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Saving the Open Skies Treaty: Challenges and possible scenarios after the U.S. withdrawal

EURO-ATLANTIC SECURITY
POLICY BRIEF

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The European Leadership Network (ELN) is an independent, non-partisan, pan-European NGO with a network of nearly 200 past, present and future European leaders working to provide practical real-world solutions to political and security challenges.

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Introduction

Signed in March 1992, the Open Skies Treaty (herein thereafter referred to as the Treaty) has been in force since January 2002. It allows 34 states to conduct joint, unarmed observation flights over each other's territory using sensors with a predefined resolution. Besides providing valuable intelligence, regular engagement between military officers from different states, particularly those in NATO and Russia, contributes to trust- and confidence-building.

On 21 May 2020, the Trump administration announced that it would leave the Treaty, pointing to Russian noncompliance as the main reason.¹ The following day the U.S. submitted an official withdrawal notice to the Treaty depositaries, Canada and Hungary. The withdrawal will take effect on 21 November 2020.

Given the benefits of the Treaty, most members publicly have regretted the U.S. withdrawal decision and reaffirmed their own commitment to the Treaty. In a joint statement, the foreign ministers of 12 states argued that the Treaty “remains functioning and useful” and that they would “continue to implement” it.² On 6 July 2020, similar positions were

expressed at the obligatory state conference that convened to discuss the implications of the U.S. decision for the Treaty.

The current situation is unprecedented. The United States is the political and philosophical founding father of the Treaty,³ and with 42 flights has the largest annual flight quota.⁴ Washington also frequently conducts shared flights with European NATO allies on U.S. aircraft, provides much needed technical expertise within the Open Skies Consultative Commission (OSCC) – the implementing body of the treaty – and accounts for more than 12% of its budget. Without U.S. flights and access to U.S. territory, states will need to re-distribute flight quotas. Responding to technical challenges will be important to adapt the Treaty after the U.S. withdrawal.

Ensuring Russia's continued participation, however, is essential for the Treaty's survival.

1 Pompeo, Michael R, “On the Treaty on Open Skies”, Press Release, May 21, 2020, <https://www.state.gov/on-the-treaty-on-open-skies/>.

2 Federal Foreign Office, “Statement of the Foreign Ministries of Belgium, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain and Sweden on the announcement by the US to withdraw from the Open Skies Treaty”, May 22, 2020, <https://www.auswaertiges-amt.de/en/newsroom/news/joint-declaration-open-skies/2343892>.

3 For a history of the Open Skies treaty negotiations see for example, Tucker, Jonathan, “Negotiating Open Skies: A Diplomatic History,” in Krepon, M. and A. Smithson (eds.), *Open Skies, Open Control and Cooperative Security*, (New York: St. Martin's Press, 1992) and Jones, Peter, *Open Skies: Transparency, Confidence-Building and the End of the Cold War* (Palo Alto: Stanford University Press, 2014).

4 The treaty sets a fixed passive quota for each member state. This is the maximum number of flights each state has to allow over its own territory. The number of flights a state can conduct is its active quota and cannot exceed its own passive quota. The distribution of treaty quotas roughly corresponds to the territorial size of the states. The state party Russia-Belarus and the United States need to allow 42 flights each.

Historically, the Treaty has been an instrument for improving military transparency between NATO states and members of the former Warsaw Pact. Flight practice still reflects this approach. Since 2002, while NATO members agreed not to overfly each other, almost one third of the more than 1,500 flights conducted went over Russia and Belarus.⁵ At the same time, European member states and Canada remain concerned about Russia's compliance with the Treaty. Russia, in turn, has recently voiced its discontent with the flight practice of several Western states, including the UK, France, and Norway.⁶

The member states will address the technical challenges primarily within the OSCC. In July 2020, they created a special informal working group for this purpose chaired by Finland that is preparing proposals on the future of the Treaty. Questions about Treaty implementation will be raised at the upcoming review conference of the Treaty, which will take place from 7-9 October 2020. Before this, member states will need to decide the distribution of active flight quotas for 2021 at the annual quota conference scheduled for 5-6 October 2020. The long-term future of the

Treaty depends on finding agreement in all three areas: technical challenges, treaty implementation, and quota distribution.

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Technical Challenges

Aircraft Capacity

The U.S. withdrawal will end all flights on U.S. aircraft. This affects several member states who do not possess their own certified aircraft.⁷ They either lease aircraft from other member states or conduct shared flights. From 2002 to 2019, European states and Canada conducted 57 overflights onboard the U.S.

5 Graef, Alexander & Moritz Kütt, "Visualizing the Open Skies Treaty", April 27, 2020, <https://openskies.flights/>.

6 Ryzhkov, Sergey, "Vystupleniye na Konferentsii Gosudarstv-uchastnikov Dogovora po otkrytomu nebu po rassmotreniyu posledstviy vykhoda SSHa iz Dogovora" [Statement at the Conference of member states to the Treaty on Open Skies to review the consequences of the U.S. withdrawal from the Treaty], July 6, 2020, https://www.mid.ru/foreign_policy/news/asset_publisher/cKNonkJE02Bw/content/id/4212382.

7 Only nine states currently possess certified aircraft equipped with sensors. In addition to the United States and Russia, these are Bulgaria, Canada, Hungary, Sweden, Romania, Turkey, and Ukraine. Bulgaria, however, has stopped flying and is unlikely to resume. The United Kingdom dismantled its former HS Andover aircraft in 2008. Moreover, the so-called Pod-group (Belgium, Canada, France, Greece, Italy, Luxembourg, the Netherlands, Norway, Portugal, and Spain) that had operated a common "SAMSON" sensor pod attached to the Lockheed C-130 Hercules aircraft dissolved in 2013. It now consists of France and Canada.

OC-135B. In the same period, however, the U.S. also made use of European aircraft capacity and conducted 89 shared quota flights over Russia-Belarus and Ukraine.

In the future, these places will become available to other parties and would be compensation for the loss of shared flights on U.S. aircraft. In 2021, member states are expected to certify the new German Open Skies aircraft, which is currently undergoing testing. This will likely improve the situation further.

Nevertheless, without the U.S. OC-135B it will be difficult to conduct some of the missions, particularly those over the vast Russian Siberian territories. In contrast to U.S. aircraft, which can conduct long-range flights of more than 6,000 kilometres, European aircraft, for example, the Swedish Saab-340 and the Romanian An-30, are multi-engine turboprop aircraft with a flight range of less than 3,000 kilometres.

Correspondingly, in the past, most of the flights over Siberia that took off at the Baikal International Airport in Ulan-Ude used the U.S. OC-135B aircraft and were conducted either unilaterally by the U.S. or as shared missions with European partners and Canada. In the future, the remaining member states will have to either reduce the number and range of missions over Siberia, negotiate new options with Russia for refuelling, or use the so-called taxi option, that is, drawing on Russian long-range aircraft when conducting overflights.

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Unauthorized data sharing

In principle, data collected by sensors during observation flights are only available to member states of the Treaty.⁸ Nevertheless, Russian officials have expressed concerns that NATO members could continue to provide the U.S. with imagery from Russia even after its withdrawal.⁹ According to the Head of the Conventional Arms Control Division at the Russian Ministry of Foreign Affairs, Oleg Bushuev, Russia will put this issue on the OSCE agenda after the U.S. withdrawal and has already raised its inten-

⁸ This data is not even shared with international organizations, including the OSCE and NATO.

⁹ Deputy Foreign Minister Sergey Ryabkov has argued that such data sharing would be “extremely troublesome” and that Russia would “need solid guarantees” to the contrary. See TASS, “Open Skies Treaty data sharing with US would cause problems, senior diplomat warns”, May 23, 2020, <https://tass.com/politics/1159657> and TASS, “Other countries may leave Open Skies Treaty after US, says senior Russian diplomat”, July 4, 2020, <https://tass.com/politics/1174791>.

Flights by European states and Canada on U.S. OC-135B from 2002-2019

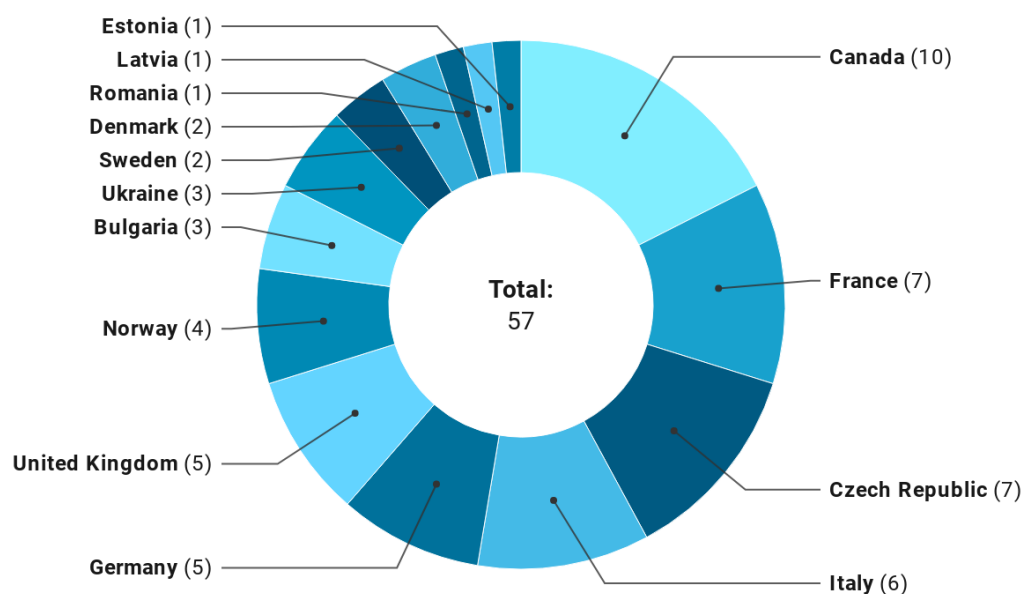
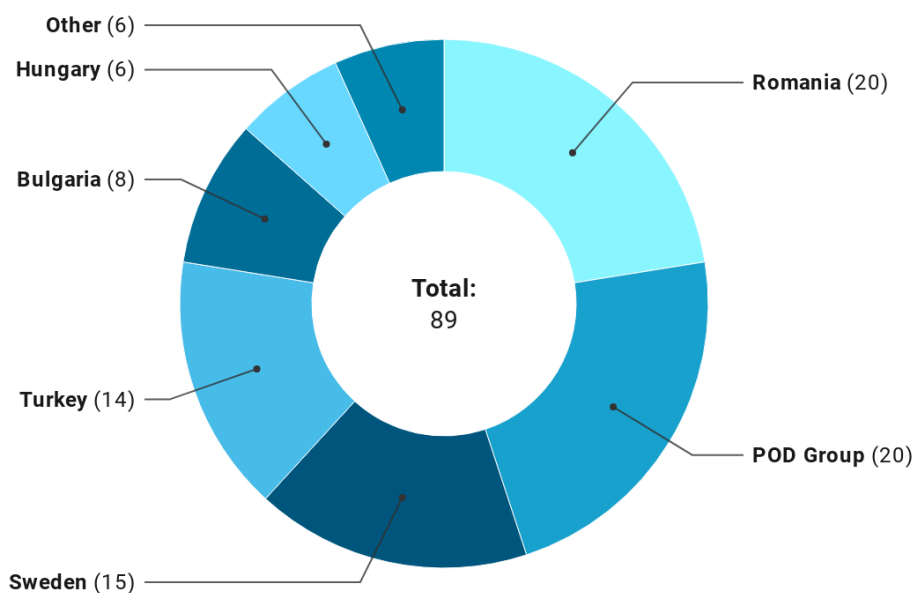


Chart: Alexander Graef •
Source: Adapted from Graef, Alexander & Moritz Kütt, "Visualizing the Open Skies Treaty", 27 April 2020 •

Flights by the U.S. on European and Canadian aircraft from 2002-2019



The Pod-group (Belgium, Canada, France, Greece, Italy, Luxembourg, the Netherlands, Norway, Poland, and Spain) that had operated a common "SAMSON" sensor pod attached to the Lockheed C-130 Hercules aircraft dissolved in 2013. It now consists of France and Canada.

Chart: Alexander Graef •
Source: Adapted from Graef, Alexander & Moritz Kütt, "Visualizing the Open Skies Treaty", 27 April 2020 •

tion to do so within the commission. In his view, there exists “distinct blueprints and ideas” about how to ensure nonproliferation, but possible technical measures have not been disclosed.¹⁰

Despite existing procedures for processing and storage, verifying that data are not being shared beyond Treaty members is a complicated task. At present, the rolls of analogue photographic films are kept in sealed containers and developed at special national facilities in the presence of representatives from both the observing and the observed party. Other Treaty members can request copies. The same is true for digital sensor data, currently in use only on Russian and Romanian aircraft. The data are saved on removable storage media and processed using equipment that is separated from any other network and has no wireless connections. Nevertheless, the production of unauthorised digital copies is arguably easier and more difficult to prevent than in the case of analogue photographs.

Although finding a technical solution is necessary, the problem is essentially political. As U.S. technical means are able to collect data of similar and even better quality than the sensors used within the Treaty, Russia seems to be primarily concerned with its power status vis-à-vis the United States rather than the proliferation of sensitive military intelligence. European member states and

Canada could mitigate Moscow’s concerns by issuing a public statement to re-confirm that they will not share Treaty-generated raw data and imagery with non-member states, and act on it. Such a commitment would not be verifiable but would be politically significant.

OSCC Budget and Informal Working Groups

Finally, the U.S. withdrawal will affect the work of the OSCC. Currently, the United States chairs two of the four informal working groups (IWG) within the OSCC: the IWG on Sensors (IWGS) and the IWG on Notifications and Formats (IWGNF).¹¹ The former develops the technically complex certification procedure for the sensor types that the Treaty permits.¹² Here the knowledge of U.S. technical experts and political leadership have played an important role, which will be difficult to replace. For example, from 2005 onwards the IWGS has worked intensively on certification procedures for thermal infrared line scanners to ensure that the ground resolution would always correspond to 50 centimetres.¹³ Similarly, the IWGS has been essential in implementing the

¹¹ In addition, there are the IWG on Certifications (IWGC) and the IWG on Rules and Procedures (IWGRP).

¹² The Open Skies Treaty permits four different sensors types, of which only the first two are currently in use: optical panoramic and framing cameras, video cameras, infrared line-scanning devices and sideways-looking synthetic aperture radar. See Treaty on Open Skies, Art. IV (1), <https://www.osce.org/files/f/documents/1/5/14127.pdf>.

¹³ Spitzer, Hartwig, “News from Open Skies. A co-operative Treaty maintaining military transparency”, February 2009, Vertic Brief 8, https://www.files.ethz.ch/isn/97949/BP8_Spitzer.pdf.

¹⁰ Valdai Discussion Club, “Netikhiy DON, ili Komu na vykhod iz otkrytogo neba?” [The not so quite DON (OST), or who is leaving the Open Sky?], July 7, 2020, <https://www.youtube.com/watch?v=rG3hM2-M1IY> [56:14-59:10].

transition from analogue black-and-white cameras to digital electro-optical sensors.

Russian representatives have already stated that governmental experts need to have the necessary experience if they want to replace U.S. staff within the respective working groups. This means that, according to Moscow, the incoming IWG chairs replacing the U.S. ones need to have been actively engaged in the implementation of the Treaty and come from member states that possess their own aircraft or plan to acquire one in the near future.¹⁴ These requirements, if implemented by OSCE members, reduce the number of possible candidates to just a couple of states, particularly because Russia and Germany already chair two informal working groups.¹⁵ Likely candidates (with varying political feasibility) are Bulgaria, Canada, Hungary, Romania, Sweden, Turkey, and Ukraine.

In addition, the U.S. also contributes about 12.6% of the OSCE budget. Consequently, once it leaves the Treaty, the remaining member states will need to increase their relative shares. Such recalculations can be aided by a formula

based on the so-called OSCE standard scale of contributions. Its use, however, is a political decision and requires unanimity within the OSCE. If this formula is applied, the largest contributors beyond the U.S. (Germany, France, Italy and the United Kingdom) will need to increase their share by a maximum of 1.6 percentage points each, from 10.3% to 11.9%, but for the majority of member states, it will be less than 0.2 percentage points.¹⁶

What does this mean in absolute numbers? The OSCE does not publish its annual budget, but extrapolation from available data suggests the annual budget is in the range of EUR 700,000 to 1,000,000.¹⁷ Hence, the actual increase for each member state will vary, but for most of them, will be below EUR 2,000 per year. Even for Germany, France, Italy and the United Kingdom, the additional payment will be less than EUR 17,000. Despite official statements to the

14 Ryabkov, Sergey, "Vystupleniye na Konferentsii Gosudarstv-uchastnikov Dogovora po otkrytomu nebu po rassmotreniyu posledstviy vykhoda SShA iz Dogovora" [Statement at the Conference of member states to the Treaty on Open Skies to review the consequences of the U.S. withdrawal from the Treaty], July 6, 2020, https://www.mid.ru/foreign_policy/news//asset_publisher/cKNonkJE02Bw/content/id/4212382, pp. 4-5.

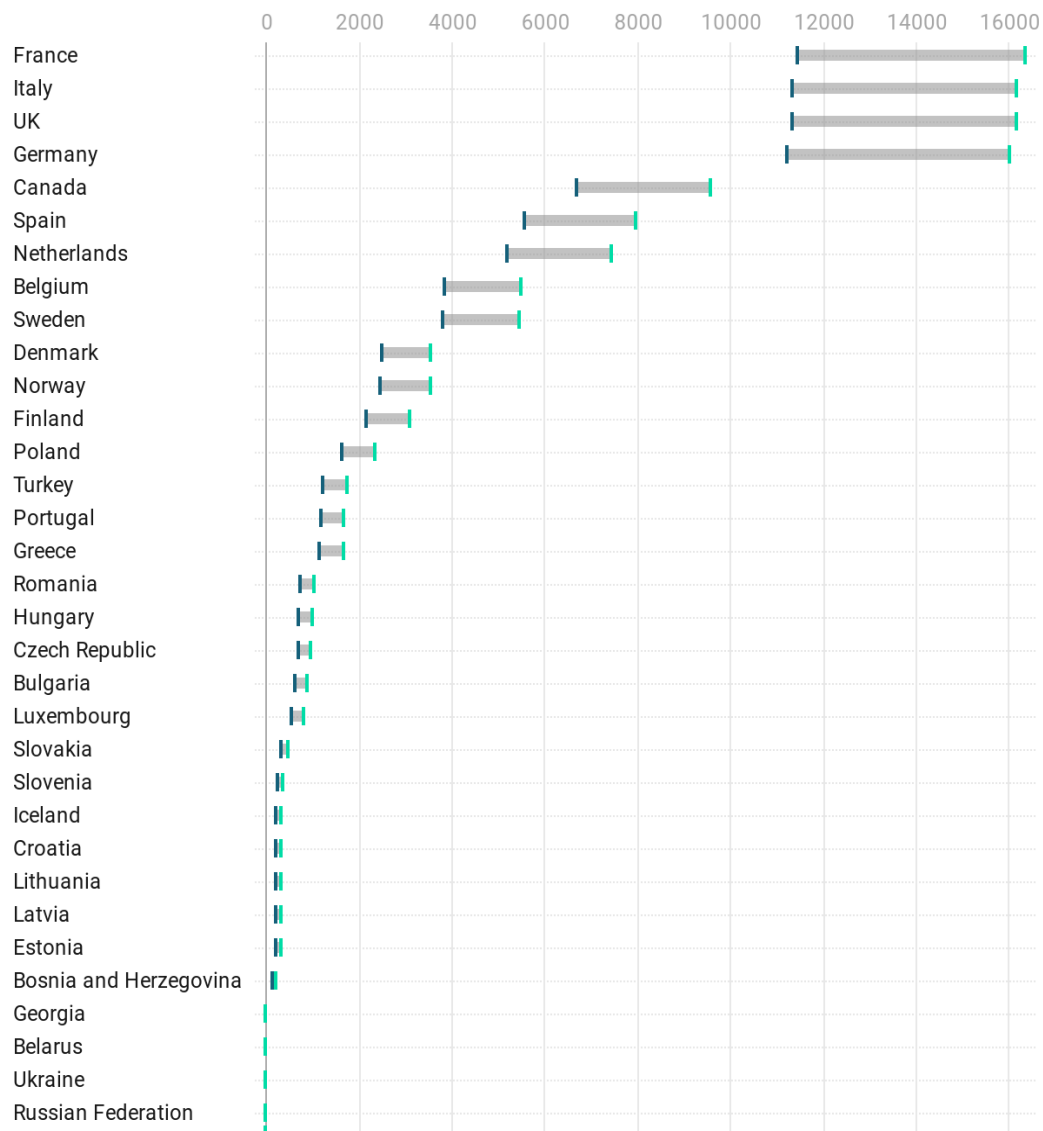
15 Germany chairs the IWG on Certifications (IWGC). Russia chairs the IWG on Rules and Procedures (IWGRP).

16 The formula draws on the OSCE standard scale of contributions (formerly the Helsinki scale) but includes proportional, additional contributions since not all OSCE members are simultaneously parties to the Open Skies Treaty. Post-Soviet states are exempt from these additional contributions. See OSCE, 1992, Annex IV to Decision Number Six, <https://2009-2017.state.gov/documents/organization/106722.pdf>. The OSCE standard scale remained unchanged for many years, but in April 2019, member states introduced minimal revisions (PC.DEC/1325). The estimate above for 2021 incorporates them.

17 Own analysis and compilation based on "Draft Assessment Report on the EU's role vis-à-vis the OSCE", 15387/1/04 REV, December 10, 2004, <http://register.consilium.europa.eu/pdf/en/04/st15/st15387-re01.en04.pdf>. In 2019, Germany provided EUR 67,720.49 to the OSCE, which given the German share (10.275%) amounts to a total OSCE budget of about EUR 660,000.

Estimated increase in annual OSCC budget contribution in Euros for 2021 (without U.S. participation)

National contributions to the annual OSCC budget follow a distinct formula that draws on the OSCE standard scale of contributions (formerly the Helsinki scale) but includes proportional, additional contributions since not all OSCE members are simultaneously parties to the Open Skies Treaty. Post-Soviet states (excluding the Baltic States) are exempt from these additional contributions. Without the United States, the contribution by France, Italy, the UK and Germany will increase by 1.6 percentage points from 10.3% to 11.9% but for the majority of member states it will be less than 0.2 percentage points.



The minimum increase is based on an estimated budget of EUR 700,000. The maximum increase is based on an estimated budget of EUR 1,000,000.

Chart: Alexander Graef •

Source: Own analysis and compilation based on "Draft Assessment Report on the EU's role vis-à-vis the OSCE" (15387/1/04 REV) and the OSCE standard scale for 2019 (PC.DEC/1325)

contrary,¹⁸ the effect of the redistribution of shares after the U.S. withdrawal will be negligible.

Despite official statements to the contrary, the effect of the redistribution of shares after the U.S. withdrawal will be negligible.

In spite of this, it is likely that the OSCC budget redistribution will cause controversy among member states for at least two reasons. Russian representatives have stated that they seek to preserve an OSCC decision from 1992 that exempts post-Soviet states from additional payments to the OSCC on the top of their basic contribution based on the OSCE standard scale (formerly the Helsinki scale).¹⁹ Maintaining this

practice, which at the time reflected the devastating economic situation in the former Soviet Union, effectively would freeze Russia's contribution at the current level even after the U.S. withdrawal. Moreover, Russian Deputy Foreign Minister Sergey Ryabkov has argued that Moscow wants to link its consent to the OSCC budget with the official annulment of Russia's financial obligations to the Joint Consultative Group of the CFE treaty, which it refused to pay in the past after withdrawing from it in March 2015.²⁰ Given Russia's improved economic performance, ongoing controversies about its Treaty implementation and its legally questionable suspension of CFE membership, this approach will cause much debate.

¹⁸ At the Open Skies state conference on July 6 2020, the Canadian Deputy Permanent Representative, Veronique Pepin-Halle, argued that "given the magnitude OF the United States' contribution to the budget of the Open Skies Consultative Commission, it is clear that this impact will be significant for remaining States Parties." See Sevunts, Levon, "Russia accuses Canada and the U.S. of violating Open Skies Treaty", July 10 2020, <https://www.cbc.ca/news/politics/open-skies-russia-canada-united-states-1.5645987>.

¹⁹ The exemption applies to Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, the Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. Only Belarus, Georgia, Russia and Ukraine are members of the Open Skies Treaty, however. Kyrgyzstan has signed the Treaty but did not ratify it, see OSCC, 1992, Annex III to Decision Number Six,

<https://2009-2017.state.gov/documents/organization/106722.pdf>.

²⁰ Vystupleniye na Konferentsii Gosudarstv-uchastnikov Dogovora po otkrytomu nebu po rassmotreniyu posledstviy vykhoda SShA iz Dogovora", July 6, 2020, https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4212382, p. 4.

Treaty Implementation and Quotas

Most member states share the concerns the United States has raised about Russia's compliance,²¹ but are keen to solve them diplomatically. Russia in turn also accused several Western members of violating Treaty provisions.²² The Treaty Review Conference scheduled for October 7-9 will look at the issues of state practice and Treaty implementation over the past five years.

Western and Russian concerns

Debates about Treaty implementation and compliance have been a constant feature, including controversies about flight safety, territorial status conflicts and national security concerns.²³ In the

last ten years, two major issues are at the centre of concern: The Russian denial of overflights within its 10 kilometre border zone to Georgia established in May 2010, and the 500-kilometre sub-limit over the Kaliningrad Oblast adopted in June 2014.

The first issue is unrelated to the Treaty as such but stems from the conflict about the political status of two Georgian breakaway regions, Abkhazia and South Ossetia. Russia recognised the sovereignty of both regions in the aftermath of its war with Georgia in August 2008. In light of this recognition, Russia argues that as a sovereign non-party state, the restrictions of Article VI of the Treaty – that “[t]he flight path of an observation aircraft shall not be closer than [...] ten kilometers [...] ten kilometers from the border with an adjacent State that is not a State Party” – apply.²⁴ No other member state of the Treaty shares this position. To them, Abkhazia and Ossetia are *de jure* Georgian territories and Article VI does not apply. In turn, Georgia regards the Russian position as a violation of its own sovereignty and ceased observing its Treaty obligations affecting Russia in April 2012.

21 U.S. Department of State, “2020 Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments”, <https://www.state.gov/2020-adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments-compliance-report-2/>

22 See for example, Ministry of Foreign Affairs of the Russian Federation, “Treaty on Open Skies: Questions and Answers”, May 26 2020, https://www.mid.ru/foreign_policy/international_safety/regprla/-/asset_publisher/YCxFJnKuD1W/content/id/4138584?p_p_id=101_INSTANCE_YCxFJnKuD1W&_101_INSTANCE_YCxFJnKuD1W_languageld=en_GB and Kelin, Andrei, “Open Skies Clouded by Sham and Ambiguity”, July 3 2020, <https://www.rusemb.org.uk/ambarticles/563>.

23 Territorial status conflicts have been the most difficult to resolve. For example, Turkey has consistently vetoed the accession of the Republic of Cyprus, an EU member state, to the treaty, because Ankara does not recognize Cyprus's sovereignty. Another problem is the status of the Crimean peninsula. In 2014, Russia invited other parties to overfly the territory from a designated Open Skies refuelling

airfield. Since the other state parties continue to view Crimea as part of Ukraine, the peninsula remains practically outside of treaty provisions. For an analysis of these and other issues see Graef, Alexander, “The End of the Open Skies Treaty and the Politics of Compliance”, July 6 2020, <https://www.lawfareblog.com/end-open-skies-Treaty-and-politics-compliance>.

24 See Treaty on Open Skies, Art. VI Section 2, <https://www.osce.org/files/f/documents/1/5/14127.pdf>.

In March 2018, Moscow signalled that it would resume “receiving observation flights in 10 kilometers contiguous to two sections of Russia’s state border in the Caucasus” and make them permanent under the condition “that Georgia implements in good faith its obligations to accept Russian observation missions.”²⁵ However, both parties have not yet been able to find a satisfactory solution. A possible way out could be returning to the *status-quo ante*. In fact, even after the Georgian-Russian war in August 2008, both states continued to allow flights within the context of the Treaty, each time with the UK as a partner. Russia and Georgia could return to this practice, but supplement it with an agreement that the disputed legal status of the two regions remains unaffected.²⁶

The second issue concerns diverging interpretations of certain Treaty provisions. According to the Russian Ministry of Foreign Affairs, the 500-kilometre sub-limit was introduced in reaction to a Polish overflight in April 2014, which took an unusually lengthy path over the small region. Its zigzag route had allegedly created problems

for the operation of the region’s airport and limited air travel.²⁷ The controversy arises over whether the Treaty provides grounds to establish sub-limits for flights originating from the established Open Skies airfields, such as Kubinka (near Moscow). Russia argues that the number of flights to observe its territory has not changed and that efficient observation of the Kaliningrad region is possible. The remaining members hold that the sub-limit not only violates Treaty provisions but decreases coverage in a militarily sensitive area, thereby undermining both the efficacy and the spirit of the Treaty.

In February 2020, Russia allowed a joined flight by the U.S., Lithuania and Estonia with a range of 505 kilometres over the Kaliningrad region, thereby undermining its own long-held policy.²⁸ It is unclear whether this was done to buttress public justification efforts in the wake of an expected U.S. withdrawal or whether it represents a genuine sign of goodwill. Nonetheless, if Russia is indeed only concerned about the safety of civilian air traffic in a comparatively small region, the State Parties could consider broadening the discussion and revisiting Annex E of the Treaty, which, among others, regulates procedures for territories separated from the mainland

25 U.S. Department of State, “2019 Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments”, <https://www.state.gov/2019-adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments-compliance-report/>

26 For such a proposal see Frear, Thomas, “Open Skies: A Status Neutral Approach for Georgia and Russia”, ELN Policy Brief, August 2017, <https://www.europeanleadershipnetwork.org/wp-content/uploads/2017/10/170623-FREAR-Open-Skies-Georgia-and-Russia.pdf>.

27 Ministry of Foreign Affairs of the Russian Federation, “Treaty on Open Skies: Questions and Answers”, May 26, 2020, https://www.mid.ru/foreign_policy/international_safety/regprla/-/asset_publisher/YCxFJnKuD1W/content/id/4138584?p_p_id=101_INSTANCE_YCxFJnKuD1W&_101_INSTANCE_YCxFJnKuD1W_languageId=en_GB.

28 Ibid.

territory of member states. Here the phrase “special procedures” as provided in subparagraph 5 (B) (2) for territories located more than 600 kilometres from the mainland could be further specified, or the threshold itself could be altered in order to cover territories such as the Kaliningrad region.

The Russian Foreign Ministry has published its own list of accusations. While most of them are directed against the United States, others are directed at European member states and Canada. At the July state conference, the Head of the Russian National Nuclear Risk Reduction Center, Sergey Ryzhkov, specifically argued that in 2015 the United States had refused the Russian An-30B access to its territory. The decision was allegedly supported by Canada and according to Ryzhkov has not been changed since then. This comes as a surprise because Russia has never conducted flights over either the U.S. or Canada using the An-30B due to the limited range of the aircraft. The flight planned in 2015 would have been an exception because the long-range Russian Tu-154M had been under repair. Ryzhkov also criticised the United Kingdom and France for denying access to their overseas territories and remarked that several states, including the United Kingdom, Norway, and Canada, had introduced altitude requirements that would not allow Russia to use the minimal configuration of its sensors. Although Ryzhkov emphasised that these issues were “not in the focus of attention”, he “strongly recommended” that

they be addressed before the review conference in October 2020.²⁹

Flight Quotas in 2021 and beyond

At the quota conference scheduled for 5-6 October, 2020, member states will need to find agreement about the distribution of active quotas for 2021. Without a consensus, flights cannot take place. This happened once before in October 2017, when the dispute between Russia and Georgia about the border issue put on hold all flights for 2018.³⁰ Russia and Belarus will likely strive to increase the number of their common flights across Europe and Canada, since the U.S. withdrawal from the Treaty will put an end to flights over U.S. territory. Russian Deputy Foreign Minister Sergey Ryabkov has already expressed his position, however, that the sum of passive and active quotas shall remain the same.³¹

29 Ryzhkov, Sergey, “Vystupleniye na Konferentsii Gosudarstv-uchastnikov Dogovora po otkrytomu nebu po rassmotreniyu posledstviy vykhoda SShA iz Dogovora” [Statement at the Conference of member states to the Treaty on Open Skies to review the consequences of the U.S. withdrawal from the Treaty], July 6, 2020, https://www.mid.ru/foreign_policy/news//asset_publisher/cKNonkJE02Bw/content/id/4212382, p. 3.

30 Spitzer, Hartwig, “The Open Skies Treaty as a transparency regime”, Extended version of a presentation at the International Conference at the Protestant Academy (June 2018), Loccum/Germany, November 2018, https://www.bits.de/public/pdf/Open-Skies_2018_11_02_HS-CS.pdf, p. 7.

31 “Vystupleniye na Konferentsii Gosudarstv-uchastnikov Dogovora po otkrytomu nebu po rassmotreniyu posledstviy vykhoda SShA iz Dogovora”, July 6, 2020, https://www.mid.ru/foreign_policy/news//asset_publisher/cKNonkJE02Bw/content/id/4212382, p. 4.

At the quota conference scheduled for 5-6 October, 2020, member states will need to find agreement about the distribution of active quotas for 2021.

This is helpful. It means that Moscow is content with its overall Treaty quota (42) and suggests that a redistribution of previous U.S.-bound flights over Europe and Canada will be sufficient for Russia and Belarus. Such a redistribution should be technically possible. It would affect about six flights per year and would not require an amendment to the Treaty text. In any case, Russia and Belarus have not previously exhausted their Treaty-allowed maximum flight quota for most European states, except Portugal, Spain, and Greece.³² The Treaty, however, does not require countries to exhaust their allocation of flights. Alternatively, Russia-Belarus may therefore choose to reduce their annual number of active flights.

These scenarios notwithstanding, a successful conclusion to the quota conference could still become an obstacle to progress. Although during the conference the United States will still be a member of the Treaty, it is unlikely that Washington will apply for active quotas in 2021. Without U.S. flight bids this year, however, there is the possibility that Russia may succeed in receiving one of the four slots for flights over Georgia. If this happens, Georgia could once again refuse to give its consent to the full package of quota distributions, which would make flights in 2021 impossible. Moreover, Russian Deputy Foreign Minister Ryabkov indicated that his country might insist that the conference negotiations proceed without the United States.³³ This potential conflict could bring the underlying political struggle to the surface. Four different scenarios for how things might play out in the next few months are conceivable.

³² According to the Treaty "No State Party shall conduct more observation flights over the territory of another State Party than a number equal to 50 per cent, rounded up to the nearest whole number, of its own total active quota, or of the total passive quota of that other State Party, whichever is less." See, Treaty on Open Skies, Art. III, Section I (10), <https://www.osce.org/files/f/documents/1/5/14127.pdf>.

³³ "Vystupleniye na Konferentsii Gosudarstv-uchastnikov Dogovora po otkrytomu nebu po rassmotreniyu posledstviy vykhoda SShA iz Dogovora", July 6, 2020, https://www.mid.ru/foreign_policy/news//asset_publisher/cKNon-kJE02Bw/content/id/4212382, p. 4.

Four Future Scenarios

The first, and currently most optimistic scenario, would see the United States withdrawing in November without serious damage to the Treaty. For this to happen, the remaining Treaty members will need to solve the technical challenges mentioned above and find agreement about the quota distribution for 2021. Russia would need to be prepared to participate in a good-faith dialogue on the outstanding compliance issues.

In the second scenario, several more member states might follow the U.S.' example and withdraw from the Treaty. Prime candidates are states like Georgia and the Baltic States that have a low number of active flights, no certified aircraft, and a special bilateral security relationship with the United States. Whether the Treaty can survive the exit of more states depends on their number and respective level of Treaty participation. In any case, the Russian reaction to such a development would be crucial to the long-term future of the Treaty.

The third scenario would see Russia and Belarus withdrawing from the Treaty, either immediately following the U.S. withdrawal or in consequence of scenario two. The former path is unlikely, given the overall support for the Open Skies Treaty in Moscow, but the latter is a realistic option and represents an active danger. Some experts point out that, even in the case of a Russian exit, Belarus would not be obliged to follow

suit.³⁴ Yet, since Minsk possesses neither certified aircraft nor sensors and President Lukashenko's political future now depends increasingly on Moscow, that seems unlikely. Without U.S. and Russian participation, the Treaty would be finished.

Finally, in a fourth scenario, the United States could either revoke the withdrawal decision before 21 November 2020 or rejoin the Treaty under a new Democratic U.S. administration in 2021. Most member states favour one of these alternative developments, and European leaders have called on Washington to reconsider its position. At a minimum, such a U-turn would require Russia's return to full compliance with the Treaty within the next two months.³⁵ Even if Russia made this commitment, however, it is difficult to imagine that the current U.S. administration would change a long-held policy position just before or immediately after the Presidential election.

Some U.S. Treaty supporters argue that the withdrawal decision itself is illegal because the Trump administration did not notify Congress 120 days before submitting its withdrawal no-

34 Bell, Alexandra, Wolfgang Richter & Andrei Zagorski, "How to fix, preserve and strengthen the Open Skies Treaty", March 2020, Deep Cuts Issue Brief 9, https://deepcuts.org/files/pdf/Deep_Cuts_Issue_Brief_9-Open_Skies_Treaty.pdf.

35 In his withdrawal statement in May 2020, Secretary of State Mike Pompeo argued that "we may, however, reconsider our withdrawal should Russia return to full compliance with the Treaty". See "On the Treaty on Open Skies", Press Release, May 21, 2020, <https://www.state.gov/on-the-Treaty-on-open-skies/>.

tice as enshrined in Section 1234 of the National Defense Authorization Act (NDAA) 2020.³⁶ Although there exists some legal uncertainty about Presidential authority when withdrawing from international agreements, the idea that Congress could force the administration to reverse its decision by appealing to federal court is both unprecedented and unrealistic.³⁷

A U.S. return to the Open Skies Treaty in 2021 is possible, but Russian officials have already indicated that Moscow will not accept a simplified procedure.³⁸ The United States would need to re-apply for Treaty membership (whose ratification would require consent by the U.S. Senate) and, as any new candidate, would have to accept all previous OSCE decisions. Moreover, the rules and provisions that are in place currently would have to be re-negotiated, including the overall U.S. Treaty quota, the designation of Open Skies airfields, and the flight range from them. In turn, if the remaining member states fail to address shared concerns about Russian Treaty compliance and make progress

towards resolving them, a U.S. return to the Treaty would become increasingly unlikely even under a Democratic President.

If the remaining member states fail to address shared concerns about Russian Treaty compliance and make progress towards resolving them, a U.S. return to the Treaty would become increasingly unlikely even under a Democratic President.

36 Engel, Eliot L. & Adam Smith, "Letter to Secretary of State Mike Pompeo and Secretary of Defense Mark Esper", May 22 2020, <https://foreignaffairs.house.gov/2020/5/engel-smith-denounce-trump-administration-s-illegal-withdrawal-from-open-skies-Treaty>.

37 Anderson, Scott R. & Pranay Vaddi, "When Can the President Withdraw From the Open Skies Treaty?", April 22, 2020, <https://www.lawfareblog.com/when-can-president-withdraw-open-skies-Treaty>.

38 "Vystupleniye na Konferentsii Gosudarstv-uchastnikov Dogovora po otkrytomu nebu po rassmotreniyu posledstviy vykhoda SShA iz Dogovora", July 6, 2020, https://www.mid.ru/foreign_policy/news//asset_publisher/cKNon-kJE02Bw/content/id/4212382, p. 4.

Recommendations

If the remaining state parties want to realize the first aforementioned scenario and save the Open Skies Treaty after the U.S. withdrawal comes into force in November 2020, they should take the following steps:

1. Reach out to Open Skies Treaty members with either a low number of active flights, no certified aircraft and/or a special bilateral security relationship with the United States to convince them to remain in the Treaty. In particular, emphasise the security benefits of the Treaty to these states, including the possible provision of imagery from overflights by all member states, the lack of alternative national means of verification and the available intelligence on Russia and Belarus;
2. Express publicly the political will to keep the Treaty in operation, confirm that sensor data from Open Skies Treaty overflights will not be shared with nonmembers and elaborate on how technical measures can prevent such proliferation;
3. Actively engage Russia and Belarus in further negotiations about the 500 kilometre sub-limit over the Kaliningrad region. Consider shifting the debate towards a broader discussion about special regulations for territories separated from the mainland, including but not limited to the specification of the phrase “special procedures” as provided in Annex E subparagraph 5 (B) (2) to the Treaty;
4. Address the Russian denial of overflights within its 10 kilometre border zone to Georgia established in May 2010, and involve Georgia in talks about its denial of Russian overflights over its territory. Re-visit possible solutions with third-party mediation that would not impinge on the international status of Abkhazia and South Ossetia (status neutrality);
5. Search for possible financial and organisational solutions to safeguard the work of the OSCC, including reasonable budget contributions reflecting present economic realities and, if possible, additional, voluntary contributions in accordance with Annex III to decision number 6 of the OSCC;
6. Evaluate the technical and political feasibility of re-establishing the Pod-group to enhance aircraft capacity beyond 2020 and consider offering to use the so-called taxi option, which is the provision of aircraft by the observed party in order to facilitate flights, particularly long-range flights over Siberia.



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