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## **1 ARTICLE 50**

### **1.1 Text of Article 50**

#### **Article 50**

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

(a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

(b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

## **1.2 Article 50.3**

### **1.2.1 "the applicant's right is being infringed or that such infringement is imminent"**

1. In *India – Solar Cells*, the Panel referred to Article 50 of the TRIPS Agreement as contextual support for its interpretation of Article XX(j) of the GATT 1994. The Panel concluded that if the terms "products in general or local short supply" in Article XX(j) can be read to include products at risk of being in short supply, this could only extend to an "imminent" shortage. The Panel then observed that "where the covered agreements require that harm be 'imminent', they typically explain further that the harm be 'clearly foreseen' and not a matter of 'conjecture or remote possibility'."<sup>1</sup> The Panel offered the following examples:

"Article 3.7 of the Anti-Dumping Agreement, dealing with threat of material injury from dumped imports, provides that the change in circumstances which would create a situation of injury 'shall be based on facts' and 'must be clearly foreseen and imminent', and not 'merely on allegation, conjecture or remote possibility'. See also Article 15.7 of the SCM Agreement, and Article 4.1(b) of the Safeguards Agreement. We observe that Article XII:2(a)(i) of the GATT 1994, concerning balance of payments measures, provides that import restrictions may be taken to 'forestall the imminent threat of, or stop to', a serious decline in its monetary reserves; and Article 50 of the TRIPS Agreement requires that national judicial authorities have the authority to order effective provisional measures to prevent an infringement of intellectual property rights from occurring where there is 'a sufficient degree of certainty ... that such infringement is imminent'."<sup>2</sup>

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<sup>1</sup> Panel Report, *India – Solar Cells*, para. 7.260.

<sup>2</sup> Panel Report, *India – Solar Cells*, fn 621.