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## **1 ARTICLE 43**

### **1.1 Text of Article 43**

#### ***Article 43***

##### *Evidence*

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

### **1.2 General**

1. In *India – Patents (EC)*, the European Communities claimed – similarly to the United States' claim in the earlier case *India – Patents (US)* – that India had failed to provide an exclusive marketing system pursuant to its obligation under Article 70.9 of the TRIPS Agreement. India argued that a generally available system was not required under Article 70.9; as support for its argument, India pointed to the provisions of Articles 42 [sic] to 48 of the TRIPS Agreement, where the judicial authorities of Members "shall have authority" to order certain actions and contrasted this wording with that of Article 70.9, which provides that marketing rights "shall be granted" when certain conditions are met. The Panel rejected this argument by India:

"We do not share India's view that it can be deduced from the use of these words in those Articles that a system of general availability is not called for under Article 70.9. To infer this, one would have to hold that the omission of the words 'shall have the authority' in Articles 42-48 [sic] (so that a court was required to act in a certain way when prescribed conditions were met, rather than merely having the authority to do so) would mean that a Member would not be expected to give its judicial authorities in advance the authority to act in this way, for example to award an injunction, but could legislate to this effect when a specific occasion arose. Such an inference would obviously be absurd. Rather the function of the words 'shall have the authority' is to address the issue of judicial discretion, not that of general availability."<sup>1</sup>

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<sup>1</sup> Panel Report, *India – Patents (EC)*, para. 7.66.