

III. The withdrawal of Russia from the Treaty on Open Skies

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In January 2021 Russia announced that it would withdraw from the 1992 Treaty on Open Skies.¹ It took this decision following the withdrawal by the United States in November 2020. Russian President Vladimir Putin signed the withdrawal law in June 2021 and, in accordance with treaty regulations, the Russian withdrawal came into effect six months later, on 18 December 2021.²

The Open Skies Treaty has been in force since 1 January 2002 and, prior to the withdrawal of Russia and the USA, had 34 states parties across Europe, North America and northern Asia. It established a regime of unarmed aerial observation flights over the entire territory of participating states on a reciprocal basis. As neither Russia nor the USA is now party to the treaty, no other state party can conduct overflights over their territories. Without these two states, the future of the treaty is uncertain, even though the remaining 32 parties have pledged to continue to implement it.

This section first reviews the consequences of the US withdrawal and its relevance for Russia in 2021. It then discusses the Russian withdrawal procedure and international reactions to it.

The impact of the US withdrawal on the treaty and Russian reactions

The coming into force of the US withdrawal on 22 November 2020 accelerated Russian attempts to receive additional security guarantees from the treaty's other remaining states parties. On 12 November 2020 Russian Foreign Minister Sergey Lavrov indicated that Russia required the other 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] strongly commit not to transmit data on flights over Russia to the United States'.³ In parallel, Russia stopped conducting overflights and introduced strict Covid-19 quarantine rules for foreign inspection team members, which essentially ruled out timely treaty implementation.⁴ Nevertheless, on 11 December 2020 Russia submitted a draft decision to the Open Skies

¹ For a summary and other details of the Treaty on Open Skies see annex A, section II, in this volume. On the US withdrawal see Davis, I., 'The withdrawal of the United States from the Treaty on Open Skies', *SIPRI Yearbook 2021*.

² Russian Ministry of Foreign Affairs, 'Foreign Ministry statement on the withdrawal of the Russian Federation from the Treaty on Open Skies', 20 Dec. 2021.

³ Russian Ministry of Foreign Affairs, 'Foreign Minister Sergey Lavrov's interview with Russian and foreign media on current international issues', 12 Nov. 2020.

⁴ Gavrilov, K., Head of the Russian Delegation, Statement, 4th plenary meeting, 83rd session, Open Skies Consultative Commission (OSCC), Vienna, 14 Dec. 2020.

Consultative Commission (OSCC) to amend the treaty rules concerning data security and to restate the right to access all national territory, which was originally to be discussed further at a regular OSCC meeting scheduled for 25 January 2021.

However, in his annual news conference on 17 December 2020, President Putin openly remarked that Russia could not allow North Atlantic Treaty Organization (NATO) members to conduct overflights, which would ‘make everything available to our US partners’. In his view Russia was ‘forced to respond’ to such issues of concern.⁵

In an unexpected diplomatic note on 22 December 2020, the Russian Ministry of Foreign Affairs pushed ahead, bypassing the OSCC process, and requested that other states parties confirm their prior acceptance of the Russian draft decision before 1 January 2021, in a legally binding form; otherwise, Russia would initiate withdrawal procedures. On 30 December 2020, 16 European states parties rejected this ultimatum, although they remained open to further discussions within the OSCC.⁶ As a result, the Russian Foreign Ministry announced on 15 January 2021 that it would begin domestic procedures for withdrawal from the treaty and would, on completion, send the notification to the treaty depositaries, Canada and Hungary.⁷

Nevertheless, even after this announcement, Russian officials continued to emphasize that Russia was willing to ‘somehow adjust the decision to launch internal procedures’ for withdrawal if the USA sent a ‘clear and unambiguous message’ that it was ready to return to the treaty.⁸ In a plenary meeting of the OSCC on 22 February, the head of the Russian delegation, Konstantin Gavrilov, stated that the Russian withdrawal procedures would be ‘completed by summer 2021’.⁹ The US government would have to make a decision by then, otherwise Russia would submit its withdrawal notification to Canada and Hungary. In parallel, however, Russia pointed out that it would not accept any special procedures intended to ease the return of the USA.¹⁰

⁵ President of Russia, ‘Vladimir Putin’s annual news conference’, 17 Dec. 2020.

⁶ Krüger, P.-A. and Mascolo, G., ‘Der Himmel könnte sich schließen’ [The sky could close], *Süddeutsche Zeitung*, 3 Jan. 2021.

⁷ Russian Ministry of Foreign Affairs, ‘Statement by the Ministry of Foreign Affairs of the Russian Federation on the beginning of domestic procedures for the withdrawal of the Russian Federation from the Treaty on Open Skies’, 15 Jan. 2021.

⁸ TASS, [Ryabkov: There is still time to rethink the situation around the Treaty on Open Skies], 11 Feb. 2021 (in Russian, author translation); and Gavrilov, K., Head of the Russian Delegation, Statement, 1st plenary meeting, 85th session, Open Skies Consultative Commission (OSCC), Vienna, 26 Apr. 2021.

⁹ Gavrilov, K., Head of the Russian Delegation, Statement, 84th session, Open Skies Consultative Commission (OSCC), Vienna, 22 Feb. 2021 (in Russian, author translation).

¹⁰ Yermakov, V., [Interview of the Director of the Department for Non-Proliferation and Arms Control of the Russian Foreign Ministry V. I. Yermakov to the international news agency ‘Russia Today’], 25 Dec. 2020 (in Russian).

The position of the new US administration

As a presidential candidate, Joe Biden had condemned the decision of US President Donald J. Trump in May 2020 to withdraw from the treaty, stating that it would only ‘exacerbate growing tensions between the West and Russia, and increase the risks of miscalculation and conflict’.¹¹ In addition, the National Defense Authorization Act for 2021, enacted by the US Congress on 1 January 2021 against Trump’s presidential veto, stated that the Trump administration had not informed legislators of the US withdrawal prior to its announcement, despite a requirement to do so. The Congress also obliged the incoming Biden administration to provide a report before 1 March 2021, including a description of how the USA would replace intelligence, military-to-military contacts and diplomatic engagement lost as a result of leaving the treaty.¹² Moreover, on 26 January 2021 presidents Biden and Putin addressed the US withdrawal in their first telephone conversation.¹³

Parallel legal assessments and debate about the possibilities for the USA to rejoin the treaty, however, emphasized existing political difficulties. Without a two-thirds majority in the US Senate to approve renewed treaty membership, the Biden administration would be forced either to circumvent the Senate’s prerogative for ‘advice and consent’, establishing a legal precedent, or to question the legality of the withdrawal decision by the Trump administration.¹⁴ Nevertheless, the nomination by Biden of advocates for the Open Skies Treaty to central positions in the US Department of State raised expectations that the president might indeed be willing to consider renewing US treaty membership under certain circumstances. These nominations included, in particular, Bonnie D. Jenkins as Under Secretary of State for Arms Control and International Security and Alexandra Bell as Deputy Assistant Secretary in the Bureau of Arms Control, Verification and Compliance. At the beginning of February 2021, the State Department announced that the government was still ‘studying the issues’ and would ‘take a decision in due course’.¹⁵

However, in a diplomatic memo released on 31 March 2021, the State Department told US allies and partners that rejoining the treaty ‘that Russia continues to violate’ would send the ‘wrong message’ and ‘undermine the [US] position on the broader arms control agenda’.¹⁶ A few days later,

¹¹ Biden, J., ‘Statement by Vice President Joe Biden on President Trump’s decision to withdraw from the Open Skies Treaty’, Medium, 22 May 2020.

¹² National Defense Authorization Act for Fiscal Year 2021, US Public Law 116–283, signed into law 1 Jan. 2021, section 1232.

¹³ President of Russia, ‘Telephone conversation with US President Joseph Biden’, 26 Jan. 2021.

¹⁴ US Senate, ‘Advice & consent’, [n.d.]; and Rademaker, S., ‘Are there shortcuts for the US to rejoin the Open Skies Treaty?’, Lawfare, 15 Jan. 2021.

¹⁵ US Department of State, ‘Department press briefing’, 2 Feb. 2021.

¹⁶ Gould, J. and Mehta, A., ‘Rejoining Open Skies would send “wrong message” to Russia, state tells partners’, *Defense News*, 7 Apr. 2021.

on 3 April 2021, the US Air Force confirmed plans to retire its two Boeing OC-135B observation aircraft, previously used for overflight missions, and to fly them to Arizona in May and June for storage.¹⁷ Nevertheless, the US State Department continued to claim publicly that no final decision had been made.¹⁸ As Russia moved ahead with its domestic withdrawal procedures, however, the Biden administration officially informed Russia on 27 May 2021 that the USA would not rejoin the treaty.¹⁹

Russian withdrawal procedures and international reactions

Meanwhile, on 9 May 2021 President Putin introduced a draft law on withdrawal from the treaty to the lower house of the Russian Parliament, the State Duma, which the latter unanimously adopted on 19 May.²⁰ Two weeks later the upper house, the Federation Council, approved this decision, after which Putin signed the withdrawal law on 7 June 2021.²¹

On 16 June 2021 the Russian government also officially dissolved the group of states parties between Belarus and Russia, which had been declared upon signing the treaty in March 1992, and terminated the related implementation agreement from February 1995.²² This arrangement had allowed Belarus to conduct joint flights with Russia and, thus, to make use of Russian equipment, based on a common active and passive quota of a maximum 42 overflights per year.²³

Finally, on 18 June 2021 the Russian Ministry of Foreign Affairs officially submitted its withdrawal notification to the treaty depositaries.²⁴ In a statement following this notification, NATO urged Russia to 'use the remaining six months before its withdrawal takes effect to reconsider its decision and return to full compliance with the Treaty on Open Skies'.²⁵

¹⁷ Liewer, S., 'Offutt's Open Skies jets headed for desert scrapyard', *Omaha World Herald*, 3 Apr. 2021.

¹⁸ Gould and Mehta (note 16).

¹⁹ Heavey, S., 'US tells Russia it will not rejoin Open Skies arms control pact', 27 May 2021.

²⁰ [Draft federal law no. PR-767, 'On the withdrawal of the Russian Federation from the Treaty on Open Skies'], 9 May 2021 (in Russian).

²¹ [Decree of the Federation Council of the Federal Assembly of the Russian Federation on the federal law 'On the withdrawal of the Russian Federation from the Treaty on Open Skies'], 2 June 2021 (in Russian); and [Federal law no. 158-FZ of 07.06.2019, 'On the withdrawal of the Russian Federation from the Treaty on Open Skies'], 7 June 2021 (in Russian).

²² [Order of the Government of the Russian Federation, no. 1611-r of 16.06.2021], 16 June 2021 (in Russian).

²³ Under the treaty, states parties can form groups with varying rules as the allocation of overflight quotas. Russia and Belarus formed a group whereby they are effectively treated as a single entity: all observation flights conducted by either Russia or Belarus are conducted on behalf of the 'group' and charged against their total active group quota. An observing party may overfly Belarus or Russia (or both countries) and would count as one flight against the active quota of the observing party.

²⁴ Russian Ministry of Foreign Affairs, 'Foreign Ministry's statement following the Russian Federation's sending notifications to the states parties to the Treaty on Open Skies', 18 June 2021.

²⁵ NATO, 'Statement by the North Atlantic Council on the Treaty on Open Skies', Press release, 18 June 2021.

However, at the obligatory conference of states parties that convened on 20 July (after the minimum time period following notification), Russian Deputy Foreign Minister Sergey Ryabkov noted that Russia would not reverse its decision.²⁶

Addressing the consequences of the Russian withdrawal

The Russian withdrawal requires the remaining 32 states parties to address several technical and political challenges. First, they will need to replace Russia as the chair of the OSCC informal working group on rules and procedures.²⁷

Second, they will have to redistribute their annual active flight quotas. In the past almost one-third of all flights went over Russian (and Belarusian) territory. Since NATO members do not conduct flights over each other, Western interest in overflights is likely to shift to Belarus and Ukraine, and possibly Georgia and Bosnia and Herzegovina. In 2021, however, the states parties were unable to reach consensus about the distribution. At the annual quota conference in October 2021, some states applied for overflights of Russian territory in the following year, despite the Russian withdrawal decision, which Russia declined to accept.

Third, without access to Russian territory, missions in Europe may become too expensive for some states parties given the low cost–benefit ratio when overflying strategic partners. Canada, for example, used to conduct more than half of its flights over Belarus and Russia. Without the ability to conduct overflights of Russia, Open Skies missions in Europe might lose their purpose.

Finally, Sweden's decided to no longer offer its national aircraft for lease to other states parties in 2022. This will affect the ability of parties without aircraft to conduct overflights. Only 8 states currently possess certified aircraft equipped with sensors: Bulgaria, Canada, France, Hungary, Sweden, Romania, Turkey and Ukraine. Bulgaria, however, has stopped flying and is unlikely to resume. Canada and France share a single sensor pod, which can be mounted under the wing of their aircraft. The Swedish decision also increases the pressure on Germany and Romania to finalize ongoing certification processes of newly acquired aircraft for use under the treaty.

Outlook

The Russian and US withdrawals from the Treaty on Open Skies have put the treaty's long-term future at risk. In response, observers have suggested

²⁶ Russian Ministry of Foreign Affairs, 'Closing address by the Deputy Minister of Foreign Affairs of the Russian Federation SA Ryabkov at the Conference of States Parties to the Open Skies Treaty', 20 July 2021.

²⁷ Chernenko, Y., [Sky. Aircraft. Full stop], *Kommersant*, 18 Dec. 2021 (in Russian).

modernizing the treaty or using its framework for purposes other than military confidence building.²⁸ Proposals have envisioned establishing aerial observation regimes in other regions, including the Arctic, and introducing new sensor types for use in environmental monitoring and disaster relief.²⁹ The latter could include (near) infrared and radar sensors, which are, in principle, already allowed under the treaty, but also non-imaging sensors for air sampling and radiation measurement.³⁰ In July 2021 Germany illustrated these technical opportunities when taking digital-optical images of the devastating floods in western Germany with its new Open Skies Treaty aircraft (albeit outside the treaty framework).³¹

The treaty continued to face major challenges at the end of 2021. The states parties had still not reached consensus about the distribution of flight quotas for 2022 and Covid-19 quarantine regulations continued to affect implementation. The future membership of Belarus also looked uncertain as it did not possess its own aircraft and sensor kit, having earlier cooperated with Russia within the group of states parties. Moreover, in the past, points of entry for aircraft and airfields for use under the treaty and several other specifications were defined only for Russian territory, not Belarus.

Statements within the OSCC in late 2021 suggested that Belarus is, in principle, interested in continuing to implement the treaty although it had not yet made a final decision. Nevertheless, Belarus will not conduct or receive overflights in 2022.³² However, Russian representatives have stated that, should Belarus decide to stay in the treaty, Russia is ready to offer technical support and provide aircraft and sensor equipment.³³ In addition, the new German and Romanian aircraft might become available for use under the treaty in late 2022.

²⁸ Gottemoeller, R. and Marvin, D., 'Reimagining the Open Skies Treaty: Cooperative aerial monitoring', *Bulletin of the Atomic Scientists*, 15 June 2021.

²⁹ Kertysova, K. and Graef, A., 'Open Skies in the Arctic: Challenges and opportunities', European Leadership Network, 20 May 2021; and Jones, P., 'Making a better Open Skies Treaty', James Martin Center for Nonproliferation Studies (CNS), Occasional Paper no. 50, Feb. 2021.

³⁰ The Open Skies Treaty permits 4 different sensor types: optical panoramic and framing cameras, video cameras, infrared line-scanning devices and sideways-looking synthetic aperture radar. Only the first 2 are currently in use. See Treaty on Open Skies (note 1), Article IV(1).

³¹ German Federal Ministry of Defence (@BMVg_Bundeswehr), 'The aerial images show the extent of the #flood disaster: The #Federal Armed Forces are now supporting the local relief forces with high-resolution aerial images. Minister @akk has ordered reconnaissance flights with the Recce Tornado and the Open Skies Airbus A319 over the flooded area.', Twitter, 22 July 2021; and Kramp-Karrenbauer, A. (@akk), 'The A319, normally used for #OpenSkies, is now taking aerial photos of the flooded area. We make these available to the countries so that aid & reconstruction can be targeted. Our reconnaissance tornadoes are also in action. We will help as long as we are needed.', Twitter, 21 July 2021.

³² Postnikova, E., [Silenced Treaty on Open Skies: What will happen with the Treaty on Open Skies after 18 December and under which conditions could Moscow and Washington return], *Izvestia*, 18 Dec. 2021 (in Russian).

³³ Postnikova (note 32).