

In the interpretation of international treaties which provide the legal basis for the rights and duties of individuals and corporate bodies it is necessary to pay attention to questions of harmonisation of national and international rules of law. The boards of appeal may take into consideration decisions and opinions given by national courts in interpreting the law (see G 5/83, OJ 1985, 64; see also G 2/12, G 2/13). Nevertheless, in the proceedings before the European Patent Office, such considerations do not exonerate a board of appeal from its duty as an independent judicial body to interpret and apply the EPC and to decide in last instance in patent granting matters. TRIPS provisions, like decisions of the European and International Courts of Justice and national decisions, are elements to be taken into consideration by the boards of appeal but are not binding on them (T 154/04, OJ 2008, 46). See also J 14/19.

Although the European Patent Organisation is not a party to the Vienna Convention on the Law of Treaties concluded on 23 May 1969 (hereinafter Vienna Convention), the principles of interpretation of Arts. 31 and 32 of the Vienna Convention are to be applied to the interpretation of the EPC even though its provisions do not apply to the EPC ex lege (G 5/83, G 2/08, OJ 2010, 456). The boards of appeal thereby refer to legal sources outside the EPC, including, for example, above-mentioned Vienna Convention and the TRIPS Agreement. Thus the boards of appeal may be guided in their decisions by the provisions of other international instruments. However, they have no obligation to apply them directly (G 2/02 and G 3/02, OJ 2004, 483).

## 1. The Vienna Convention on the Law of Treaties

In G 5/83 (OJ 1985, 64) the Enlarged Board stated that the provisions of the Vienna Convention do not apply to the EPC ex lege, since the former Convention applies only to treaties which are concluded by States after the entry into force of the Vienna Convention with regard to such States (Art. 4 Vienna Convention). At the time of conclusion of the EPC, the Vienna Convention was not in force. Nevertheless, there were convincing precedents for applying the rules for interpretation of treaties incorporated in the Vienna Convention to a treaty to which in terms they do not apply (see also G 2/12, G 2/13). The International Court of Justice did already apply principles expressed in the Vienna Convention to situations to which the Convention strictly did not apply, whilst the European Court of Human Rights, the Federal German Constitutional Court and the House of Lords (England) have also applied the principles of interpretation in Art. 31 and 32 of the Convention to treaties to which strictly they do not apply. After a careful study of the whole subject, the Enlarged Board of Appeal concluded that the European Patent Office had to do the same.

In J 10/98 (OJ 2003, 184) the Legal Board of Appeal stated that, although the Vienna Convention did not expressly apply to the interpretation of EPC, PCT or the Paris Convention, since it came into force at a later date than all of those treaties, in accordance with what had been recognised by the Enlarged Board of Appeal in decision G 5/83, its principles of interpretation were a valuable guide to the interpretation of all treaties executed both before and after it. In T 1173/97 (OJ 1999, 609) the board stated that although the Vienna Convention is not applicable to the EPC, it has considerable authority