

Legality of Suspension of the Intermediate - Range Nuclear Forces Treaty by the USA and Russia

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Abstract

In a written statement, Donald Trump announced on 2 February 2019 that the US would be suspending its compliance with the 1987 Intermediate-Range Nuclear Forces Treaty between US and Russia (hereinafter, the INF), and would serve formal notice that it would withdraw altogether in six months. One month later, the President of Russia, Vladimir Putin, declared on 4 March 2019 that Russia had suspended its participation in the INF.

A number of experts expect that this may incite a new arms race — not only involving the US and Russia, but also China, which was never a signatory to the INF.

This paper aims to evaluate the legality of the suspension by the USA and Russia, and other relevant procedures such as withdrawal. To that end, the paper will examine this procedure in the light of the INF per se, as well as the rules of suspension set forth in the Vienna Convention on the Law of Treaties 1969 (VCLT). In addition, the case law and opinions of international law scholars in the field of suspension of treaties will be considered.

The paper argues that the legality of suspending the INF by the USA and Russia cannot be determined without evidence and facts regarding the grounds invoked by both of states. The paper concludes that one of the peaceful means to solve conflicts between States set forth in Article 33 of the United Nations Charter (UN), such as arbitration, mediation or judicial settlement, might determine the legality of this suspension.

Keywords: Suspension, obligations, breach, grounds, substantive, procedural.

1. Introduction

The INF treaty negotiations began when Mikhail Gorbachev became President of the Soviet Union in March 1985⁽¹⁾. In the same year, the Soviet Union proposed a plan to establish a balance between the number of SS-20 warheads in its arsenal and the growing number of allied intermediate-range missile warheads in Europe⁽²⁾.

The United States expressed its interest in the Soviet proposal, and the scope of the negotiations expanded in 1986 to include all US and Soviet intermediate-range missiles around the world⁽³⁾. Thereafter, the President Ronald Reagan and Gorbachev began to move toward a comprehensive intermediate-range missile elimination agreement⁽⁴⁾.

Their efforts culminated in the signing of the INF treaty on 8 December 1987, and the treaty entered into force on 1 June 1988⁽⁵⁾. This treaty established a main obligation whereby both the USA and Russia were required to ban all ballistic and cruise missiles with a range of up to 5,500 kilometers and all the technology associated with those missiles that were capable of delivering a nuclear warhead⁽⁶⁾.

In 1991, the INF treaty's membership expanded to the successor states of the former Soviet Union, such as Belarus, Kazakhstan, and Ukraine⁽⁷⁾. Although the INF treaty consists of five states parties, a number of European states, such as Germany, Hungary, Poland, Slovakia, and the Czech Republic also destroyed their intermediate-range missiles⁽⁸⁾.

Every treaty between two States or more must be performed by them in good faith⁽⁹⁾. As long as a State has become a party to a treaty, the State is required to comply with the obligations set forth in the treaty. The INF is a case of point. It is assumed that the US and Russia are bound to comply with the obligations

(1) Daryl Kimball and Kingston Reif, "The Intermediate-Range Nuclear Forces (INF) Treaty at a Glance" (Arms Control Association) < <https://www.armscontrol.org/factsheets/INFtreaty> > accessed 6 March 2019.

(2) Ibid.

(3) Ibid.

(4) Ibid.

(5) Ibid.

(6) P. Sean Morris, "Is Zero Disarmament Possible? Multilateralism and Nuclear Arms Control Treaties" (2016) 8 Wm. & Mary Poly Rev. 6.

(7) Kimball and Reif (n 4).

(8) Ibid.

(9) See the Vienna Convention on the Law of Treaties (adopted on 23 May 1969 and entered into force on 27 January 1980) Article 26.

set forth in the INF. To be more precise, enforcement of the INF by the US and Russia should be through elimination all intermediate-range missiles and launchers of such missiles, and all support structures and support equipment of the categories listed in the Memorandum of Understanding associated with such missiles and launchers⁽¹⁰⁾.

To ensure compliance with this obligation, each State party has the right to conduct on-site inspections and using national technical means of verification⁽¹¹⁾, and these mechanisms are in line with the well-known strategies of compliance with the rules of international law, in particular, arms control agreements⁽¹²⁾.

However, after 2014, both the USA and Russia started to exchange accusations about violations of the INF treaty⁽¹³⁾. In fact, it seems that there is a degree of distrust between the two superpowers. On the one hand, Russia believes that there are American nuclear weapons (tactical) that are based in Europe, and aimed at Russia⁽¹⁴⁾. On the other hand, the US has concern based on that Russia involves constantly in development its nuclear arsenal and manipulate the relevant agreements, such as INF.

In general, it is important to say that accusations exchanged between the USA and Russia are generally part of a de-compliance regime in international

(10) See the INF, Article IV.

(11) Ibid, Article XI and Article XII.

(12) Edith B. Weiss, "Rethinking compliance with international law" in Eyal Benvenisti & Moshe Hirsch (eds), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge University Press, the UK, 2004) pp.161-63.

(13) - In July 2014, the USA government alleged in the Compliance Report submitted that Russia had violated its obligations set forth in the INF treaty.

- In March 2017, a senior US officer confirmed press reports that Russia had begun deploying missiles that are not compliant with the INF treaty, while Russia denied such reports and accused the US of developing new technology, including drones capable of delivering nuclear warheads.

- On 20 October 2018, the President of the USA, Donald Trump, announced his intention to "terminate" the INF treaty, stressing the Russian violation of the treaty, as well as his concerns about China's arsenal of intermediate-range missiles.

- On 4 December 2018, the USA Secretary of State, Mike Pompeo, declared that the US had found Russia to be in "material breach" of the INF treaty and that the USA would suspend its treaty obligations in 60 days if Russia did not comply with the treaty in that time.

- On 2 February 2019, Donald Trump declared that the USA suspended its obligations under the INF treaty and also announced its intention to withdraw from the treaty in six months.

- On 4 March 2019, the President of Russia, Vladimir Putin, announced that Russia had suspended its participation in the INF treaty.

- See Kimball and Reif (n.4); Morris (n.9); "Russia suspends participation in nuclear arms treaty with US" (n.2).

(14) Andrei Zagorski, "Tactical Nuclear Weapons" (2011) 22 *Security & Human Rights*, pp. 399-409.

law⁽¹⁵⁾, but it seems that the USA and Russia have decided to take rigorous actions in the face of such non-compliance (i.e. suspending the INF treaty). Therefore, it is necessary to assess the legality of the suspension adopted by the USA and Russia.

The legal suspension means that the suspension is in compliance with the rules of international law that regulate the procedure. On the other hand, non-compliance with such rules will generate an illegal suspension, which can be taken as a pretext by the USA or Russia to invoke State responsibility or taking a countermeasure in order to compel the other party to comply with the INF. The legality of suspension adopted by the USA and Russia will be examined in light of the INF treaty (Section 2), as well as in light of the VCLT (Section 3).

2. The procedure of suspension in light of the INF

Article XV of the INF treaty states that each state party has the right to withdraw from the treaty if the party decides that extraordinary events related to the subject matter of the treaty have jeopardised its supreme interests⁽¹⁶⁾. However, the state party should give notice of its decision to withdraw to the other party six months prior to withdrawal from the treaty⁽¹⁷⁾. This article concerning withdrawal, at first glance, stipulates a substantive requirement and another procedural requirement.

In terms of the substantive requirement, it is necessary that a state party proves that its supreme interests have been endangered as a consequence of extraordinary events related to the subject of the INF. On the other hand, notification of the other party six months prior to withdrawal from the INF can be classified as the procedural requirement. It can be said that the US government met the latter requirement when it sent formal notice to the Russian government stating it would withdraw from the INF treaty unless Russia destroyed all of its new ground-launched cruise missiles, launchers and associated equipment⁽¹⁸⁾.

In the context of the substantive requirement, the US alleged that Russia has developed new ground-launched cruise missiles, which violates the INF prohibition of missiles with ranges between 500km and 5,500km⁽¹⁹⁾. Such an allegation, or the substantive requirement, needs to be proved by the USA,

(15) Morris (n.9), p. 7.

(16) See the INF, Article XV.

(17) Ibid.

(18) Borger (n. 1).

(19) Ibid.

through providing, for example, material evidence.

In fact, it is remarkable that the INF does not, through Article XV or another article, refer to the procedure of suspension of the INF treaty adopted by both Trump and Putin. Article XV of the INF does not permit states parties to suspend the treaty as an initial procedure before the withdrawal enters into force. However, the US government simultaneously applied two types of procedures. The first procedure was being willing to withdraw from the INF treaty while the second was the suspension of the treaty.

On the other hand, the Russia government used one procedure, that is the suspension of the INF treaty. President Vladimir Putin declared through an executive order that Russia was suspending its obligations under the 1987 INF treaty and would continue to do so “until the United States of America rectifies its violations of the said Treaty or until it expires”⁽²⁰⁾.

Although the procedure for suspension is not indicated in the INF, as explained above, this does not deprive the USA and Russia of using such a procedure in the context of the INF treaty. Article 42 of the VCLT states that suspension of the operation of a treaty may take place as a result of the application of the provisions of the treaty or of the VCLT. Therefore, the procedure of suspension adopted by the USA and Russia should be evaluated in the light the VCLT and this is the subject of the next section.

3. The procedure of suspension in light of the VCLT

Suspension of a treaty means the temporary cessation of the operation of all or a part of a treaty⁽²¹⁾. This procedure is regulated by Part V, Section 3 of the VCLT. It is necessary to indicate that Russia is a state party to the VCLT, while the USA is not⁽²²⁾. However, most of the rules set forth in the VCLT reflect customary international law⁽²³⁾.

Firstly, in the *Kasikili/Sedudu Islands Case (Botswana/ Namibia)*, the International Court of Justice (ICJ) interpreted the *Heligoland-Zanzibar Treaty*

(20) President of Russia, “Executive Order suspending Russia’s compliance with the USSR-US INF Treaty” < <http://en.kremlin.ru/events/president/news/59939>> Accessed 30 March 2019.

(21) Iain Cameron, *Treaties, Suspension* (Encyclopedia of Public International Law, 2007) p. 2.

(22) Russia ratified the VCLT on 29 April 1986, while the USA signed the latter on 24 April 1970 and has not ratified it yet. See status of Vienna Convention on the Law of Treaties Vienna, 23 May 1969 < https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en> accessed 18 April 2019.

(23) Malcom N. Shaw, *International Law* (Sixth edition, Cambridge University Press) p. 9485; Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2007) p7.

of 1890 according to Article 31 of the VCLT, although neither Botswana nor Namibia are parties to the VCLT⁽²⁴⁾.

The court decided that this article was applicable to this case because it reflects customary international law⁽²⁵⁾. Secondly, the ICJ applied the rules of the VCLT concerning termination and suspension set forth in Articles 60 and 61 because in many aspects these rules are considered as a codification of customary international law⁽²⁶⁾.

Thirdly, the substantive provisions of the VCLT are considered as a part of international customary law, such as the grounds of termination or suspension⁽²⁷⁾. The ICJ in the *Legal Consequences of South Africa in Namibia Case* decided that a breach of a treaty as a ground of termination (or suspension) may in many respects be considered as a codification of existing customary law⁽²⁸⁾, and also the court has applied the same approach to the fundamental change of circumstances (article 62 of the VCLT) – as a ground of suspension - in the *Fisheries Jurisdiction Case*⁽²⁹⁾.

Finally, even some important procedural provisions, such as the requirement to give a minimum period of notice of suspension or termination may now be accepted as representing an international customary rule⁽³⁰⁾.

It seems from the examples mentioned above that the ICJ deals with all of the substantive and procedural provisions of the VCLT as rules reflecting international customary law, particularly as there is no case in which the court has decided that certain provisions in the VCLT do not enjoy customary status⁽³¹⁾. It can be concluded that states that are not parties to the VCLT, such as the USA, are still bound to comply with the rules of the VCLT, including

(24) *Kasikili/Sedudu Islands Case (Botswana/ Namibia)* (judgement of 13 December 1999, ICJ Rep 1045) para 18.

(25) *Ibid.*

(26) *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory opinion of 21 June 1971, ICJ Rep 3) para. 94; *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)* (Judgement of 25 September 1997, ICJ Rep 7) paras 42–46.

(27) Malgosia Fitzmaurice, *Treaties* (Max Planck Encyclopedia of Public International, 2010) p4.

(28) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion of 21 June 1971, ICJ, Reports of Judgments, Advisory Opinions and Orders) para 94.

(29) See *Fisheries Jurisdiction Case, Federal Republic of Germany v Iceland* (1973] ICJ Rep 49) paras 24 and 36.

(30) Anthony Aust, *Vienna Convention on the Law of Treaties, 1969* (Max Planck Encyclopedia of Public International) p6.

(31) Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) p. 66.

the provisions of suspension on the basis of international customary law. This fact was confirmed by the USA Secretary of State during the declaration of suspension of the INF treaty⁽³²⁾.

Consequently, it is necessary to evaluate the procedure of suspension adopted by the USA and Russia in respect of the INF treaty in light of the VCLT. The latter includes a number of legal requirements concerning exercising suspension, by which the procedure of suspension by the USA and Russia will be examined in light of the substantive requirements (section 3.1) and the procedural requirements (section 3.2).

3.1. The substantive requirements of suspension

The VCLT includes seven legal bases on which suspension can be used by the states parties to a treaty⁽³³⁾. First, the treaty can be suspended according to the provisions set forth in the treaty itself. Second, the treaty can be suspended upon the consent of all the parties. Third, two or more parties to a multilateral treaty can temporarily suspend the operation of provisions of the treaty under an agreement and according to conditions set forth in Article 58(1) of the VCLT. Fourth, the treaty can be suspended if a later treaty has been concluded with the same subject. Fifth, a material breach of a bilateral or multilateral treaty by one of the parties entitles the other(s) to suspend the treaty in whole or in part. Sixth, the temporary impossibility of performing a treaty is a basis for suspension. Seven, if a fundamental change of circumstances occurs with regard to those existing at the time of the conclusion of that treaty, this is a basis for suspension.

It can be understood from the legal substantive requirement of suspension set forth in the VCLT and mentioned above that a treaty is not to be suspended automatically: a state party to the treaty must firstly invoke one of these grounds for suspension. It is not within the scope of this article to discuss these grounds in detail; the focus will be on the most relevant ground that might cover the case of suspension adopted by the USA (section 3.1.1.) and Russia (section 3.1.2.) in respect of the INF treaty.

3.1.1. USA

From the side of the USA and according to the pronouncements by Donald Trump and his Secretary of State, Mike Pompeo, Russia is in “material

(32) See p. 11.

(33) See the VCLT (n.12) Arts 57 to 62.

breach” of the INF treaty. In this regard, the US has alleged that Russia has developed a new ground-launched cruise missile (NATO designator: SSC-8, Russian designator: 9M729), which violates the INF prohibition of missiles with ranges of between 500km and 5,500km⁽³⁴⁾.

Moreover, the US has provided detailed information to Russia regarding its violation, such as “Information pertaining to the missile and the launcher, including Russia’s internal designator for the mobile launcher chassis and the names of the companies involved in developing and producing the missile and launcher”⁽³⁵⁾.

This allegation provided by the USA comes within the fifth ground of suspension mentioned above. For further clarification, the USA might use Article 60 (2) (b) and (c) of the VCLT as a justification or ground to suspend the operation of the treaty in whole.

First, Article 60 (2) (b) of the VCLT states that a material breach of a multilateral treaty by one of the states parties entitles a party affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between the affected state and the defaulting state. According to this article, it seems that the USA has classified itself as an affected party among the other parties to the INF as a consequence of the material breach committed by Russia.

What is important is that 60 (2) (b) of the VCLT requires a type of material breach that is clarified in paragraph (3) (a) and (b) of the same article. The latter states that a material breach can be a repudiation of the treaty not accepted by the VCLT (paragraph a) or the violation of a provision essential to achieve the object or purpose of the treaty (paragraph b). The type of material breach set forth in Article 60 (3) (b) might cover the action committed by Russia on the basis that the latter violated a provision that is essential to achieve the object or purpose of the treaty.

Nevertheless, the USA, through the pronouncements of its President and Secretary of State, or even the written statements published on the website of the US Department of State, has not identified the provision in the INF treaty that has been violated by Russia. It is possible to say that the Russian action

(34) US Department of State, “Russia’s Violation of the Intermediate-Range Nuclear Forces (INF) Treaty” (Fact Sheet Office of the Spokesperson Washington, DC, 4 December 2018) <<https://www.state.gov/r/pa/prs/ps/2018/12/287868.htm>> accessed 24 April 2019.

(35) Ibid.

(development of a new ground-launched cruise missile with a range between 500km and 5,500km, as alleged by the USA) may constitute a violation of Article VI of the INF treaty that prohibits producing or testing any short or intermediate-range missiles, or producing any stages of such missiles or any launchers of such missiles.

Second, another ground that might cover the procedure of the suspension adopted by the USA, is paragraph (2) (c) of Article 60 of the VCLT. This paragraph permits the suspension of a treaty in whole or part as long as a breach by one party tends to undermine the whole regime of the treaty as between all the parties.

The International Law Commission (ILC), in the commentary of the VCLT, used disarmament treaties as an example of treaties that can be subject of Article 60 (2)(c)⁽³⁶⁾. Moreover, the ILC has decided that in a case where there is a material breach of a multilateral treaty that changes the position of every party with respect to the further performance of its obligations, any state party to the multilateral treaty is authorised to suspend the treaty without a need to obtain the agreement of the other parties⁽³⁷⁾.

According to this paragraph, it is possible to say that the US can establish its suspension of INF treaty on the basis that the development of such new cruise missiles by Russia would lead to undermining the whole regime of the INF between all the parties, and that it has used its right under Article 60 (2) (c) of the VCLT to suspend the INF treaty in whole.

What is important in this regard is that the material breach, the subject of Article 60 (2) (b) and (c) of the VCLT, needs to be proved by the USA. This can occur by using Article XI of the INF treaty and the additional Protocol regarding inspections relating to the INF treaty.

If the USA managed to prove such a material breach or the substantive ground for suspension, the USA could have the right to suspend the INF treaty and absolve itself temporarily from any obligations in the treaty. As the ILC clarified in the commentary concerning Article 60 of the VCLT, “it would be inequitable to allow a defaulting State to continue to enforce the treaty against the injured party, whilst itself violating its obligations towards that State under the treaty”⁽³⁸⁾.

(36) See Draft Articles on the Law of Treaties with commentaries 1966 (United Nations, 2005), p. 255.

(37) Ibid.

(38) Ibid.

However, a problem arises as to whether Russia will permit or not activation of the rules regarding inspection set forth in the INF treaty and the additional protocol. Consequently, the matter of material breach or the substantive ground for suspension invoked by the USA cannot be definitively confirmed unless material evidence (resulting from rules of inspection) is provided by the USA, or through an official acknowledgement by Russia.

Generally, the ILC clarified in the commentary of Article 60 that such evidence that supports the ground for suspension is normally subjected to determination or appreciation which may be controversial⁽³⁹⁾.

3.1.2. Russia

With regard to Russia, the President of Russia, Vladimir Putin, signed an executive order on 4 March 2019 that suspended Russia's compliance with the INF treaty⁽⁴⁰⁾.

Moreover, Russia decided in the executive order that it would continue in that suspension "until the United States of America rectifies its violations of the said Treaty or until it expires"⁽⁴¹⁾. Russia has alleged that the US violated the pact by deploying missile defence facilities in eastern Europe that could fire cruise missiles⁽⁴²⁾.

It will be noticed that the suspension adopted by Russia might be established on the same grounds as the US's suspension. In other words, the action of deploying missile defense facilities in eastern Europe adopted by the USA has been classified by Russia as a violation of the INF treaty.

It is possible to say that the USA violated Article IV (2) of the INF treaty⁽⁴³⁾, and this violation might be considered as a material breach within Article 60 (3) (b) of the VCLT. Consequently, Russia could be classified as an affected state within Article 60 (2) (b) of the VCLT, as a result of the USA's violation.

In addition, Article 60 (2) (c) of the VCLT might cover the Russian suspension of the INF treaty. This means that deploying missile defence facilities in

(39) *Ibid.*, p. 262.

(40) "Executive Order suspending Russia's compliance with the USSR-US INF" (n. 23).

(41) *Ibid.*

(42) "Russia suspends participation in nuclear arms treaty with US" (n. 2).

(43) Article IV (2) of the INF treaty states that "... both Parties shall begin and continue throughout the duration of each phase, the reduction of all types of their deployed and non-deployed intermediate-range missiles and deployed and non-deployed launchers of such missiles and support structures and support equipment associated with such missiles and launchers in accordance with the provisions of this Treaty."

eastern Europe by the US would lead to undermining the whole regime of the INF between all the parties. This effect can be used by Russia to suspend the INF in whole.

As has been said previously, the validity of the substantive ground relies significantly on material evidence proving the deployment of missile defence facilities in eastern Europe by the USA (the material breach). This matter needs, for example, implementation of the rules of inspection set forth in the INF treaty and the additional protocol⁽⁴⁴⁾.

What is important in this section (particularly the condition of the material breach) is that “suspension for breach cannot be exercised pre-emptively: a material breach must have actually occurred”⁽⁴⁵⁾.

For more clarification, the ICJ, in a case concerning the Gabčíkovo-Nagymaros Project between Hungary and Slovakia, decided that a state party to a treaty should be in material breach of the treaty itself, and this entitles the other party to rely on it as a ground for terminating (or suspending) the treaty⁽⁴⁶⁾.

In other words, violation of another treaty or other rules of international law may justify the taking of certain measures, such as countermeasures by the invoked state, but it does not constitute a ground for termination (or suspension) under the VCLT (Article 60)⁽⁴⁷⁾.

Consequently, it is necessary to say that both the USA and Russia must establish the ground for their suspension on the basis that the other party breached the INF treaty per se, and no other rules of international law regarding disarmament, for instance. It seems from the official statements of the USA⁽⁴⁸⁾ and the executive order signed by the President of the Russia⁽⁴⁹⁾ that both states have met this condition.

Nevertheless, neither the USA nor Russia have identified a certain provision in the INF treaty that has been breached by the other. This could be clarified if a judicial settlement has been requested by one of the parties of the conflict and accepted by the other. In this case, the material breach as the ground for the suspension of the INF will be elaborated and proved by each party in the conflict.

(44) See p. 9.

(45) Cameron (n. 24), p. 4.

(46) See Gabčíkovo-Nagymaros Project (n. 29), para 106.

(47) Ibid.

(48) See “Russia’s Violation of the Intermediate-Range Nuclear Forces (INF) Treaty” (n37).

(49) See “Executive Order suspending Russia’s compliance with the USSR-US INF Treaty” (n.23).

3.2. The procedural requirements of suspension

Articles 65 to 68 of the VCLT refer to a number of procedural safeguards that must be observed by a state invoking a substantive ground for suspension⁽⁵⁰⁾. Nevertheless, Article 65 has been regarded by the ILC as a key article for application of the provisions dealing with suspension⁽⁵¹⁾.

Therefore, this article is the most relevant procedure that must be examined in the context of the suspension adopted by the USA and Russia.

Article 65(1) of the VCLT stipulates that a state that decides to suspend – under the VCLT – the operation of a treaty, must notify the other parties of its claim, and such notification must also refer to the proposed measure (suspension) that will be taken with respect to the treaty, and its reasons.

This means that the affected state must inform the other party or parties that it will suspend the treaty on the basis of a certain ground that is set forth in the VCLT. In general, Article 65 has been inserted in the VCLT as a procedural safeguard to prevent a possible suspension of a treaty arbitrarily in cases in which the actual intention of such suspension is avoiding an inconvenient obligation in the treaty⁽⁵²⁾.

Such notification may grant the defaulting state the opportunity to submit an objection, defend itself and express its views⁽⁵³⁾. For this purpose, paragraph 2 of Article 65 states that the other parties must be given a period of time to reply, which – except in cases of special urgency – should not be less than three months from receiving the notification. If there is no objection after the expiry of three months, the affected states can take the proposed measure⁽⁵⁴⁾. On the other hand, if there is an objection, the states parties to a treaty are required under paragraph 3 of Article 65 to find a solution through the peaceful means set forth in Article 33 of the United Nations Charter.

In effect, the USA declared that “Russia’s ongoing violation of the INF treaty constitutes a material breach of the Treaty”, and it decided to suspend its obligations set forth in the INF treaty within 60 days from 4 December 2018 unless Russia returns to full and verifiable compliance⁽⁵⁵⁾. On 2 February

(50) Danae Azaria, *Five Responses to Breaches under the Law of Treaties* (Oxford Monographs in International Law, 2015), p. 9.

(51) *Draft Articles on the Law of Treaties with commentaries 1966* (n. 39), p. 262.

(52) *Ibid.*

(53) *Ibid.*

(54) Article 65 (2) of the VCLT.

(55) See “Russia’s Violation of the Intermediate-Range Nuclear Forces (INF) Treaty” (n. 37).

2019, Secretary of State Pompeo declared that “in accordance with customary international law, the United States has suspended its obligations under the INF treaty, effective today, in response to Russia’s material breach”⁽⁵⁶⁾.

Neither Article 65 (1) of the VCLT nor its commentary state that the notification of suspension must be formal or written. However, Article 67(1) of the VCLT states that the notification set forth in Article 65(1) must be in written form. It is not certain that the USA sent a written notification regarding the suspension to the states parties to the INF treaty, including Russia, but it is certain that it sent a formal notification to the parties to the INF concerning withdrawal from the treaty within 60 days⁽⁵⁷⁾ as a subsequent procedure of suspension.

Therefore, the declaration adopted by the USA on 4 December 2019 cannot be considered a valid notification under Article 65 (1) of the VCLT unless there is a confirmation by the states parties to the INF treaty, including Russia, stating they have received written notification by the USA. Since there is not an objection by the states parties to the INF treaty about this procedural safeguard, it can be assumed that they have received a formal notification regarding the suspension from the USA.

Another concern relates to the 60 days granted by the USA to Russia to return to full and verifiable compliance with the INF treaty. This period of time (60 days) does not comply with Article 65 (2) of the VCLT, which stipulates a period of time not less than three months, except in cases of special urgency. It seems that the USA has classified the material breach by Russia as a case of special urgency, giving the possibility to grant Russia 60 days only for the purpose of objection before the procedure of suspension is put into force. In particular, the USA has described Russia’s continued non-compliance with the INF treaty as “extraordinary events” that have jeopardised the USA’s supreme interests⁽⁵⁸⁾.

On the other hand, Russia suspended implementation of the INF treaty through paragraph 1 of the executive order signed on 4 March 2019⁽⁵⁹⁾ Moreover, paragraph 2 of the same order states that the Ministry of Foreign Affairs of the Russian Federation is to send the signatory states of the INF a notice on the

(56) U.S. Department of State, “U.S. Intent to Withdraw from the INF Treaty February 2, 2019” (Press Statement Michael R. Pompeo Secretary of State Washington, DC 2 February 2019) < <https://www.state.gov/secretary/remarks/2019/02/288722.htm> > accessed 13 May 2019.

(57) Ibid.

(58) “U.S. Intent to Withdraw from the INF Treaty February 2, 2019” (n. 59).

(59) See “Executive Order suspending Russia’s compliance with the USSR-US INF Treaty” (n. 23).

suspension of its implementation⁽⁶⁰⁾.

It will be noticed that though this paragraph Russia met the condition of the written notification set forth in Article 67(1) of the VCLT. In addition, it activated the case of “special urgency” set forth in Article 65 (2) of the VCLT. The preamble of the executive order states that this order proceeded from the need to take “urgent measures” in connection with the violation by the USA of its commitments under the INF treaty⁽⁶¹⁾.

Consequently, Russia adopted the procedure of the suspension without giving the other parties any period of time for the purpose of objecting to the proposed measure. The concept of “urgent measures” in the executive order might be interpreted on the basis that Russia considers the violation by the USA as a material breach that constitutes “special urgency” set forth in Article 65 (2) of the VCLT.

Generally, the issue of whether or not the material breach by Russia or the USA is a case of “special urgency” is controversial, particularly in the absence of any clarification about the concept of “special urgency” in the commentary of Article 65 by the ILC. Therefore, it is difficult to determine the legality of the suspensions adopted by the USA and Russia on the basis of the procedural safeguard set forth in Article 65 of the VCLT.

4. Conclusion

Suspension of the INF treaty by the USA and Russia is the final stage following a series of accusations exchanged between both powerful states regarding the breach of the treaty. Although the procedure for suspension is not mentioned within the INF treaty, both the USA and Russia have resorted to this procedure. This can be justified on the basis that suspension is rooted in the international customary law of treaties, as the ICJ has confirmed in a number of cases.

The procedure of suspension adopted by the USA and Russia has been evaluated in light of the substantive and procedural requirements set forth in the VCLT. Nevertheless, it is difficult to come to a precise and certain determination regarding whether the suspension adopted by the USA and Russia is legal. This is because, on the one hand, the material breach, as a substantive condition set forth in Article 65 of the VCLT, needs to be proved by the USA and Russia, as each state used this basis against the other as a

(60) Ibid.

(61) Ibid.

ground of suspension. On the other hand, notification of other states, as the procedural requirement of suspension, is not clarified in the VCLT or its commentaries; thus, the legality of the notifications issued by the USA and Russia, may be controversial.

In conclusion, the legality of the suspension adopted by the USA and Russia can be determined through activation of Article 65 (3) of the VCLT. This urges the parties to a conflict – concerning the suspension of a treaty – to find a solution through the peaceful means set forth in Article 33 of the UN Charter. Arbitration, mediation and judicial settlement are good examples of such means.

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