CONFLICTING INTERPRETATIONS OF INTERNATIONAL TREATIES

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1. Introduction to Theory

Bilateral and multilateral international treaties are the most frequently employed instruments used to create a stable system and to establish mutual cooperation in the international community. An [international] treaty is defined in the Vienna Convention on the Law of Treaties (the "Vienna Convention") as "... an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[1] In view of the fact that an international treaty always represents the consensus of two or more equal parties resulting from negotiations, contrary to, *inter alia*, statutes in national legal systems (laws of national origin), the text of the treaty embodies the outcome of such negotiations and reflects the mutual compromises. This, however, often introduces a varying degree of vagueness into the wording of the international treaty. That in turn results in ambiguities and differing views on the interpretation thereof.[2] It comes as no surprise that States endeavour to prevent such complications. This article thus strives to describe the potential means of avoiding future disputes regarding the interpretation of treaties, and to present examples illustrating the fact that the unclear codification of interpretation rules may result in divergent interpretations in the international community.

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[1] See Article 2(1)(a) of the Vienna Convention (No. 15/1988 Coll.). For different definitions, cf. also BORGEN, Ch. J. *Resolving Treaty Conflicts*, St. John's Law Scholarship Repository, 2005, p. 579, or ŠTURMA, P. Mezinárodní smlouva [title in translation—International Treaty]. In HENDRYCH, D., BĚLINA, M., FIALA, J., ŠÁMAL, P., ŠTURMA, P., ŠTENGLOVÁ, I., KARFÍKOVÁ, M. *Právnický slovník* [title in translation—Dictionary of Law]. 3rd ed. Prague: Nakladatelství C. H. Beck, 2009.

[2] Similarly, there is no clear definition of the concept itself of the interpretation of international treaties. See also POTOČNÝ, O. *Mezinárodní právo veřejné. Zvláštní část.* [title in translation—Public International Law. Special Part] 6th ed. Prague: C. H. Beck, 2011, p. 244., or JANKUV, J., LANTAJOVÁ, D. et al. *Medzinárodné zmluvné právo a jeho interakcia s právnym poriadkom Slovenskej republiky* [title in translation—Law of International Treaties and Its Interaction with the Law of the Slovak Republic], Aleš Čeněk, 2011, p. 82.

1.1 Available Means of Avoiding Future Interpretation Problems

The States may employ three basic methods of avoiding future problems with the interpretation of international treaties. First, some international treaties attempt to prevent ambiguous interpretation by establishing a special tribunal with jurisdiction to hear and resolve any potential future disputes arising from the treaty, whether by authoritative decisions resolving individual disputes, or in the form of interpretative notices.[3] This procedure aims to make sure that the interpretation provided by the sole authority will be consistent and uniform, thus enhancing legal certainty in practice. Consequently, should the treaty contain unclear provisions whose specific meaning is not readily discernible by the parties due to defects, such as an imperfect wording, the case would be submitted to a specialised authority that would resolve the dispute over interpretation. In view of the fact that the respective international treaty provides in such a case for a single tribunal, it can be reasonably assumed that the tribunal will make consistent conclusions, and its case law will eliminate any future ambiguities as to the interpretation of the treaty. The ambiguous original wording of the treaty is thereby reconciled, and despite the fact that a potential dispute over correct interpretation always only involves two contracting parties, the situation is cleared up for the other signatories as well.

The second alternative for limiting, if not entirely avoiding, inconclusive interpretation is to lay down special interpretation rules in the international treaty itself that will govern the interpretation of the particular international treaty.[4] This means that the problem itself will be notionally resolved *in advance*, without the need to await the assessment and resolution of any future dispute by a forum with jurisdiction to hear such specific disputes; a framework for interpretation binding on the forum will already be embodied in the contents of the international treaty.[5] Such an international treaty will better comply with the parties' original intent, because the parties themselves will have the possibility to influence its future interpretation. However, it follows from the general nature of law as such that, although this method may significantly facilitate the interpretation of the international treaty, it is never possible to "capture" any and all terms used in the treaty to entirely eliminate the possibility of a dispute.

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[3] See also Article 66 of the Vienna Convention or Article 19 of the European Convention for the Protection of Human Rights (No. 209/1992 Coll.).

[4] See also Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) (No. 160/1991), Article 18 of the Convention on the Law Applicable to Contractual Obligations (Rome Convention), or Article 4 of the UNIDROIT Convention on International Factoring.

[5] One may similarly employ legal definitions that precisely stipulate how a particular concept in an international treaty is to be construed. This approach will prevent any differences in interpretation depending on the general perception of the term under the relevant law of the signatory States; see also Article 1 of the Convention on the Rights of the Child.

Failure to employ either of the above methods may result in an unpredictable and questionable interpretation of the international treaty. Indeed, disputes arising from such treaties in practice are in such case submitted to *ad hoc* tribunals, or even national courts of the signatory states, and—obviously—any unification of interpretation in such cases is generally more complicated. Unwilling to permit completely different interpretations of one and the same treaty, the international community has decided to conclude the Vienna Convention (see also the words used in the title itself of this international treaty—"the treaty on treaties").[6] The Vienna Convention should provide a comprehensive definition of, or at least a framework for, the interpretation of international treaties. However, the Vienna Convention itself employs many unclear provisions and opinions, the proper interpretation of which varies considerably in practice. It ultimately becomes necessary to interpret the interpretation manual itself, which results in diverging interpretations that in practice conflict with one another. When combined, these problems often result in the parties being unable to agree on the proper interpretation, and the situation then escalates into a dispute. This summarising article strives to focus precisely on those situations in which the ambiguity of the treaty results in the development of two inconsistent interpretations of the same provisions.

2. Issue as Reflected in Case Law

2.1 Vienna Convention on Law of Treaties Gives Rise to Interpretation Ambiguities in Practice

As mentioned above, despite being the instrument intended to overcome interpretation problems, the Vienna Convention itself has given rise to disputes over interpretation. Articles 31 and 32, dealing with the interpretation of international treaties, belong among the most ambiguous provisions. Indeed, the international community has not reached any general consensus as to whether the said provisions set out a hierarchy of interpretation methods, i.e. whether such methods ought to be used in the order provided in the Vienna Convention whenever interpretation is required, or whether it is "only" a simple overview of the interpretation methods, free of any emphasis on any potential priorities, in consequence of which the choice of the particular procedure depends only on the person or authority performing the interpretation of the international treaty.[7] In practice, the parties to a dispute then attempt to provide

[6] See also AUST, A. *Modern Treaty Law and Practice*. Cambridge: Cambridge University Press, 2007, p. 6.

[7] The International Law Commission has also presented its opinion and strictly rejected any hierarchy in the said provisions, arguing that the wording is intentionally drafted in such manner as to clearly indicate that the entire interpretation under these provisions constitutes a whole. See Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission, 1966, vol. II,*

the court or tribunal, not always successfully, with an interpretation according to the respective provisions of the Vienna Convention.

2.1.1 Application of Vienna Convention to *Nicaragua* v. *Colombia* Dispute

The dispute between Nicaragua and Colombia submitted to the International Court of Justice (ICJ) is just one example of a State's futile attempts to employ the provisions on interpretation incorporated in the Vienna Convention.[8, 9] The ICJ was called upon to rule on a party's objections that, based on the interpretation and the procedure applied under the Vienna Convention, the ICJ lacks jurisdiction to hear and resolve the dispute under the American Treaty on Pacific Settlement ("Pact of Bogotá")[10] because the proceedings were instituted only after Colombia's notice of denunciation of this international treaty. Hence, the primary issue in the case was the resolution of the contested interpretation of the second paragraph of Article LVI of the Pact of Bogotá,[11] because its contents do not clearly indicate whether the ICJ's jurisdiction to hear and resolve disputes arising from this treaty covers disputes that arise after a notice of denunciation by a signatory State, but before the end of the one-year notice period under the first paragraph of Article LVI of the Pact of Bogotá. The parties to the dispute presented contradictory interpretations of this issue. Colombia argued, inter alia, that it was necessary to employ the interpretation under Articles 31 to 33 of the Vienna Convention, despite the fact that the parties were not signatories to the Vienna Convention, because the rules incorporated

pp. 219–220. Cf. also ŠTURMA, P., TRÁVNÍČKOVÁ, Z. (eds.) *Výklad a aplikace mezinárodních smluv v průběhu času* [title in translation—History of Interpretation and Application of International Treaties], Česká společnost pro mezinárodní právo, 2014, p. 27, or ICJ Judgment in *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)* of 2 February 2017.

[8] It is to be noted, though, that the unsuccessful application of a provision of the Vienna Convention for the purposes of interpretation does not mean a lack of success in terms of the applicability of the Vienna Convention, but the unsuccessful application of the articles of the Convention as such. Although the State parties to the dispute are not generally signatories of the Vienna Convention, the application of the Vienna Convention is permitted with reference to the special nature of this instrument; the generally accepted opinion is that the text of this Convention represents a codification of the customary rules of international law, thus extending its applicability to countries other than the signatory States. Regarding this issue, see also LO, Ch. *Treaty Interpretation Under the Vienna Convention on the Law of Treaties*, Springer Nature Singapore Pte Ltd., 2017, p. 10 or AUST, A., Vienna Convention on the Law of Treaties [online]. *Max Planck Encyclopedia of Public International Law, Oxford Public International Law.* 11 October 2017. Available at: https://spacelaw.univie.ac.at/fileadmin/user_upload/p_spacelaw/EPIL_Vienna_Convention_on_the_Law_of_Treaties_1969.pdf [cit. 2020-12-03], p. 3.

[9] ICJ Judgment of 17 March 2016, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections*, I.C.J. Reports 2016, p. 100.

[10] See: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280162ab6 [cit. 2020-12-05].

[11] See Article LVI of the Pact of Bogotá (cit.): "The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification."

therein represent a codification of customary law. Hence, Article 31 of the Vienna Convention stipulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Colombia argued that upon proper interpretation, determined by the application of that procedure, the proceedings necessarily had to be influenced by the signatory State's notice of denunciation of the treaty, and moreover, if the signatory States had intended, when discussing the text of the treaty, to extend jurisdiction to disputes arising at that time, i.e. after the notice of denunciation by a signatory State, but before the lapse of the notice period, they would have explicitly incorporated that intention in the treaty. In support of its reasoning, Colombia also invoked Article 32 of the Vienna Convention when it presented its pleading, with a detailed analysis of the *travaux préparatoires,* and argued that its opinion was the correct one, because a contrary interpretation would deprive the second paragraph of the said provision of its *effet utile.*[12]

Conversely, Nicaragua argued that the ICJ had jurisdiction under Article XXXI of the Pact of Bogotá, because the Pact explicitly provides for jurisdiction "... as the present Treaty is in force...". Nicaragua also maintained that the absence of any such rule in the text of the treaty could not justify the alleged lack of the ICJ's jurisdiction; conversely, it was necessary to apply an interpretation in accordance with the overall meaning of the treaty and the contents of other provisions that allowed for no conclusion other than that the ICJ had jurisdiction in the case. As concerns the procedure to be followed in using the interpretation methods, both parties thus eventually arrived at completely opposite conclusions due to the text itself of the treaty that had left room for argument in respect of the said issue. Consequently, the dispute had to be resolved by the tribunal, which ultimately dismissed Colombia's objection and confirmed its jurisdiction. The tribunal provided a detailed rejection of Colombia's arguments, and inferred its jurisdiction primarily from the interpretation of the object and purpose of the treaty; the ICJ argued that, when properly interpreted, Article XXXI of the Pact of Bogotá (which determines the ICJ as the competent forum) remained applicable, because not even a notice of denunciation, i.e. a unilateral juridical act, could affect the applicability of a provision in a multilateral international treaty.[13]

The case serves as an illustration of the potential consequences that such different approaches to the interpretation rules in the Vienna Convention may have in practice.[14] At the same time, however, the case shows the connection between

[12] Apart from these main considerations, Colombia also suggested other arguments, such as *argumentum a contrario* with respect to the interpretation of the said provision, on the basis of the other signatory States' failure to act when Colombia lodged the notice of denunciation, etc.

[13] Concerning this argument, see also ICJ Judgment of 20 December 1988, *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility*, I.C.J. *Reports*, 1988, p. 84.

[14] But cf. *Declaration of Judge Ad Hoc Brower* concerning the said decision, who provides a more detailed explanation of the concepts of *effet utile, travaux préparatoires* in his opinion, together with a proper interpretation of the contested provision.

multiple interpretations and the determination of the forum of competent jurisdiction directly in the text of the treaty. The author of this article has already mentioned above that the determination of the competent forum may serve as a method of avoiding future problems with the interpretation of the international treaty. But the model example annotated above indicates that even this solution cannot entirely eliminate any and all future disputes, as such, because it is by no means uncommon for the parties to an international treaty to frequently challenge the jurisdiction of the agreed forum. The undeniable advantage of this solution is, though, that once the jurisdiction of the agreed forum is confirmed, the forum provides a clear interpretation, which should not change in the future. In the Pact of Bogotá case, the agreement on the forum reconciled the textual deficiencies, in that the tribunal (ICJ) provided an interpretation to the signatories of the treaty, applicable to future disputes, that a notice of denunciation of such a treaty does not eliminate the jurisdiction of the tribunal to hear and resolve disputes arising from the treaty that are submitted to the tribunal against the party that gave notice of denunciation before the end of the notice period, despite the effective notification of the denunciation.

2.2 Conflicting Interpretations in National Courts of Signatory States

The issue of conflicting interpretations arising from imperfect wording of an international treaty may also be illustrated by the dispute over the interpretation of Article 17 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the "Warsaw Convention").[15] This case specifically concerned the contents of the term "accident" in the said provision. The Warsaw Convention itself provides no legal definition of the term. This was the reason why a dispute was submitted to the High Court of Australia,[16] in which the claimant argued that the airlines were liable for the claimant's deep vein thrombosis sustained during carriage, because Article 17 of the Warsaw Convention stipulates that the "carrier is liable for damage[17] sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident that caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking". According to the claimant's

[15] This Convention was promulgated in the Czech Republic under No. 15/1935 Coll.; the Additional Protocol to the Convention was then promulgated as Decree No. 15/1966 Coll., Decree of the Minister of Foreign Affairs on the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929.

[16] Specifically, the High Court of Australia, *Povey* v. *Qantas Airways and British Airways*, [2005], HCA 33, 23 June 2005.

[17] In compliance with the current terminology of Czech law, "damage" should be construed as harm.

interpretation of this provision, an "accident" under the said Article also covered situations in which the ailment results from certain aircraft cabin conditions, such as the confined physical environment, combined with the airlines' offering of particular beverages during flights, and their failure to warn passengers about deep vein thrombosis. The respondent rejected this interpretation of the term and argued that it had no liability for the claimant's condition, because no event classifiable as an accident in terms of the said provision of the Warsaw Convention had occurred during the flight. The Court was ultimately called upon to provide an interpretation of the contested Article, specifically the term "accident", and to resolve the dispute. The Court held that the claimant's claim had to be dismissed, because it could not be inferred that the said term should include such situations as described by the claimant. The interesting aspect of the case for the purposes of this article is, however, that one of the judges of the Australian court presented a dissenting opinion and argued, conversely, that the confined physical environment during the flight, combined with the not entirely appropriate offering of alcoholic beverages and coffee, could indeed cause the "accident".[18] Consequently, this case is also a fitting example of the fact that the inapt wording of an international treaty (with no legal definition of one of the terms) gave rise to contrary interpretations advocated by the parties to the dispute, as well as a differing perception of the key term by the judges themselves; indeed, the existence of the dissenting opinion suggests that the dispute could, in theory, have had an outcome different from the actual outcome that prevailed on the basis of the majority opinion.

2.3 Inconsistent Interpretation of International Treaties in Decisions of Courts and Tribunals

The above cases described situations in which various ambiguities in international treaties resulted in different interpretations of the individual provisions, as perceived by the parties, and the dispute ultimately escalated to legal proceedings. However, both model situations are of the same type, in that the decision of the forum explained and defined the issue for the future, eliminating any potential future disputes from the same grounds. But a conflict of differing interpretations of international treaties is not limited to situations in which the diverging interpretations are presented by the parties. Indeed, sometimes the conflict of interpretations of an identical provision of an international treaty, or even of comparable factual and legal situations, occurs among the courts or tribunals themselves. Model examples of this situation are two decisions of tribunals in investment disputes;[19] both concern

[18] For more details, see: https://archive.onlinedmc.co.uk/povey_v__qantas_airways.htm [cit. 2020-12-01].

[19] *BG Group Plc.* v. *The Republic of Argentina*, UNCITRAL Arbitration, Final Award, 24 December 2007, available at: https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf [cit. 2020-12-03], and *National Grid plc* v. *The Argentine Republic*, UNCITRAL Arbitration, Award, 3 Novem-

the interpretation of the same issue arising from a bilateral investment treaty entered into by the United Kingdom and Argentina[20] (the "UK-Arg BIT"). Both disputes were submitted to tribunals on the basis of Article 8(4) of the UK-Arg BIT,[21] but the composition of the tribunals was different in each case. The problem consisted in the interpretation of Article 2(2) of the UK-Arg BIT.[22]

The investment protection system agreed by the parties was logically set at the same qualitative level in the treaty. In both of these cases, however, Argentina passed emergency national legislation after the treaty had entered into force, and the claimants argued that the former was capable of jeopardising the level of protection provided by the latter (UK-Arg BIT).[23] The claimants thus argued that the Government of Argentina had undermined or negated, as applicable, the guarantee of a particular level of protection of investments that the international treaty was presumed to provide.[24] But when the competent tribunals embarked on the interpretation of the relevant provisions in order to determine the level of protection of investments among the states, they arrived at diametrically opposed conclusions.

The tribunal in the first case held that the claim submitted by the claimant (investor) had to be dismissed, because, according to the tribunal's interpretation, it was unreasonable to depart from the originally perceived standard of "protection and constant security" for the benefit of "full protection and security", the latter being associated with situations in which the investor's "physical security" or investment are jeopardised.[25] The tribunal thus concluded that the treaty had not been breached, because Argentina had not breached the agreed level of protection of the

ber 2008, available at: https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf [cit. 2020-12-03].

[20] The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments.

[21] See Article 8(4) of the UK-Arg BIT (cit.): "The arbitral tribunal shall decide this dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in this dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law."

[22] See Article 2(2) of the UK-Arg BIT (cit.): "Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. (...)".

[23] For more details, see Academic Forum, Concept Paper on Issues of ISDS Reform, Working Group No. 3: Lack of Consistency and Coherence in the Interpretation of Legal Issues. Available at: https://www.cids.ch/images/Documents/Academic-Forum/3_Inconsistency_-_WG3.pdf, par. 18.

[24] See BG Group Plc. v. The Republic of Argentina, UNCITRAL (1976), par. 344 (cit.): "... Argentina unilaterally withdrew commitments which induced BG to make its investment in Argentina and this constitutes unreasonable action and a breach of this provision of the treaty." As concerns the second decision, cf. National Grid plc v. The Argentine Republic, UNCITRAL (1976), par. 181 (cit.): "The Claimant has alleged that by taking the Measures the Respondent withdrew the protection and security previously granted to its investment."

[25] See Academic Forum, Concept Paper on Issues of ISDS Reform, Working Group No. 3: Lack of Consistency and Coherence in the Interpretation of Legal Issues. Available at: https://www.cids.ch/images/Documents/Academic-Forum/3_Inconsistency_-_WG3.pdf, par. 19.

investments. Indeed, according to the tribunal, only "physical security" could be subsumed under such protection.[26]

The tribunal in the second case, however, provided an interpretation of the identical provision of the UK-Arg BIT, only to grant the investor's claim. The tribunal held that there was no reason to justify as acceptable Argentina's national legislation diminishing the level of protection in that area. Hence, the tribunal arrived at an opinion conflicting with the opinion of the tribunal in the first case based on the fact that the tribunal in the second case provided an interpretation of the relevant BIT, according to which there was no reason to limit the protection to "physical assets", whereas the tribunal in the first case deemed the protection limited to "physical security". Consequently, the investor was the successful party in the second case due to a contrary interpretation of an identical provision of a treaty in a situation that was essentially identical (or at least comparable) to the situation in the first case.

This example illustrates the practical difficulties arising from the fact that the interpretations provided by qualified courts or tribunals need not necessarily mean any degree of certainty as to which interpretation of the provisions of one and the same international treaty will prevail in future. From the perspective of legal certainty, such conflicts of interpretations significantly reduce the level of predictability for the beneficiaries. Compared to the previous examples, conflicts of interpretations among courts or tribunals are thus highly undesirable and should be avoided in practice at all costs. Indeed, it is generally unacceptable to allow any provision of an international treaty to be susceptible to their being two (or even more) mutually exclusive or contradictory meanings for the tribunal to choose from and apply, depending on which interpretation the tribunal finds more "appropriate".[27] Although such differing interpretations may be based on logical reasons in individual cases, it is imperative, as a matter of principle, to prevent such divergent, or even contradictory interpretations in practice.

3. Conclusion

The international legal practice has repeatedly witnessed situations in which the inadequate wording of international treaties resulted in conflicting interpretations provided by various subjects, whether by the beneficiaries themselves (parties to

[26] Cf. BROWN, CH., ORTINO, F., ARATO, J. Lack of Consistency and Coherence in the Interpretation of Legal Issues [online]. *Blog of the European Journal of International Law*. 5 April 2019. Available at: https://www.ejiltalk.org/lack-of-consistency-and-coherence-in-the-interpretation-of-legal-issues/ [cit. 2020-12-03].

[27] For another example of a conflict of interpretations in this area, see also the comparison of the decisions in *Lauder* v. *Czech Republic* and *CME* v. *Czech Republic*. See also BROWN, CH., ORTINO, F., ARATO, J. Lack of Consistency and Coherence in the Interpretation of Legal Issues [online]. *Blog of the European Journal of International Law*. 5 April 2019. Available at: https://www.ejiltalk.org/lack-of-consistency-and-coherence-in-the-interpretation-of-legal-issues/ [cit. 2020-12-03].

the international treaty), or even by the fora called upon to provide an authoritative interpretation and resolve disputes arising from international treaties. This phenomenon may in certain situations be more serious than in others. If the conflict of interpretations occurs between the parties themselves and escalates to a dispute, there is a tribunal that will rule on the issue of correct interpretation and, ideally, provide greater certainty as concerns the interpretation of the international treaty; conversely, there are also situations in which the conflict of interpretations occurs in the tribunals' decisions. The difference between these two situations inheres in the fact that, although there may generally exist possibilities of avoiding disputes from international treaties, it is never possible to entirely eliminate such disputes. But on the other hand, as concerns *ad hoc* permanent court institutions or tribunals, it is necessary to ensure that such situations do not occur at all, or only very exceptionally, because otherwise the situation contributes to a significant impairment of legal certainty, with negative impacts on the signatories of international treaties and the entire international community.