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1 ARTICLE 65

1.1 Text of Article 65

Article 65

Transitional Arrangements

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.
2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.
3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.
4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.
5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

1.2 General

1. In *Canada – Patent Term*, after upholding the Panel's finding that a term of protection available under the Canadian patent law was shorter than required under Article 33, the Appellate Body distinguished the content of TRIPS obligations from their temporal effect:

"In conclusion, we wish to point out that our findings in this appeal have no effect whatsoever on the transitional arrangements found in Part VI of the TRIPS Agreement. The provisions in Part VI establish when obligations of the TRIPS Agreement are to be applied by a WTO Member and not what those obligations are. The issues raised in this appeal relate to what the obligations are, not to when they apply."¹

¹ Appellate Body Report, *Canada – Patent Term*, para. 100.

1.3 Article 65.4

1.3.1 "an additional period of five years"

2. In *India – Patents (US)*, the Panel linked Articles 27 and 65:

"Article 27 requires that patents be made available in all fields of technology, subject to certain narrow exceptions. Article 65 provides for transitional periods for developing countries: in general five years from the entry into force of the WTO Agreement, i.e. 1 January 2000, and an additional five years to provide for product patents in areas of technology not so patentable as of 1 January 2000. Thus, in such areas of technology, developing countries are not required to provide product patent protection until 1 January 2005."²

3. In *India – Patents (EC)*, the Panel emphasized that its findings on the substance of the TRIPS obligations do not relate in any way to the transition period:

"Since the matter has been addressed by India in its arguments and caused some confusion in the previous case, we would like to underline that the Panel's findings do not in any way foreshorten the transition period of until, at the latest, 1 January 2005 that India has for meeting its obligations under Articles 65.4 and 70.8(b) and (c)."³

1.4 Article 65.5

1.4.1 "changes ... do not result in a lesser degree of consistency"

4. In *Indonesia – Autos*, the Panel examined the claim of the United States that "Indonesia is in violation of its obligations under Article 65.5 of the TRIPS Agreement because provisions of the National Car Programme which were introduced by Indonesia during its transition period under the TRIPS Agreement put special requirements on nationals of other WTO Members in respect of the use of their trademarks which are inconsistent with the provisions of Article 20 of the TRIPS Agreement":

"The arguments put forward by the United States in support of its claim [under Article 65.5] are essentially the same as those that have been considered in paragraphs 14.277 and 14.278 above [in relation to Article 3, in conjunction with Article 20 on use of trademarks]. For the reasons set out in those paragraphs above, [that these are not 'requirements' in the sense of Article 20] we find that the United States has not demonstrated that measures have been taken that reduce the degree of consistency with the provisions of Article 20 and which would therefore be in violation of Indonesia's obligations under Article 65.5 of the TRIPS Agreement."⁴

1.5 Relationship with other provisions of the TRIPS Agreement

5. In *Indonesia – Autos*, the Panel noted that the transition period under Article 65.2 does not apply to Article 3:

"[W]e note that Indonesia has been under an obligation to apply the provisions of Article 3 since 1 January 1996, Article 3 not benefiting from the additional four years of transition generally provided by Article 65.2 to developing country Members."⁵

6. The Panel in *India – Patents (US)* made clear that Article 70.8 is also one of the provisions of the TRIPS Agreement to which the transition period of Article 65 does not apply:

"However, these transitional provisions [in Article 65] are not applicable to Article 70.8, which ensures that, if product patent protection is not already available

² Panel Report, *India – Patents (US)*, para. 7.27.

³ Panel Report, *India – Patents (EC)*, para. 8.1.

⁴ Panel Report, *Indonesia – Autos*, para. 14.282.

⁵ Panel Report, *Indonesia – Autos*, para. 14.266.

for pharmaceutical and agricultural chemical product inventions, a means must be in place as of 1 January 1995 which allows for the entitlement to file patent applications for such inventions and the allocation of filing and priority dates to them so that the novelty of the inventions in question and the priority of the applications claiming their protection can be preserved for the purposes of determining their eligibility for protection by a patent at the time that product patent protection will be available for these inventions, i.e. at the latest after the expiry of the transitional period."⁶

7. Certain provisions of the TRIPS Agreement contain obligations contingent upon the applicability of Article 65 (and Article 66). The Panel in *India – Patents (US)* held with respect to Article 70.9:

"As is the case with Article 70.8(a), the granting of exclusive marketing rights is a special obligation linked with the enjoyment by Members of the transitional arrangements under Articles 65 and 66 of the Agreement."⁷

Current as of: December 2020

⁶ Panel Report, *India – Patents (US)*, para. 7.27.

⁷ Panel Report, *India – Patents (US)*, para. 7.59.