Oliver Dörr
Kirsten Schmalenbach
Editors

Vienna Convention on the Law of Treaties

A Commentary

Second Edition

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pertinent extrinsic material. It seems that the "relevance" of other treaties or customary rules can be seen to follow from various grounds: it is fairly obvious when those rules relate to the same subject matter as the treaty provision under interpretation.[285]

> For example, the exact scope of privileges of family members of diplomatic agents, which is described in Art 37 para 1 of the Vienna Convention on Diplomatic Relations with the words "forming part of his household", may be determined by looking at the provision addressing the same issue in the Vienna Convention on Consular Relations (Art 49 para 1). Even if in this case the English texts of both provisions do not reveal any significant differences in wording that would assist in the interpretation, the other authentic language versions in fact do.

Moreover, external rules, regardless of their subject matter, can be relevant when they are created to solve the same or similar factual, legal or technical problems. Again, another treaty cannot be "relevant" in this sense, if it is intended by its parties to be **of lower rank** than the treaty under interpretation (→ MN 73). An agreement that "shall adjust" to the latter or shall leave its provisions unaffected (*etc*) does not, therefore, qualify as a means of interpretation under para 3 lit c.[286]

103 Finally, para 3 lit c only allows those rules to be used for the purpose of interpretation that are "**applicable in the relations between the parties**". Since the word "parties" is defined in Art 2 para 1 lit g, its meaning seems, on the face of it, clear, *ie* States for whom the treaty under interpretation is in force. However, this does not settle the question, of whether the norm requires *all* the parties of that treaty to be bound by the "rules" in question, or whether it suffices that the latter apply only to some of the parties, *eg* those having an immediate interest in the interpretation or being involved in a dispute over it. While the comparison with para 2 lit a, where "all" is included before "the parties", might point to the latter, less restrictive reading, the definite wording "the" parties strongly suggests the former, restrictive reading.[287] This is confirmed by the immediate context of the norm, that is by para 3 lit b: it would be incongruous to allow the interpretation of a treaty to be affected by rules of international law that are not applicable between all parties to the treaty, but not by a subsequent practice, which does not establish the agreement of all parties regarding the meaning of that treaty (→ MN 86).[288]

104 It is admitted that this restrictive approach severely limits the relevance of para 3 lit c for the interpretation of multilateral treaties with a wide, even universal participation.[289] However, on proper construction, it may allow for an exception,

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[285] The WTO Appellate Body confined the concept of "relevant" to this meaning in *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R para 846 (2011). Similarly, ICJ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya) (Preliminary Objections),* 2 February 2017, para 89.

[286] Thus, the WTO Panel in *Chile–Price Band System* WT/DS207/R, para 7.85 (2002).

[287] In favor of the restrictive reading, also *Villiger* (2009), Art 31 MN 25; *Thiele* (2008), pp. 26–27.

[288] This was held by the WTO Panel in *EC–Approval and Marketing of Biotech Products* WT/DS291-3/R, para 7.68, n 243 *in fine* (2006).

[289] Favoring a less restrictive reading for practical reasons *French* (2006), p. 307.

and that is if the treaty obligation in question, even if contained in a multilateral treaty, is in fact owed in a synallagmatic way between pairs of parties, rather than *erga omnes partes*: in those **cases of a bilateral implementation structure,** the treaty obligation may very well be considered in the light of other obligations applying bilaterally between those two parties only.[290]

The restrictive approach was applied by the WTO Panel in the *EC–Biotech* case when it held that other rules of international law, in that case the Convention on Biological Diversity and the Biosafety Protocol, cannot be taken into account for the interpretation of the WTO agreements, unless all WTO Members are bound by them.[291] The fact that the United States had signed, but not ratified the former Convention meant that it was not "applicable" to them and that Art 31 para 3 lit c did not apply.[292] The WTO Appellate Body was confronted with the issue in another case, but avoided to give an opinion on it.[293]

The less restrictive approach, which allows external rules to be used even if they are not binding on all the parties to the treaty, receives considerable support from the **practice of the ECtHR**: while in some cases it emphasized the fact that the other treaties referred to for the purpose of interpretation were at least binding upon the respondent State, the Court admitted itself in *Demir and Baykara v Turkey* that in searching for common ground among the European Convention and other norms of international law it had not always distinguished between sources of law according to whether or not they had been ratified by all States Parties to the Convention, or even by the respondent State.[294]

That the external rules are "**applicable**" in the relations between the parties presupposes that the latter are legally bound by those rules, either because they have given their consent to them as treaty rules, or because they are addressed by them as binding customary rules or general principles, or because they are bound for other reasons, such as acquiescence or unilateral declaration. Secondly, even if the external rules may have in principle binding effect on "the parties", their applicability between them must not be excluded for reasons of estoppel or through admissible reservations to a treaty. **105**

In practice, it is sometimes considered possible that rules extrinsic to the treaty under interpretation which do not qualify for consideration under lit c, either because they are not binding on all parties to the treaty, or because they face restrictions of application, may under certain circumstances nevertheless become relevant for the interpretation of the same treaty. **106**

[290] *McLachlan* (2005), p. 315.

[291] WTO Panel *EC–Approval and Marketing of Biotech Products* WT/DS291-3/R, paras 7.68–7.71 (2006).

[292] *Ibid* para 7.74.

[293] *Cf* WTO Appellate Body *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R, paras 844–846 (2011).

[294] ECtHR *Demir and Baykara v Turkey* (GC) App No 34503/97, ECHR 2008-V, para 78, with examples given in paras 79–84.