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**Datasheet for the decision
of 17 September 2014**

Case Number: T 1729/06 - 3.3.04

Application Number: 03744126.8

Publication Number: 1487256

IPC: A01H5/00, A01H1/00

Language of the proceedings: EN

Title of invention:

Enhanced pollenizer and method for increasing seedless
watermelon yield

Applicant:

Syngenta Participations AG

Headword:

Seedless watermelon/SYNGENTA

Relevant legal provisions:

International Convention for the Protection of New Varieties
of Plants (UPOV Convention)
Convention on the Unification of Certain Points of Substantive
Law on Patents for Invention (Strasbourg Patent Convention)
Article 6
European Union - Directive 98/44/EC of the European Parliament
and of the Council of 6 July 1998 on the legal protection of
biotechnological inventions
EPC Art. 52(1), 53(b)
EPC R. 26(2), 26(3), 26(5), 27(c)
EPC 1973 Art. 53(b)
EPC 1973 R. 23b

Keyword:

"Essentially biological process for the production of plants (no)"

Decisions cited:

G 0001/98, G 0002/07, G 0001/08, T 1054/96, T 0083/05,
T 1242/06

Catchword:

see points 11 to 33



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Case Number: T 1729/06 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 17 September 2014

Appellant: Syngenta Participations AG
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4058 Basel (CH)

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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 13 June 2006
refusing European patent application
No. 03744126.8 pursuant to Article 97(1) EPC
1973.**

Composition of the Board:

Chairwoman G. Alt
Members: B. Claes
D. Rogers

Summary of Facts and Submissions

I. The appeal was lodged by the applicant (hereinafter "appellant") against the decision of the examining division to refuse European patent application 03744126.8 with the title "Enhanced pollenizer and method for increasing seedless watermelon yield" which was filed as international application PCT/US03/05720 on 25 February 2003 and published as WO 03/075641.

II. Independent claims 1 and 5 to 7 of the main request before the examining division, filed with a letter dated 7 April 2006, read:

"1) Use of a diploid watermelon plant comprising a gene *e* as pollenizer for triploid watermelon plants in a process of producing triploid seedless watermelon fruit, wherein the fruits of the diploid watermelon plant are in a size range of between 0.9 to 3.2 kg and the fruit rind is brittle breaking under a pressure in the range of 90 to 150 g/mm².

5) A method for producing triploid, seedless watermelon fruit comprising the steps of:

- a) planting a field with rows of triploid watermelon plants;
- b) planting said field with rows of diploid watermelon plants comprising a gene *e* and small fruits in a size range of between between [*sic*] 0.9 to 3.2 kg with a brittle rind breaking under a pressure in the range of 90 to 150 g/mm²; and
- c) allowing pollination of said triploid watermelon plants by pollen of said diploid watermelon plants to obtain triploid, seedless watermelon fruit.

6) A method of increasing the yield of triploid, seedless watermelon plants, wherein the method comprises the steps of:

a) obtaining diploid watermelon plants for pollenizing said triploid, seedless watermelon plants, which diploid watermelon plants comprise a gene *e* and small fruits in a size range of between 0.9 to 3.2 kg with a brittle rind breaking under a pressure in the range of 90 to 150 g/mm²;

b) planting said diploid watermelon plants in a field of triploid watermelon plants;

c) allowing pollination of said triploid watermelon plants by pollen of said diploid watermelon plants to obtain triploid, seedless watermelon fruit; and

d) harvesting said triploid, seedless watermelon fruit.

7) A method of increasing the yield of triploid, seedless watermelon plants, wherein the method comprises the steps of:

a) obtaining diploid watermelon plants for pollenizing said triploid, seedless watermelon plants, which diploid watermelon plants comprise a gene *e* and small fruits in a size range of between 0.9 to 3.2 kg with a brittle rind breaking under a pressure in the range of 90 to 150 g/mm²;

b) planting said diploid watermelon plants in a field of triploid watermelon plants;

c) allowing pollination of said triploid watermelon plants by pollen of said diploid watermelon plants to obtain triploid, seedless watermelon fruit;

d) harvesting said triploid, seedless watermelon fruit; and

e) eliminating the unharvested fruits of the diploid watermelon plant from further re-production through conventional crop disposal such as discing and plowing."

Claims 2 to 4 were dependent on claim 1, whereas claim 8 was dependent on claims 5 to 7.

III. The examining division decided that the subject-matter of the independent claims of the main request (see section II, above) and the auxiliary request (filed during the oral proceedings on 11 May 2006) before them were essentially biological processes for the production of plants for which European patents shall not be granted in accordance with the provisions of Article 53(b) EPC. It can be taken from the minutes of the oral proceedings that the examining division considered the main request to comply with *inter alia* the requirements of Articles 83 and 84 EPC. The decision and minutes are however silent on whether or not the main request complied with the requirements of Article 123(2) EPC or would comply with any of the patentability requirements other than the exception in Article 53(b) EPC.

IV. With a letter dated 14 August 2012 the appellant requested that the decision be set aside and the case be remitted for further prosecution to the department of first instance. With the same letter the appellant maintained its request for oral proceedings.

V. The arguments of the appellant can be summarised as follows:

Article 53(b) EPC

- The claimed use and methods did not qualify as a process for the production of plants as referred to in the context of Article 53(b) EPC. The claims were, rather than to a method for the production

of plants *per se*, directed to a process for the industrial production of seedless watermelon fruits for human consumption.

- Seedless watermelon fruits were grown from triploid plants. Triploid watermelon plants did not produce viable pollen and without viable pollen triploid watermelon plants did not set fruits and, consequently, no seedless fruits were produced. Triploid watermelon plants had therefore to be pollinated by the pollen of diploid watermelon plants. To provide adequate pollination of triploid watermelon plants, it was current practice to plant diploid polleniser plants over approximately 25-33% of the field surface. The remaining portion of the field was planted with the triploid plants. Thus, to maximize the value of the crop in the field, growers used high yield marketable diploid watermelon varieties, which ultimately competed with the triploid seedless varieties for sun, nutrients and space.

- Article 53(b) EPC did not exempt methods for the industrial production of fruits from patentability. Guidance as to the meaning of the process exclusion in the context of Article 53(b) EPC could be obtained from the following documents: the EPC; the Preparatory Documents of the EPC; the Preparatory Documents of the Strasbourg Patent Convention 1963; the UPOV Convention; the Case Law of the Boards of Appeal and of the Enlarged Board of Appeal of the EPO.

- The German and French language versions of Article 53(b) EPC made clear reference to plant breeding methods. The exclusion from patentability

aimed to avoid double-protection issues by exempting from patentability subject-matter that was amenable to protection under the UPOV Convention. It was the legislator's intention to permit the patenting of subject-matter which could not be protected under the provisions of the UPOV Convention (see decision G 1/98, points 3.4 to 3.7 of the reasons). There was no protection available under the UPOV for a method such as now claimed and, thus, there was no issue of potentially overlapping or double protection. However, the industrial production of watermelon fruits for human consumption was susceptible of industrial application and should therefore not be excluded from patent protection.

- A narrow interpretation of the exclusion in Article 53(b) EPC was justified in view of:
 - the discrepancies between the English version of Article 53(b) EPC on the one side and the French and German version on the other side;
 - the legislative history of Article 53(b) EPC as documented in the Preparatory Documents of the EPC. These showed that it was not the intention of the legislator to exclude subject-matter for which no protection under a plant breeder's rights system was available; and
 - the leading legal principle that exceptions to a general provision, according to which European patents shall be granted for any inventions, were to be construed narrowly.

- When applying a narrow interpretation to the provisions of Article 53(b) EPC, then the expression "processes for the production of plants" did not embrace industrial production methods for producing fruits such as those claimed.

Reasons for the Decision

1. The appeal is admissible

Request for oral proceedings

2. With its letter dated 14 August 2012 the appellant stated that it maintained its request for an oral hearing. The original request for oral proceedings was formulated in the statement of the grounds of appeal and was made conditional on the board not being able to order the grant of a patent in accordance with the main request or the auxiliary request. Given that the board allows the appeal, the board sees no reason to summon the appellant to attend oral proceedings.

Main request - Article 53(b) EPC

3. The examining division refused the present application for the sole reason that the claimed subject-matter (of both the main request and auxiliary request) was an essentially biological process for the production of plants for which pursuant to Article 53(b) EPC no patents shall be granted.

Context of the invention described in the application

4. The present invention is in the field of the production of watermelon fruit, in particular of seedless watermelons (see page 1, lines 5 to 8 of the application as filed).
5. From a botanical point of view the board notes that the watermelon is a monoecious plant and thus has separate male and female flowers on the same plant. The board notes furthermore that seedless watermelons have been produced and marketed for human consumption since the early 1950s (see e.g. W000/70933, page 1, lines 21 to 25, referred to on page 2, line 11 of the application as filed).
6. Watermelon plants setting seedless fruits (see e.g. "Development of Seedless Watermelons", page 9, line 27 to page 11, line 13 of the application as filed) are produced by crossing a tetraploid ($4n=44$) inbred line as the female plant with a diploid ($2n=22$) inbred line as the male parent (note by the board: the reciprocal cross does not produce seeds). The resulting triploid ($3n=33$) seeds can be germinated and grown into a triploid watermelon plant bearing triploid male and female flowers. Characteristically for triploid organisms, however, these triploid plants are female and male sterile, *i.e.* they produce neither female nor male gametes. The reason for this sterility is that triploid plant cells have three sets of chromosomes and one of these sets will not have a matching (homologous) set to pair up with during synapsis of prophase 1 of meiosis. This failure of synapsis results in an improper meiosis and therefore in gametes that are not viable. Accordingly, because the triploid watermelon plant is female sterile, no fertilisation (*i.e.* union

- of female and male gametes) inside the female flower can take place and embryo-bearing seeds are not typically formed on triploid watermelon plants.
7. Triploid watermelon plants are also male sterile and hence self-pollination does not take place. However, in order for triploid watermelon plants to develop fruits (note by the board: i.e. such fruits being seedless watermelons which consist entirely of tissues of the triploid plant), pollination of the sterile female flowers is required (note by the board: for fruit development fertilisation is however not required). It is thus necessary to plant (diploid) watermelon polleniser plants in the watermelon production field to provide the necessary pollen to pollinate the triploid female flowers and thereby stimulate fruit development.
 8. The present application is mainly concerned with the development and the use of particularly advantageous diploid enhanced polleniser plant lines, e.g. NO1F3203B (see "Development of Enhanced Pollenizer Diploid Watermelon", page 11, line 15 to page 15, line 29) and their use in the production of triploid watermelon fruits.

The claimed invention

9. It is in the context of the invention as described above that the claimed subject-matter (see section II, above) is to be assessed:

Independent claim 1 is directed to the **use of a particular diploid watermelon plant as polleniser for triploid watermelon plants, in a process of producing triploid seedless water melon fruit.**

Independent claim 5 is directed to a method for **producing triploid seedless water melon fruit** which comprises the steps of **planting** triploid watermelon plants and a particular diploid watermelon plant and **allowing the pollination of the triploid plants** by the diploid plants to obtain the triploid seedless watermelon fruit.

Independent claims 6 and 7 are directed to methods for **increasing the yield of triploid, seedless watermelon plants** comprising the steps of **planting** particular diploid polleniser watermelon plants and **allowing them to pollinate** triploid watermelon plants **to produce triploid, seedless watermelon fruit** followed by the harvesting of this fruit. Claim 7 comprises the additional step of eliminating the unharvested fruits of the diploid watermelon plants.

10. The subject-matter of the claims is therefore directed to those steps in the production process of seedless watermelons which involve the (planting and) growing of the triploid and diploid watermelon plants, the pollination of the triploid female flowers by the diploid pollen and the development of the seedless watermelon fruit on the triploid plant.

The exclusion from patentability of "essentially biological processes for the production of plants" in the EPC

11. Article 53(b) EPC provides that: "European patents shall not be granted in respect of (b) ... essentially biological processes for the production of plants ...; this provision shall not apply to microbiological processes ...".

12. It has not been argued by the appellant that the claimed use and methods are equivalent to microbiological processes in the sense of the Article 53(b) EPC. The board also considers that these uses and methods are not microbiological processes within the meaning of Article 53(b) EPC. It therefore needs to be assessed by the board, whether or not the claimed use and methods constitute "essentially biological processes for the production of plants" within the meaning of Article 53(b) EPC.

Processes for the production of plants considered excluded from patentability by virtue of Article 53(b) EPC by the Enlarged Board of Appeal

13. The meaning and the scope of the process exclusion in Article 53(b) EPC were considered by the Enlarged Board of Appeal in decision G 1/98 (OJ EPO 2000, 111) and, recently, in great detail in the consolidated decisions G 2/07 and G 1/08 (OJ EPO 2012, 130 and 206).
14. In its decision G 1/98, *supra*, the question raised by this referring board (in a different composition) in its referring decision T 1054/96 (OJ EPO 1998, 511) of how to decide whether a process can be defined as an "essentially biological process" was, however, left unanswered by the Enlarged Board of Appeal (see decision G 1/98, *supra*, point 6 of the reasons). Decision G 1/98, *supra*, is therefore not of direct assistance in this matter.
15. The relevant questions raised by this board (in a different composition) in its referring decisions T 83/05 (OJ EPO 2007, 644) and T 1242/06 (OJ EPO 2008, 523) were, however, answered by the Enlarged Board of

Appeal in its decisions G 2/07, *supra*, and G 1/08, *supra*.

16. In summary, after an analysis of the object and purpose of the process exclusion of Article 53(b) EPC, the Enlarged Board of Appeal came in its decisions G 2/07, *supra*, and G 1/08, *supra*, to the conclusion that (emphasis added by the board) "[a] *non-microbiological process for the production of plants which contains or consists of the steps of **sexually crossing the whole genome of plants and of subsequently selecting plants*** [was] in principle excluded from patentability as being "essentially biological" within the meaning of Article 53(b) EPC" (see decision G 2/07, *supra*, Headnote, answer 1). These "processes were characterised by the fact that the traits of the plants resulting from the crossing were determined by the underlying natural phenomenon of **meiosis. This phenomenon determined the genetic make-up of the plants produced, and the breeding result was achieved by the breeder's selection of plants having the desired traits**" (see decision G 2/07, *supra*, point 6.4.2.3 of the reasons; the full paragraph on page 199). In the context of these, in principle, excluded processes, the Enlarged Board of Appeal added however the qualifications that "[s]uch a process does not escape the exclusion of Article 53(b) EPC merely because it contains, as a further step or as part of any of the steps of crossing and selection, a step of a technical nature which serves to enable or assist the performance of the steps of sexually crossing the whole genomes of plants or of subsequently selecting plants" (see decision G 2/07, *supra*, Headnote, answer 2) and that "[i]f, however, such a process contains within the steps of sexually crossing and selecting an additional step of a technical nature, which step by itself

introduces a trait into the genome or modifies a trait in the genome of the plant produced, so that the introduction or modification of that trait is not the result of the mixing of the genes of the plants chosen for sexual crossing, then the process is not excluded from patentability under Article 53(b) EPC" (see decision G 2/07, supra, Headnote, answer 3).

17. In the case at hand, the claimed use and methods all concern the step of the pollination of triploid watermelon plants by pollen of a particular diploid polleniser watermelon plant and **result in the development of triploid seedless watermelon fruit on the triploid watermelon plants** (see point 10, above). They aim therefore in essence at the production of triploid seedless watermelon fruit on existing triploid watermelon plants and not at the creation of any genetic make-up of any plant produced as the result of meiosis. Indeed, as explained in points 5 and 6, above, the use and methods do not involve successful meiosis in the triploid plant flowers. Rather, they merely concern the pollination of the sterile female flowers of the triploid watermelon plant with pollen of the diploid polliniser plant. They do not concern sexually crossing two whole genomes of plants (implying meiosis and fertilisation) and the subsequent selection of plants.

18. The board is therefore satisfied that the use and methods as subject-matter of the claims are not such methods which the Enlarged Board of Appeal in its decisions G 2/07, *supra*, and G 1/08, *supra*, considered to fall under the exclusion of "essentially biological processes for the production of plants" pursuant to Article 53(b) EPC.

Further considerations by this board on the process exclusion in Article 53(b) EPC in the light of observations by the Enlarged Board of Appeal in decisions G 2/07 and G 1/08

19. Although, on the one hand, the Enlarged Board of Appeal, in its decisions G 2/07, *supra*, and G 1/08, *supra*, has given extensive guidance which processes for the production of plants are "*in principle*" excluded from patentability by virtue of the process exclusion in Article 53(b) EPC (see point 16, above), the board notes that, on the other hand, the Enlarged Board of Appeal has not, in these decisions, given a comprehensive and exhaustive definition of the subject-matter to which the process exclusion in Article 53(b) EPC applies in relation to plant inventions.

20. Indeed, both cases underlying the referring decisions in the cases G 2/07, *supra*, and G 1/08, *supra*, were concerned with processes in which the desired trait of the (resulting) plant was achieved by crossing and selection, i.e. they were breeding methods (for the production of plants). This fact was recognised and acknowledged by the Enlarged Board of Appeal when it stated that "[b]oth cases as they underlie the referring decisions are concerned with processes in which the desired trait of the plant is achieved by crossing and selection, i.e. they are breeding methods" (see decision G 2/07, *supra*, point 6.1.2 of the reasons). The Enlarged Board of Appeal considered subsequently, that "[h]ence, any potential difference in the meaning of the English wording of Article 53(b) EPC "method for the production" of plants as compared with its German and French texts ("Züchtungsverfahren", "procédé d'obtention") [did] not

appear relevant for the referred issues" (see point 6.1.2 of the reasons).

21. A further indication that the Enlarged Board of Appeal in its decisions in fact did not give an exhaustive definition of the subject-matter to which the process exclusion in Article 53(b) EPC is applicable in relation to plant inventions can be found in point 6.4.2.3 (on page 199) of the reasons for decision G 2/07, *supra*. Here the Enlarged Board of Appeal stated that "*[i]t must be concluded that the legislator's intention was to exclude from patentability the kind of plant breeding processes which were the conventional methods for the breeding of plant varieties of that time. These conventional methods included **in particular** those (**relevant for the present referrals**) based on the sexual crossing of plants (i.e. of their whole genomes) deemed suitable for the purpose pursued and on the subsequent selection of the plants having the desired trait(s)*" (emphasis added by the board).

22. The board therefore considers that, notwithstanding the conclusion in point 18, above, it still needs to establish whether or not the claimed uses and methods of the present case are excluded from patentability by virtue of the process exclusion in Article 53(b) EPC for other reasons.

Biotechnological inventions are patentable under the EPC

23. Rule 26(2) EPC states that "biotechnological inventions are inventions which concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used", whereby "biological material" is defined in

Rule 26(3) EPC as any material containing genetic information and capable of reproducing itself or being reproduced in a biological system. Undoubtedly the presently claimed use and methods therefore concern "biotechnological inventions" and are therefore, in principle, patentable (Article 52(1) and Rule 27 EPC).

24. In this context, the Enlarged Board of Appeal, in its decisions G 2/07, *supra*, and G 1/08, *supra*, established (see decision G 2/07, *supra*, point 6.4.2 of the reasons) that "**biological forces and phenomena, to the extent that they are controllable**, are considered to pertain to the area of technologies in which patentable inventions are possible. [...] For biotechnological inventions this is now explicitly enshrined in the EPC and in the Biotech Directive" (see point 23, above and decision G 2/07, *supra*, page 194, two middle paragraphs; emphasis added by the board). The Enlarged Board stated that "*plants and their parts are a material substrate which can be processed by man to achieve a desired result by using natural forces*" (see decision G 2/07, *supra*, page 194, third paragraph).
25. Hence, the board finds that the fruit resulting from the presently claimed uses and methods is "biological material" pursuant to Rule 26(2) EPC. Accordingly, the presently claimed subject-matter, is not explicitly and *a priori* excluded from being a patentable invention under the EPC.

The object and purpose of Article 53(b) EPC

26. As indicated in point 16, above, in its decisions G 2/07, *supra*, and G 1/08, *supra*, the Enlarged Board of Appeal, has extensively analysed the object and purpose of the process exclusion in Article 53(b) EPC as

derivable from the legislative history of the relevant provisions in the Strasbourg Patent Convention (SPC) and the EPC 1973 (see decision G 2/07, *supra*, points 6.4.2.2 and 6.4.2.3 of the reasons).

27. The Enlarged Board of Appeal established that earlier versions of the exclusion now found in Article 53(b) EPC were drafted against the background of the drafting of the UPOV convention (note by the board: concluded in 1961) and the so-called ban on dual protection contained therein.
- 27.1 The first Preliminary Draft Convention of the EC Working Group of 14 March 1961 contained an Article 12(2) providing an exclusion from patentability for **"inventions relating to the production of or a process for producing a new plant variety or a new animal species"**, whereby this provision was not to apply to processes of a technical nature. It was explained in the comments on the Draft Convention that a process of a technical nature applicable to plants, e.g. processes for producing new plants by irradiation of the plant themselves or the seeds with isotopes, would still have to be granted (see decision G 2/07, *supra*, point 6.4.2.2, paragraph bridging pages 195 and 196, emphasis added by the board).
- 27.2 The historical documentation on the drafting of the SPC showed that an originally drafted (optional) exclusion from patentability of *"purely biological, horticultural or agricultural (agronomic) processes"* (note by the board: not limited to processes for the production of plants and also encompassing e.g. growing of plants) was later removed in the legislative process for being unjustified, as the exclusion of *"horticultural or agricultural (agronomic) processes"* was considered to

exclude a whole "*class*" of inventions from patentability. Subsequently, the exclusion of "*purely biological processes*" was re-drafted to the final wording of the exclusion in Article 6 of the SPC which was later taken over, *expressis verbis*, in the EPC 1973 as Article 53(b) EPC (see decision G 2/07, *supra*, point 6.4.2.2, page 196, second paragraph to page 197, second paragraph of the reasons). The Enlarged Board of Appeal noted that, according to the explanations given for the final re-drafting, the notion "*essentially biological processes for the production of plants and animals*" should include those processes which may produce known varieties as well as those which may produce new ones, e.g. selection or hybridisation of known varieties. The new wording "*essentially*" biological (as opposed to "*purely*" biological) made it evident that the provision should be extended to cover processes which were fundamentally of this type even if technical devices were involved, e.g. use of a grafting instrument or of a special greenhouse for growing of a plant (see decision G 2/07, *supra*, point 6.4.2.2, paragraph bridging pages 196 and 197 of the reasons).

28. The board notes in this context that seedless watermelons have been produced and marketed since the early 1950s (see point 5, above). The board accordingly sees no indications in the analysis of the Enlarged Board of Appeal of the object and purpose of Article 53(b) EPC that the legislator(s) intended to cover with the process exclusion such agricultural (agronomic) processes as now claimed in the present application. The board itself has also not been able to identify any such indications in the historical documentation.

*More recent legislative developments concerning
Article 53(b) EPC*

29. The history of more recent legislative developments concerning Article 53(b) EPC have also been analysed in the decisions G 2/07, *supra*, and G 1/08, *supra*, of the Enlarged Board of Appeal.
30. Rule 26(5) EPC was introduced in the EPC as Rule 23b(5) EPC 1973 and remained untouched in the revision of the Implementing Regulations to the EPC 2000. Rule 26(5) EPC states that "A process for the production of plants or animals is essentially biological if it consists entirely of natural phenomena such as crossing or selection".
31. The Enlarged Board of Appeal in its decisions judged that Rule 26(5) EPC, because of its ambiguous, if not contradictory, wording, did not give any useful guidance on how to interpret the term "essentially biological process for the production of plants" in Article 53(b) EPC. The board considers, nevertheless, that the Enlarged Board of Appeal's analysis of the legislative history of Rule 26(5) EPC (see decision G 2/07, *supra*, the whole point 4 of the reasons) contains no indications that the legislator intended to exclude from patentability such use and methods as now claimed in the present application.

Conclusion

32. The board concludes therefore that the legislator drafting Article 53(b) EPC did not have the intention to exclude from patentability a whole class of inventions, *i.e.* horticultural or agricultural (agronomic) processes, under which the now claimed use

and methods undoubtedly fall. Furthermore, the board concludes that the EPC 1973 legislator (and hence the EPC 2000 legislator) only wished to exclude from patentability, in the context of the process aspect of the exclusion in relation to plant inventions, the - then conventional - processes applied by plant breeders in connection with new plant varieties for which a special property right was available under the UPOV Convention and processes which were fundamentally of this type.

33. Accordingly, in view of all the above considerations the board concludes that the use and methods as claimed in the present application are not such as the Enlarged Board of Appeal in its decisions G 2/07, *supra*, and G 1/08, *supra*, considered as being excluded from patentability. This is in view of the fact that the use and methods as claimed neither explicitly nor implicitly involve breeding (mixing of whole genomes) and that the use and methods as claimed are rather agricultural, with there being no intention by the legislator to exclude from patentability this "class" of inventions. The board found no indications in the legislative history of Article 53(b) EPC that the now claimed use and methods were intended to be covered by the article. The board therefore considers that, rather than being excluded from patentability by virtue of Article 53(b) EPC, the claimed uses and methods constitute a "technical process" for which the EPC foresees patentability pursuant to Rule 27(c) EPC.

34. The board therefore allows the appeal.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution on the basis of claims 1 to 8 of the main request filed under cover of a letter dated 7 April 2006.

The Registrar:

The Chairwoman:



P. Cremona

G. Alt

Decision electronically authenticated