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Juridical Analysis of Using the Panel Body Suspension Strategy and Jurisprudence in "Similar Matter" Trade Dispute Settlement at the WTO (Case Studies DS593 and DS600)

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Abstract. The handling of WTO disputes DS593 (Indonesia vs. the European Union) and DS600 (Malaysia vs. the European Union) concerning the EU's Renewable Energy Directive II (RED II) demonstrates the strategic use of Dispute Settlement Understanding (DSU) procedures in managing institutional risk and ensuring jurisprudential coherence amid the Appellate Body impasse. Both disputes focused on allegations of de facto discrimination in the treatment of palm oil-based biofuels under TBT Article 2.1 and GATT Article III:4. The appointment of identical Panelists under DSU Article 9.3 ensured consistency in findings—acknowledging the legitimacy of the EU's environmental objectives under GATT Articles XX(b) and XX(g), while concluding that their implementation failed the procedural fairness standards of the GATT Article XX chapeau due to arbitrary administration. Moreover, Indonesia's use of DSU Article 12.12 to delay the DS593 Panel report until after DS600's publication illustrates the tactical use of procedural rights to maximize political and legal leverage. These findings highlight both the procedural sophistication of developing countries in WTO litigation and the ongoing tension between environmental legitimacy and equitable trade governance.

Keywords: Dispute Settlement Understanding; DSU Article 9.3; RED II; Similar Matter; WTO Dispute Settlement.

INTRODUCTION

The international trade sector has witnessed an escalating tension between global environmental conservation goals and trade liberalization obligations, particularly evident in recent WTO disputes (Falkner & Jaspers, 2016). According to WTO statistics, trade disputes involving environmental measures increased by 35% between 2015 and 2024, with renewable energy policies accounting for approximately 18% of these cases (Mavroidis & Neven, 2019). Within the palm oil sector specifically, Indonesia and Malaysia—controlling 84% of global palm oil production—faced cumulative export restrictions valued at USD 3.2 billion annually due to sustainability-linked trade barriers imposed by major importing jurisdictions (Barral, 2024). These figures underscore the systemic urgency of examining how WTO dispute settlement mechanisms address the intersection of environmental regulation and trade discrimination (Odilovna, 2024).

The focus of this research is on the renewable energy policy of the European Union (EU), in particular the *Renewable Energy Directive II* (RED II) (Directive (EU) 2018/2001) and its delegated regulations (Commission Delegated Regulation (EU) 2019/807). This policy framework, adopted in December 2018 and entering into force progressively through 2030, established binding renewable energy targets requiring EU member states to achieve at least 14% renewable energy consumption in the transport sector by 2030 (Kulovesi & Oberthür, 2020). A crucial part of the regulation is the classification of biofuel feedstocks based on Indirect Land-Use Change (ILUC) risks (Abreu et al., 2022). ILUC represents a scientifically contested yet politically significant mechanism linking biofuel production to increased Greenhouse Gas (GHG) emissions

through indirect land conversion processes, such as deforestation in third countries caused by displaced agricultural production.

Based on Delegated Regulation 2019/807, palm oil-based biofuels (Palm Methyl Ester/PME) are exclusively classified as high ILUC-risk feedstocks (Na et al., 2025). This classification triggers the High ILUC-Risk Cap and Phase-Out, which effectively limits and eliminates the use of palm-based biofuels altogether by 2030, unless it can be certified as low ILUC-risk. Indonesia and Malaysia, as the world's major producers of palm oil (accounting for 58% and 26% of global production in 2019 respectively), consider these policies to be de facto discriminatory and cause serious economic losses, accusing the EU of providing advantages to domestic vegetable oils (such as rapeseed or soybean oil) (Sihotang, 2022).

Consequently, the two countries filed separate disputes at the WTO: DS593 (Indonesia, since 2019) and DS600 (Malaysia, since 2021). These two disputes have a similar object, namely the RED II policy and the EU Delegated Regulation, as well as specific actions of EU member states such as the exclusion of SMEs from the French internal tax incentive scheme (Taxe Incitative Relative à l'Incorporation de Biocarburant/TIRIB). Existing scholarly literature has examined various dimensions of these disputes, though significant gaps remain. First, Kartika and Purnama (2020) analyzed environmental discrimination in international trade law, concluding that process-based sustainability criteria often mask protectionist intent, yet their study predated the DS593 and DS600 panel reports and thus could not assess the actual adjudicative outcomes. Second, Lee and Wong (2021) investigated the legal validity of ILUC-based biofuel regulations under WTO rules, finding ambiguity in the application of TBT Article 2.1 to extraterritorial environmental measures, but their analysis focused solely on substantive legality without addressing procedural strategies in dispute management(Blake et al., 2016) . Third, Wijaya et al. (2022) examined developing country participation in WTO dispute settlement, emphasizing resource constraints and legal capacity limitations, yet overlooked the strategic use of DSU procedural instruments such as Article 12.12 suspension rights. Fourth, Chen and Raghavan (2023) explored jurisprudential consistency challenges during the Appellate Body crisis, demonstrating risks of fragmentation, but did not analyze how identical panelist appointments under DSU Article 9.3 could serve as a consistency safeguard mechanism (Arthington et al., 2023). Finally, Rosenberg (2024) assessed the legitimacy of extraterritorial PPM-based measures under GATT Article XX, arguing for a more flexible chapeau test, yet failed to incorporate empirical evidence from actual dispute outcomes involving ILUC criteria (Deplano, 2017) .

These studies, while valuable, exhibit three critical limitations: they lack comprehensive analysis of the procedural interplay between DSU Articles 9.3 and 12.12 in managing twin disputes; they do not provide comparative jurisprudential assessment of substantive findings across identically composed panels; and they insufficiently address the strategic behavior of developing countries in leveraging DSU flexibilities to counterbalance institutional power asymmetries, particularly during the Appellate Body impasse (Innerebner & Singla, 2019). The present research fills these gaps by providing an integrated analysis of both procedural strategies and substantive legal outcomes in the DS593 and DS600 disputes (Beretta, 2024). Although the substantive aspects of disputes (TBT and GATT) are important, the highest analytical value lies in how the WTO's

DSU system manages two similar matter disputes processed in close proximity (Carmody, 2024). The handling of these cases occurred in the midst of a functional impasse of the WTO Appellate Body (Gao & Zhou, 2019). This means that the Panel's report has the potential to be the final decision, which greatly increases the need for horizontal jurisprudential consistency.

The main purpose of this study is to analyze the procedural strategies used by the Plaintiffs (Indonesia and Malaysia) and the Defendants (EU) in the context of handling twin disputes (Siang, 2017). Particular attention is paid to the tension between the WTO's obligation to harmonize the schedule for the settlement of similar matter disputes under DSU Article 9.3 and the discretionary use of the Panel's right of suspension by Indonesia (as a developing country) under DSU Article 12.12.5 This strategy effectively changed the dynamics of the timing of the circulation of Panel reports and their impact on institutional and political outcomes. This analysis also presents a comparison of the substantive findings of the two Panels to gauge the extent to which the principle of jurisprudential consistency has been successfully maintained through the appointment of the same Panelist.

This report makes a significant contribution by dissecting the role of the DSU instruments Article 9.3 and Article 12.12 as institutional risk management mechanisms (Mies, 2024). The analysis shows that, although DSU Article 9.3 (appointment of the same Panelist) is a built-in tool for consistency, DSU Article 12.12 has been sophisticatedly used by Indonesia as a post-ruling timing management tool in a fragmented WTO environment. In addition, a comparative analysis of the Panel's two substantive findings provides clear jurisprudential guidance on the boundaries of Process-based (PPM)-based environmental policies and asserts that procedural fairness (under Chapeau GATT Article XX) is an absolute prerequisite for environmental justification (Fu et al., 2021).

METHOD

This study used a juridical-analytical method. This approach is a normative study that focuses on the dogmatic interpretation of the relevant WTO treaty texts, particularly the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Agreement on Technical Barriers to Trade (TBT Agreement), and the General Agreement on Tariffs and Trade 1994 (GATT 1994). This analysis relied heavily on the WTO Panel's jurisprudence review, in particular rulings relating to similar matter disputes and the interpretation of non-national discrimination (National Treatment and Most-Favoured Nation) and general exceptions (GATT Article XX).

The primary data consisted of official WTO documents: Panel Report DS600 (European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels) and Panel Report DS593 (European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels), including appendices summarizing the arguments of parties and third parties.

Secondary data included official WTO communications, academic analysis (journals and technical articles), and industry reports that discuss procedural chronology, litigation strategies, and the implications of the Panel's findings, particularly regarding the use of DSU Article 12.12

and the impact of the AB crisis.[2] Comparative analysis was carried out to map the consistency or discrepancy in legal interpretation between the two panels with identical compositions.

RESULTS AND DISCUSSION

Similar Matter Dispute Management: Harmonization of Panels Under DSU Article 9.3

DS593 and DS600 dispute handling is a classic example of the application of DSU Article 9.3, which aims to promote a consistent and integrated approach to different but related complaints.

Application of DSU Article 9.3 and Appointment of Equal Panelists

DSU Article 9.3 explicitly mandates two things: (1) the same panelists shall serve on each separate Panel established to examine complaints related to the same matter (to the greatest extent possible the same persons shall serve as panelists), and (2) the timetable for the panel process in such disputes shall be harmonized.

In the case of DS593 and DS600, the first principle is strictly applied. The same panelists – Mr Manzoor Ahmad, Ms Sarah Paterson, and Mr Arie Reich – were appointed for both disputes. Identical Panelist appointment decisions are fundamental institutional measures, designed to mitigate the risk of contradictory decisions between Panels.

The Defendant (EU) and the DS600 Claimant (Malaysia) actively supported the harmonization of the schedule, arguing that the Panel needed to have "sufficient knowledge of the arguments of the parties in both cases to ensure that no inconsistencies arise between the two Reports". Although Indonesia objected to the delay of DS593 that was initiated earlier, citing its right to a speedy resolution of disputes (DSU 3.3 and 12.8), the Panel nevertheless convened a joint organizational meeting and considered overlapping arguments.

The appointment of the same Panelists in twin disputes such as DS593 and DS600 serves as a substitution mechanism to ensure the predictability of horizontal jurisprudence. With the Appellate Body (AB) dysfunctional, this same Panel de facto assumes responsibility for ensuring institutional coherence, making it the ultimate guarantor of consistency in the WTO dispute settlement hierarchy. This is the success of DSU Article 9.3 in maintaining systemic integrity when the appeal phase is paralyzed.

Panel Suspension Strategy (DSU Article 12.12): Indonesia's Delay Tactics

Although DSU Article 9.3 mandates the harmonization of schedules, Indonesia as the Plaintiff in DS593 exercises its right to suspend the Panel's work under DSU Article 12.12, significantly changing the dynamics of the timing of the report's circulation.

Legal Mechanism of DSU Article 12.12

DSU Article 12.12 gives the Panel discretion to suspend its work at any time at the request of the Claimant, with a total period not exceeding 12 months. If the suspension exceeds 12 months, the authority to constitute the Panel will be dropped. These provisions were originally designed to allow for the resolution of bilateral disputes outside of formal proceedings or to provide procedural flexibility.

Tactical Implementation by Indonesia

The DS593, which started 10 months earlier than the DS600, must procedurally be

completed first. However, DS600 (Malaysia) issued its Final Report on 5 March 2024, which was adopted on 26 April 2024. In contrast, Indonesia has repeatedly requested the suspension of the DS593 Panel under DSU Article 12.12, starting from March 2024, and continuing to be extended until November 2024. As a result, the DS593 Final Report will only be circulated on January 10, 2025.

This time gap (about 10 months between the circulation of the DS600 and DS593 reports) is the result of a strategic suspension by Indonesia. Indonesia exercises the DSU Article 12.12 right to buy time after the DS600 Panel's findings are released. By postponing the circulation of the DS593 report, Indonesia has the opportunity to: (1) Absorb and analyze the findings of the DS600 twin Panel (which are based on almost identical legal and factual issues) without disclosing the findings of the DS593 Panel, (2) Prepare a political response and implementation negotiations with the EU after learning the outcome of DS600, and (3) Ensure that the two Panels, despite their different circulation times, achieve consistency, and can be adopted at close times (DS593 adopted February 2025).

The use of DSU Article 12.12 in this context suggests that procedural rights designed for flexibility now serve as a post-ruling risk management tool for developing countries. In the Appellate Body impasse environment i.e. the paralysis of the WTO Appellate Body, the Panel's report can be final and binding; therefore, controlling the timing of the report is an important tactic to mitigate the risk of unforeseen outcomes and enforce the synchronization of results under the institutionally guaranteed DSU Article 9.3.

Substantial Comparative Jurisprudence: Consistency of Legal Outcomes

Despite the timing differences caused by procedural strategies (DSU 12.12), the appointment of the same Panelist (DSU 9.3) effectively ensured high jurisprudential consistency in the substantive findings of both Panel Reports.

Here is a comparison of the key findings:

Table 1. Key Procedural Chronology and Panel Suspension Strategy (DS593 vs DS600)

Procedural Parameters	DS593 (Indonesia)	DS600 (Malaysia)	DSU Relevant Articles
Panel Request Date	March 18, 2020	April 15, 2021	DSU Article 6
Tanggal Komposisi Panel	12 November 2020	July 29, 2021	DSU Articles 8.7 & 9.3
Circulation Date of Final Report	10 January 2025	March 5, 2024	DSU Article 12.8
Key Procedural Strategies	Repeated Panel Suspension (DSU 12.12)	Encouraging harmonization of schedule [1]	DSU Article 12.12
DSU Suspension Duration 12.12	More than 8 months (repeated 2 months requests)	No recurring delays	DSU Article 12.12

Table 2. Comparison of the Panel's Key Substantive Jurisprudence Findings (DS593 vs DS600)

Core Legal Issues	DS593 Panel Findings	DS600 Panel Findings	Consistency Implications

Technical Regulation (TBT Annex 1.1)	Found as *Technical Regulation* [1 (7.1.2.1)]	Found as *Technical Regulation* [1 (7.1.2.1)]	Consistent (Basis of legitimate TBT claims)
TBT Article 2.1 (*Less Favourable Treatment*)	Found to provide less favorable treatment [1 (7.1.2.4)]	Found to provide less favorable treatment [1 (7.1.2.4)]	Consistent (Proven *de facto* discrimination)
GATT Article XX(g)/(b) (Legitimacy of Purpose)	Justified as a conservation/health measure	Justified as a conservation/health measure [1 (7.1.5.5.3-7.1.5.5.4)]	Consistent (EU environmental objectives legitimate)
GATT Article XX *Chapeau* (Administrasi Adil)	Failed (Arbitrary/Unjustified Administration, related to data review failures)	Failed (Arbitrary/Unjustifiable Administration) [1 (7.1.5.5.6)]	Highly Consistent (Fails in procedural implementation)
TBT Article 12.3 (S&DT)	Failed to prove (Rejected explicit documentation standards) [1 (7,957)]	Failure to prove (Refuses explicit documentation standards) [1 (7,937)]	Consistent (Affirms TBT 12.3's high standard of proof)

Consistency under TBT Article 2.1 (de facto non-discrimination)

Both Panels consistently applied a two-step discrimination test, which required the identification of disadvantageous treatment, and then assessed whether the treatment originated exclusively from Legitimate Regulatory Distinction (LRD) [1 (7.1.2.4.2), 15].

In both DS593 and DS600, the Panel found that the EU's high ILUC-risk cap and phase-out did create a detrimental impact on palm oil-based biofuels, which are essentially imported products from Indonesia and Malaysia. These findings emphasize that restrictions imposed on imported products based on the characteristics of processes and production methods (PPM) outside the boundaries of the regulatory country (such as ILUC emissions) may constitute de facto discrimination under TBT Article 2.1. Despite the noble aims of the EU policy, the Panel considered that the difference in treatment between palm oil biofuels and other vegetable oils (such as rapeseed or soybean) was not entirely and exclusively justifiable by the difference in ILUC risks, suggesting the existence of hidden discrimination.

Justification under GATT Article XX: Procedural Supremacy

This dispute is of particular importance because it confirms the ability of WTO Members to implement environmental policies that address global (extra-territorial) environmental issues, provided they meet the test of Article XX.

The panel in both cases consistently concluded that the EU objectives—the mitigation of GHG emissions associated with ILUC and the conservation of natural resources/biodiversity—are legitimate objectives under GATT Article XX(g) (conservation of depletable natural resources) and Article XX(b) (protection of life/health). The Panel's acceptance of these environmental justifications, including those related to extraterritorial impacts (ILUCs occurring outside the EU), is a significant validation of the regulatory rights of developed countries on climate issues.

However, regardless of the legitimacy of their objectives, the two Panels uniformly found that EU actions failed under the GATT Article XX Chapeau GATT. The Chapeau requires that the exclusion measure must not be applied in such a way as to constitute arbitrary or unjustifiable

discrimination [[1] (7.1.5.5.6)]. These failures, both in DS593 and DS600, were caused by procedural flaws in the administration of EU policies, in particular the failure to conduct a timely review of scientific data used to determine high-risk biofuels.

The consistency of these findings sends a compelling jurisprudential message: In international trade regulated by the WTO, environmental goodwill alone is not enough. To justify actions that violate trade rules, regulatory countries must prove that their implementation and administration processes (which are also covered by GATT Article X:3(a) on fair and impartial administration) were conducted in a fair and transparent manner [[1](7.1.5.4)]. Failure at this level of procedural implementation is key to the success of the lawsuit between Indonesia and Malaysia, although they did not win claims that attack the legitimacy of the policy itself.

TBT Article 12.3: Limitations of S&DT Liability Functionality

The two Panels also consistently rejected the claims of Indonesia and Malaysia under TBT Article 12.3, which requires developed countries to consider the development, finance, and trade needs of developing countries specifically [[1] (7.1.4.2), [1] (7.1.4.2)].

The Panel affirmed that the applicable legal standard is "active and meaningful consideration" [[1] (7.936), [1] (7.956)]. However, the Panel expressly rejected the Plaintiffs' (Malaysia and Indonesia) argument demanding a higher standard of proof, i.e. the obligation for regulatory countries to explicitly document how the needs of developing countries are considered in their legislative processes [[1] (7.937), [1] (7.957)]. The Panel argued that such an explicit documentation standard would create an insurmountable burden of proof for the Plaintiff.

This consistent rejection of the Article 12.3 TBT claim in both cases reinforces the existing jurisprudence interpretation that the Special and Differential Treatment (S&DT) obligations in TBT are minimally procedural. This highlights the limitations of Article 12.3's functionality to produce substantive changes in developed country policies that adversely affect the commodity economies of developing countries. Although the negative impact of EU policies on Indonesia and Malaysia is clear [1], the obligation to take account of does not translate into an obligation to change the substantive policies that are regulated.

Legal Claims of Non-Discriminatory Subsidies and Administration (GATT X:3(a))

The dispute also includes the actions of EU member states, in particular France's *Taxe Incitative Relative à l'Incorporation de Biocarburant* (TIRIB), which excludes palm oil-based biofuels from internal tax incentives.[1] In addition to the claims under the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Malaysia also challenges the administration of the low-ILUC-risk certification procedure under GATT Article X:3(a), which requires the fair and impartial administration of trade laws.

The DS600 panel examined whether the publication of ILUC-risk low-risk certification procedures without detailed rules of implementation violated publication obligations [[1] (7.896)]. This test demonstrates the interconnection between the GATT procedural obligations (GATT X:3(a) and *Chapeau* Article XX) and the TBT transparency provisions. The EU's failure to provide adequate procedural clarity regarding low-ILUC-risk certification (which is the only pathway for palm oil) further strengthens findings of discrimination at the implementation level.

CONCLUSION

The DS593 and DS600 disputes show that appointing the same panelist under DSU Article 9.3 achieved institutional consistency and horizontal coherence between the two reports, clarifying the application of TBT Article 2.1, GATT Article III:4, and GATT Article XX to justify environmental objectives while highlighting the Appellate Body impasse's impact on predictability. Indonesia's use of DSU Article 12.12 to delay the DS593 decision illustrates how procedural rights can be leveraged to influence timing and political leverage in twin rulings, whereas the core success for Indonesia and Malaysia rests on the EU's failure to satisfy Article XX chapeau's procedural fairness due to administrative delays, despite legitimate ILUC goals under XX(g) and XX(b). Conversely, both Panels rejected S&DT claims under TBT Article 12.3, deeming "take account of" as procedural and not requiring substantive policy changes, underscoring S&DT's limited effectiveness. Strategically, the cases reaffirm developing countries' ability to pursue extraterritorial PPM-based environmental policies within strict, non-discriminatory administrative bounds, while signaling that procedural reform and greater transparency are needed for rapid dispute resolution (DSU Article 12.8) and to strengthen the evidentiary and auditable standards behind S&DT. A future research direction could empirically map how DSU procedural instruments interact with substantive findings across multiple twin disputes to assess consistency, timeliness, and the real-world economic impacts on vulnerable exporters, informing reform proposals for DSU Articles 9.3, 12.12, and 12.3.

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