

unambiguously as extending to products defined or obtained by such processes. The Enlarged Board therefore endorsed the conclusions it had come to in this respect in G 2/12. At the same time, however, it acknowledged that Art. 53(b) EPC did not prohibit this broader understanding of the process exclusion either. Furthermore, it recognised that, with the introduction of R 28(2) EPC, the legal and factual situation underlying decision G 2/12 had substantially changed. This amendment constituted a new aspect or consideration which had arisen since the EPC was signed and which could give reason to believe that a grammatical, and restrictive, interpretation of the wording of Art. 53(b) EPC conflicted with the legislator's aims, whereas a dynamic interpretation could bring a result that diverged from the wording of the law.

In relation to the interpretation of Art. 116 EPC, the board in T 2320/16 (oral proceedings by videoconference) stated that there was no need for it to seek further means of interpretation. Art. 125 EPC was not concerned with the interpretation of the EPC but served merely as a "fill-in" in case of missing procedural provisions (G 2/12, point V.(1)). As Art. 116 EPC was understood not to impose any limitation on the specific form of oral proceedings, there was therefore nothing to "fill". Regarding a "dynamic interpretation" of Art. 116 EPC, the board was of the view that it was a further approach to construing *inter alia* a legal provision of the EPC (with reference to G 3/19, point XXII; G 2/12 point VIII.(2).1.(1); G 3/98, point 2.5 of the Reasons). The board found that oral proceedings by videoconference were consistent with both the literal interpretation of Art. 116 EPC 1973 and 2000 and the legislative intent underlying them. The question of whether a dynamic interpretation of Art. 116 EPC had to be considered therefore did not arise. Compare with G 1/21 of 16 July 2021 (OJ 2022, A49) and the referral decision T 1807/15, which explores dynamic interpretation with reference to G 3/19.

## 2. Interpretation of the EPC affected by TRIPS Agreement

### 2.1. General

The European Patent Organisation, established by the EPC, which constitutes a special agreement under Art. 19 of the Paris Convention, is not a party to the WTO/TRIPS Agreement. The Enlarged Board of Appeal observed in G 2/02 and G 3/02 (OJ 2004, 483) that although the EPO is not a party to TRIPS and not bound by it, the national legal systems of the EPC contracting states might be affected by TRIPS and they may be under an obligation to see to it that the EPC is in conformity with TRIPS. The European Patent Organisation as an international organisation has an internal legal system of its own, the EPC. The boards of appeal of the EPO have the task of ensuring compliance with the autonomous legal system established by the EPC and are bound by the provisions of the EPC alone (Art. 23(3) EPC).

### 2.2. Application of the TRIPS Agreement

The issue of the application of TRIPS in the context of the EPC has been considered on a number of occasions by the boards of appeal of the EPO (see for instance G 1/97, OJ 2000, 322; T 1173/97, OJ 1999, 609; J 10/98).