister, Sergey Lavrov, indicated that Russia required the other states parties 'to legally confirm in writing that . . . they will not prohibit flights over any part of their territory regardless of whether US bases are located there' and to restrict the distribution of treaty data to states parties only.⁵⁰ Regarding the latter, Russia submitted a proposal to the OSCC on 11 December to amend the treaty rules concerning data security.⁵¹ In a diplomatic note dated 22 December, the Russian Ministry of Foreign Affairs requested that the other states parties confirm in a legally binding form their acceptance of the draft decision before 1 January 2021, otherwise it would initiate withdrawal procedures. However, on 30 December 2020, 16 European states parties rejected this ultimatum while remaining open to further discussions.⁵² An extraordinary OSCC meeting scheduled for 25 January 2021 was expected to be crucial for identifying any potential ways forward and preventing a Russian withdrawal.

Finally, there also remained uncertainty as to whether the USA, under the new US administration of Joe Biden, might rejoin the treaty.⁵³ The US Congress had indicated that the decision to withdraw from the Open Skies Treaty did not comply with US domestic law and required the US secretaries of State and Defense to submit a report on the security implications of the withdrawal by March 2021.⁵⁴ It was conceivable that this report could argue that the USA has been unable to effectively replace imagery and intelligence previously received under the Open Skies Treaty. During the US presidential election, Biden had expressed support for the treaty and condemned the withdrawal decision, although he stopped short of committing to rejoin the agreement once in office. Moreover, any decision to do so would also require the approval of the US Senate by a two-thirds vote.

⁴⁹ Gressel, G., 'How a US withdrawal from the Open Skies Treaty would benefit the Kremlin', Commentary, European Council for Foreign Relations, 27 May 2020.

⁵⁰ Russian Ministry of Foreign Affairs, 'Foreign Minister Sergey Lavrov's interview with Russian and foreign media on current international issues, Moscow, November 12, 2020', 12 Nov. 2020; and Russian Ministry of Foreign Affairs, 'Foreign Ministry statement on the withdrawal by the United States from the Open Skies Treaty', 22 Nov. 2020.

⁵¹ Gavrilov, K., Head of the Russian Delegation to the Vienna Negotiations on Military Security and Arms Control, Statement at the 4th Plenary meeting of the 83rd Session of the Open Skies Consultative Commission (OSCC), 14 Dec. 2020 (in Russian), English translation: Facebook.

⁵² The 16 states parties were Belgium, Croatia, Czechia, Denmark, Finland, France, Germany, Greece, Iceland, Latvia, Luxembourg, the Netherlands, Slovenia, Slovakia, Spain and Sweden. Krüger, P.-A. and Mascolo, G., 'Der Himmel könnte sich schließen' [The sky could close], *Süddeutsche Zeitung*, 3 Jan. 2021.

⁵³ Cohen, R. S., 'The US is out of the Open Skies Treaty. What's next?', *Air Force Magazine*, 23 Nov. 2020; and Gould, J., Insinna, V. and Mehta, A., 'Trump left the Open Skies Treaty, but don't write it off yet', *Defense News*, 25 Nov. 2020.

⁵⁴ National Defense Authorization Act for Fiscal Year 2021, US Public Law 116-283, signed onto law 1 Jan. 2021, section 1232.