

agreement or practice within the meaning of Art. 31(3)(a) and (b) Vienna Convention regarding its earlier interpretation.

Dynamic interpretation in the light of Rule 28(2) EPC

The Enlarged Board held that the application of the various methods of interpretation provided for in Art. 31 and 32 Vienna Convention, also taking into account the subsequent developments in the contracting states, did not 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 unambiguously as extending to products defined or obtained by such processes. It therefore endorsed the respective conclusions that it came to in G 2/12. At the same time, however, the Enlarged Board acknowledged that Art. 53(b) EPC did not prohibit this broader understanding of the process exclusion either. Furthermore, the Enlarged Board 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 that had arisen since the EPC was signed 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. The Enlarged Board held that the exclusion of products exclusively obtained by means of an essentially biological process was not incompatible with the wording of Art. 53(b) EPC, which did not rule out this broader construction of the term "essentially biological processes for the production of plants or animals". The Enlarged Board concluded that, in view of the clear legislative intent of the contracting states as represented in the Administrative Council and having regard to Art. 31(4) Vienna Convention, the introduction of R. 28(2) EPC allowed and indeed called for a dynamic interpretation of Art. 53(b) EPC. Accordingly, the Enlarged Board abandoned the interpretation of Art. 53(b) EPC given in decision G 2/12 and, in the light of R. 28(2) EPC, held that the term "essentially biological processes for the production of plants or animals" in Art. 53(b) EPC was to be understood and applied as extending to products exclusively obtained by means of an essentially biological process or if the claimed process feature defined an essentially biological process.

In conclusion, the Enlarged Board of Appeal answered the referral as follows:

"Taking into account developments after decisions G 2/12 and G 2/13 of the Enlarged Board of Appeal, the exception to patentability of essentially biological processes for the production of plants or animals in Article 53(b) EPC has a negative effect on the allowability of product claims and product-by-process claims directed to plants, plant material or animals, if the claimed product is exclusively obtained by means of an essentially biological process or if the claimed process features define an essentially biological process. This negative effect does not apply to European patents granted before 1 July 2017 and European patent applications which were filed before that date and are still pending."