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## **1 ARTICLE 33**

### **1.1 Text of Article 33**

#### **Article 33**

##### *Term of Protection*

The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.<sup>8</sup>

(footnote original)<sup>8</sup> It is understood that those Members which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant.

### **1.2 General**

#### **1.2.1 Basic structure**

1. In *Canada – Patent Term*, Canada argued that although it was making available a patent protection period of only 17 years from the date of the *grant* of the patent, contrary to the requirement under Article 33 of a 20-year protection period counting from the date of the *filing* of the patent application, the relevant Canadian law was not inconsistent with Article 33, because – due to the length of the application procedures – the *effective* patent protection period was in fact equal to 20 years, as required by Article 33. The Panel rejected this argument and found a violation of Article 33. On appeal, the Appellate Body first considered the ordinary meaning of Article 33:

"In our view, the words used in Article 33 present very little interpretative difficulty. The 'filing date' is the date of filing of the patent application. The term of protection 'shall not end' before twenty years counted from the date of filing of the patent application. The calculation of the period of 'twenty years' is clear and specific. In simple terms, Article 33 defines the earliest date on which the term of protection of a patent may end. This earliest date is determined by a straightforward calculation: it results from taking the date of filing of the patent application and adding twenty years. As the filing date of the patent application and the twenty-year figure are both unambiguous, so too is the resultant earliest end date of the term of patent protection."<sup>1</sup>

2. As Article 33 requires that a Member "make available" a patent protection period of 20 years, the Appellate Body then considered the meaning of the term "available":

"We agree with the Panel that, in Article 33 of the *TRIPS Agreement*, the word 'available' means 'available, as a matter of right', that is to say, available as a matter of legal right and certainty.

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<sup>1</sup> Appellate Body Report, *Canada – Patent Term*, para. 85.

To demonstrate that the patent term in Article 33 is 'available', it is not sufficient to point, as Canada does, to a combination of procedures that, when used in a particular sequence or in a particular way, *may* add up to twenty years. The opportunity to obtain a twenty-year patent term must not be 'available' only to those who are somehow able to meander successfully through a maze of administrative procedures. The opportunity to obtain a twenty-year term must be a readily discernible and specific right, and it must be clearly seen as such by the patent applicant when a patent application is filed. The grant of the patent must be sufficient *in itself* to obtain the minimum term mandated by Article 33. The use of the word 'available' in Article 33 does not undermine but, rather, underscores this obligation."<sup>2</sup>

3. The Appellate Body agreed with the Panel that Article 33 does not embody a notion of "effective" protection:

"The text of Article 33 gives no support to the notion of an 'effective' term of protection as distinguished from a 'nominal' term of protection. On the contrary, the obligation in Article 33 is straightforward and mandatory: to provide, as a specific right, a term of protection that does not end before the expiry of a period of twenty years counted from the filing date."<sup>3</sup>

### **1.2.2 Relationship with other provisions of the TRIPS Agreement**

4. In *Canada – Patent Term*, the Panel referred to Article 33 in the context of examining Canada's argument that Article 1.1 permitted it to maintain a term for patent protection of 17 years calculated from the date of grant of a patent, in spite of the minimum requirement, under Articles 33 and 70, of granting patent protection for a period expiring 20 years from the date of filing of such application. The Panel noted the discretion of Members, under Article 1.1, to determine the appropriate method of implementing their obligations under the TRIPS Agreement, but emphasized that such discretion did not extend to choosing which obligations to comply with:

"Article 33 contains an obligation concerning the earliest available date of expiry of patents, and Article 62.2 contains a separate obligation prohibiting acquisition procedures which lead to unwarranted curtailment of the period of protection. We recognize that some curtailment is permitted by the text of these two provisions. However, Article 1.1 gives Members the freedom to determine the appropriate method of implementing those two specific requirements, but not to ignore either requirement in order to implement another putative obligation concerning the length of effective protection."<sup>4</sup>

5. In *Canada – Pharmaceutical Patents*, the Panel did not examine an Article 33 complaint after having found a violation of Article 28.1.

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<sup>2</sup> Appellate Body Report, *Canada – Patent Term*, paras. 90 and 92.

<sup>3</sup> Appellate Body Report, *Canada – Patent Term*, para. 95.

<sup>4</sup> Panel Report, *Canada – Patent Term*, para. 6.94.