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**Datasheet for the decision
of 17 May 2006**

Case Number: T 0100/04 - 3.3.03

Application Number: 97118519.4

Publication Number: 0821011

IPC: C08F 10/02

Language of the proceedings: EN

Title of invention:

Process for the preparation of ethylene-based polymers

Patentee:

Basell Polyolefine GmbH

Opponents:

Univation Technologies, LLC
Borealis Technology OY

Headword:

-

Relevant legal provisions:

EPC Art. 54, 108
RPBA Art. 10a(2), 10b(1), 10b(3)

Keyword:

"Novelty (yes)"
"Late submitted material - admitted - (no)"
"Appeal admissible - (yes)"

Decisions cited:

T 0793/93, T 0065/96

Catchword:

-



Case Number: T 0100/04 - 3.3.03

D E C I S I O N
of the Technical Board of Appeal 3.3.03
of 17 May 2006

Appellant:
(Patent Proprietor)

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office dated 29 October 2003
and posted 1 December 2003 revoking European
patent No. 0821011 pursuant to Article 102(1)
EPC.

Composition of the Board:

Chairman: R. Young
Members: M. Gordon
E. Dufrasne

Summary of Facts and Submissions

I. Mention of the grant of European Patent No. 0 821 011 in the name of Basell Technology Company B.V. in respect of European patent application No. 97 118 519.4, filed as a divisional application of European patent application No. 95 924 286.8, which was filed on 19 June 1995, claiming priority of an Italian patent application No. MI941279 dated 20 June 1994, was announced on 31 January 2001 (Bulletin 2001/05) on the basis of 11 claims.

Claim 1 read as follows:

"1. Process for the preparation of ethylene homopolymers or of copolymers of ethylene with at least one comonomer selected from:

- (a) α -olefins of the formula $\text{CH}_2=\text{CH}-\text{CH}_2\text{R}$, where R is hydrogen or a linear, branched or cyclic alkyl radical having 1 to 20 carbon atoms,
- (b) cycloolefins and
- (c) polyenes,

said copolymers having a content of units derived from said α -olefin, cycloolefin and/or polyene comonomers of between 1 and 20 mol %,

said process comprising the polymerization reaction of ethylene in the presence of a catalyst consisting of the reaction product of:

- (A) a mixture of the racemic and meso isomers of a stereorigid metallocene compound of a transition metal, belonging to Groups III, IV or V or the lanthanides in the Periodic Table of the Elements, with two cyclopentadienyl ligands connected to each other by a chemical bridge, and

(B) at least one co-catalyst capable of activating both the racemic form and the meso form of the metallocene compound, selected from the alumoxanes and the compounds capable of forming an alkylmetallocene cation."

Claim 2 restricted the process by requiring the presence of a comonomer selected from (a), (b) and (c) of claim 1 with the difference however that the residue R of comonomer (a) could not be H. Claim 3 specified that the racemic and meso forms of the metallocene compound were present in a weight ratio of between 99:1 and 1:99. Claims 4 to 7 defined preferred structures of the metallocene compound. Claim 8 specified that the alumoxane was methylalumoxane, claim 9 specified that the catalyst was supported on an inert support and claims 10 and 11 related to preferred embodiments of the support.

II. Two notices of opposition against the grant of the patent were filed on 30 October 2001 by Univation Technologies (OI) and on 31 October 2001 by Borealis Technology Oy (OII).

The opponents requested revocation of the patent in its entirety, OI on the grounds of lack of novelty and lack of inventive step pursuant to Article 100(a) EPC and OII on the grounds of lack of novelty, lack of inventive step pursuant to Article 100(a) EPC and on the ground that the subject matter of the patent extended beyond the content of the application as filed pursuant to Article 100(c) EPC.

The Opponents relied *inter alia* on the following documents:

E1: EP-A-0 399 348
E2: US-A-5 086 134
E9: EP-A-0 628 565
E10: US-A-5 229 022
E11: US-A-5 084 534.

III. With a letter dated 4 September 2003 the EPO was informed that the patent had been assigned to Basell Polyolefine GmbH.

IV. In a decision announced orally on 29 October 2003 and issued in writing on 1 December 2003 the opposition division revoked the patent.

The decision was based on a main and an auxiliary request, both filed during the oral proceedings before the opposition division.

Claim 1 of the main request corresponded to claim 1 as granted with the differences the claim was now restricted to a process for the preparation of ethylene copolymers (homopolymers having been deleted) and that the passage in section (A) "a transition metal...by a chemical bridge" was replaced by the structural formula of the metallocene compound, derived from granted claim 4. Claim 1 of the auxiliary request differed from claim 1 of the main request in that the permissible structure of the metallocene compound was further restricted, corresponding to the subject matter of granted claim 5.

According to the decision:

- (a) It was noted that no objections had been raised pursuant to Article 100(b) EPC and furthermore that the requirements of this article were met by the claims according to both the main and auxiliary requests.

- (b) The claims according to both requests met the requirements of Article 123(2) EPC. The objection of the opponents that the specification of a comonomer content of between 1 and 20 mol% without specifying further properties of the polymer contravened Article 123(2) EPC was dismissed. The properties in question were that the molecular weight distribution (M_w/M_n , hereinafter "MWD") be greater than 3 and the feature that in Temperature Rising Elution Fraction (hereinafter "TREF") analysis a quantity equal to at least 90% by weight of the copolymer be eluted in a temperature interval of less than 50°C. It was held that the application taught that the claimed process could also lead to copolymers of ethylene and 1-butene which did not fulfil said parameters. From this it would be clear to the artisan that the process of the claims according to both requests did not automatically fulfil these requirements.

- (c) Regarding novelty it was held that E2, example 5 taught a process for preparing an ethylene copolymer comprising 10.3 mol% of propylene in the presence of a reaction product between methylaluminoxane (i.e. methylalumoxane) and a catalyst comprised of 95% racemic isomer of a

defined metallocene. It was held that the declaration of the opponents that this catalyst comprised at least some of the meso isomer was credible in the light of the explanation of all parties that in the preparation of such metallocene catalysts it was normal that a mixture of racemic and meso isomers was obtained, which mixture under normal circumstances could not be stripped of all meso isomer. Hence it could be assumed beyond all reasonable doubt that at least some of the remaining 5% of the catalyst employed in example 5 of E2 was the meso isomer. The subject matter according to both the main and auxiliary requests was also held to lack novelty over the combined teachings of examples 4 and 5 of E11 together with column 6, line 66 to column 7 line 3.

Consequently the patent was revoked.

- V. A notice of appeal against this decision was filed by the patentee on 22 January 2004, the requisite fee being paid on the same day. Together with the statement of grounds of appeal, filed on 7 April 2004 the patentee submitted sets of claims forming a main and first to fifth auxiliary requests. It was requested that the decision under appeal be set aside and the patent be maintained on the basis of the main or first to fifth auxiliary requests in that order.

Claim 1 of the main request corresponded to granted claim 1 with the exception of the deletion of all

reference to homopolymers and of the value "H" in the definition of the residue "R".

Claim 1 of the first auxiliary request corresponded to the auxiliary request upon which the decision of the opposition division had been based, with the difference that residue "R" could no longer be "H".

Claim 1 of the second auxiliary request corresponded to claim 1 of the main request with the difference that the features relating to MWD and TREF of the copolymer were specified.

Claim 1 of the third auxiliary request corresponded to a combination of claims 1 of the first and second auxiliary requests, i.e. specifying both the permissible structure of the metallocene compound and the MWD and TREF features.

Claim 1 of the fourth auxiliary request was identical to that of the main request upon which the decision of the opposition division had been based.

Claim 1 of the fifth auxiliary request corresponded to claim 1 of the fourth auxiliary request but further restricted by specifying the proportions of the *meso* and *racemic* forms of the catalyst as being between 99:1 and 1:99, as specified in claim 3 of the granted patent.

- (a) It was submitted that the claims according to all requests met the requirements of Article 123(2) and (3) EPC and Article 76(1) EPC.

- (b) With regard to the specification of the MWD and TREF it was argued that these were the inherent result of the process by means of which the polymers were obtained.

- (c) With regard to novelty, the Appellant referred to a letter of 12 August 2001 for the main and first auxiliary requests. With regard to the second auxiliary request, which was stated to correspond to the request filed with a letter of 12 August 2002, reference was made to the arguments advanced in respect of the main request. For the third auxiliary request reference was made to the same arguments as for the main and first auxiliary requests. Detailed arguments were set out with regard to the novelty of the subject matter of the claims of the fourth and fifth auxiliary requests.
- (d) Arguments in support of inventive step for all requests were also advanced.

VI. In responses dated 29 October 2004 from Opponent I now Respondent I (RI) and 3 November 2004 from Opponent II, now Respondent II (RII),
RI requested:

- that all requests with the exception of the fourth and fifth auxiliary requests be rejected as being inadmissible;
- that the fourth and fifth auxiliary requests be dismissed as not clearly allowable;
- notwithstanding the first request, should the Board of Appeal declare the main request and/or any of the first to third auxiliary requests admissible that they be dismissed as not clearly allowable;

- that the decision of the opposition division revoking the patent be upheld;

- if the board were to contemplate setting aside the decision of the opposition division that oral proceedings be convened;

- in the case that the board should find that a request was admissible and met the requirements of added subject matter and novelty that the claims be remitted to the opposition division for consideration of inventive step,

RII requested that the appeal be dismissed, an auxiliary request being made for oral proceedings.

- (a) With regard to the admissibility of the appeal in respect of the main and first to third auxiliary requests, RI noted that a letter of 12 August 2001 did not exist. It was assumed that the appellant had intended to refer to its letter of 12 August 2002. RI submitted that although the letter of August 2002, referred to by the appellant related to a set of claims corresponding to the claims of the main request submitted together with the statement of grounds of appeal these submissions did not take into account comments raised during the subsequent progress of the opposition, in particular the findings in the decision of the opposition division. Thus the submissions did not indicate why the decision of the opposition division was incorrect. It further was submitted, with respect to case law developed by the Boards of Appeal that a general reference to earlier

submissions was not sufficient to fulfil the requirement that the grounds of appeal give full reasons why the contested decision was incorrect. The same objections and reasoning were presented in respect of the first auxiliary request which, it was noted, corresponded to the auxiliary request previously considered by the opposition division before it was replaced at the oral proceedings.

With regard to the second and third auxiliary requests it was submitted that there were no arguments in support of the novelty of the subject matter of these claims on file.

- (b) With regard to added subject matter (Articles 123(2) and (3) EPC), both respondents submitted that the definition in the respective claims 1 of the main and first, fourth and fifth auxiliary requests of the comonomers (a) to (c) without specifying the MWD and TREF values violated said Articles. The submission of the appellant that these values were an inherent result of the claimed process (cf section V.a above) was not supported by any proof and was thus merely an unsubstantiated allegation. Similarly it was disputed that the patent disclosed that the claimed process could lead to polymers which did not exhibit these features.
- (c) With regard to novelty RI maintained objections in respect of E10 and E11.
 - (i) With respect to E10 it was submitted that this disclosed the preparation of ethylene

copolymer with a large variety of compounds falling within the scope of claim 1 of the main request. The ethylene content was between about 20% and about 80%. The comonomer content of about 20 mol% thus overlapped with the amount set out in claim 1 of the main request. E10 also disclosed various mixtures of racemic and meso isomers of bridged metallocene compounds which were used in conjunction with an alumoxane compound.

- (ii) With regard to E11 it was submitted that example 4 thereof disclosed the polymerisation of ethylene with 10 mol% of 1-octene. Although the catalyst employed was non-chiral, the decision under appeal had found that it was permissible to combine the disclosure of this example with the teachings of the description (cf section IV.c above). The skilled person would seriously contemplate this combination. These objections applied also to the first to third auxiliary requests. Arguments were presented with respect to the fourth and fifth auxiliary requests.

R11 maintained objections in respect of E9 and on the basis of E1 in combination with a newly cited document:

E18: J. Chem. Soc., Dalton Trans., 2001, 1131-1136.

(iii) With respect to E1 it was submitted that the metallocene employed in example 44 although nominally pure racemic would inevitably contain some meso isomer. The preparation of the catalyst reported no special isomer separation steps and would not result in 100% pure *rac* isomer. In support of this argument reference was made to E18, which, it was submitted, showed the first step employed for the preparation of the catalyst of E1, synthesis of diphenylsilylbisindene and reported that the resulting product was a 50:50 mixture of the *rac* and *meso* isomers. Following further purification a product of no greater than 90% purity was obtained, the purification step of E18 being more rigorous than that of E1. This product was then reacted with HfCl_4 resulting in a product containing both racemic and meso isomers. The *rac* complex was isolated by crystallisation at -30°C but nevertheless was reported to still be contaminated with 15% of the *meso* isomer. E18 reported washing the final metallocene with toluene and did not achieve optical purity. This was the washing step employed in E1 hence it was inevitable that the metallocene product of E1 was also present as a mixture of isomers. While the metallocene of E1 was a zirconium complex and that of E18 was a hafnium complex, this difference was considered not to affect the amounts of the isomers present. On the contrary it was explicitly stated that the selectivity of the ligand should be

the same for the two metals. Thus it was inevitable that the metallocene employed in example 44 of E1 contained meso impurity and hence that the process of this example fell within the scope of the claims. The polymer produced in example 44 of E1 - an ethylene/hexene copolymer had a density of 0.924 which it was submitted meant that the comonomer content was at least 2%.

- (iv) With regard to E9, RII submitted that this related to the use of fluorenyl based metallocenes in the polymerisation of α -olefins. It was stated in E9 that the level of racemic isomer was such that no separation from the meso isomer was necessary in order to obtain isotactic polymer, or that the meso isomer did not significantly affect the production of isotactic polymer, meaning that the metallocenes employed in E9 were present as a *meso/rac* mixture. These catalysts were employed with an alumoxane, this combination being disclosed as useful for the preparation of polymers of ethylene and/or propylene and generally a minor amount (no more than 12 mol%) of a higher molecular weight olefin.

VII. The Board issued, on 21 February 2006, a summons to attend oral proceedings. In the accompanying communication, with regard to the objections of inadmissibility of certain of the requests, it was observed that it was not apparent under which Articles

of the EPC and/or the Rules of Procedure of the Boards of Appeal this objection had been raised.

A number of objections were raised pursuant to Article 84 EPC and Articles 123(2) and (3) EPC, and as a consequence of the fact that the patent was derived from a divisional application, Article 76(1) EPC in respect of all the requests on file with the exception of the second auxiliary request. Further the admissibility of certain amendments according to the main and second, fourth and fifth auxiliary requests pursuant to R57a EPC was questioned.

VIII. With a letter dated 11 April 2006 RI maintained the objections of inadmissibility of the appeal in respect to all requests with the exception of the fourth and fifth auxiliary requests.

It was requested that the question of whether an appeal can be declared to be only partially admissible be referred to the Enlarged Board of Appeal under Article 112 EPC as being an important point of law. A further novelty objection based on newly cited documents:

E20: EP-A-495 099, and

E21: an experimental report repeating part of example 1 of E20;

E22: A.J. Peacock, L. Mandelkern, Journal of Polymer Science: Part B: Polymer Physics, Vol. 28, 1917-1941 (1990) (referred to in the 11 April 2006 letter as to be sent "shortly" and submitted with a letter of 12 April 2006)

was raised.

The discussion of the experimental report stated that "It can clearly be seen that the compound contains the meso isomer in an amount of 7.4%" meaning that the catalyst was present as a mixture of *rac* and *meso* isomers.

The experimental report referred to, but did not contain, any NMR spectra. The report also contained a reference to a figure in a journal article (Organometallics 1995, 14, 1256 to 1266) which article was also not enclosed with the submission of RI.

IX. With a letter dated 13 April 2006 the Appellant submitted a single set of 6 claims as the main request, based on the former second auxiliary request, amended to take account of comments made by the Board in the communication.

The claims of this request read as follows:

"1. Process for the preparation of copolymers of ethylene, with at least one comonomer selected from:

- (a) α -olefins of the formula $\text{CH}_2=\text{CH}-\text{CH}_2\text{R}$, where R is a linear, branched or cyclic alkyl radical having 1 to 20 carbon atoms,
- (b) cycloolefins and
- (c) polyenes,

with a content of units derived from said α -olefin, cycloolefin and/or polyene comonomers of between 1 and 20 mol%, characterized in that:

- (a) in TREF (Temperature Rising Elution Fractionation) analysis, a quantity equal to at least 90% by weight of the copolymer is

eluted in a temperature interval of less than 50°C; and

- (b) $M_w/M_n > 3$, where M_w is the weight-average molecular weight and M_n is the number-average molecular weight, both determined by GPC;

said process comprising the polymerization reaction of ethylene in the presence of a catalyst consisting of the reaction product of:

- (A) a mixture of the racemic and meso isomers of a stereorigid metallocene compound of a transition metal, belonging to Groups III, IV or V or the lanthanides in the Periodic Table of the Elements, with two cyclopentadienyl ligands connected to each other by a chemical bridge, and
- (B) at least one co-catalyst capable of activating both the racemic form and the meso form of the metallocene compound, selected from the alumoxanes and the compounds capable of forming an alkylmetallocene cation.

2. Process according to claim 1, wherein the racemic form and the meso form of the metallocene compound are present in a weight ratio of between 99:1 and 1:99 respectively.

3. Process according to claim 1, wherein the alumoxane is methylalumoxane.

4. Process according to claim 1, wherein the catalyst is supported on an inert support.

5. Process according to claim 4 wherein the support is a porous organic support functionalized by groups having active hydrogen atoms.
6. Process according to claim 4, wherein the organic support is a partially crosslinked styrene polymer."
- X. With letter of 12 May 2006 RI submitted the references referred to in the experimental report E21 (see section VIII).
- XI. With letter of 12 May 2006 the appellant submitted an auxiliary request of 6 claims. This was stated to be in response to the "late filed documents" submitted with the letter dated 11 April 2006 and for the case that the board were to introduce these into the procedure.
- XII. Oral proceedings were held before the board on 17 May 2006.
- (a) With regard to the question of admissibility, RI referred to the written submissions.
- (b) Concerning the documents E20 and E21 filed with the letters of 11 and 12 April 2006 and the further documents submitted with the letter of 12 May 2006:
- (i) RI argued that subsequent to filing the response to the statement of grounds of appeal, it had been considered necessary to find new evidence relating in particular to the feature that the catalysts existed as a mixture of the *rac* and *meso* isomers. It had

proved impossible to locate a document with all necessary features. Hence the disclosure of the document E20 was supplemented by experimental reports. It had not been possible to file the experimental results earlier since the respondent had not been aware of E20. Preparation of the experimental report required additional time in particular since one of the materials required proved not to be readily available. After submission of the experimental data to the professional representative further correspondence with the respondent company had been necessary to clarify certain issues causing further delay. In this respect the parties drew attention to the date on the spectra - November 2005 and contrasted this with the date on which the experimental report had been transmitted to the board (April 2006).

- (ii) Regarding the filing of the documents on 12 May 2006 it had been intended to submit these with the 11 April 2006 letter. Inspection of the Website of the EPO revealed that these were not on the electronic file. Hence as a precaution the documents were resubmitted. RII confirmed that these documents had not been received with the copy of the 11 April 2006 submission forwarded by the European Patent Office.

- (iii) RI argued that fact that the appellant had reacted by filing an auxiliary request indicated that the Appellant had understood the submissions being made and recognised the relevance of these submissions. Further the appellant could have requested postponement of the oral proceedings.

- (iv) The appellant submitted that it had been impossible within the time available to prepare an answer dealing with the issues raised by the submission of E20. Hence the filing of the auxiliary request represented the only route open to address these new issues.

- (c) The respondents indicated that objections with respect to Articles 123(2) and (3) EPC were not maintained.

- (d) With regard to novelty, RI referred to its written submissions.
RII indicated that it maintained objections based on E1 and E9, but no longer relied on E10 and E11.

- (i) The submissions with regard to E1, example 44 corresponded to those made in the written procedure. Regarding the final catalyst, obtained by reaction of this precursor with a metal salt - HfCl_4 in E18 and ZrCl_4 in E1, it was argued that due to the smaller size of the Zr ion a higher proportion of meso isomer would be produced than in the example of E18 further

confirming that a *rac/meso* mixture would result (see also VI.c.iii above).

The appellant responded that E1 and E18 employed different methods to obtain the stated precursor. Chirality would be lost in the step involving treatment with an alkyl lithium meaning that the conclusions drawn based on the precursor were invalid.

- (ii) With regard to E9, RII submitted that this disclosed that the metallocenes employed were present as mixtures of racemic and meso isomers. These were used with alumoxane to polymerise olefins. The examples disclosed polymerisation of ethylene and/or propylene with other monomers. Thus binary and ternary copolymers of combinations of the named monomers were encompassed. The description specified that the "other monomers" be present in an amount of not more than 12 mol%.

The appellant submitted that E9 contained no evidence or analysis relating to the isomeric composition of the catalyst. There was no disclosure of preparation of copolymers with the monomer compositions as claimed. The sole example related to polymerisation of propylene. MWD and TREF were not disclosed.

- (e) Regarding the further procedure, both respondents requested remittal to the opposition division for consideration of inventive step. The appellant did not oppose this request.

XIII. The final requests of the parties were:

The appellant (patentee) requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request (claims 1 to 6) filed with the letter dated 13 April 2006. He further requested that the documents filed by respondent I with the letters dated 11 April 2006, 12 April 2006 and 12 May 2006 be not admitted to the procedure or, in the alternative, that the auxiliary request (claims 1 to 6) filed with the letter dated 12 May 2006 be considered by the Board.

The respondents (opponents) requested that the appeal be dismissed or, in the alternative that the case be remitted to the first instance for consideration of the inventive step. Respondent I further requested that the main request and first to third auxiliary request filed with the statement of grounds of appeal be declared inadmissible or, in the alternative, that the question of whether an appeal can be declared to be only partially admissible be referred to the Enlarged Board of Appeal.

Reasons for the Decision

1. Admissibility of the Appeal

1.1 The claims of the main request forming the basis of this decision correspond, with the exception of certain editorial modifications, to the second auxiliary request as filed together with the statement of grounds of appeal.

In the statement of grounds of appeal the substantive issues in relation to the second auxiliary request were dealt with by a reference to arguments submitted with respect to the main request, i.e. with the wording "All arguments as for the main request apply even more so in the present case".

With regard to the main request detailed arguments were presented with respect to Articles 123(2) and 56 EPC. With regard to novelty it was stated "we make reference to our letter of 12.08.2001".

1.2 Firstly, there was in fact no letter of 12.08.2001, and this incorrect date is repeated a number of times in the statement of grounds of appeal. There was, however, a letter of 12 August 2002, which date is also referred to several times in the statement of grounds of appeal. It is apparent from the response of RI to the statement of grounds of appeal (see VI.a above) firstly that this error was immediately apparent and secondly that the respondent was able to identify the submission to which it had been intended to refer. RII did not comment on this. It is therefore concluded that this error did not impede understanding by the respondents of the case that the appellant intended to present in the statement of grounds of appeal. Accordingly this error was immaterial for the question of admissibility of the appeal.

1.3 Regarding the substance of the submissions in the statement of grounds it is explained that the claims of the second auxiliary request (i.e. the present main request) differ from those of the sole request accompanying the letter of 12 August 2002 by reciting characteristics inherent to the copolymers thus

rendering the claims "more clearly complying with the requirements of Article 123(2)".

1.3.1 These differences relate to specifying the TREF and MWD features. Since, however, the opposition division considered these features to be optional or preferred features, it is apparent that the introduction of these features into the claims would not have led to any different conclusion being reached with regard to Article 123(2) by the opposition division (see section IV.b above).

1.3.2 With regard to the ground of lack of novelty the decision under appeal held that the disclosures of E2 and E11 anticipated the subject matter claimed according to the main and auxiliary requests before it. The August 2002 submission systematically discussed each of the citations invoked by the then opponents, namely E1, E2, E3, E7, E9, E10, E11, E12 and E13. Each citation was clearly identified and the arguments in respect of each set out. Accordingly due to the clear structure of the August 2002 submission, it was possible directly and unambiguously to identify upon which arguments the appellant wished to rely in respect of the issue of novelty with regard to the two documents invoked by the opposition division.

Thus the board is satisfied that the specific reference to the submission of August 2002 together with the clearly structured nature thereof made it possible for the respondents and the board immediately to identify and understand the arguments upon which the appellant wished to rely.

1.3.3 The question remains to be decided whether such a reference in the statement of grounds of appeal to specific arguments submitted during the first instance proceedings is sufficient to satisfy the requirements of admissibility.

(a) According to Article 10a(2), second sentence, final part, of the Rules of Procedure of the Boards of Appeal, in the version valid with effect from 1 May 2003 (OJ EPO 2003 pages 61 and 89) which version finds application in the present case, "[The statement of grounds of appeal]...should contain, expressly or **by specific reference to material filed in the first instance proceedings**, all the facts, arguments and evidence relied on and all the requests made." (emphasis by the Board).

(b) The statement of grounds of appeal contained a reference to a specific submission - identified by its date - i.e. "material" filed during the first instance proceedings. Further, the clear structure of the submission (see paragraph 1.3.2 above) meant that the relevant parts thereof could be swiftly and unambiguously identified.

(c) Accordingly the requirements of admissibility of the appeal are met in respect of the originally filed second auxiliary request (now main request) by way of a specific reference to a submission from the first instance proceedings setting out the arguments on which it was wished to rely.

- 1.4 It has also been objected by RI that the submissions in the August 2002 letter did not take account of the comments raised in the subsequent progress of the prosecution of the opposition or in the decision, and therefore did not indicate why the decision of the opposition division was incorrect (see section VI.a above) and so was inadmissible for this reason also. This objection thus related to the relevancy of the arguments advanced upon filing the appeal. However as held in paragraph 1.1 of the reasons of decision T 65/96 (18 March 1998, not published in the OJ EPO), whilst irrelevancy and lack of cogency may lead to an unsuccessful outcome of the appeal, they cannot of themselves render an appeal inadmissible.
- 1.5 It is therefore concluded that the statement of grounds of appeal met the requirements of admissibility in respect of the then valid second auxiliary request, which has now been promoted to the main request with the consequence that the appeal is admissible.
- 1.6 Regarding the request of RI for referral of a question to the Enlarged Board of Appeal concerning the partial admissibility of an appeal, it is observed that admissibility has not been challenged in respect of the originally filed fourth and fifth auxiliary requests. Since in the present case even the main and first to third auxiliary requests, in respect of which the criticism of inadmissibility was raised by RI were themselves clearly such as to meet the requirements of admissibility (see 1.3.3 above) there can be no justification in this case for referring a question of this tendency to the Enlarged Board of Appeal.

Consequently the request for referral is refused.

2. *Late filed submissions*

The respondent RI filed with the letter dated 11 April 2006 a new document on the basis of which a further objection of lack of novelty was raised. This objection relied not only on the cited document but on an experimental report and supplementary documents, certain of which were only submitted one month later (see section VIII above).

2.1 According to Article 10a(2) of the Rules of Procedure of the Boards of Appeal, the statement of grounds of appeal and the reply shall contain a party's complete case. Article 10b(1) states that any amendment to a party's case after filing of the grounds of appeal or the reply shall be admitted and considered at the Board's discretion. This discretion shall be exercised in view of *inter alia* the complexity of the new subject matter submitted.

2.2 According to the submissions made by RI in the oral proceedings, the decision to submit this new argument arose from a reappraisal of the case subsequent to filing its response to the statement of grounds of appeal (see section XII.b.i above). This amounts, in the board's view, to an admission that the response as dated 29 October 2004 was in fact incomplete, contrary to the provisions of Article 10a(2) of the Rules of Procedure of the Boards of Appeal.

It was also stated that the cited document did not disclose all the necessary features, hence the disclosure thereof was supplemented by an experimental

report. Preparation of this experimental report required additional time, *inter alia* due to the lack of ready availability of one of the materials required. Subsequent to preparation of this report further discussions between the professional representative and the respondent company were necessary. It is also the case that all documents relating to this amendment to the case were not submitted even when presenting this amendment to the respondent's case (i.e. the NMR spectra and the journal article both referred to in the experimental report) making it impossible for the other parties and the board fully to appraise it.

- 2.3 The procedure relating to amendments to a party's case after oral proceedings have been arranged is governed by Article 10b(3) of the Rules of Procedure of the Boards of Appeal. There it is stated that amendments sought to be made shall not be admitted if they raise issues which the board or the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings.
 - 2.3.1 The fact that the respondent elected to submit not only a new document but also an experimental report indicates that the amendment to its case relied not on the explicit literal disclosure of the new document, but on the implicit disclosure thereof, namely the result of carrying out a part of the teaching thereof.
 - 2.3.2 In such a case in order for the other party to establish whether the newly raised objections were supported by the facts it could not be excluded that it would be necessary not only to analyse the written, explicit teaching of the document but also arguably to

carry out experimental work in order to ascertain whether the allegation concerning the implicit disclosure thereof was correct.

2.3.3 In the present case a number of considerations indicate that it was not reasonable to expect the appellant to deal with this new objection in the time (five weeks) between the notification of the amendment to the respondent's case and the oral proceedings:

- (a) Part of the evidence (NMR spectra and a document) relied upon by the respondent was omitted from the papers provided setting out the objection and was only provided five days before the oral proceedings.
- (b) The lack of ready availability of one of the required materials would have resulted in a delay before any experimental work necessary to address the new arguments could be carried out.
- (c) It may be derived from the statement of the respondent (XII.b.i above) that further discussion and clarification of the experimental results was necessary that interpretation and analysis thereof was not trivial or straight forward. This appears plausible in the light of the evidence provided by the dates borne by the spectra (November 2005), i.e. six months prior to submission of the results to the EPO.
- (d) The fact that demonstrably the respondent required some six months to analyse and understand its own results, said results being derived from

experiments which required the use of a reagent which itself was not readily available (thus occasioning additional delay) indicates that it was not reasonable to expect the appellant to carry out the necessary counter-investigations in the period of only five weeks between (incomplete) notification of these results and the oral proceedings let alone in the space of the five days that elapsed between submission of the complete set of papers relating to the respondent's experiments and the oral proceedings.

2.3.4 Taken together, these aspects lead the board to conclude that, in order to allow the appellant the opportunity to deal with the issues raised by the amendment of the respondent's case, it would have been necessary to adjourn the oral proceedings.

2.4 Accordingly, it was decided pursuant to Article 10b(3) of the Rules of Procedure of the Boards of Appeal that the amendment to the RI's case, consisting of the allegation of lack of novelty based on E20 and associated documents would not be admitted.

3. *Article 123(2) and (3) EPC.*

Neither of the respondents maintained objections pursuant to these Articles against the claims of the main or first auxiliary requests. Nor has the board any objections of its own in this respect.

Consequently the requirements of Article 123(2) and (3) EPC are held to be met.

4. *Article 54 EPC - Novelty - main request.*

Novelty objections were maintained in respect of E10 and E11 (cf written submissions of RI reported in section VI.c above and the statement at the oral proceedings reported in section XII.d above), in respect of E1 in connection with E18 and in respect of E9 (cf sections XII.d.i and XII.d.ii above).

4.1 *General considerations*

When arguing a lack of novelty based on an example of a prior art citation in the case that the required property is not explicitly disclosed in the citation, the case being made is that the subject matter claimed, even if not anticipated by the explicit literal disclosure of the citation is nevertheless implicitly anticipated to the extent that in carrying out the express literal disclosure and instructions of a prior art document (e.g. an example) subject matter falling within the terms of the claims of the patent in suit is the inevitable outcome. This has the consequence that there can be no space for doubt and hence that the "balance of probability" is not the appropriate standard to apply. Rather, a stricter standard of proof, namely "beyond all reasonable doubt" needs to be applied. This means that if there is any reasonable doubt as to what may or may not be the result of carrying out the literal disclosure and instructions of a prior art document, i.e. if there remains a "grey area" then the case of anticipation based on that document must fail (see T 793/93, 27 September 1995, not published in the OJ EPO, section 2.1 of the reasons).

4.2 E1

4.2.1 E1 relates to a process for preparing ethylene polymers by polymerisation of ethylene or copolymerisation of ethylene with a C₃ to C₂₀ α-olefin under defined conditions of temperature and pressure, in solution, suspension or in the gas phase in the presence of a catalyst consisting of a defined alumoxane component and a defined metallocene component (claim 1). According to page 2, line 20 of the description catalysts in which the metallocene component is a bridged biscyclopentadienyl complex have interesting benefits.

4.2.2 Example 44, cited as novelty destroying employs as metallocene a compound, rac-diphenylsilylbis(1-indenyl) zirconium dichloride identified as "Metallocene B". This metallocene is employed to produce a catalyst with methyl alumoxane which catalyst is employed in the copolymerisation of ethylene with 1-hexene. The MWD, TREF and proportion of monomers in the product copolymer are not reported.

(a) The synthesis of Metallocene B is disclosed in example 3 of E1. According to this example diphenylsilylbisindene ((C₆H₅)₂Si(Ind)₂) is employed as the precursor.

(i) This precursor is prepared from (C₆H₅)₂SiCl₂ and lithium indenyl analogously to example 1 of E1. According to that example 30g (0.23 mol) of indene in 200ml diethyl ether is reacted with 80ml of 2.5 molar n-butyl

lithium (hereinafter n-BuLi) in hexane under ice cooling. This reaction mixture is stirred for 15 minutes at room temperature and then added via a needle over 2 hours to a solution of 13.0g (0.10 mol) of dimethyldichlorosilane in 30ml diethyl ether (in the preparation according to example 3 this component would be replaced by diphenyldichlorosilane). The suspension is stirred overnight and extracted three times with 100-150ml portions of water. The organic phase is dried twice over sodium sulphate and reduced in volume. The resulting product is maintained for 4 to 5 hours under vacuum to remove excess indene providing a precipitate. This is recrystallised from methanol.

- (ii) In order to prepare Metallocene B 20 grams of the resulting diphenylsilyl bisindene $((C_6H_5)_2Si(Ind)_2)$ is dissolved in 200ml diethyl ether and is reacted at 0°C with 40ml (100mmol) of n-BuLi (2.5 molar in hexane). After stirring for 2 hours at room temperature the solvent is distilled off, the residue stirred with 100ml hexane and filtered. After drying under vacuum the dilithio salt is added to a suspension of 11.3g (48.5mmol) of $ZrCl_4$ in 150 ml methylene chloride at -78°C. The mixture is stirred overnight and warmed to room temperature. The solution is reduced in volume and the resulting precipitate

filtered on a frit. Extraction with toluene yields 2.0g of Metallocene B.

(b) This compound is employed as a metallocene catalyst component in example 44 to prepare a copolymer of ethylene and 1-hexene.

4.2.3 According to the literal disclosure of E1, the metallocene complex employed in example 44 is in the *rac* configuration. There is no statement that any of the *meso* form is present.

4.2.4 The respondent RII argued that although according to the literal disclosure of E1, Metallocene B was nominally pure *rac*, the product would inevitably contain some of the *meso* isomer. This allegation was supported solely by analogy with reference E18, a document disclosing the preparation of a hafnium-based metallocene catalyst derived from diphenylsilylbisindene. It was submitted that the preparation of diphenylsilylbisindene disclosed in E18 corresponded to the first step employed for the preparation of Metallocene B in E1 and that E18 reported that the resulting product was obtained as a 50:50 mixture of the two isomeric forms, which even after purification yielded a product containing not more than 90% of the *rac* form (see section VI.c.iii, above).

(a) According to E18, page 1135 (lefthand column, first entry under "Preparations") diphenylsilylbisindene (identified throughout E18 by the systematic name "Di(1*H*-inden-1-

yl)diphenylsilane") is also used as the precursor for the metallocene.

- (i) The diphenylsilylbisindene is prepared as follows. To a solution of indenyl-lithium (prepared from 11.62g (13.0ml, 0.10mol) of indene in 120ml THF with 52.0 ml of 1.43 M MeLi in diethyl ether) is added dropwise for several minutes at -60°C a solution of 10.5ml (0.05 mol) $(\text{C}_6\text{H}_5)_2\text{SiCl}_2$ in 50ml THF. The mixture is stirred at this temperature for three hours, followed by overnight at ambient temperature and finally evaporated to dryness. The residue is dissolved in toluene (200ml) and filtered. The toluene solution is evaporated to dryness and the product extracted with 500ml warm pentane. The white solid obtained from the pentane solution at -30°C is filtered off and dried in vacuum, to yield a *rac/meso* mixture of $(\text{C}_6\text{H}_5)_2\text{Si}(\text{Ind})_2$ (diphenylsilyl bisindene).
- (ii) The metallocene is prepared by adding to a suspension of 3.66g of the precursor in 100 ml of ether, 10 ml of 1.86 molar MeLi in ether, the addition being carried out dropwise over several minutes. This is stirred for 2 hours. A solution of 17.7 mmol SnEt_3Cl in 70 ml ether is added dropwise over several minutes, the mixture stirred for one hour and evaporated to dryness. The residue is redissolved in 100 ml toluene and evaporated to dryness (removal of ether). A further 100 ml of toluene is added and the

mixture filtered. The resultant toluene solution is added dropwise over 2 hours to a suspension of 2.84g (8.87mmol) HfCl_4 in 50 ml toluene. The mixture is stirred for 6 hours at 95°C. A yellow precipitate is obtained at 0°C and filtered off, washed with 3x15ml portions of toluene and 2x50ml portions of ether. The ether extracts were combined, reduced in volume and cooled to -30°C leading to precipitation of the *rac* isomer. The residue yielded after further purification the *meso* isomer.

(b) A comparison of the method employed in E1 to prepare the diphenylbisindene and that employed in E18 reveals the following differences:

(i) According to E1 the indenyllithium is prepared by reaction of 30g (0.23 mol) of indene in 200 ml diethyl ether with ice cooling with 80 ml (0.20 mol) of a 2.5 molar solution of n-BuLi in hexane followed by stirring for 15 minutes.

The method of E18, however, employs 13.0ml (11.62g, 0.10 mol) of indene in 120 ml THF, which is reacted with 52.0 ml of 1.43 MeLi in diethyl ether).

Thus different concentrations of indene (0.15 g/ml and 0.097 g/ml respectively), in different solvents (diethyl ether, THF) and different lithium compounds at different concentrations in different solvents are employed.

Since the temperature of the indenyllithium preparation step, or the conditions or time of stirring are not disclosed in E18, it is not possible to ascertain whether these conditions were the same in both documents.

- (ii) In the subsequent step E1 adds the obtained indenyllithium solution over a period of two hours to a solution of 13.0g (0.10 mol) of diphenyldichlorosilane in 30 ml diethyl ether. According to E18 the indenyl lithium solution is added dropwise over "several minutes" at -60°C to a solution of 0.05 mol diphenyldichlorosilane in 50 ml THF. Accordingly in the second step there are a number of differences between the teachings of E1 and E18. Specifically different solvents are used, different molar amounts of the diphenyldichlorosilane and different concentrations (3.33×10^{-3} moles/ml and 0.1×10^{-3} moles/ml respectively) are employed.

4.2.5 There are therefore a number of discrepancies between the teachings of E1 and E18. The respondent has however failed to explain why these discrepancies do not prejudice the validity of the analogy presented.

4.2.6 Quite apart from the above, it was submitted at the oral proceedings by the appellant (section XII.d.i second paragraph above) that chirality would be lost in the diphenylsilylbisindene as a result of the subsequent treatment with the alkyl lithium compound, which statement was not contested by the respondents.

The consequence of such a loss of chirality would be that the isomeric composition of the precursor prior to treatment with the alkyl lithium compound would not directly yield any information about the isomeric composition of the final product and hence could not serve as an indicator of the expected isomeric composition of such final product.

- 4.2.7 The subsequent steps employ different reagents to produce different metallocene compounds, in particular having different metal ions (Zr or Hf). Accordingly the disclosure in E18 that the metallocene product (based on Hf and derived from a precursor in which chirality had been lost - see above) was obtained as a *rac/meso* mixture (which was then subjected to separation) does not establish that the metallocene compound of E1, example 3 and employed in example 44 derived from the same precursor compound (obtained however by a different method and the chirality of which precursor would also be lost during subsequent reaction) and employing a different metal ion would, contrary to the explicit statement in example 3 of E1, also exist as a *rac/meso* mixture.
- 4.2.8 The arguments of the respondent relating to the relative rigorousness of the purification steps employed (section VI.c.iii above) cannot overcome this defect, since in each case different products are being purified.
- 4.2.9 The submissions made at the oral proceedings concerning the influence of the metal ion on the resulting chirality of the final metallocene products cannot, for the same reasons establish that the metallocene

employed in example 44 of E1 is present as a *rac/meso* mixture. In any case it is noted that these submissions contradict those made in the written procedure, according to which the metal ion would be expected to exert no influence on the isomeric composition of the products (compare sections VI.c.iii and XII.d.i above).

4.2.10 Therefore neither the explicit, literal disclosure of E1 nor the evidence relating to the implicit disclosure thereof, based on the analogy with E18 supports the position of the respondent that the catalyst system disclosed in E1 example 44 is present as a *rac/meso* mixture as required by claim 1 of the main request.

4.2.11 In this connection the board observes that there would have been an opportunity during the proceedings to repeat the example relied upon of E1 and although there was ample time available to do so, this was not done. Consequently and for the reasons given above, the burden of proof of the respondents in this respect has not been discharged.

4.2.12 Accordingly the subject matter claimed is novel with respect to the disclosure of E1.

4.3 E9

4.4 E9 relates to a bridged sandwich bonded metallocene of a group IVb metal compound and a bridged ligand selected from bis (1-methyl fluorenyl) diphenyl silane and bis(1-methyl fluorenyl) dimethyl tin (claim 1). Claim 5 defines a process for polymerizing olefins in the presence of a catalyst system comprising said metallocene. Claim 6 defines such a process for

polymerizing propylene. Claims 7 and 8 specify that the polymerization is conducted in the presence of an alkyl alumoxane, preferably methyl alumoxane. According to column 2, lines 6 to 30 of E9 in order to produce polymers having high levels of isotactic microstructure the literature teaches to use racemic ethylene bridged bisindenyl or bis-tetrahydroindenyl metallocenes, which must be isolated from mixtures of the racemic and meso isomers by "difficult, tedious, expensive" techniques. It is further stated that a specific chiral metallocene produces highly syndiotactic rather than isotactic polypropylene. It is further stated that a specific bridged, chiral stereorigid metallocene leads to amorphous rather than isotactic polymers. The aim of E9 is thus to provide compositions comprising bisfluorenyl bridged sandwich bonded metallocene for use in preparing isotactic polypropylene even without separation of racemic and meso isomers (column 2 lines 31-35). According to column 3 lines 38-44 it is theorized that the level of racemic isomer is sufficiently high that it is not necessary to separate it from the meso isomer in order to obtain the desired polymers, or, in the alternative, that the meso isomer does not significantly affect the production of isotactic polymer. According to column 6, lines 30 to 45 the metallocenes are useful for polymerisation of one of a number of defined olefins. It is in particular taught that the metallocenes are useful for:

"preparing polymers of mixtures of ethylene and propylene or of ethylene and/or propylene and generally a minor amount, i.e. no more than about 12 mole percent, more typically less than about

10 mole percent, of a higher molecular weight olefin."

4.4.1 The examples of E9 disclose preparation of two ligands, bis-9-(1-methyl fluorenyl) dimethyl silane and bis-9-(1-methyl fluorenyl) dimethyl tin. It is stated that metallocenes are prepared from these ligands without any attempt to separate the racemic and meso isomers (column 8, lines 9-12). The thus prepared metallocenes together with methyl alumoxane are then employed to effect polymerisation of propylene.

4.4.2 With regard to the polymerisations disclosed in E9 the only explicit disclosure is of homopolymerisation of propylene, in the examples. The passage at column 6 lines 30 to 45 reproduced above indicates that copolymers may be produced. However a number of alternatives are presented, namely:

- copolymers of ethylene and propylene in undefined proportions;
- copolymers of ethylene with a minor amount (no more than about 12 mole %) of a higher molecular weight olefin of undefined molecular structure;
- corresponding copolymers of propylene with a comonomer as defined.

Therefore it is apparent that in order to arrive at the combination of monomers permitted according to the process according to claim 1 of the main request, it would be necessary from within the disclosure of E9:

- (i) to select between the alternatives of homopolymerisation and copolymerisation;
- (ii) to select from the three disclosed alternatives for the type of copolymer, those copolymers with ethylene as the principal monomer;
- (iii) to select from within the scope of the disclosure "higher molecular weight olefin" a comonomer meeting the requirements set out in claim 1 of the main request;
- (iv) on the understanding that "i.e." denotes that the limit of not more than 12 mole percent is mandatory, to restrict the lower limit of the content of the comonomer to 1 mol%;
- (v) to adjust the reaction conditions in order to obtain polymers with the required MWD and TREF.

4.4.3 It is therefore concluded that the E9 does not disclose a process for copolymerising the required proportions of the required monomers defined in claim 1 of the main request or the required properties of the resulting polymers.

4.4.4 Accordingly the subject matter claimed according to the main request is novel with respect to E9.

4.5 E10

4.5.1 According to claim 1 E10 relates to functionalized ethylene alpha-olefin "ene" reacted polymer which comprises substituted ethylene alpha-olefin polymer, which polymer comprises monomer units derived from ethylene and at least one alpha-olefin of the formula $H_2C=CHR^1$ wherein R^1 is an alkyl group of from 1 to 18 carbon atoms. The ethylene content of the copolymer is between 20 to 80 percent by mole. The polymers are prepared by use of a metallocene/alumoxane catalyst system (column 6 lines 41-52). According to the description at column 9, lines 34-41 among the metallocenes which can be employed are chiral compounds, which, it is stated, may be present in the racemic and/or meso form.

4.5.2 Of the 6 examples (examples 1-5 and 41) of E10 which relate to copolymerisation all but one relate to copolymerisation of ethylene and propylene, which is excluded from claim 1 of the main request due to the definition of the residues which R can represent. The exception, example 5, relating to preparation of ethylene/butene-1 copolymer employs as the metallocene compound dimethylsilyldicyclopentadienyl zirconium dichloride which is achiral. Further the proportion of monomers in the copolymer produced is not disclosed.

4.5.3 Accordingly neither the disclosure of the description nor the examples of E10 disclose a process according to claim 1 of the main request. Accordingly the subject matter claimed according to the main request is novel with respect to the disclosure of E10.

4.6 E11

- 4.6.1 According to claim 1 E11 relates to a process for polymerizing ethylene either alone or in combination with one or more other olefins. The process comprises contacting the monomers with a cyclopentadienyl-group IVb transition metal compound and an alumoxane in defined ratios at defined temperatures and pressures. According to column 3 lines 18 to 21 of the description the comonomers are C₃ to C₁₀ α-olefins. The description provides a long list of usable metallocene compounds. Of these metallocenes three are chiral (listed at column 6 line 66 to column 7 line 4). In the case of two of these it is stated that they may be present in the form of the racemic and/or meso isomer.
- 4.6.2 Examples 4 and 5 disclose the preparation of ethylene/1-octene copolymers. The content of 1-octene injected into the reaction vessel was 10 and 5 mole% respectively. The amount of comonomer in the final polymer is not disclosed. The catalyst used in these examples is bis(n-butyl cyclopentadienyl) zirconium combined with methylalumoxane. The metallocene compound is achiral.
- 4.6.3 According to the decision under appeal, which position was endorsed by the respondents (see section VI.c.ii above) the combination of examples 4 and 5 with the statement in the description bridging columns 6 and 7 would anticipate the subject matter claimed.

4.6.4 It is however conspicuous to the board that:

- (a) the examples in question do not disclose the comonomer content of the copolymer obtained;
- (b) the metallocenes employed in these examples cannot exist in either the *rac* or *meso* forms since they are achiral. Hence the position taken by the respondents makes no technical sense.

4.6.5 Accordingly the disclosure of E11 has not been shown to anticipate the subject matter of claim 1 of the main request.

4.7 Since none of the prior art invoked by the respondents anticipates the subject matter of claim 1 of the main request, it is concluded that this subject matter is novel.

4.8 The same applies to the subject matter of claims 2 to 6 which are dependent claims.

5. *The further procedure*

The respondents have requested remittal to the first instance for consideration of inventive step. The appellant has not opposed this request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of the main request (claims 1 to 6) filed with the letter dated 13 April 2006.
3. The request for referral of a question to the Enlarged Board of Appeal is refused.

The Registrar:

The Chairman:

E. Görgmaier

R. Young