

## The Enlarged Board of Appeal to consider Breeding Processes again

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In March 2011 we reported an EPO Enlarged Board of Appeal (EBA) decision on two cases involving patentability of plant breeding processes. In a unique turn of events, the Technical Board of Appeal (TBA) hearing one of the cases has referred it to the EBA for a second time.

The TBA refers cases to the EBA very rarely, only when a fundamental point of law needs clarification. Once the EBA makes its decision, clarifying the point of law, it hands the case back to the TBA to continue the appeal in the light of that clarification. For the TBA to refer the same case twice is unprecedented.

The case is an opposition to a patent for a process of breeding tomatoes, and the tomatoes produced. The TBA referred it to the EBA to decide what the law means by an unpatentable “essentially biological process”.

The [EBA decision](#) held that plant breeding processes which do not involve a genetic engineering step are unpatentable

When the case returned to the TBA, the patent proprietors deleted the process claims, leaving the claims to the tomato products of that process.

The TBA decided that the EBA did not provide guidance on whether products are patentable if they are obtained by an unpatentable process. The TBA has now referred this question to the EBA.

We do not yet know if the EBA will accept this referral. Even if it does, it has a history of side-stepping difficult decisions, so may yet not clarify the law for users. We will report the progress of the referral with interest.