

| | |
|---|----------|
| 1 ARTICLE 27 | 1 |
| 1.1 Text of Article 27 | 1 |
| 1.2 Article 27.1 | 1 |
| 1.2.1 "without discrimination" | 1 |
| 1.2.2 "the field of technology" | 2 |
| 1.3 Relationship with other provisions of the TRIPS Agreement | 3 |

1 ARTICLE 27

1.1 Text of Article 27

Article 27

Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.⁵ Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

*(footnote original)*⁵ For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

- (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
- (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

1.2 Article 27.1

1.2.1 "without discrimination"

1. In *Canada – Pharmaceutical Patents*, in explaining its understanding of the term "without discrimination" in Article 27, the Panel advised against using the term "discrimination" whenever "more precise standards are available", given the potentially "infinite complexity" of the term:

"The primary TRIPS provisions that deal with discrimination, such as the national treatment and most-favoured-nation provisions of Articles 3 and 4, do not use the term 'discrimination'. They speak in more precise terms. The ordinary meaning of the word 'discriminate' is potentially broader than these more specific definitions. It

certainly extends beyond the concept of differential treatment. It is a normative term, pejorative in connotation, referring to results of the unjustified imposition of differentially disadvantageous treatment. Discrimination may arise from explicitly different treatment, sometimes called '*de jure* discrimination', but it may also arise from ostensibly identical treatment which, due to differences in circumstances, produces differentially disadvantageous effects, sometimes called '*de facto* discrimination'. The standards by which the justification for differential treatment is measured are a subject of infinite complexity. 'Discrimination' is a term to be avoided whenever more precise standards are available, and, when employed, it is a term to be interpreted with caution, and with care to add no more precision than the concept contains.

...

In considering how to address these conflicting claims of discrimination, the Panel recalled that various claims of discrimination, *de jure* and *de facto*, have been the subject of legal rulings under GATT or the WTO. These rulings have addressed the question whether measures were in conflict with various GATT or WTO provisions prohibiting variously defined forms of discrimination. As the Appellate Body has repeatedly made clear, each of these rulings has necessarily been based on the precise legal text in issue, so that it is not possible to treat them as applications of a general concept of discrimination. Given the very broad range of issues that might be involved in defining the word 'discrimination' in Article 27.1 of the TRIPS Agreement, the Panel decided that it would be better to defer attempting to define that term at the outset, but instead to determine which issues were raised by the record before the Panel, and to define the concept of discrimination to the extent necessary to resolve those issues."¹

2. The Panel also attributed two different meanings to the term "de facto discrimination" under Article 27.1 in the following terms:

"[D]e facto discrimination is a general term describing the legal conclusion that an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, and because those differential effects are found to be wrong or unjustifiable. Two main issues figure in the application of that general concept in most legal systems. One is the question of *de facto* discriminatory effect - whether the actual effect of the measure is to impose differentially disadvantageous consequences on certain parties. The other, related to the justification for the disadvantageous effects, is the issue of purpose - not an inquiry into the subjective purposes of the officials responsible for the measure, but an inquiry into the objective characteristics of the measure from which one can infer the existence or non-existence of discriminatory objectives."²

1.2.2 "the field of technology"

3. In *Canada – Patent Term*, addressing a claim of discrimination in terms of the field of technology, the Panel stated that it had ascertained neither *de jure* nor *de facto* discrimination:

"In sum, the Panel found that the evidence in record before it did not raise a plausible claim of discrimination under Article 27.1 of the TRIPS Agreement. It was not proved that the legal scope of Section 55.2(1) was limited to pharmaceutical products, as would normally be required to raise a claim of *de jure* discrimination. Likewise, it was not proved that the adverse effects of Section 55.2(1) were limited to the pharmaceutical industry, or that the objective indications of purpose demonstrated a purpose to impose disadvantages on pharmaceutical patents in particular, as is often required to raise a claim of *de facto* discrimination. Having found that the record did not raise any of these basic elements of a discrimination claim, the Panel was able to find that Section 55.2(1) is not inconsistent with Canada's obligations under Article 27.1 of the TRIPS Agreement. Because the record did not present issues

¹ Panel Report, *Canada – Pharmaceutical Patents*, paras. 7.94 and 7.98.

² Panel Report, *Canada – Pharmaceutical Patents*, para. 7.101.

requiring any more precise interpretation of the term 'discrimination' in Article 27.1, none was made."³

1.3 Relationship with other provisions of the TRIPS Agreement

4. In *Canada – Pharmaceutical Patents*, rejecting Canada's argument that Article 27.1 did not apply to exceptions granted under Article 30, the Panel addressed the relationship between these provisions:

"The text of the TRIPS Agreement offers no support for such an interpretation. Article 27.1 prohibits discrimination as to enjoyment of 'patent rights' without qualifying that term. Article 30 exceptions are explicitly described as 'exceptions to the exclusive rights conferred by a patent' and contain no indication that any exemption from non-discrimination rules is intended. A discriminatory exception that takes away enjoyment of a patent right is discrimination as much as is discrimination in the basic rights themselves. The acknowledged fact that the Article 31 exception for compulsory licences and government use is understood to be subject to the non-discrimination rule of Article 27.1, without the need for any textual provision so providing, further strengthens the case for treating the non-discrimination rules as applicable to Article 30. Articles 30 and 31 are linked together by the opening words of Article 31 which define the scope of Article 31 in terms of exceptions not covered by Article 30.⁴ Finally, the Panel could not agree with Canada's attempt to distinguish between Articles 30 and 31 on the basis of their mandatory/permissive character; both provisions permit exceptions to patent rights subject to certain mandatory conditions. Nor could the Panel understand how such a 'mandatory/permissive' distinction, even if present, would logically support making the kind of distinction Canada was arguing. In the Panel's view, what was important was that in the rights available under national law, that is to say those resulting from the basic rights and any permissible exceptions to them, the forms of discrimination referred to in Article 27.1 should not be present."⁵

5. Rejecting Canada's related arguments, the Panel also provided guidance as to the policy considerations contained in Article 27:

"Nor was the Panel able to agree with the policy arguments in support of Canada's interpretation of Article 27. To begin with, it is not true that being able to discriminate against particular patents will make it possible to meet Article 30's requirement that the exception be 'limited'. An Article 30 exception cannot be made 'limited' by limiting it to one field of technology, because the effects of each exception must be found to be 'limited' when measured against each affected patent. Beyond that, it is not true that Article 27 requires all Article 30 exceptions to be applied to all products. Article 27 prohibits only discrimination as to the place of invention, the field of technology, and whether products are imported or produced locally. Article 27 does not prohibit bona fide exceptions to deal with problems that may exist only in certain product areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies referred to in Articles 7 and 8.1, that fact may well constitute a deliberate limitation rather than a frustration of purpose. It is quite plausible, as the EC argued, that the TRIPS Agreement would want to require governments to apply exceptions in a non-discriminatory manner, in order to ensure that governments do not succumb to domestic pressures to limit exceptions to areas where right holders tend to be foreign producers."⁶

³ Panel Report, *Canada – Pharmaceutical Patents*, para. 7.105.

⁴ (*footnote original*) Article 31 is titled "Other Use Without Authorization of the Rights Holder", and footnote 7 to Article 31 defines "other use" as "use" (derogations from exclusive patent rights) other than that allowed by Article 30.

⁵ Panel Report, *Canada – Pharmaceutical Patents*, para. 7.90.

⁶ Panel Report, *Canada – Pharmaceutical Patents*, para. 7.91.

6. In *India – Patents (US)*, the Appellate Body addressed the relationship between Article 27 and Article 70.8 and held that the latter provision applies in a situation where a Member does not make available patents pursuant to the former provision:

"The introductory clause to Article 70.8 provides that it applies '[w]here a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27 ...' of the TRIPS Agreement. Article 27 requires that patents be made available 'for any inventions, whether products or processes, in all fields of technology', subject to certain exceptions. However, pursuant to paragraphs 1, 2 and 4 of Article 65, a developing country Member may delay providing product patent protection in areas of technology not protectable in its territory on the general date of application of the TRIPS Agreement for that Member until 1 January 2005. Article 70.8 relates specifically and exclusively to situations where a Member does not provide, as of 1 January 1995, patent protection for pharmaceutical and agricultural chemical products."⁷

7. In *Canada – Patent Term*, the Appellate Body addressed the relationship between Section 5 and Article 70.2:

"Article 70.2 applies the obligations of the TRIPS Agreement to 'all subject matter existing ... and which is protected' on the date of application of the TRIPS Agreement for a Member. A Member is required, as from that date, to implement all obligations under the TRIPS Agreement in respect of such existing subject matter. This includes the obligation in Article 33. We see no basis in the text for isolating or insulating the obligation in Article 33 relating to the duration of a patent term from the other obligations relating to patents that are also found in Section 5 of the TRIPS Agreement. There is nothing whatsoever in Section 5 to indicate that the obligation relating to patent term in Article 33 differs in application in any respect from the other obligations in Section 5. An obligation that relates to duration must necessarily have a beginning and an end date. On that ground alone, it cannot be argued that the obligation is attached to, and arises uniquely from, certain 'acts'. Although Canada has not done so, it could just as easily be argued that the exclusive rights under Article 28 are also an 'integral part' of the 'act' of granting a patent, as those rights also can arise only from the grant and consequent existence of a patent."⁸

Current as of: December 2020

⁷ Appellate Body Report, *India – Patents (US)*, para. 52.

⁸ Appellate Body Report, *Canada – Patent Term*, para. 77.