

in a narrow or broad way. The Enlarged Board noted that under Art. 31(3) of the Vienna Convention any subsequent agreement between the parties regarding the interpretation of the treaty or its application, and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is to be taken into account. It pointed out that R. 26(5) EPC (formerly R. 23b(5) EPC 1973) could be regarded as such subsequent agreement and practice. R. 26(1) EPC explicitly calls for due consideration of the Biotech Directive (see G 2/06, point 16 of the Reasons).

The decision to adopt R. 28(2) EPC could not be regarded as a subsequent agreement between the parties that shall be taken into account for the interpretation of the treaty, in the meaning of Art. 31(3)(a) of the Vienna Convention (T 1063/18). Opinion G 3/19 (OJ 2020, A119, point XIX.) stated that the board's conclusion in T 1063/18 seemed to be based on the notion that in decision G 2/12, the Enlarged Board gave a definitive interpretation of the scope of the exception patentability, which could only be overturned by a formal amendment of Art. 53(b) EPC itself. However according to G 3/19, this notion, which was not supported by the EPC itself or by any general legal principle, was too strict, bearing in mind that Art. 53(b) EPC is to be open to interpretation and, furthermore, that a subsequently made rule which diverges from a particular interpretation of an EPC Article by a board of appeal is not per se ultra vires (see T 315/03). A particular **interpretation** which has been given to a **legal provision** can **never** be taken as **carved in stone**, because the meaning of the provision may change or evolve over time. This aspect is intrinsic to the ongoing development of the law by way of judicial decision-making. G 3/19 regarded the introduction of R. 28(2) EPC as a clear legislative intent, in the sense of Art. 31(4) Vienna Convention, which could not be ignored; as regard Art. 31(3)(a) to (b) Vienna Convention, legislative and administrative developments in a quarter of the contracting states did not amount to a subsequent agreement or practice.

1.2.5 Secondary considerations: dynamic interpretation

The Enlarged Board stated that a "dynamic interpretation" might come into play where considerations have arisen since the Convention was signed which might give reason to believe that a literal interpretation of the wording of the relevant provision would conflict with the legislator's aims. Secondary considerations serve the purpose of testing the legal soundness of the conclusions reached in interpreting the scope of application of the process exclusion under Art. 53(b) EPC. The Enlarged Board concluded that the concept of a dynamic interpretation did not require revising the result of the interpretation established by applying traditional rules of construction (G 2/12, OJ 2016, A27, also cited in T 1063/18). In G 3/19, however, the Enlarged Board held **to the contrary** that the dynamic interpretation required as a result of the introduction (after G 2/12) of R. 28(2) EPC, which reflected the contracting states' clear intention, meant the interpretation of Art. 53(b) EPC in G 2/12 had to be abandoned (albeit not with retroactive effect).

The application in G 3/19 of the various methods of interpretation provided for in Art. 31 and 32 Vienna Convention, which also took into account the subsequent developments in the contracting states, did not in fact lead to the finding that the term "essentially biological processes for the production of plants" in Art. 53(b) EPC was to be read clearly and