1 ADMISSIBILITY AND JURISDICTION

1.1 Introduction

In international dispute settlement proceedings, respondents often argue, as a first line of defence, that one or more of the claims either are inadmissible, or fall outside of the jurisdiction of the international court or tribunal. In contentious proceedings before, for example, the International Court of Justice, a judgment on the merits is frequently preceded by a separate judgment addressing the respondent's objections on admissibility and/or jurisdiction; likewise, rulings on admissibility and/or jurisdiction are a 'standard feature'[1] in the context of investor–State disputes. The issues relating to admissibility and jurisdiction that arise most frequently in the context of WTO dispute settlement are derived from specific provisions of the DSU.[2] These provisions do not embody concepts or principles of general international law, which makes WTO jurisprudence related to those specific provisions of limited relevance or applicability in other contexts. This chapter reviews statements of wider applicability by WTO adjudicators relating to other issues of admissibility and jurisdiction. International decisions 'are replete with fine distinctions between jurisdiction **1.1**

[1] C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), p. 531.
[2] These issues are: (i) whether the complainant's *request for the establishment of a panel* impermissibly broadens the scope of the dispute by including measures and/or claims under treaty provisions that were not included in the complainant's *request for consultations*, as required by Article 4 of the DSU; (ii) whether the complainant's *request for the establishment of a panel* is defective by virtue of a failure to identify the measures at issue and the claims of violation with sufficient precision, as required by Article 6.2 of the DSU; (iii) whether the complainant has, in the course of the proceeding, challenged measures or claimed violations of treaty provisions that were not identified in the *request for the establishment of a panel*, and which therefore fall outside of the panel's *terms of reference* pursuant to Article 7 of the DSU; (iv) whether issues raised on appeal comply with the rules governing *notices of appeal* contained in the Working Procedures for Appellate Review; and (v) whether, in the context of compliance panel proceedings pursuant to Article 21.5 of the DSU, the measures challenged by the complainant are measures '*taken to comply*' with the original recommendations and rulings.

and admissibility'.[3] It is not clear that the distinction between admissibility and jurisdiction carries any legal implications in the context of WTO dispute settlement, and this may explain why it has not been discussed by panels and the Appellate Body (and why it would seem that the two terms have sometimes been used interchangeably by WTO adjudicators).[4] The first part of this chapter reviews, under the rubric of the 'admissibility of claims', statements by WTO adjudicators on: (i) restrictions on admissibility not being lightly inferred; (ii) acquiescence, estoppel and waiver; (iii) absence of legal interest/standing; (iv) failure to implead an 'essential party'; (v) failure to join cases; (vi) failure to exhaust local remedies; (vii) *forum non conveniens*; and (viii) *res judicata*. The second part of this chapter reviews, under the rubric of the 'jurisdiction over claims', statements by WTO adjudicators on: (i) the rule governing claims falling outside of a tribunal's subject-matter jurisdiction; (ii) implied restrictions arising from overlapping jurisdictional competencies among different bodies; (iii) a tribunal's duty to address jurisdictional issues on its own motion; (iv) the timeliness of jurisdictional objections and rulings; and (v) the distinction between jurisdictional issues and issues going to the merits of a case.

1.2 Admissibility of claims

1.2 There have been few, if any, cases in which WTO adjudicators have found that one or more claims were inadmissible on the basis of general international law concepts or principles (as distinguished from specific procedural requirements and limitations contained in the DSU). WTO adjudicators have consistently emphasized that restrictions on the right to bring claims may not be lightly

[3] *Waste Management Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting opinion of Keith Highet, 8 May 2000, para. 57.

[4] For commentary on several issues relating to admissibility and jurisdiction in the context of WTO dispute settlement, see I. Van Damme, 'Inherent Powers of and for the WTO Appellate Body', Working Paper Centre for Trade and Economic Integration, Graduate Institute of International and Development Studies, Geneva, 2008, available at www.graduateinstitute.ch/ctei/page2142.html, pp. 15–35. One understanding of the distinction between admissibility and jurisdiction, and that which is reflected in the organization of jurisprudence in this chapter, is that jurisdiction refers to the scope of the subject-matter that a complaining party can bring before a particular adjudicative body (which is constant and does not change from case to case), whereas inadmissibility concerns an alleged action or omission by a particular complaining party in a particular set of circumstances that may or must lead that adjudicative body to decline to examine a particular claim that otherwise falls within its subject-matter jurisdiction. In other words, a tribunal may find that a claimant's conduct in a particular case renders one or more of its claims, which fall within the tribunal's jurisdiction, inadmissible. The same would apply *mutatis mutandis* with respect to a respondent's defences. The distinction between issues of admissibility and issues of jurisdiction, and the characterization of a respondent's objection as falling into the one or the other category, carries considerable importance in the context of some international dispute settlement systems. Notably, in the field of international commercial arbitration and investor–State dispute settlement, errors by a tribunal relating to its jurisdiction (as distinguished from errors relating to its findings on admissibility) constitute a basis for setting aside or annulling a tribunal's award.

assumed or inferred. The interrelated concepts of acquiescence, estoppel and waiver have been raised in a number of GATT/WTO cases, often in connection with the respondent's argument that one or more claims of violation were inadmissible on the grounds that the challenged measure(s) had been in force for a long period of time. To date, adjudicators have rejected all arguments based on acquiescence, estoppel and waiver. To date, panels and the Appellate Body have also rejected all arguments that the complainant lacked a legal (or other) 'interest' in the dispute and/or 'standing' to invoke the responsibility of the responding Member, that a complainant's failure to join its case to an earlier one brought by another complainant rendered it inadmissible, that consideration of the claims should be dismissed or deferred until the complainant had attempted to resolve the issue in another international forum, or that the dispute would more appropriately be pursued before another international dispute settlement mechanism. In cases where the respondent argued that one or more claims was inadmissible on the basis of such general international law concepts or principles, WTO adjudicators have often proceeded on an *arguendo* approach and reasoned that, assuming for the sake of argument that the concept or principle in question is applicable in WTO dispute settlement, one or more of the conditions for the application of that concept or principle were not met on the facts of the case.[5]

1.2.1 Restrictions on admissibility not lightly inferred*

1.3 In *US – FSC*, the Panel examined a claim that certain US tax exemptions were subsidies contingent upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Footnote 59 to item (e) of the Illustrative List of Export Subsidies in Annex 1 to the SCM Agreement provides, in respect of certain types of tax measures, that 'Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994'. The United States argued, on the basis of footnote 59, that the Panel should 'defer' or 'dismiss' all of the European Communities' claims relating to the tax measure at issue until the European Communities had attempted to resolve the issue at the OECD, or in the 'competent authority' process under the relevant bilateral tax treaties. The Panel rejected the United States' argument. In the course of its analysis, the Panel stated:

> In considering the preliminary objection raised by the United States, we take as a starting-point that, under Article XXIII of GATT 1994, the DSU and Article 4 of the SCM Agreement, a Member has the right to resort to WTO dispute

[5] For WTO jurisprudence on the use of *arguendo* reasoning, see Section 9.3.2.
* See also the cases in Section 4.2.1. ('The narrow definition of and presumption against 'conflict' in international law').

> settlement at any time by making a request for consultations in a manner consistent with those provisions. This fundamental right to resort to dispute settlement is a core element of the WTO system. Accordingly, we believe that a panel should not lightly infer a restriction on this right into the WTO Agreement; rather, there should be a clear and unambiguous basis in the relevant legal instruments for concluding that such a restriction exists.[6]

1.4 In *Mexico – Taxes on Soft Drinks*, Mexico requested that the Panel decline to exercise its jurisdiction until a parallel NAFTA dispute settlement proceeding had been completed. The Panel declined Mexico's request. On appeal, the Appellate Body agreed with the Panel's statement that, in the absence of 'a legal impediment to the exercise of a panel's jurisdiction',[7] a WTO panel 'would seem . . . not to be in a position to choose freely whether or not to exercise its jurisdiction'.[8] The Appellate Body did not consider it necessary, in the circumstances of that dispute, to elaborate on the types of situations that could give rise to a 'legal impediment to the exercise of a panel's jurisdiction'.

1.5 In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body stated that the relinquishment of rights granted by the DSU 'cannot be lightly assumed'. In that case, the Appellate Body examined whether certain understandings that the European Communities had concluded with the United States and Ecuador (following the original panel and Appellate Body proceeding in *EC – Bananas III*) prevented the complainants from subsequently initiating compliance proceedings pursuant to Article 21.5 of the DSU. In the course of its analysis, the Appellate Body stated:

> We consider that the complainants could be precluded from initiating Article 21.5 proceedings by means of these Understandings only if the parties to these Understandings had, either explicitly or by necessary implication, agreed to waive their right to have recourse to Article 21.5. In our view, the relinquishment of rights granted by the DSU cannot be lightly assumed. Rather, the language in the Understandings must reveal clearly that the parties intended to relinquish their rights.[276]

[276] In this respect, we note the International Court of Justice, Preliminary Objections, *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand*), Judgment of 26 May 1961, ICJ Reports (1961) 32, addressing the interpretation of declarations of acceptance of the compulsory jurisdiction of the Court. In order to determine whether Thailand had recognized as compulsory the jurisdiction of the Court, the Court considered that the 'sole relevant question' was whether Thailand's declaration clearly revealed such intention.[9]

[6] Panel Report, *US – FSC*, para. 7.17.
[7] Appellate Body Report, *Mexico – Soft Drinks*, para. 54.
[8] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.
[9] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 217.

1.2.2 Acquiescence, estoppel and waiver[10]

1.6 In the GATT dispute on *EEC – Import Restrictions*, the Panel recognized that the restrictions at issue had been in existence for many years, without being challenged by any GATT contracting party. However, the Panel concluded that:

> [T]his did not alter the obligations which contracting parties had accepted under GATT provisions. Furthermore the Panel considered it would be erroneous to interpret the fact that a measure had not been subject to [dispute settlement under] Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties.[11]

1.7 In *EEC – Pasta Subsidies*, the GATT Panel observed that the European Communities had notified other GATT contracting parties of its subsidies on pasta products in accordance with the notification requirements in Article XVI:1 of the GATT, and that such measures had remained unchallenged over a period of years. However, the Panel found that:

> [T]he notifications under Article XVI:1 of certain export subsidies on processed agricultural products did neither require nor preclude contracting parties from challenging the legality of such practices. As contracting parties were under no legal obligation to challenge the legality of export subsidies of other contracting parties, the mere abstaining from such a legal challenge could not be relied upon as acquiescence to or construed as approval of the legality of such export subsidies. In this context the Panel noted that another Panel had concluded that the fact that certain practices had been in force for some time without being the subject of complaints was not, in itself, conclusive evidence that there was a consensus that they were compatible with the General Agreement.[12]

1.8 In another GATT case, *EEC (Member States) – Bananas I*, the measures at issue had been in place, and their existence notified to other GATT contracting parties, over a number of years. The GATT Panel addressed several interrelated arguments under the heading 'Subsequent practice, acquiescence and estoppel':

> The Panel noted the EEC's argument that subsequent practice of the CONTRACTING PARTIES, or of the parties to the dispute, with respect to the banana import régimes of EEC member States, had resulted in a modification of the rights and obligations under Part II of the General Agreement, or in the complaining parties being estopped (i.e. legally prevented) from raising such rights. In examining this argument, the Panel considered that such modification or estoppel could only result from the express, or in exceptional cases implied, consent of such parties or of the CONTRACTING PARTIES.

[10] See also Chapter 8 generally (Good Faith), and Section 15.8 (Subsequent practice).
[11] GATT Panel Report, *EEC – Import Restrictions*, para. 28.
[12] GATT Panel Report, *EEC – Pasta Subsidies*, para. 4.10 (citing *EEC-Import Restrictions*, supra).

> The Panel considered that the decision of a contracting party not to invoke a right under the General Agreement at a particular point in time could be due to circumstances that change over time. For instance, a contracting party may not wish to invoke a right under the General Agreement pending the outcome of a multilateral trade negotiation, such as the Uruguay Round, or pending an assessment of the trade effects of a measure. The decision of a contracting party not to invoke a right *vis-à-vis* another contracting party at a particular point in time can therefore, by itself, not reasonably be assumed to be a decision to release that other contracting party from its obligations under the General Agreement. The Panel noted in this context that previous panels had based their findings on measures which had remained unchallenged for long periods of time. The Panel therefore found that the mere fact that the complaining parties had not invoked their rights under the General Agreement in the past had not modified these rights and did not prevent them from invoking these rights now.
>
> With respect to subsequent practice of the CONTRACTING PARTIES, the Panel considered that the mere fact that the EEC had notified these restrictions to the CONTRACTING PARTIES, and that such measures had not been acted upon by them until now had not changed the obligations of the EEC under the General Agreement. Any action of the CONTRACTING PARTIES on these notifications would normally have resulted from a request for such action by individual contracting parties. Since, for the reasons set out in the preceding paragraph, the mere failure to make such a request could not be interpreted as a decision to abandon the right to make such a request, the mere inaction of the CONTRACTING PARTIES could not in good faith be interpreted as the expression of their consent to release the EEC from its obligations under Part II of the General Agreement.[13]

1.9 In *EC – Bananas III (Article 21.5 – EC)*, the European Communities took certain measures to implement the DSB recommendations and rulings in *EC – Bananas III*, and then requested the establishment of a compliance panel under Article 21.5 of the DSU with the mandate 'to find that the above-mentioned implementing measures of the EC must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures' – which the complainants had not done. In the course of its analysis, the Panel observed that:

> [T]he failure, as of a given point in time, of one Member to challenge another Member's measures cannot be interpreted to create a presumption that the first Member accepts the measures of the other Member as consistent with the WTO Agreement. In this regard, we note the statement by a GATT panel that 'it would be erroneous to interpret the fact that a measure has not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties'.[14]

[13] GATT Panel Report, *EEC (member States) – Bananas I*, paras. 361–3.
[14] Panel Report, *EC – Bananas III (Article 21.5 – EC)*, para. 4.13 (citing GATT Panel Report, *EEC – Import Restrictions*, para. 28).

1.10 In *Guatemala – Cement II*, Argentina invoked the concepts of acquiescence and estoppel with respect to 'the lack of reaction' by Mexico, in the course of the anti-dumping investigation at issue, to certain alleged violations of the Anti-Dumping Agreement. The Panel found that Mexico was 'under no obligation to object immediately' to the violations it subsequently alleged before the Panel, and could not therefore be considered as having acquiesced to belated notification by Guatemala, to insufficiency in the public notice, or to delay in providing the full text of the application, much less to have given 'assurances' to Guatemala that it would not later challenge these actions in WTO dispute settlement. In the course of its analysis, the Panel distinguished 'acquiescence' from 'estoppel', stating:

> We note that 'acquiescence' amounts to 'qualified silence', whereby silence in the face of events that call for a reaction of some sort may be interpreted as a presumed consent. The concept of estoppel, also relied on by Guatemala in support of its argument, is akin to that of acquiescence. Estoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is 'estopped', that is precluded.[15]

1.11 In *EC – Asbestos*, the parties disagreed on whether the measure at issue was a technical regulation falling within the scope and coverage of the TBT Agreement. In this regard, Canada argued that the European Communities had recognized that the TBT Agreement applied to the measure at issue by notifying the measure at issue (a Decree) to the WTO Committee on Technical Barriers to Trade, and also by virtue of statements allegedly made during the confidential consultations relating to this dispute. The Panel stated:

> From a legal point of view, the question seems to be whether there is *estoppel* on the part of the EC because they notified the Decree or because of their statements, including those during the consultations. This would be the case if it was determined that Canada had legitimately relied on the notification of the Decree and was now suffering the negative consequences resulting from a change in the EC's position. In this case, however, it does not appear that Canada was able legitimately to rely on a notification to the Committee on Technical Barriers to Trade or on a statement made during the consultations. We consider that notifications under the TBT Agreement are made for reasons of transparency. It has been recognized that such notifications do not have any recognized legal effects. Furthermore, notification under the TBT Agreement is one of the few ways of notifying this type of measure for a Member who wishes to show transparency in good faith. Lastly we consider that both the notification and the comments made by the EC during the consultations or in another

[15] Panel Report, *Guatemala – Cement II*, para. 8.23 (citing V. D. Degan, *Sources of International Law* (Martinus Nijhoff Publishers, 1997), pp. 348–9; I. Brownlie, *Principles of International Law* (Clarendon Press, pp. 640–2)).

> context constitute observations on the legal characterization of the Decree. Claims regarding the legal characterization of a fact by the parties, however, cannot bind the Panel.[16]

1.12 In *India – Autos*, India argued that the European Communities' claims were inadmissible because they were already resolved through a bilateral settlement between the parties arising out of an earlier dispute. The Panel observed that 'there may be an argument that a general principle such as *estoppel* may apply' in such circumstances.[17] However, the Panel found that, even if the conclusion of a mutually agreed solution could in some cases preclude a panel from hearing a dispute, the agreement at issue here did not do so given its wording and scope.[18]

1.13 In *Argentina – Poultry Anti-Dumping Duties*, Brazil challenged an Argentine anti-dumping measure before a MERCOSUR Ad Hoc Tribunal and then, having lost that case, initiated WTO dispute settlement proceedings against the same measure. Argentina argued that Brazil was 'estopped' from pursuing its claims before the WTO panel (and/or that the Panel should treat the prior ruling as a 'relevant rule of international law' under Article 31(3)(c) of the Vienna Convention – see para. 4.16 below). Argentina argued that the essential elements of estoppel are '(i) a statement of fact which is clear and unambiguous; (ii) this statement must be voluntary, unconditional, and authorized; (iii) there must be reliance in good faith upon the statement . . . to the advantage of the party making the statement'.[19] The Panel found that the conditions identified by Argentina for the application of the principle of estoppel were not satisfied in that case (and therefore considered it unnecessary to determine whether the three conditions proposed by Argentina were sufficient for the application of that proposal). First, the Panel found that Brazil had made no clear statement that was inconsistent with its subsequent conduct:

> We do not consider Argentina's response sufficient to establish that the three conditions it identified for the application of the principle of estoppel are fulfilled in the present case. Regarding the first condition identified by Argentina, we do not consider that Brazil has made a clear and unambiguous statement to the effect that, having brought a case under the MERCOSUR dispute settlement framework, it would not subsequently resort to WTO dispute settlement proceedings. In this regard, we note that the panel in *EEC (Member States) – Bananas I* found that estoppel can only 'result from the express, or in exceptional cases implied consent of the complaining parties'. We agree. There is no evidence on the record that Brazil made an express

[16] Panel Report, *EC – Asbestos*, para. 8.60 (citing *North Sea Continental Shelf* case, 1969 ICJ Reports, p. 26, para. 30; P. Daillier and A. Pellet, *Droit international public*, 5th edn (1994), p. 834, citing Guggenheim, *Traité de droit international public*, Volume II, p. 158).
[17] Panel Report, *India – Autos*, footnote 364. [18] *Ibid.*, paras. 7.105–7.135.
[19] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.20 and footnote 41 (citing I. Brownlie, *Principles of Public International Law* (Clarendon Press, 1990), p. 641).

> statement that it would not bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR. Nor does the record indicate exceptional circumstances requiring us to imply any such statement. In particular, the fact that Brazil chose not to invoke its WTO dispute settlement rights after previous MERCOSUR dispute settlement proceedings does not, in our view, mean that Brazil implicitly waived its rights under the *DSU*. This is especially because the Protocol of Brasilia, under which previous MERCOSUR cases had been brought by Brazil, imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure. We note that Brazil signed the Protocol of Olivos in February 2002. Article 1 of the Protocol of Olivos provides that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subject-matter in the other forum. The Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia. Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognized that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure.[20]

In *Argentina – Poultry Anti-Dumping Duties*, the Panel also found that Argentina failed to demonstrate the existence of any detrimental reliance on statements allegedly made by Brazil:

> Quoted in full, the third condition reads 'there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement'. Citing the same author, another panel has asserted that '[e]stoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is "estopped", that is precluded'. In our view, merely being inconvenienced by alleged statements by Brazil is not sufficient for Argentina to demonstrate that it was induced to act in reliance of such alleged statements. There is nothing on the record to suggest to us that Argentina actively relied in good faith on any statement made by Brazil, either to the advantage of Brazil or to the disadvantage of Argentina. There is nothing on the record to suggest that Argentina would have acted any differently had Brazil not made the alleged statement that it would not bring the present WTO dispute settlement proceedings. In its abovementioned response to Question 66, which was specifically addressing this issue, Argentina simply stated that it 'is now suffering the negative impact of [Brazil's] change of position' (regarding its earlier practice of not pursuing WTO cases following MERCOSUR rulings in respect of the same subject-matter), without explaining

[20] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.38 (citing GATT Panel Report, *EEC (Member States) – Bananas I*, para. 361; Panel Report, *Guatemala – Cement II*, footnote 791).

> further the nature of that 'negative impact'. Argentina's vague assertion regarding 'negative impact' is not sufficient to demonstrate that it was induced to act in reliance on the alleged statement by Brazil, and that it is now suffering the negative consequences of the alleged change in Brazil's position. For these reasons, we reject Argentina's claim that Brazil is estopped from pursuing the present WTO dispute settlement proceedings.[21]

1.14 In *EC – Export Subsidies on Sugar*, the European Communities argued that the complainants were estopped from bringing certain claims because the alleged violations would have been flagrant and immediately manifest upon the conclusion of the WTO agreements, yet the complainants remained silent on the issue for a number of years. At the outset of its analysis, the Panel set forth the following definition of the principle of estoppel:

> The Panel notes that parties and third-parties to this dispute do not seem to agree on the nature of the principle on estoppel and its exact parameters. Muller and Cottier define it as follows:
>
> > 'It is generally agreed that the party invoking estoppel "must have been induced to undertake legally relevant action or abstain from it by relying in good faith upon clear and unambiguous representations by the other State".'[22]

The Panel in *EC – Export Subsidies on Sugar* proceeded with its analysis by assuming *arguendo* that the principle of estoppel is applicable in WTO dispute settlement proceedings, and then found that there was no basis in the circumstances of that case for finding that the complaining parties were estopped from bringing their claims. In the course of its analysis, the Panel stated:

> In the Panel's view, Brazil's and Thailand's silence concerning the European Communities' base quantity levels as well as with respect to the ACP/India sugar Footnote does not amount to a clear and unambiguous representation upon which the European Communities could rely, especially considering that, in the Panel's view, there was no legal duty upon the Complainants to alert the European Communities to its alleged violations. Furthermore, it is not possible to identify any facts or statements made by the Complainants where they have admitted that the EC measure was WTO consistent or where they have promised that they would not take legal action against the European Communities. In the Panel's view the 'silence' of some of the Complainants cannot be equated with their consent to the European Communities' violations, if any. Moreover, the Complainants' silence cannot be held against other WTO Members who, today, could decide to initiate WTO dispute settlement proceedings against the European Communities. In other words, even if the three Complainants had remained completely silent on this issue, their silence could not be considered a commitment binding on other

[21] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.39 (citing Panel Report, *Guatemala – Cement II*, para. 8.23).

[22] Panel Report, *EC – Export Subsidies on Sugar (Australia)*, para. 7.61 (citing J. P. Müller and T. Cottier, in *Encyclopaedia of Public International Law*, ed. Max Planck Institute (North Holland, 1992), p. 116).