

Surpassing the Silence of the DSM: Discussion on the Digital Trade Dispute Resolution Path for China and the Global South Countries under the Paralysis of the WTO Appellate Body

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Abstract: Since the appointment of new appellate judges by the World Trade Organization (WTO) was banned in 2019, the paralysis of the appellate body has seriously damaged the Dispute Settlement Mechanism (DSM), leaving a gap in resolving the escalating digital services trade disputes involving complex issues such as data flow and algorithm governance, and the existing WTO rules have failed to fully address these problems. Although MPIA offers a temporary alternative, its limited membership, uncertain executability, and untested applicability to new types of digital disputes make it inadequate. Meanwhile, the rising technological nationalism and fragmented regulations (such as the GDPR and the CLOUD Act) have exacerbated the global digital governance divide, marginalizing China and the countries in the Global South. This article analyzes the decline of DSM, highlighting the eroded rule predictability and legal fragmentation, and critically assesses the limitations of MPIA and the deficiencies of the traditional WTO framework in disputes such as data localization. A series of cases has revealed the trends of “pre-dispute governance” and unilateralism. In the face of this dual crisis, this article holds that China and the Global South must embark on a path of transformation from “system participants” to “system shapers,” rather than merely conforming. The strategies it explores include leveraging domestic regulations (such as data outbound security assessment), promoting regional cooperation (such as the mediation mechanism of RCEP), and advancing initiatives like the Global Data Security Initiative. This dual approach of maintaining “policy sovereignty” and establishing “compliance sovereignty” aims to ensure institutional autonomy, enhance rule-making capabilities, and establish a fairer, rule-based digital trade order in the context of DSM paralysis and regulatory fragmentation.

Keywords: DSM; MPIA; Digital services trade; China-Global South rule-shaping

Online publication: October 3, 2025

1. Introduction

As the global economy undergoes digital transformation, digital services trade has increasingly become a new

focal point in international economic governance. As a key component of the digital economy, digital services trade encompasses not only the cross-border transmission, storage, and processing of data but also multiple fields such as algorithm services, cloud computing, platform economy, and digital platform governance^[1]. Its legal attributes and institutional norms are far more complex than those of traditional goods or services trade. Under this situation, the major theoretical and practical issues facing global data service governance are how to effectively resolve international disputes involving digital services trade and improve the dispute resolution mechanisms for digital services trade.

However, at a time when such disputes are rapidly increasing, the global multilateral trading system is experiencing unprecedented institutional dysfunction. Since its establishment, the WTO's Dispute Settlement Mechanism (DSM) has been regarded as the cornerstone of global economic rule of law. Although it is difficult to accept, the WTO is indeed in decline. Since 2019, the WTO's Appellate Body has been paralyzed due to the United States' prolonged obstruction of new judge appointments, rendering the DSM's three-tiered mechanism system effectively unable to function properly^[2]. This has left trade disputes among members without final, binding rulings^[3]. Such institutional paralysis not only undermines the WTO's authority and credibility but also poses a fundamental challenge to the rules-based multilateral trade system.

Against the failure of the DSM, some members have attempted to fill the institutional void by establishing the Multi-party Interim Appeal Arbitration Arrangement (MPIA)^[4]. On April 27, 2020, China, along with the European Union and more than ten other WTO members, jointly released a ministerial declaration announcing the establishment of the MPIA within the WTO framework. Under this mechanism, disputes among participating members during the temporary suspension of the Appellate Body will be resolved through arbitration procedures outlined in Article 25 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes. China expressed its commitment to collaborating with other WTO members to actively advance efforts to resolve the impasse in the appointment process of Appellate Body members through the MPIA. The goal is to restore the normal functioning of the Appellate Body at the earliest opportunity, thereby upholding the rules-based multilateral trading system^[5]. However, as a temporary arrangement, the MPIA has a limited scope of participating members, insufficient binding force, and lacks predictability, and thus cannot fully replace the original DSM system^[6]. What's more? There are no disputes involving digital services trade that have been addressed through the MPIA mechanism, and its applicability and effectiveness in addressing complex issues such as data flows, digital regulation, and platform rules remain to be tested^[7].

Meanwhile, a new wave of global conservatism is profoundly reshaping the international environment for digital services trade. As Lin *et al.* discussed, major developed countries are increasingly linking data flows and data service trade to national security and technological competition^[8], strengthening control over domestic and foreign platforms through the CLOUD Act, export controls, and investment reviews^[9]. The European Union (EU), on the other hand, is establishing its dominant data governance framework through regulations such as the General Data Protection Regulation (GDPR) and the Digital Markets Act (DMA), exporting compliance standards with strong extraterritorial effects^[10]. The EU had discussed issues related to data services in the GDPR, and the AIA completes the general principles on algorithmic systems and their operation with a risk-based approach to categorization^[11]. As discussed by Wang and Zuo, this trend not only results in highly fragmented global digital governance rules but also creates institutional tensions and disputes between different jurisdictions regarding data sovereignty, review authority, and compliance standards^[12].

Against this failure, cross-border disputes in digital services trade are beginning to exhibit new legal

characteristics and challenges: for example, do data localization requirements fall under the “necessity” exception under the GATS ^[13]? Does the algorithmic black box constitute an implicit technical barrier? These issues often involve sovereignty claims, regulatory logic, and legal cultures across different jurisdictions, and there is a lack of clear adjudication pathways and precedents under existing WTO rules and dispute resolution practices ^[14].

For China, while digital services trade is developing rapidly, it must also confront multiple challenges: on the one hand, platform companies expanding overseas are increasingly facing legal uncertainty and compliance pressures from markets such as the United States, the European Union, and India; on the other hand, for global south countries, the influence in global digital rule-making and dispute resolution mechanisms remains limited ^[15]. How to establish compliance safeguards through domestic regulations and regional arrangements in the context of institutional failure, while enhancing institutional participation and rule-shaping capabilities in international dispute resolution and data global governance, has become a key issue for promoting the sustainable development of China’s digital services trade ^[16].

This article aims to respond to the above questions and focuses on institutional responses to digital trade disputes in the context of the failure of global dispute resolution mechanisms. This article will first analyze the functional decline of the WTO dispute resolution mechanism and its institutional impact on the handling of digital trade disputes, and then assess the operational logic and practical limitations of the MPIA mechanism. Subsequently, this paper will explore the unique legal structure and international trends of digital services trade disputes, particularly in the context of global digital governance, exhibiting a multipolar and fragmented landscape. It will examine how China can establish a dispute resolution mechanism that balances compliance and strategic considerations. Through a combination of institutional analysis and case studies, this article attempts to provide theoretical support and policy recommendations for China to secure greater institutional autonomy and governance leadership in the digital age.

2. The decline of the DSM and its institutional impact on the handling of disputes in digital services trade

2.1. Structure and original functions of the DSM

The WTO Dispute Settlement Mechanism’s core design consists of a 3-stage process: consultation, panel review, and Appellate Body ruling ^[17]. Due to its automaticity, enforceability, and time limits, the mechanism was once considered one of the most successful dispute resolution models in the field of international economic law. In particular, the authoritative rulings made by the Appellate Body are not only legally binding but also form a system of “jurisprudence constante” under the WTO framework through the “accumulation of precedents,” providing institutional guarantees for the stable operation of the multilateral trading system ^[18].

Over the years, the DSM has played a positive role in resolving disputes related to traditional goods trade and certain service trade issues, including cases involving most-favored-nation treatment, national treatment, technical barriers to trade, and subsidy measures. However, entering the second decade of the 21st century, as global trade structures underwent profound transformations and the nature of disputes became increasingly complex, the institutional tensions and operational risks of the DSM began to surface ^[19].

2.2. The paralysis of the Appellate Body and the outbreak of a systemic crisis

Since 2017, the United States has continuously blocked the appointment of new judges on the grounds that the Appellate Body has “overstepped its authority” and that the Dispute Settlement Understanding (DSU) does not

sufficiently reflect member sovereignty^[20]. Finally, in December 2019, due to the lack of three judges, the WTO Appellate Body was unable to form an arbitration panel and officially became paralyzed. This marked the failure of the core mechanism of the DSM and also meant that the WTO dispute settlement system entered an “era without appeals.”

The institutional paralysis of the Appellate Body triggered a widespread crisis of institutional trust, manifested in uncertainty among member states regarding the application of rules, thereby weakening the enforceability of dispute rulings. Additionally, due to the inability to appoint new judges, the “two-tiered adjudication” system was forced to simplify into a one-instance final adjudication mechanism, lacking review procedures and final adjudication mechanisms, further impacting the quality of DSM rulings. The failure of the DSM has further negatively affected the multilateralism supported by the WTO, with some countries choosing to replace multilateral mechanisms with unilateral retaliatory measures or bilateral consultations. Of particular concern is that, although the WTO framework has not yet formed systematic rules for digital trade in services, there is a trend toward an increase in related disputes in the future. In this institutional vacuum, the WTO will be unable to perform its ruling functions normally, and there will be a serious shortage of institutional supply in the digital field.

2.3. New requirements for DSM in digital services trade

Digital services trade has legal characteristics and governance challenges that are significantly different from traditional trade, imposing new institutional requirements on dispute resolution mechanisms. First, the digital services trade is highly mobile. Second, the cross-border nature of digital services often involves multiple jurisdictions and regulatory authorities, making it difficult to apply traditional territorial jurisdiction principles. In terms of evidence review, digital services often involve complex and specialized algorithmic structures and issues related to encrypted storage and transparency crises, significantly increasing the difficulty of obtaining and verifying evidence during the adjudication process^[21]. Additionally, digital trade disputes often involve the intersection of issues across multiple dimensions, such as platform compliance obligations, data privacy rights, and national security, often leading to conflicts between multiple rights that cannot be resolved by a single rule^[22].

However, the WTO has no precedents for rulings on data localization, digital censorship measures, and cross-border compliance disputes, and there is a lack of legal logic that can be applied by analogy. For this reason, the adjudication of digital service trade disputes cannot simply rely on the application of existing GATS provisions or TBT agreements, but requires new methods of interpretation and rule construction^[23]. This requires the DSM to have a higher level of professionalism, adaptability, and institutional innovation capabilities.

2.4. The systemic impact of institutional failure on global digital trade governance

The failure of DSM is not only a procedural crisis, but also poses a structural challenge to the global digital trade governance system. First, it undermines the “predictability of rules” in cross-border data service trade. Businesses and platforms have to deal with compliance issues when it comes to data flow and service exports, which raises legal concerns. Second, it leads to “legal fragmentation” in international trade regulations^[24]. To settle digital conflicts, some members may turn to domestic laws, regional agreements, or bilateral agreements. This makes the institutional structure more fragmented^[25]. In this context, the establishment of the MPIA and the exploration of regional arbitration mechanisms reflect members’ efforts to address the shortcomings of existing mechanisms and maintain the fragile global order. Against this failure, members of the MPIA, or we say those members who hope the WTO will continue to play a role in the resolution of international trade disputes, must reevaluate their role and

strategic positioning in the global digital services trade dispute resolution mechanism, and consider how to create institutional responses in the face of institutional failure, while safeguarding national development interests and promoting the construction of a new institutional framework.

The rise of regional digital economy agreements has further exacerbated the trend toward fragmentation in global dispute resolution mechanisms. The Digital Economy Partnership Agreement (DEPA), the United States-Mexico-Canada Agreement (USMCA), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) all attempt to introduce high standards for data, but their dispute resolution mechanisms are mainly based on bilateral consultations, soft law frameworks, or regional arbitration, and are not subject to the unified jurisdiction of the WTO^[26]. This trend of institutional externalization has increased rule diversity and room for experimentation in the short term, but in the long term, it may pose a challenge to the consistency of global trade law and the uniform application of WTO rules^[27]. It is particularly worth noting that in the process of foreign countries imposing market bans or technical sanctions on China's digital service providers, dispute resolution often does not enter the WTO track but bypasses multilateral mechanisms through exceptions such as national security and data protection. This trend of "universalization of exceptions" (rather than general exceptions) has gradually eroded the institutional authority of the WTO as the "gatekeeper" of the international trade legal order, and has also placed developing members and countries in the Global South in an increasingly asymmetrical position in the institutional game^[28].

3. Exploring the Chinese path: From compliance to controversy-driven institutional innovation

In the face of DSM's failure, the Global South countries need to re-establish institutional responses in the field of digital service trade and further transform themselves from passive "system participant" to "system shaper." This transformation is not a rash move, but is rooted in the reality of the absence of international rules and the intensification of political risks.

3.1. The incident and the absence of multilateral DSM as a case study

Take a certain international data platform service provider as an example. Since 2020, the application has faced multiple bans and national security reviews in the United States. The controversies surrounding its data services should be categorized as investment disputes, digital service freedom, and data flow conflicts. However, due to the lack of clear rules for such data-intensive services in the World Trade Organization's General Agreement on Trade in Services (GATS) and the fact that the investment dispute settlement mechanism (ISDS) is mainly dominated by investment protection treaties, the provider was ultimately forced to defend itself in US courts and even considered selling or restructuring its US business at one point^[29].

In 2023, the European Data Protection Board (EDPB) released a review report on third-country cloud service providers, issuing a compliance warning to a certain overseas enterprise regarding its data processing practices, stating that its data access transparency and data subject rights protection were not in line with the General Data Protection Regulation (GDPR). Although the incident did not escalate into a formal dispute, it significantly hindered the enterprise's business development in Europe through the EU's internal enforcement mechanism^[30]. This case reveals a trend toward "pre-dispute governance," where national regulatory mechanisms preemptively "set the tone" before institutional triggers are activated, effectively creating de facto market exclusion^[31].

3.2. Dual coordination path of “policy sovereignty” and “compliance sovereignty”

Faced with an increasingly complex digital service governance landscape, China’s choice of path is no longer a simple choice between “complying with existing rules” and “withdrawing from or confronting rules,” but rather an effort to build a dual mechanism that is compatible with “policy autonomy” and “international compliance.” On the other hand, China continues to emphasize the global consensus on free trade, technology neutrality, and freedom of services in international forums, and actively participates in WTO e-commerce negotiations and regional agreements (such as RCEP) to ensure “rule security” for external digital services^[32]. By establishing data sovereignty red lines domestically and building compliant channels internationally, China aims to provide sufficient legal space and international acceptability for the actions of Chinese enterprises and the government in an era of rule fragmentation.

4. From “participant” to “leader”: China’s role transformation in global digital dispute governance

With the collapse of the WTO dispute settlement mechanism (DSM) and the surge in disputes over digital trade in services, the “multilateral narrative” of global trade governance is gradually giving way to a new order of “region-led” policy space conflict. Against this backdrop, Global South Countries not only face a lack of tools to protect their rights, but also face the systemic challenge of how to rebuild their voice in digital governance rules. This challenge is not only a legal and regulatory challenge but also a contest of institutional identity and value systems.

4.1. Mechanistic attempts to proactively shape rules

To better address these issues, Global South Countries need to shift from “adhering to existing rules” to “shaping future rules” in the field of resolving disputes in digital services trade. For example, the proposal of the Global Data Security Initiative and the integration of digital trade issues into the negotiations for the upgrading of the China-ASEAN Free Trade Area, both of which demonstrate China’s efforts to reshape the foundational rules of digital trade through multilateral or regional platforms^[33]. These institutional building attempts not only help reduce reliance on a single system but also provide developing countries with a “non-Western-centric” institutional option^[34].

More significantly, China is promoting the establishment of a digital trade dispute resolution mechanism with Chinese characteristics, such as exploring a dispute resolution path within the RCEP that focuses on “neutral mediation & expert assessment.” Such mechanisms are more flexible and efficient than the WTO dispute resolution process and can respond more promptly to disputes in the face of a rapidly changing technological ecosystem.

4.2. Systemic construction of cross-jurisdictional compliance mechanisms

In response to the increasingly complex global compliance environment, the Chinese government and businesses are concurrently advancing a more forward-looking cross-jurisdictional compliance mechanism^[35]. For instance, China has recently enacted the “Measures for the Security Assessment of Data Outbound Transfer” and the “Personal Information Protection Law,” while strengthening data governance responsibilities for platform companies^[36]. These measures are not only institutional responses to external pressures but also crucial steps to enhance China’s institutional competitiveness.

Additionally, in its digital cooperation with countries along the Digital Belt and Road Initiative (DBAR)^[37],

China's data service trade cooperation model is presenting a positive situation of "co-construction, co-governance and shared benefits"^[38]. While this mechanism may not be as systematic as the EU's General Data Protection Regulation (GDPR) in form, it places greater emphasis on flexibility and respect for sovereignty, aligning more closely with the concerns of Global South countries regarding development rights and data sovereignty^[39].

5. Conclusion: A new path for dispute resolution in the era of digital sovereignty

Under the dual impact of the ineffectiveness of the WTO dispute settlement mechanism and the resurgence of global conservatism, dispute resolution in the field of digital trade in services is entering a transitional period of "authority imbalance and order restructuring." China must find its own path of development and institutional breakthroughs amid these changes.

This article argues that the WTO Dispute Settlement Mechanism faces structural difficulties and that the MPIA is temporary and limited. It also reveals the current trend toward diversification in regional dispute resolution mechanisms in digital trade in services. At the same time, if Global South countries want to occupy a dominant position in data services trade dispute resolution and global digital trade governance, they must consider transforming themselves from rule acceptors to rule contributors, especially for countries in the Global South. such as the construction of compliance mechanisms, the promotion of regional cooperation, and the establishment of a legal basis. In the future, if China can further strengthen its discourse system in terms of institutional transparency, predictability, and data governance legitimacy, and expand its influence through institutional output and experience sharing, China will, together with other countries in the Global South, actively participate in building a new positive DSM order in international data service trade and global digital governance, to safeguard the rules-based multilateral trading system.

Disclosure statement

The author declares no conflict of interest.

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