MASTER THESIS

The Appellate Body deadlock at the WTO

An analysis of alternative ad hoc arbitral tribunals
under Article 25 DSU in form of the plurilateral MPIA (2020)
– The Unites States and China –

by

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Abstract

The WTO fulfils three mandates: multilateral negotiations, dispute settlement, and monitoring. Following the stalemate of the Doha Development Round (2001-2015), multilateral trade negotiations came to a halt. This also impacts the dispute settlement pillar. In December 2019, the Appellate Body (AB) as supreme instance of WTO jurisdiction, became deadlocked following a US refusal to consent to the appointment of AB members. To circumvent this unpredictability, so far 51 of the 164 WTO members have joined the EU-initiated 'Multi-Party Interim Appeal Arbitration Arrangement' (MPIA) providing a two-step legal structure similar to the blocked AB. I investigate the decision of the US not to join and China to join the MPIA based on the respective trade strategies from 2017 to 2021. The theoretical framework of Institutional Realism by Keohane (1984) accounts for a member-driven WTO in a post-hegemonic institutional setting and thereby bridges two strands of existing research. While the AB deadlock is commonly either explained with a general WTO governance crisis or the blocking behaviour of the US, I combine both under the concepts of **hegemony**, **harmony**, **cooperation**, and **discord**. I found that while bilateral aspirations dominate US and Chinese trade strategies, neither this nor the discord between US and Chinese interests are the main motivations for a divergent behaviour in the case study on the MPIA. Rather, I found that the trade strategies provide a pronounced explanatory power for the respective decision (not) to join the MPIA. The US trade strategy opposes the AB, is supportive of the AB deadlock and in consequence the US opposes the MPIA as replication of the AB. The Chinese trade strategy supports the AB, opposes the AB deadlock and in consequence China supports the MPIA, which it is member of. While decisions regarding the MPIA can be well explained through the trade strategies, this might look completely different in other parts of the WTO mandate as both the US and Chinese trade strategies violate WTO principles.

Keywords: World Trade Organization WTO, Appellate Body, Trade Dispute Settlement, Multi-Party Interim Appeal Arbitration Arrangement MPIA, EU, US, China.

List of abbreviations

A
AB - *Appellate Body*
AIIB - *Asian Infrastructure Investment Bank*

B
BRI - *Belt and Road Initiative or One Belt, One Road*

C
CAI - *China-EU Comprehensive Agreement on Investment*
CCP - *Chinese Communist Party*
China - *People's Republic of China*
CICC - *China International Commercial Court*
CRS - *Congressional Research Service*
CTB - *Compilation and Translation Bureau*

D
DDA - *Doha Development Agenda*
DG - *Director-General*
DSB - *Dispute Settlement Body*
DSS - *Dispute Settlement System*
DSU - *Understanding on Rules and Procedures Governing the Settlement of Disputes or Dispute Settlement Understanding*

E
EU - *European Union*

F
FTA - *Free Trade Agreement*
FYP - *Five-Year Plan*

G
GATT - *General Agreement on Tariffs and Trade*
GDP - *Gross Domestic Product*

I
IDSP - *International Dispute Settlement Procedure*
IO - *International Organisation*
IR - *International Relations*
ITO - *International Trade Organization*

M
MOFCOM - *Ministry of Commerce of the People's Republic of China*
MPIA - *Multi-Party Interim Appeal Arbitration Arrangement*

N
NAFTA - *North American Free Trade Agreement*
NPC - *National People's Congress of the PRC*

R
PRC - *People's Republic of China (or China)*

R
RBIO - *Rules-based International Order*
RCEP - *Regional Comprehensive Economic Partnership*
RQ - *Research Question*

S
SDT - S*pecial and differential treatment*
SOE - S*tate-owned enterprises*

T
TBT - *Technical Barriers to Trade*
TPP - *Trans-Pacific Partnership*
TRM - *Transnational Review Mechanism*

U
US - *United States (of America)*
USMCA - *United States-Mexico-Canada Agreement*
USTR - *United States Trade Representative*

W
WTO - *World Trade Organization*

Table of Contents

I. Introduction and Research Question

Throughout history, trade and foreign policy have been closely linked, while the latter is often tailored to foster the former. Following the emergence of post-1945 Bretton Woods Institutions, trade has been characterised by increased cooperation and multilateralism, especially within the World Trade Organization (WTO). In its status as member-driven organisation, the WTO fulfils three mandates: multilateral negotiations, dispute settlement, and monitoring (Rashish, 2021, p.4). With a diversification of members and policy areas, however, the multilateral approach which seemed a given, is increasingly challenged. Following the stalemate of the Doha Development Round[1] (2001-2015) due to differences between major trade powers and developing countries, multilateral trade negotiations came to a halt. Gradually, the conclusion of bilateral and plurilateral Free Trade Agreements (FTAs) became the 'new normal' to foster national trade policy objectives. This impacts WTO dispute settlement, mandated to interpret law established in multilateral negotiation rounds. As FTAs contain their own – but sometimes less regulated – dispute settlement mechanisms, the strict rules of WTO dispute settlement started to be questioned by major trade powers, most notably the United States (US).

In 2019, a new change of paradigms might have surfaced with the deadlock of the WTO Appellate Body (AB) as final legal instance in trade dispute settlement. There is now the possibility for the first-instance losing party to 'appeal into the void'. In the climate of growing trade conflicts, this poses the risk of a spillover effect to the benefit of major economic powers, which Pauwelyn (2019) terms the "transformation of the AB from 'crown jewel' to a problem child" (p.297). Not only does the current situation render the AB inoperable but might – depending on the states' behaviour – paralyse the entire WTO dispute settlement system.

The Dispute Settlement Understanding (DSU) provides two solutions to this problem: prior to the Dispute Settlement Body[2] (DSB) ruling, parties can either make an agreement not to appeal[3] or they can agree to have recourse to Article 25 DSU[4] in case of an appeal (De Andrade, 2020). The European Union (EU) took an active role and initiated the creation of an interim solution providing a two-step legal structure similar to the blocked AB. The 'Multi-Party Interim Appeal Arbitration Arrangement' (MPIA) currently unites 51 of the 164 WTO members (EC, 2021), having agreed on a mandatory use of Article 25 DSU in case of non-

[1] "The Doha Development Agenda […] was launched in 2001 but ended in stalemate, with no clear path forward. […] The negotiations were characterized by persistent differences among the United States, European Union (EU), and developing countries on major issues, such as agriculture, industrial tariffs and nontariff barriers, services, and trade remedies. Developing countries sought the reduction of agriculture tariffs and subsidies by developed countries, nonreciprocal market access for manufacturing sectors, and protection for services industries. In contrast, developed countries sought reciprocal trade liberalization, especially commercially meaningful access to advanced developing countries' industrial and service sectors, while retaining some protection for their own agricultural sectors. […] In 2015, WTO members failed to reaffirm Doha mandates and many observers considered the round to be effectively over" (CRS, 2021, p.1).

[2] "DSB, which consists of representatives of the entire membership of the WTO and is empowered to establish dispute settlement panels, adopt panel and Appellate Body reports, oversee the implementation of panel recommendations adopted by the DSB, and authorize retaliation" (USTR, 2017, p.70).

[3] For example adopted in Indonesia - *Safeguard on Certain Iron or Steel Products dispute* (DS 496) (De Andrade, 2020).

[4] Information on Article 25 DSU can be found in the WTO Analytical Index on https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art25_jur.pdf (WTO, (n.d.f.).

satisfaction with the DSB panel report. With the AB being inoperable, this plurilateral procedure might become the 'new normal' among states willing to abide by the rules-based two-level jurisdiction and the automatic binding nature of WTO dispute settlement (Pauwelyn, 2019, p.312). If states decide not to follow one of these two options, they are free to 'appeal into the void' with the inoperable AB and thus cannot be punished in matters of trade disputes.

Considering that a possible deadlock has been on the horizon since the US blocking started in 2017, it is extensively addressed in the academic literature from perspectives on legal as well as political and diplomatic consequences (see chapter II). Political Scientists have identified two strands of explanation: A general WTO governance crisis and the US blocking. While arguments are mostly linked either to the institutional WTO set-up or power-dominated US interests, I bridge these two strands. My arguments rely on a member-driven WTO in a post-hegemonic setting. I investigate the case of the MPIA against the backdrop of international trade dispute settlement in times of geopolitical power shifts. A confrontation between the US as declining hegemon and China as aspiring economic power has been materialising for some time in the context of the Sino-American conflict. On the WTO level, this is particularly evident in the position taken by the two economically dominant states with respect to dispute settlement: While the US has been blocking the (re-)appointment of AB members since 2017, China joined the EU-led MPIA in its very early stages. I investigate to what extent the national trade strategies of the US and China can explain the respective decision (not) to join the MPIA. The results are relevant regarding the interplay of multilateralism, plurilateralism and (regional) bilateralism within the WTO dispute settlement in times of geopolitical shifts.

For this approach, I combine two relevant theoretical debates. While Institutionalism sees the need for stable institutions but understates the member-driven nature and Realism accentuates the struggle for power but neglects the institutional setting, I draw on elements of Institutional Realism by Keohane (1984).The related concepts of **hegemony**, **harmony**, **cooperation**, and **discord** enable me to analyse relations between the US and Chinese national trade strategies as well as their explanatory power for the respective interests pursued in WTO dispute settlement. I hypothesise that following the stalemate of multilateral WTO negotiation rounds and the AB deadlock, the decision of the US and China (not) to join the MPIA is rooted in the respective trade strategy. Therefore, I argue that both the 'realist' account of national trade strategies as well as the 'institutional' setting need to be combined for a pertinent assessment.

The following sub-chapters complete this introduction with a historical outline from GATT to WTO AB deadlock and the Research Question (RQ) which I will embed into the theoretical debate. In chapter II, I expand on this framework with a classification of the AB deadlock within the theoretical approaches of Constructivism, Institutionalism and (Institutional) Realism. This, in turn, provides the grounds for hypotheses concerning the MPIA case study and the US and China as actors. In chapter III, I justify methodological choices before I delve into the analysis in chapter IV. To grant a coherent approach, the national trade strategies from 2017 to 2021 are outlined, before I apply the results to the respective position towards AB deadlock and MPIA. Chapter V concludes and embeds my results in the wider debate on trade dispute settlement.

1.1. Setting the Scene: From GATT to WTO Appellate Body deadlock and MPIA

As a preceding step, a historical outline will support my arguments put forward in the analysis. Subsequently, I depict the judicialisation of trade dispute settlement from GATT to WTO in the 1990s, reasons for the AB deadlock as well as Article 25 DSU and the MPIA as alternative arbitration through the lens of the member-driven WTO nature.

The post-1945 trade regime was created in the aim of peace and security (WTO, n.d.a). After the envisaged International Trade Organization (ITO) could not be realised due to US domestic issues, the General Agreement on Tariffs and Trade (GATT) was signed by 23 states in 1948. It rather represented a multilateral forum for future trade negotiations than a strict rulebook, which is mirrored in the design of its dispute settlement system (DSS). In the 1950s, ad hoc panels decided on whether states had acted against their GATT obligations (Lester, 2020). Thereby, the underlying principle was more political than legal. Panellists were chosen by the disputing parties, impeding their independence. Defendants could block the establishment of a panel as well as the adoption of an issued panel report and thus any unfavourable decision (Zangl, 2008, p.830f.). A rising frustration linked to blocked panel decisions[5] led to the inclusion of the DSS in the Uruguay Round[6] discussions (1986-1993).

Negotiations resulted in the creation of the WTO in 1995. As compared to the politicised GATT dispute settlement, the WTO design builds on an enhanced legal mandate and a

[5] Starting in 1990, a growing divergence […] and a rising complexity of cases led to 59% of panels being blocked which "remained in stalemate" (Pauwelyn, 2019, p.305).
[6] "Launched in 1985, the Uruguay Round was the most ambitious and successful round ever, covering sensitive sectors previously excluded—agriculture and textiles— but also extending to vast new areas of trade, services and intellectual property rights. […] The Uruguay Round created the WTO as a new institutional structure and also established a radically different system of dispute settlement in which panel reports were to be adopted automatically, with no veto right for a losing party, and with a new Appellate Body of sitting judges to consider appeals of panel reports" (Linscott, 2019).

politically independent three-step procedure (**Appendix I**). Disputing parties are first given room for bilateral consultations. In case of non-agreement, the complaining party might request the establishment of a panel[7] within the DSB. This panel report it is automatically adopted, unless the DSB unanimously decides against it or if one or both disputing parties decide to appeal. According to Article 17 DSU, the Appellate Body is composed of seven legal experts, elected by WTO members for two possible four-year terms. For each case, three members are allocated to issue a report within 60 (or 90) days. The AB ruling is quasi-automatically adopted by the DSB and binding for all parties, unless WTO members decide against it by 'negative consensus', involving the winning party (Lester, 2020). In terms of legalisation and enforcement, the Uruguay Round brought three decisive changes: (1) 'right to panel' stopping the veto power of the defendant, (2) 'negative consensus' and quasi-automatic adoption of DSB panel reports and AB rulings, and (3) a decentralised sanctions system.

In the aftermath of the Uruguay Round, negotiators assumed that the mechanism would not be used frequently. The chairperson stated that they "thought that things would go on like in the past, […] nobody expected that the AB would become as active" (Elsig, 2017, p.316). However, as states increasingly used the AB to delay or reverse unfavourable rulings, more than two-thirds of all panel reports have been appealed since 1995 (Lester, 2020).

Elsig (2017) sees this development as one reason behind the current "backlash against the AB, exemplified through an increasing politicization of the appointment procedures" (Elsig and Pollack, 2014; Shaffer et al., 2016; as cited in: Elsig, 2017, p.316). Following this reasoning, the academic literature includes two strands of explanation for the AB deadlock: A general WTO governance crisis and the US blocking. Concerning the former, reasons are the failure of the Doha Development Round, geopolitical rivalries between the US and China as well as a rising number of authoritarian regimes opting for unilateral actions (Petersmann, 2019, p.504).

In addition to these external challenges, AB procedures are increasingly criticised, most vocally by the US – its primary user (**Appendix V**). While the blocking of (re-)appointment of AB members started in 2011 under the Obama Administration[8], former President Trump amplified US concerns regarding the AB. Within the 2018 Trade Policy Agenda, six main issues are scrutinised: First, the US criticises the ***AB for not following the 90-days deadline*** foreseen in Article 17(5) DSU. A second criticism concerns the ***continued service on***

[7] "the panellists are usually chosen in consultation with the countries in dispute. Only if the two sides cannot agree does the WTO director-general appoint them. Panels consist of three (possibly five) experts from different countries who examine the evidence and decide who is right and who is wrong. The panel's report is passed to the Dispute Settlement Body, which can only reject the report by consensus" (WTO, n.d.d.).

[8] The "Obama administration blocked the reappointment of Jennifer Hillman in 2011 supposedly for failing to defend the US interests and perspectives. This was repeated in 2016 when it blocked the reappointment of Seung Wha Chang from South Korea on the grounds of his judicial activism and overreaching decision-making approach. In 2014, it blocked consensus for the appointment of James Gathii who would have been the first and the only black sub-Saharan African member of AB" (Bahri, 2019, p.2).

uncompleted cases of AB members no longer in office. In terms of content, the paper claims the ***AB to issue opinions not necessary to the core dispute***. Building on this, the US reproaches the ***AB for overstepping Article 17(6) DSU by reviewing member's domestic law and facts*** instead of only legal findings. Further, the US classifies the ***AB practice to view its reports as 'precedents'*** for future reports as not consistent with WTO rules. As a concluding remark, the report tackles the ***AB's practice to interpret certain 'rights and obligations' differently*** than they were intended in the negotiated agreements (ibid., p.507f.).

As some of this US criticism is shared by other WTO members and the need for reform of DSS procedures is widely acknowledged, several proposals have been drafted over the past years. The most far-reaching goes back to the 'Walker Principles' issued in 2019. Negotiations led by the New Zealand Ambassador to the WTO, David Walker, directly refer to the above US concerns by demanding the AB to return to the written rules from 1995 (De Andrade, 2020). However, the US did not accept the proposal and the AB deadlock occurred in December 2019.

While many alternatives to the AB have been discussed, the only one providing for a two-level jurisdiction is Article 25 DSU. It presents an interim solution to which parties can agree in case of a dispute "that concern[s] issues that are clearly defined by both parties" (Article 25(1) DSU). In the specific case of the AB deadlock, states acting under Article 25 DSU at the same time agree not to call the AB under Articles 16 and 17 DSU to prevent an 'appeal into the void'. Pursuant to Article 25(4) DSU, reports are comparable to regular reports. Despite all similarities to AB proceedings, Article 25 DSU is not compulsory by nature and thus depends on mutual consent in every case under review at the DSB stage (Sen, n.d.).

To circumvent this unpredictability, an EU-led initiative, inspired by a 2017 paper published by WTO lawyers (Lester, 2020), is operating since April 2020. The 'Multi-Party Interim Appeal Arbitration Arrangement'[9] (MPIA) currently unites 51 of the 164 WTO members. They have agreed on a mandatory use of Article 25 DSU in case of non-satisfaction with the DSB panel report (**Appendix III & IV**). Thereby, MPIA members neither intend to replace the AB nor to directly answer US criticism. Rather, it is an interim agreement to preserve the binding nature of WTO dispute settlement (De Andrade, 2020).

The plurilateral agreement consists of three parts: first, the founding members (EU-27 and 19 states) set out their "commitment to a multilateral rules-based trading system" (WTO, 2020a) in a communication to the DSB dated 30 April 2020. While the interim character of the

[9] "The MPIA will operate under the WTO framework, based on a provision in the WTO's Dispute Settlement Understanding (DSU) for dispute arbitration (Article 25 DSU). It is based on the usual WTO rules applicable to appeals, but also contains some novel elements to enhance procedural efficiency. The interim appeal arrangement is not intended to supplant the WTO's Appellate Body. This is a stopgap measure. As soon as the Appellate Body is again able to operate, appeals will be brought before the Appellate Body" (EC, 2020).

MPIA is stressed, it is supposed to preserve "consistency and predictability in the interpretation of rights and obligations" (ibid.). Annex I specifies the agreed procedures for arbitration under Article 25 DSU. Following the distribution of a DSB panel report to the disputing parties, one or both can send a notification to appeal under the MPIA. The case is then transferred to an arbitral tribunal outside the WTO (Gladstone, 2020). Despite this transfer away from DSS authority, section 15 of the MPIA stipulates: "The parties agree to abide by the arbitration award, which shall be final. Pursuant to Article 25.3 of the DSU, the award shall be notified to, but not adopted by, the DSB and to the Council or Committee of any relevant agreement" (WTO, 2020a). In July 2020, 10 arbitrators were presented, following the same working principles as the AB under Article 17 DSU (**Appendix II & IV**).

Despite not being a direct answer to US concerns, the MPIA is more precise than the AB in three aspects. First, the 90-days deadline can only be extended with consent of the parties (Annex I, section 14), which is supported by limits on page numbers, and number of hearings (Annex I, section 12). Second, reports are restricted to issues "necessary for the resolution of the dispute" (Annex I, section 10), mirroring the US reproach of judicial overreach.

Admittedly, the MPIA circumvents the unpredictability of Article 25 DSU through its binding character. However, MPIA membership is voluntary, and the relevancy of the agreement depends on participating states. While current MPIA members accounted for 25% of DSU caseload since 1995, the US alone accounted for 18% of disputes as defendant during the same time (Hoekman & Mavroidis, 2020, p.704). Hence, a kind of 'parallel system' to the paralysed AB has been created. An impact assessment cannot be conducted at this juncture due to the missing cases decided under the MPIA. The analysis of interests fostering or hindering states to join the MPIA, nevertheless, is a preceding and imperative step towards an assessment of plurilateral or bilateral agreements as a means for future trade dispute settlement.

1.2. Research Question

Against this historical outline, the question now arises as to how AB deadlock on the one hand and MPIA on the other are to be interpreted regarding a rules-based dispute settlement. The purpose of the thesis is to explain the decision of the US and China in a case study on the MPIA based on their trade strategies from 2017 to 2021. This covers the timeframe of the US blocking of (re-)appointment of AB members to the submission date of this thesis with the occurrence of the deadlock in December 2019 being the mid-point.

In a variety of literature dealing with legal questions and International Relations (IR) investigations, the AB deadlock is evaluated against the backdrop of falling back to the power-based and 'realistic' GATT times or a possible continuity of the rules-based WTO order. These considerations depart from adversary predictions stemming from Realism, Institutionalism and Constructivism.[10] The realist lens predicts a further estrangement from the rules-based AB following the logic of self-help and relative gains. Institutionalism, in contrast, describes the world in terms of a rules-based international order (RBIO), absolute gains and is outward-looking in favour of International Organisations (IOs). The Constructivist perspective adds the impact of state identities and interests in the field of international law and the adherence to dispute settlement mechanisms. A Literature Review on trade dispute settlement will be followed by an investigation of the following Research Question (RQ):

RQ: To what extent can the national US and Chinese trade strategies from 2017 to 2021 explain the respective decision (not) to join the plurilateral Multi-Party Interim Appeal Arbitration Arrangement (MPIA) within the WTO framework?

In the introductory part, I have elaborated upon the judicialisation of trade dispute settlement with the emergence of the WTO in 1995, causes of the AB deadlock and possible alternatives including Article 25 DSU. Within the following Literature Review, I will further embed the Research Question into the theoretical debate on international trade dispute settlement and – by means of theory-derived hypotheses – establish a link to the empirical analysis in chapter IV.

[10] see chapter II for selection criteria.

II. Theoretical Framework

Since the emergence of the multilateral trade regime with the GATT in 1948, the previously mentioned internal as well as external changes to the system[11] are discussed within different theoretical debates. The post-1945 trade regime has seen three major landmarks: the creation of the GATT instead of the ITO, the transition from GATT to WTO in 1995, and the stalemate of the Doha Round since 2015. The deadlock of the WTO AB cannot be investigated in isolation from these events, as it can, to a certain extent, be placed in a historical line of trade dispute settlement since 1948 and 1995 respectively.

Based on this understanding, relevant academic publications can be classified according to the theoretical lens applied. Even though the focus varies, most of them treat the aspect of a possible end of the Liberal Order (Ikenberry, 2018; Giuliani, 2019) and a concomitant move away from multilateralism following a new international constellation post-US hegemony. How these insights are explained and what is interpreted into them, however, varies among authors. Whilst some argue that the US is the sole instigator of the crisis by blocking the appointment of AB members, others stress that WTO reform is bitterly necessary – and without the US this is not desirable or even possible (Stephen & Parízek, 2018). In the following Literature Review, I discuss how existing literature on post-hegemony trade dispute settlement applies to the Research Question and to what extent the current situation requires a new approach given changes in the geopolitical landscape.

2.1. Literature Review: the post-hegemonic trade regime

The debate evolving around a possible shift within the world trade regime is broadly studied in academic publications. The question of '*How to permanently commit states to refrain from unilaterally taking measures to protect their economies in a liberal world trade order?'* is discussed within different theoretical approaches. In accordance with the respective ontology, they accentuate different ways of overcoming incentives of unilateral action in a multilateral system: Realism sees the need for a hegemon to make the system binding for the remaining states; Institutionalism stresses the need for stable institutions; and Constructivism focuses explanations on consensual ideas and norms (Slaughter, 2011). The following table contains research results concerning the explanatory power of these three theories in the events of (a) GATT liberalisation, (b) new GATT/ WTO in 1995 and (c) Doha Round (failure).

[11] e.g. the emergence of the WTO in 1995, the rise from 23 to 164 members, the stalemate of the Doha Round, the current AB deadlock and alternative bilateral FTAs.

	Liberalisation GATT	New GATT/WTO	Doha-Round (failure)
Realism	hegemonic stability (initially)	–	–
Institutionalism	stability of the regime	spillover market power	membership of emerging economies
Constructivism	embedded liberalism	neo-liberalism	crisis of legitimacy of neoliberalism

Table 1: International trade policy: explanatory power of theories (Schimmelfennig, 2017, p.265); translated from German original.[12]

While no explanatory power is found within the realist approach for the new GATT/WTO in 1995 and the failure of the Doha Round, I argue that the AB deadlock as well as adherence and non-adherence to the MPIA can best be explained from the perspective of a realist member-driven WTO within an institutional setting. While Institutionalism sees the need for stable institutions but understates the member-driven nature, Realism accentuates the need for a hegemon to make the system binding but neglects the institutional setting. I combine these two approaches as I draw on elements of Institutional Realism by Keohane (1984) and work with the concepts of **hegemony**, **harmony**, **cooperation**, and **discord** (chapter 2.2).

Both occurrences (AB deadlock and MPIA) seem to be very different in terms of bindingness in the liberal WTO system. However, I argue that both reflect **discord** among WTO members (especially US and China) with different degrees of possibility for **coordination** and **policy adjustment** (see conceptualisation chapter 2.2.). Building on this, I argue that Institutional Realism provides the greatest explanatory power for both the decisions of the US not to join the MPIA and China to join in the early stages. To get to this argument, the following Literature Review includes the most prominent articles to demonstrate the classification into three different theoretical debates: Constructivism, Institutionalism, and Realism.

CONSTRUCTIVISM

Emerged in the 1980s, the constructivist approach challenges the "rationalist framework" (Slaughter, 2011, p.4), which – from this perspective – includes Realism, Liberalism, and

[12] Annotation: the original table additionally contains the theories of Liberalism and Transnationalism. As the debate led within these approaches is less present in publications concerning AB deadlock and MPIA, the following Literature Review is restricted on the remaining theoretical debates.

Institutionalism. Constructivism thereby rather represents a set of assumptions than a unified theory (ibid.). Constructivist scholars question that motivation of state action is based on a fear-dominated power struggle. Rather, they ascribe a lot of meaning to ideas and ideals when it comes to shaping state identities in an international surrounding. While Constructivism shares the realist assumption of an anarchic international system (meaning the absence of a world government), Wendt argues that "Anarchy is what states make of it" (1992, p.395).

This view on the international sphere representing a socially constructed reality, however, does not neglect the important role of state actors, even though not as purely rational actors as within the realist approach. Constructivists generally describe states as sovereign actors, acting according to an ideal 'logic of appropriateness' within a dichotomous scheme of 'in-groups' as friends and 'out-groups' as enemies (Slaughter, 2011, p.4). By following incorporated moral values and ideals, states aspire to reach and keep a good international standing. Brown argues that states not only maintain closer relations with others based on geographic proximity or out of security reasons, but following a common ground of shared history, ideas, norms, and identities (2019, p.46). Incentives are thus seen as intrinsic to a state rather than exogenous and stemming from a fear-dominated system as it is the case of Realism.

Fitting into the overall ontology, institutions are seen as reflections of states' identities and interests which are "themselves forged through interaction" (Baylis et al., 2011, p.258). Responding to globalisation, these patterns of interaction will be either reinforced or altered, depending on values and interests of member states (ibid.).

In accordance with the RQ, the following section applies these ontological patterns to international trade dispute settlement and AB deadlock. In their publication on '*Law and Politics in International Dispute Settlement Behaviour'*, Zangl et al. (2011) find that constructivists generally "agree that international (legal) norms matter. Yet, as opposed to rational institutionalists, they underline that they have an impact not only on states' behaviour, but on their interests and identities too" (Koh, 1997; Reus-Smit, 2004; Wendt, 1992; as cited in: Zangl et al., 2011, p.396). They find that if disputing states do not accept legal procedures, they remain meaningless (ibid., p.369). On general terms, constructivist studies show a possible divergence between a sate's behaviour which could have been expected based on its market power and the actual behaviour, often explained with economic policy ideas. With respect to trade dispute settlement, Zangl (2008) has found that US trade representatives acted according to normative commitments just as according to the maintenance of a favourable reputation as they followed their duties under WTO rulings (p.846). With reference to Goldstein & Keohane, Zangl brings this thought to a more abstract level by finding that "state leaders' fundamental

foreign policy beliefs are, among other things, crucial to understanding states' dispute settlement behavior" (ibid., p.847).

With regards to AB deadlock and MPIA, conversely, the opposite is observed by Hoekman & Wolfe (2020). Focusing on the EU, the US, and China as the WTO's three major trade powers, their study finds a "substantial alignment between EU and U.S. respondents' views, but substantially less alignment with those of respondents in China" (p.20). Within the AB system, however, the EU has been found to be closer to China than to the US. This is reflected in China joining the EU-led MPIA. According to the authors, China sees the AB as a means to "push back on U.S. and EU use of trade remedy law" (Shaffer & Gao, 2018, as cited in: ibid., p.18). The US, on the other hand, has been found to see a need for a general addressing of the country's criticism towards the AB (Bahri, 2019), possibly leading to the US's criticism of the MPIA. This is one of the matters to be examined in the analysis.

In all these constructivist considerations, the overarching narrative must be considered. The RQ targets the behaviour of the US and China in the case of the MPIA. However, statements by the respective trade representatives suggest that the conflict within the WTO is part of the larger trade dispute between the two economic superpowers. Relevant academic literature paints a picture that there is indeed an ideological layer to this conflict which contains constructivist traits about ideology, norms, and values (Inkster, 2013). Yet, the larger explanatory framing is placed in the realm of power struggle. While the US has been retreating from its hegemonic role for several years, China is an aspiring superpower. This dichotomy suggests a power struggle, which is clearly questioned from a constructivist perspective. Hence, the constructivist approach does not sufficiently cover the judicialised WTO DSS nor underlying dynamics of the Sino-American conflict to provide a solid framework for the RQ. The following parts of the Literature Review are dedicated to the theories of Institutionalism and Realism taking up these concepts and dynamics.

INSTITUTIONALISM

The WTO as an IO with historic roots in the post-1945 Bretton Woods system is oftentimes studied from the perspective of Institutionalism. Having its origins in the early liberal thinking, Institutionalism as a theory of IR was established under the paradigms of functional and regional integration in the 1940s and 1950s. The approach defends that "the way towards peace and prosperity is to have independent states pool their resources and even surrender some of their sovereignty to create integrated communities to promote economic growth or respond to regional problems" (Baylis et al., 2011, p.121.).

Since the mid-1980s, theoretical debates were dominated by the deliberation between neo-realism and neo-liberalism, also called Institutionalism (ibid., p.116). Both theories share core assumptions of an anarchic international structure, a central role of states, and a rationalist approach to scientific research. However, institutionalists defend the view that despite anarchy, inter-state cooperation is possible through the creation of international regimes. Costs of transaction are lowered by the reciprocal sharing of information and the institutional possibility of punishment in case of rule-breaking (ibid., p.107). This view contrasts with the (neo-)realist view of relative gains, as institutionalists advocate absolute gains in functioning institutions. In the applied field of politics, Institutionalism refers to Western democratic values and free trade (ibid., p.116). Institutions are created for the purpose of mutual gains, expanding through cooperation, and leading to a 'liberal' globalised economy (ibid., p.258).

Within the debate revolving around trade dispute settlement, Zangl et al. (2011) distinguish between a realist and an institutionalist view on International Dispute Settlement Procedures[13] (IDSPs). While (neo-)realists see power constellations as determining factor as to which IDSPs are accepted or not, their *design* is put in the foreground by institutionalists (Zangl et al., 2011, p.370). From an institutional perspective, the legalisation of the GATT dispute settlement can be explained by the spillover mechanism (table 1).

However, institutionalist studies suggest a heterogenisation of interests among WTO members, leading to negotiation obstacles. Bahri (2019) argues that resulting from the stalemate in negotiation rounds, the "litigation wing appears to have compensated for the lack of progress in multilateral negotiations" (p.16). These relations are taken to a more concrete level in a publication by Pauwelyn (2019), entitled '*WTO Dispute Settlement Post 2019: What to Expect?'*. This research approaches the issue of whether a turning away from the legalised WTO AB system inevitably leads to a return to the politically dominated GATT dispute settlement. Pauwelyn puts this possibility into perspective after an in-depth analysis of four different scenarios following the AB deadlock:

(i) appeals 'into the void' and blocking the panel report,
(ii) no appeal ex post, or ex ante no appeal pacts,
(iii) Article 25 appeal arbitration,
(iv) 'floating' panel reports (interim or final), neither adopted, nor appealed/ blocked

Referring to standard legal procedures, Pauwelyn classifies (i), (ii) and (iii) as likely to happen, whereby he considers (iii; Article 25 DSU) as "the only scenario that preserves both an appellate

[13] "IDSPs are procedures for making decisions on alleged violations of international legal norms. […] While a significant number of IDSPs, like the one of the United Nations Security Council, largely follow diplomatic proceedings, […] over the last 30 years more and more IDSPs have become increasingly court-like" (Zangl et al., 2011, p.370).

stage and automatic adoption or bindingness of reports" (p.315). Building on these basic observations, the emphasis of the thesis is constructed on Article 25 DSU and the related MPIA.

In summary, the institutionalist perspective on trade dispute settlement can be broken down to the supremacy of judicialised procedures over diplomatic procedures due to an enhanced compliance of states (Zangl, 2008, p.825). What the institutionalist debate is missing to account for a clear answer to the RQ, however, is the member-driven aspect of the WTO. Changes in the geopolitical landscape and inter-state rivalries might play a more prominent role than the scope given to competing state interests in Institutionalism. Considering that the focus of Realism is more actor-centred, core ideas are now presented under the same angles.

REALISM

As IR analyses are often state-focused, Realism is a frequently applied theoretical lens. Even less unified than the two previous theories, Realism is divided into various sub-understandings such as Classical Realism, Neo-Realism, and Offensive and Defensive Realism. Common to all is, however, the notion of 'anarchy' within a state-centric system stemming from the lack of a central and all-encompassing authority (world government). This does not reflect lawless disorder but assumes states as sovereign actors driven by the pursuit of survival during which they rely solely on themselves (Brown, 2019, p.97f.). John Mearsheimer, a US Political Scientist, has shaped the notion of Great Power Politics, resulting from the restricted knowledge of other states' intentions (Slaughter, 2011, p.1f.). Within the categories of *hard power* (military, resources, etc.) and *soft power* (credibility, moral authority, values), which are for the most part asymmetrically divided among states (Nye, 2005; as cited in: Brown, 2019, p.94), interaction is measured in 'relative gains'. International institutions are not being accorded a high magnitude in this realist system of 'self-help'. With respect to motivations for state actions, Slaughter (2011) puts it as follows: "it is not the rules themselves that determine why a State acts a particular way, but instead the underlying material interests and power relations" (p.2).

Even though institutions are not at the centre of realist thinking, they are included in the neo-realist view. Departing assumptions describe the emergence of institutions as a "product of state interests and the constraints imposed by the international system itself" (Baylis et al., 2011, p.236). Upon these state interests and constraints, the decision on cooperation or competition is based, while the institutional framework is accorded a marginal role. Once institutions are set up, they facilitate policy coordination in a globalised setting. These dynamics, in turn, are not directed towards mutual gains as promoted in the institutional thinking or shaped by states' ideals and values as in the constructivist thinking. They are managed in the interests of the most

powerful states or even a hegemon (ibid., p.258). The question now arises as to how this might be altered in a post-hegemonic setting as it is pertinent to AB deadlock and MPIA.

Establishing a link to the failure of the Doha Round, Stephen & Parízek (2018) explain the AB deadlock with a major shift in the 'distribution of preferences', against which it could not stand the pressure and collapsed (p.749). This argument mirrors a realist perspective of changing US power interests as (former) hegemon. Hoekman & Wolfe (2020) situate this standpoint within a general WTO development. Structural changes of the world economy, manifesting themselves in the US leaving its position as hegemon and the economic rise of China, changed power relations. While some argue that China's intentions are nor clear, Hoekman & Wolfe support that it might be the US as "established or declining power that seeks institutional change" (Kruck and Zangl, 2020, p.13; as cited in: Hoekman & Wolfe, 2020, p.3).

Linking back to trade dispute settlement, realist perspectives differ from institutionalist and constructivist approaches. Many realists do not consider international law as proper law. Departing from this assumption, IDSPs are "considered to be epiphenomena of states' interests and the underlying power constellations" (Zangl, 2008, p.826). Trade dispute settlement – whether politicised or judicialised – is perceived as scarcely effective as the rules are not made by international law, but by the most powerful states. Realists as well as neo-realists transfer this to the national level by arguing that reference to international law is a rhetorical means to justify national interests and enhance the state's international position (ibid.). This is when the notion of 'hegemon' intersects. Some realists maintain that only a hegemonic state disposes of the power to enforce legal actions against rule-breaking states (Zangl et al., 2011, p.371).

While this account might hold true for the majority of WTO DSS rulings, it does not sufficiently consider the institutional framework to which states have (at least formally) committed to when joining the WTO. Zangl (2008) found that the US behaviour in trade disputes with the EU was more in compliance with WTO rulings than with previous GATT rulings. According to the above assumptions, this should be explainable with a shift in the power distribution towards the EU and a relative decline of the US power post-1995. Yet, this cannot be confirmed by Zangl. Taking the gross domestic product (GDP) as indicator of economic power, the ratio between EU and US from 1975 to 2000 has remained relatively stable with the US GDP constantly being about 10% above the EU GDP. The higher US compliance with WTO rules might therefore be due to the WTO judicialisation and not a shift in the power distribution (Zangl, 2008, p.847). This raises the question of the role played by international law within a binding institutional setting. For this reason, the notion of Realism

will henceforth be complemented with core ideas of Institutionalism, as represented in the approach of 'Institutionalist Realism' by Keohane (1984).

INSTITUTIONAL REALISM

The questions raised by Keohane in his 1984 work '*After hegemony – cooperation and discord in the world political economy',* have lost little of their topicality. He has already anchored this in his ideas when he speaks of "implications of this book for understanding the prospects for international cooperation during the coming decades and for theories of world politics" (p.243). Keohane investigates in which forms international cooperation can take place after a hegemon has retrieved. In his words, US hegemony, having shaped Bretton Woods Institutions, is declining since the 1960s. While the EU and Japan (today surpassed by China) rise in economic power, Keohane questions their rising as new hegemon. Historically seen, hegemonic systems emerge following wars. In the nuclear age, a (world) war would be even more devastating, leading Keohane to the conclusion that "hegemony will not be restored during our lifetimes. If we are to have cooperation, therefore, it will be cooperation without hegemony" (ibid., p.244).

Keohane begins his line of arguments with a clear distinction between Institutionalism and Realism, mentioning core assumptions similar to the two previous sections. While, post-hegemony, Institutionalism predicts more cooperation following an increasing need for policy coordination, the realist perspective predicts this change in the power constellation to render the established order inoperable (ibid., p.9). Keohane concludes the following: "Theories that dismiss international institutions as insignificant fail to help us understand the conditions under which states' attempts at cooperation, in their own interests, will be successful" (ibid., p.246). Inasmuch as the theories of Institutionalism[14] and neo-realism described above, depart from comparable assumptions, Keohane refines this mapping procedure by using Realism as starting point for analysing post-hegemonic cooperation and discord. As Realism describes states as "egoistic, rational actors operating on the basis of their own conceptions of self-interest" (ibid., p.245), Keohane adds elements of Institutionalism to display the role of information-sharing in the conception of states' interests, "even when rational egoism persists" (ibid., p.246).

Applied to trade dispute settlement, this combination of Institutionalism and Realism acknowledges the role of international law as well as underlying dynamics shaped by power struggle. Especially in a post-hegemonic system, Institutional Realism covers both. It sees the

[14] Also called neo-liberalism.

need for a hegemon to establish International Organisations. Once established, however, a hegemon is not regarded as necessary anymore (ibid., p.12), as diverging state interests have the power to reshape the system. Central to Keohane's reflections on inter-state relations are the notions **harmony**, **cooperation**, and **discord**, which I conceptualise in the subsequent chapter. A graphical representation of negotiation processes within this scheme is to be found in **Appendix VI**. These ideas make the theoretical debate of Institutionalist Realism especially pertinent to the Research Question. Within the analysis, I investigate the behaviour of the US as declining hegemon and China as rising economic superpower based on their trade strategies in a case study on the MPIA. The institutional frame is given by the WTO dispute settlement system and the MPIA as plurilateral alternative for ad hoc arbitral tribunals.

2.2. Conceptualisation

The three notions **harmony**, **cooperation**, and **discord** shaped by Keohane in his 1984 book are pertinent to the RQ as they cover the 'realist' aspect of trade strategies as well as the 'institutional' WTO setting. As they are embedded in the context of post-hegemonial considerations, I include the term **hegemony** in the conceptualisation. This "process through which we specify what we mean when we use particular terms in research" (Babbie, 2011, p.134), turns generalised notions into measurable real-world concepts. Other notions such as power, anarchy, and self-help are also underlying principles of Institutional Realism. However, I will not conceptualise them in detail. The following analysis, in accordance with the Research Question, investigates the decisions of the US and China within the framework of their institutional WTO membership. Hence, these 'typical' realist notions are less pertinent than the ones presented by Keohane in his reflections on post-hegemonial institutional settings.

	Conceptualisation through the lens of Institutional Realism (Keohane)
Hegemony	• Hegemony depends on **asymmetrical cooperation**, with the hegemon at the top • **Necessary for institution-building**, but not for the maintenance of cooperation (pp.12 & 49)
Harmony	• Situation in which actors' policies enacted in their own self-interest **automatically smooth the attainment of other states' policy ends** • Harmonic situation does not require cooperation • **Harmony is apolitical,** communication is unnecessary (pp.51 & 53)

Cooperation	• Cooperation ≠ absence of conflict • Cooperation is required in case on **non-congruent behaviour** and aims of states • **Highly political setting**: patterns of behaviour need to be brought into conformity through negotiation **('policy coordination'** through positive or negative incentives) • Intergovernmental cooperation: states converge their policies with other states' policies if they see them as contributing to their own objectives (p.51ff.)
Discord	• Situation in which states see other states' polices as **hindering their own objectives** (states hold the others responsible for this situation) • This often results in states trying to alter other states' policies to their own benefit (**policy adjustment** towards more compatibility) • In case of resistance = **policy conflict** • In case of accord = **cooperation** is possible (p.52)

Table 2: Conceptualisation of the terms *harmony*, *cooperation*, and *discord* through the lens of Institutional Realism by Keohane (1984, pp.52-53), complemented by the term *hegemony* (ibid., pp.12 & 49). Own depiction.

2.3. Hypotheses

I analyse the case of the MPIA in a post-hegemonic institutional setting based on related notions of Institutional Realism. The following theory-derived hypotheses will guide the analysis in chapter IV and will be verified or falsified. The hypotheses are based on expected relations between the situation as described in chapter 1.1. and the respective decision of the US and China based on their national trade strategies.

Within the empirical setting, I do not assume a fixed dependent and independent variable for two reasons. First, the considerations are investigated in the form of a qualitative content analysis (see chapter 3.1). I will consider a wide range of possible explanations, which could be interwoven in different ways. Second, not all behavioural patterns may have causal explanations in the trade strategies. Specifying two concrete and unadjustable variables prior to the analysis – which could range between AB deadlock, MPIA, national strategies, and bilateral or plurilateral relations – would make them too broad to grasp or would limit the scope of the analysis. Therefore, the hypotheses are rooted in the overall situation of the trade regime, WTO dispute settlement and national trade strategies without being bound by a necessary causal relationship. Building on this, I answer the RQ in chapter 4.4., before the conclusion opens the discussion to a relevancy on theoretical, empirical, and political/policy levels.

	Hypotheses to be accepted or rejected during the analysis
(H1)	*(H1) The WTO principle of unanimity in appointing AB members requires **harmony** or **cooperation** to uphold the agreed rules of the DSU.*
(H2)	*(H2.1) The deadlock of the Doha Round led to a shift towards bilateral aspirations in national trade strategies.* *(H2.2) These 'realist' trade strategies weakened 'institutional' obligations also in the WTO dispute settlement pillar and minimised the importance of **cooperation** in dispute settlement.* *(H2.3) This culminated in the US blocking of the AB.*
(H3)	*(H3.1) The **discord** between US and Chinese national trade strategies from 2017 to 2021 led to a **policy conflict.*** *(H3.2) Given a less pronounced **asymmetry** in light of the declining US hegemony, this **policy conflict** is the most decisive motivation for a different behaviour regarding the MPIA.*
(H4)	*(H4.1) The US trade strategy pursues a zero-sum approach which is in **discord** with the rules-based and non-discriminatory status of the WTO.* *(H4.2) The US resistance to proposals by other WTO members displays a **policy conflict** which resulted in the decision against joining the MPIA.*
(H5)	*(H5.1) The Chinese trade strategy pursues a zero-sum approach which is in **discord** with the rules-based and non-discriminatory status of the WTO.* *(H5.2) However, China as aspiring economic power needs allies within the international trade regime. It thus uses its accession to the MPIA to make use of the boosting effect of the 'international cycle' on the 'internal cycle' within the 'dual circulation strategy' by means of **policy adjustment**.*

Table 3: Hypotheses based on the notions *hegemony, harmony, cooperation,* and *discord* inherent to the theory of Institutional Realism. Answers to the Hypotheses are to be found in chapter 4.3.

III. Methodology

In the following sub-chapters, I describe the methodological procedure of the thesis. As it concludes a Master Programme in the field of Political Sciences, I worked with three books: *The Basics of Social Research* (2011) by Earl Babbie, *Quality Criteria for Quantitative, Qualitative and Mixed Methods Research* (2008) by Bryman et al. and *Research Methods for the Social Sciences* (2020) by Valerie Sheppard. All three present an account of social research methods and a balanced approach towards options of data collection and research design.

3.1. Case Selection and Research Design

The following analysis is a **case study on the MPIA** in a post-hegemonic situation of the WTO dispute settlement system. The relevancy of the MPIA derives from the possibility to classify it – conjointly with the AB deadlock – as fourth decisive event in the international trade regime.[15] The case of the MPIA is actor-dependent and the analysis focuses on the US as declining hegemon and China as rising economic superpower within the WTO framework. Based on the theory of Institutional Realism by Keohane (1984) and the derived notions of **hegemony**, **harmony**, **cooperation**, and **discord**, I investigate the decision of China to join the MPIA and the US not to join based on the respective national trade strategies. I thus follow an explanatory approach as distinct to explorative or descriptive designs (Babbie, 2011, p.95ff.).

In terms of procedure, I conduct a **qualitative content analysis** based on content described in chapter 3.3. A qualitative content analysis is a "research method for the subjective interpretation of the content of text data through the systematic classification [by] identifying themes or patterns" (Hsieh & Shannon, 2005, p.1278). While the focus is on language patterns within a contextual meaning of verbal, print, or electronic text sources, qualitative content analysis transcends the text-immanent comprehension. By categorising text-based content into patterns, the unit of analysis is studied in the context of the overall research purpose (ibid.).

Depending on available data, three approaches can be distinguished: conventional, directed, and summative. The conventional approach is most apt in case of limited availability of literature and theory. The summative approach focuses on specific words within a text, which are determined prior to the research process and mostly managed in a (digital) database (ibid.,

[15] See chapter 1.1. Following the emergence of the General Agreement on Tariffs and Trade (GATT) instead of the envisaged International Trade Organization (ITO), the transition from GATT to the World Trade Organization (WTO) in 1995, and the stalling of the Doha Round since 2015.

p.1283ff.). This technique grants structured insights into the words used as a means of conveying information. However, while the former approach complicates the merging of theoretical foundation and research findings (ibid., p.1281), the latter is "limited by [its] inattention to the broader meanings present in the data" (ibid., p.1285). Therefore, both are incompatible with the Research Question and the broader WTO framework.

From this perspective, the approach of **directed content analysis** is most pertinent for the research design. Both, theoretical considerations, and textual data describing the phenomenon to study are available in sufficient quantity and quality. I used this existing research to identify key concepts through an extensive Literature Review and the conceptualisation of key terms in chapter II. Within a deductive process, I complete prior research on post-hegemonic trade dispute settlement through the MPIA case study. I have formulated theory-derived hypotheses which will be validated or falsified. Following the data analysis, I will link back the results to the theory section in a discussion of findings. This procedure, however, requires an effort to reduce the bias of theoretical predictions throughout the process of data collection and analysis (ibid.). I further elaborate on this in chapter 3.3. within the process of data collection.

3.2. Units of Analysis and Units of Observation

According to Babbie (2011), a **unit of analysis** is "the what or whom being studied" (p.101). The author states that the most typical units of analysis in social research are individual people or groups of people. In the following case study on the MPIA, the units of analysis will be geographical units in the form of WTO member states. Namely, these are the US and China as states pursuant to international law for the following reasons: Within the post-1945 Bretton Woods system, the US has long been the economic leader, accounting for approximately 60% of global economic activity. It was in 1995 when the WTO was founded, that the EU reached comparable economic numbers. When China surpassed Japan regarding international trade in 2004, the country joined the US and the EU (Eurostat, 2020). For years, the US, China, and the EU[16] have been acting as the WTO's three main economic actors. In 2019, they accounted for more than 40% of the world economy in terms of imported and exported goods (ibid.). This economic strength mirrors the importance of the three actors within WTO dispute settlement.

[16] formerly EU-28, since January 2020 EU-27.

Argued from an institutional perspective, states with a huge global market share dispose of more leeway in shaping the rules of the system. This supports the decision to focus the analysis on the US and China as the WTO's two most important states in terms of trade power (Hoekman & Wolfe, 2020). The following table displays the respective share of world economy of the two states under review and their role within the MPIA. As the MPIA is an EU-led initiative, I additionally display the EU's economic standing to show the importance such an initiative might have in future trade dispute.

Actor	Share of world economy (trade in goods, import and export in 2019)	Role within MPIA
European Union (EU)	14,5%*	initiator & member with all 27 member states
United States of America (US)	13,5%*	no member, critical attitude
People's Republic of China (PRC, China)	14,5%*	member
	Total: 42,5%*	

Table 4: Share of world economy (trade on goods, import and export 2019). *Source: Eurostat, 2020.

As state actions are driven by and associated with persons representing the state in official positions, individuals authorised to speak in the name of the state such as national WTO representatives, Government officials as well as national ministers will be associated with the units of analysis (see chapter 3.3. on data collection).

The process of finding out about the unit of analysis is closely linked to the **unit of observation**. Sheppard (2020) describes the unit of observation as the "item (or items) that you actually observe, measure or collect in the course of trying to learn something about your unit of analysis" (p.87). In a given case, they might be congruent, but this does not apply to the thesis. The unit of analysis consists of states, which, as such, are static and can only act through statements made in the name of the state. In this case, Sheppard determines the unit of analysis and the unit of observation to be different. While the former is determined by the Research Question as being the US and China, the latter is determined by the method applied for data collection. In this case, these will mainly be textual documents (ibid., p.92).

3.3. Data Collection Method and Operationalisation

Babbie (2011) describes qualitative content analysis as being an "art as much as a science" (p.418) due to the non-numerical and mainly text-based nature. Since most of the analysis is aimed at evaluating data in text form, I now describe how and where I collected data. Relevant data is part of the above-described unit of observation, being the means to study to get to know more about the US and China as units of analysis (Sheppard, 2020, p.87).

Data to analyse the MPIA and a comparison of the EU-led initiative based on Article 25 DSU to the 'ordinary' AB comes from the official document of the 2020 arrangement itself as well as from related statements of parties to the MPIA (**Appendix III & IV**).

As for the data analysis in chapter IV, I investigate incentives of the US not to join and China to join the MPIA based on their trade strategies as well as assessments thereof. In a first step, data encompasses the respective national trade strategies in the original English version for the US and the official English translation for the Chinese strategy. In a second step, I have identified the position of the US and China towards the MPIA based on relevant statements by the Presidents, national Ministers of Economic Affairs, WTO country representatives, and former AB members. A table covering data sources, selected examples, and purpose for the analysis in the respective categories is placed in **Appendix VII.**

To ensure a diligent approach towards the RQ, I have respected criteria regarding qualitative data analyses both during the process of data collection and the following analysis. While qualitative and quantitative approaches to research differ in terms of content, Bryman et al. (2008) have found in a study that established quantitative criteria can equally be applied to qualitative analyses (p.268). Given the research design of the thesis, however, not all of them apply to the same extent. As for criteria ensuring a consistent research approach, **validity** ("a measure that accurately reflects the concept it is intended to measure"[17]), **reliability** ("whether a particular technique, applied repeatedly to the same object, yields the same result each time"[18]) and **generalisability** ("idea that a study's results will tell us something about a group larger than the sample from which the findings were generated"[19]) are frequently cited in social research. As Babbie (2011, p.331) describes, case studies generally provide a low degree of generalisability. This is also true for this thesis. The analysis will provide a clear picture of interests of the two actors within the case study on the MPIA. The results, however, are not directly transferrable to other WTO members due to different interests pursued in trade matters.

[17] (Babbie, 2011, p.160).
[18] (Babbie, 2011, p.157).
[19] (Sheppard, 2020, p.158).

The two remaining concepts are being accorded a high relevancy by Bryman et al. (validity = 75.7% & reliability = 56.6%) (2008, p.266). Adherence to both can best be ensured by means of a solid operationalisation. Closely linked to the process of conceptualisation, an operationalisation ensures a consistent line of thought from RQ to Literature Review to data collection and analysis under a coherent understanding of concepts. While the former is, as described in chapter 2.2, the specification of abstract concepts, the latter is "the development of specific research procedures (operations) that will result in empirical observations representing those concepts in the real world" (Babbie, 2011, p.146) to ensure measurability.

Similar to the conceptualisation, a plan for the operationalisation is presented by Keohane (1984) when he justifies the "institutionalist modification of Realism" (p.14). With reference to Waltz (1979), Keohane presents two methods to study state behaviour: from the *'inside-out'*, meaning a location of explanations within the domestic structure of the state actor, or from the *'outside-in'*, meaning a location of explanations within the surrounding system (Keohane, 1984, p.25). As my point of reference is the US and Chinese national trade strategy, I follow the *'inside-out'* approach. However, the institutional WTO framework will not be neglected. As required by the **directed approach to content analysis**, I embed state actions in a larger picture to understand patterns and dynamics within the AB/MPIA debate.

Possible limits of the measurement of **harmony**, **cooperation**, and **discord** lie in the diplomatic nature of state affairs. Publicly available data might not fully represent the intention pursued by a state with certain actions. Therefore, I tailored the RQ to the trade strategies as written documents and I do not search for vague underlying motives. For the investigation of the US and Chinese position towards AB deadlock and MPIA, I collected data from national, as well as academic literature, economic assessments, and newspaper articles for the purpose of source triangulation. The table in **Appendix VII** contains more detailed information on the respective purpose within the research design.

IV. Analysis: Interests (not) to join the MPIA

With a rising number of Free Trade Agreements (FTAs) incorporating their own dispute settlement mechanisms (Hoekman & Wolfe, 2020), the trend towards plurilateral or bilateral dispute settlement is not a new phenomenon. What distinguishes the MPIA from FTA dispute settlement is the fact that it provides states with an alternative to the AB to which they had already agreed when joining the WTO. Following the AB deadlock, WTO members are left with three options regarding a two-tiered system: Article 25 DSU, which requires both parties to agree to it prior to the appeal of each DSB report, is hardly reliable. Hence, joining or not joining the MPIA is a decision requiring a positioning of WTO members. While by joining, states uphold a two-level judicial dispute procedure, by not joining they retain the possibility to 'appeal into the void'. However, this would be coupled with the other side of the coin, namely that states will most likely no longer be able to win WTO disputes if they do not join the MPIA.

This brings the first sentence of the thesis under consideration yet again: *Throughout history, trade and foreign policy have been closely linked, while the latter is often tailored to foster the former*. Pre-deadlock, WTO membership included mandatory acceptance of the AB for all 164 states. The AB deadlock since December 2019 and the MPIA since April 2020 introduced the necessity to decide for one of the two above options. States now have the possibility to decide based on their trade and foreign policies whether joining the MPIA would be beneficial or not. Not only does this decision entail economic consequences but also legal and political ones. While – in a purely realistic scenario of anarchy, self-help, and relative gains – the favourable decision would be not to join the MPIA, the institutional WTO framework adds further weight to the decision-making process.

Although most MPIA members are economically strong countries frequently involved in trade disputes, they represent less than $^1/_3$ of total WTO membership. More than $^2/_3$ of the 164 WTO states have thus far decided not to join the MPIA and either use Article 25 DSU on a case-by-case basis or avail themselves of the newly created latitude to 'appeal into the void'. The latter reflects a general reluctance of states to "provide their ex-ante consent and expose themselves to the risk of an obligation to comply with legally binding rulings, especially when immense political and national economic interests are at stake" (Kotzampasakis, 2020, p.1).

In the following analysis, I take the US as example for not joining and China for joining within a case study on the MPIA. Thereby, the MPIA is my subject of investigation in a post-hegemonic situation of the WTO dispute settlement system. I investigate the national trade strategies of the US and China for a potential explanatory power for the respective decision under the concepts **hegemony**, **harmony**, **cooperation**, and **discord** introduced in chapter II.

4.1. The US and the WTO – the path of a declining hegemon?

Within the post-1945 world order, and especially the international trade regime, the US has since the beginning had a "seat at the table to shape the […] agenda in ways that both advance and defend U.S. interests" (CRS, 2020a, Introduction). The hegemonic role of the US was anchored in economic dominance, as well as soft power in the pursuit of a reciprocal reducing of export barriers (Allard, 2018, p.3f.).

Following the creation of the WTO, a two-fold perception arose on the US side. Internal mistrust of the rules-based system[20] as well as a perceived limitation of national sovereignty fostered bilateral trade negotiations since 2013 (Rashish, 2021, p.8). Under the Trump Administration, the US departed further from its rules-shaping power. While previous Administrations have already expressed discontent with current trade rules, the Trump Administration fundamentally changed direction with the "blurring of traditional boundaries between the economic and security spheres" (Allard, 2018, p.1f.). Although unlikely for procedural and substantial[21] reasons, the US repeatedly threatened to leave the WTO. Complemented by the AB blocking and the imposing of massive tariffs[22] to safeguard national interests, this moulded the US trade strategy since 2017. Especially the latter is commonly assessed as "bypassing the spirit, if not the letter, of WTO rules" (ibid., p.3).

Trade policy established itself as one crucial issue in the 2020 US presidential election, which Democrat Joe Biden narrowly won. President Biden's support for the new WTO Director-General (DG) Ngozi Okonjo-Iweala from Nigeria, who had been refused by the Trump Administration, is a signal for US responsibility on the international stage. However, Biden's promotion of multilateralism is overshadowed by the COVID-19 pandemic and many of Trump's trade policies have been continued during the first months in office (Hopewell, 2021).

In terms of the US's status as former rules-shaping power, the AB blocking and the Sino-American trade war are perceived by the international community as '*path of a declining hegemon*'. While other WTO members share some of the criticism, no state was willing to go as far as blocking the AB, leading to an isolation of the Trump Administration in Geneva (Liao & Mavroidis, 2021, p.62). Building on the concepts of Institutional Realism, I will further elaborate upon this based on the US trade strategy from 2017 to 2021 and the possible explanatory power for the US position towards the MPIA.

[20] From the US perspective, rules were either too vaguely formulated, sanction mechanisms too slow and insufficient, and unsuitable for new challenges (China) or they encroach on sovereign rights (Diekmann, 2020, p.325). Additional factors were the "increasing unlikelihood of breathing new life into the WTO Doha Round and intensifying concerns about a rising China" (Rashish, 2021, p.8).

[21] Procedural: need to pass House and Senate, Substantial: economic costs, exclusion from WTO rules, no influence on future trade rules (CRS, 2020a, p.59f.).

[22] The US had "applied unilateral tariff increases through use of authorities delegated by Congress in the Trade Expansion Act of 1962 (Section 232 tariffs on steel and aluminum) and the Trade Act of 1974 (Section 201 tariffs on washing machines and solar panels, and Section 301 tariffs on Chinese imports). Congress created these authorities to address injurious import threats to U.S. industry (Sec. 201) and national security (Sec. 232), as well as foreign trade barriers or trade commitment violations (Sec. 301)" (CRS, 2020b, p.1f.).

4.1.1. US Trade Strategy 2017 - 2021

The US trade strategy from 2017 to 2021 comprises policy priorities of two US Administrations and Presidents: Donald Trump (2017-2021) and Joe Biden (since 2021).[23] The two most relevant decisions for this thesis – the unconditional refusal to consent to the (re-)appointment of AB members and the decision against joining the MPIA – occurred under the Trump Administration. While trade strategies of the preceding and subsequent Administrations will be noted, I therefore focus on the Trump Administration with Robert Lighthizer[24] as United States Trade Representative (USTR) and Dennis Shea[25] as US Ambassador to the WTO in Geneva.

The annual Trade Policy Agenda published under the responsibility of the USTR on average contains 340 pages.[26] It presents policy goals for the current year as well as an assessment of the previous year. The 2017 Trade Policy Agenda was the first under the Trump Presidency. The report harshly criticises past US commitment to "multilateral and other agreements designed to promote incremental change in foreign trade practices" (USTR, 2017, p.19), under which "Americans have been put at an unfair disadvantage in global markets" (ibid.). The USTR builds on defending US sovereignty, enforcing US trade laws, encouraging other countries to open their markets to US exports, and protect US intellectual property rights (ibid., p.14ff.). In terms of effectiveness, the report states that "we believe that these goals can be best accomplished by focusing on bilateral negotiations rather than multilateral negotiations – and by renegotiating and revising trade agreements when our goals are not being met" (ibid., p.13). In this regard, the first part of *Hypothesis 4 (H4.1)* can be verified, as the US policy is in **discord** with the WTO principle of non-discrimination (Article 2.1. of the TBT Agreement[27]) by following a zero-sum approach (Petersmann, 2019, p.507f.).

Alongside domestic considerations, this abandoning and re-negotiating of unfavourable trade deals became pivotal in the 2018 report and extends through subsequent reports. The 2019 report departs from a "significantly flawed trading system" (USTR, 2019, p.16) inherited from the Obama Administration. Guided by the agenda to "rebalance America's relationship with its trading partners, aggressively enforce [US] trade laws, and take prompt action in response to unfair trade practices by other nations" (USTR, 2020a, p.16), the US embarked on a new path

[23] Obama as 44th President: 20.01.2009 - 20.01.2017; Trump as 45th President: 20.01.2017 - 20.01.2021; Biden as 46th President: since 20.01.2021.
[24] Robert Lighthizer term of office as USTR: 15/05/2017 – 20/01/2021 (Unknown a), n.d.).
[25] Dennis Shea term of office as US Ambassador to the WTO: 01/05/2018 to 20/01/2021 (Unknown b), 2021).
[26] Average of the years 2017 - 2021. Relevant chapter- and sub-chapter in all Trade Policy Reviews from 2017-2021 are: The President's Trade Policy Agenda, The World Trade Organization: Introduction, Dispute Settlement Body Special Session, Dispute Settlement Understanding, and WTO Dispute Settlement. The chapter headings are consistent in all five documents, whereas order and location in the chapters varies. The 2020 Document additionally contains a relevant chapter entitled: The WTO at Twenty-Five and U.S. Interests. In the 2021 version, the chapter on WTO Dispute Settlement is changed to 'WTO and FTA Dispute Settlement'.
[27] Article 2.1. TBT Agreement: "Parties shall ensure that technical regulations and standards are not prepared, adopted, or applied with a view to creating obstacles to international trade. Furthermore, products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards. They shall likewise ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade" (WTO, n.d.e.).

of trade negotiations. Soon after taking office, the Trump Administration abandoned the Trans-Pacific Partnership (TPP), re-negotiated the 'outdated' North American Free Trade Agreement (NAFTA), resulting in the United States-Mexico-Canada Agreement[28] (USMCA), and entered negotiations with Japan[29] as the world's third-largest economy aiming at export opportunities (USTR, 2019, p.16; USTR, 2020a, p.16). The US further announced in 2019 to launch negotiations with the EU and the United Kingdom "to adjust U.S. trade policy to the realities of the 21st century economy" (USTR, 2019, p.17).

This far-reaching America First trade agenda is grounded in the deadlock of the multilateral Doha Round negotiations since 2015. The 2018 report states that: "Consequently, the Trump Administration will not negotiate off the basis of the [Doha Development Agenda] DDA mandates or old DDA texts and considers the Doha Round to be a thing of the past" (USTR, 2018, p.41). The US further accuses states still supporting the Doha mandate of being responsible for keeping the focus "on how trade worked in 2001 […] and not on today's realities" (ibid.). The US Congressional Research Service (CRS) announced in 2020 that the US was part of 14 FTAs with 20 countries, "usually exceeding WTO commitments" (CRS, 2020b, p.2). The first part of *Hypothesis 2 (H2.1)* concerning bilateral aspirations following the Doha deadlock can hence be confirmed for the US.

Another pivotal aspect of the US trade strategy is captured in *Hypothesis 3 (H3)* on a possible **policy conflict** between the US and Chinese strategies as most decisive motivation for a different behaviour regarding the MPIA. Within the 2018 and 2019 reports, China is not directly addressed as a threat to US interests, but rather as a threat to the WTO system. The reports assert that "the WTO is not well equipped to handle the fundamental challenge posed by a non-market economy like China" (USTR, 2019, p.40). The USTR sees the US in the position to "aggressively continue pursuing these and other issues to ensure that the WTO promotes true market competition that rewards hard work and innovation – not market distorting practices in countries like China" (USTR, 2018, p.45).

The 2020 report displays a shift in the US-China policy. In January 2020, the conclusion of the 'ground-breaking' Phase One Trade Agreement with China is portrayed as beneficial to the US. The report confirms that the "[US] President confronted China's unfair trade policies and practices head-on and imposed substantial tariffs" (USTR, 2020a, p.16) in an agreement obligating "China to take actions to cease its unfair trade policies" (ibid.). Trade specialists

[28] "USMCA represents a much better deal for U.S. workers and the U.S. economy than the TPP would have been. […] For example, the USMCA's rules on intellectual property, digital trade, labor, and the environment are significantly stronger and more effective than anything in the TPP. The TPP also has no provision like the one in the USMCA that discourages parties from signing free trade agreements with China. (Indeed, as discussed above, the TPP would likely have benefited China)" (USTR, 2019, p.29).
[29] The US-Japan FTA was signed in 2019: "The United States and Japan have achieved a trade agreement regarding market access for certain agricultural and industrial goods, with plans to pursue subsequent negotiations for an expanded free trade agreement. On October 17, 2019, the United States and Japan reached an agreement on market access for certain agriculture and industrial goods" (U.S. Customs and Border Protection, 2021).

classify this agreement as a halt to the Sino-American trade conflict, which, however, conceptually is in sharp contradiction to WTO principles of free and rules-based trade and might be to the detriment of third countries (Diekmann, 2020, p.327). The plan of a Phase Two Agreement is announced in the 2020 report (USTR, 2020a, p.18).

Published in March 2021, the first Trade Policy Agenda of the Biden Administration introduces several new aspects, while also maintaining some. Core elements are the fight against COVID-19, economic recovery, the Build Back Better Agenda, and the restoring of US global leadership (USTR, 2021, p.14). While Biden announced to abandon the America First line, current public health challenges constitute an impediment to liberalising policies (Rashish, 2021, p.3ff.). Rather, the 2021 report continues the bilateral way to "work with allies and like-minded trading partners to establish high-standard global rules […], in line with our shared democratic values" (USTR, 2021, p.17). This extends to Chinese WTO rule-breaking. The 2021 report outlines the current strategy as follows: "Addressing the China challenge will require a […] more systematic approach than the piecemeal approach of the recent past. The Biden Administration is conducting a comprehensive review of U.S. trade policy toward China" (ibid.). This shows that from the US perspective, the US-China relation is marked by distrust and a sharp **policy conflict**. *(H3.1)* can be verified for the US side.

4.1.2. US position towards AB deadlock and MPIA

Along with this shift in US trade policy, an intensification of the US criticism towards the WTO DSS and especially the AB surfaced. In this chapter, I outline the US position towards AB deadlock and MPIA, as well as statements by former USTR Robert Lighthizer, former AB member Thomas R. Graham, and former US Ambassador to the WTO Dennis Shea.

I already elaborated the six main points of US criticism towards the AB in chapter 1.1. Throughout the various text-based units of observation, this criticism is summarised as judicial overreach by which the AB "has increased its own power and seized from sovereign […] WTO Members authority that it was not provided" (USTR, 2020b, p.1). According to the 2020 Trade Policy Agenda, the insufficient support by other members put the US in a position to bring "about a fundamental rethinking of the World Trade Organization, an institution that has strayed far from its original mission and purpose" (USTR, 2020a, p.16). The way in which this found expression is the US refusal to consent to the (re-) appointment of AB members since 2017. This culminated in the diminution of AB members from seven to one in December 2019,

effectively invalidating the AB. One month prior, in November 2019, the US refused a last trial by 116 WTO members to agree on an AB appointment process (WT/DSB/M/437; as cited in: Galbraith, 2020, p.519). Regarding the theoretical framework, this validates *Hypothesis 1 (H1)* in that **harmony** or – in this case – **cooperation** is a precondition to uphold the agreed DSU rules due to the WTO principle of unanimity.

By implication, and in line with the verification of *(H2.1)*, the shift from multilateral to bilateral aspirations following the Doha stalemate might have weakened 'institutional' obligations also in the WTO dispute settlement pillar. Consequently, this might have minimised the importance of **cooperation** in dispute settlement *(H2.2)*, culminating in the US blocking of the AB *(H2.3)*.

By 2020, the US was member to 14 FTAs with 20 countries which does by far not cover the majority of WTO members. In line with this, US officials accentuate that the AB blocking is not motivated by an obsolescence of the AB due to IDSP in FTAs, but rather it is systemic criticism. US officials defend the intention to force "the WTO to engage in a long-overdue debate about the role of the Appellate Body" (USTR, 2020a, p.28). Upholding the position that problems cannot be 'papered over', blocking the AB is presented as necessary "to find a way to ensure the system operates as agreed by Members" (US Mission Geneva, 2019).

While the 2021 report neutrally concludes that "[accordingly], there were no Appellate Body members from January 1, 2020 to December 31, 2020" (USTR, 2021, p.305), the farewell speech by Thomas R. Graham presents a more personal account from his eight years as AB member. He classifies the blocking as "reaction to the unwillingness of others to listen" (WTO, 2020b). Thereby, Graham follows the 2020 report, in which is written that the US "will continue to raise its systemic concerns with Appellate Body overreaching" (USTR, 2020a, p.224). Ambassador Shea adds that the "[effort] of the U.S. over the last three years has finally gotten a recognition by many that there are problems. So that is some progress" (Stewart, 2020).

In summary, US officials accentuate that the US intention to block the AB is of systemic nature and not directly linked to the emergence of bilateral alternatives. As the possible minimised importance of **cooperation** in multilateral dispute settlement has not proven to be a major factor, I can falsify *(H2.2)*. Consequently, the US blocking of the AB is not a culmination of the assumed minimised importance of **cooperation**, but equally linked to the US's systemic concerns. *(H2.3)* can hence also be falsified.

Within relevant literature, the US position is often explained by the country's role in AB procedures. While the US supported the judicialised WTO DSS in 1995, the realisation that the

US was more frequently the defendant than anticipated led to growing frustration (Elsig, 2017, p.313). As a result of the America First policy, the US approach to trade became more oriented towards a zero-sum calculation. This is in **discord** with the rules-based and non-discriminatory status of the WTO as proven with *(H4.1)* in the last chapter. In extension, the US decision not to join the MPIA might be explained with a **policy conflict** stemming from the US resistance to proposals form other WTO members *(H4.2)*.

In his farewell speech, Graham speaks of the AB's definite end, indicating that US consent to (re-)appoint members under these circumstances is unlikely: "The Appellate Body, as we have known it, is gone and is not returning. And the view I have come to - as the chaos and fog of last December cleared away - is that it is better this way" (WTO, 2020b). The 2019 Walker Principles (chapter 1.1.) as most elaborated proposal to stop US blocking, is cited by Graham as scheme which "may one day be a useful starting point for real negotiations" (ibid.).

This line of reasoning is applied to a proposal of a different kind – the MPIA, which is not primarily seeking to reinstate the AB, but to provide for alternative ad hoc arbitral tribunals under Article 25 DSU. In a letter to then WTO DG Roberto Azevêdo, former US Ambassador Shea expresses a strict rejection of the MPIA. Shea assures that the US does not oppose any WTO member's recourse to Article 25 DSU. The MPIA, however, is not considered as based on Article 25 DSU, but as an agreement which "incorporates and exacerbates some of the worst aspects of the Appellate Body's practices" (US Mission Geneva, 2020b, p.1). This is supported by a presentation of the MPIA as further 'judicial overreach' by means of consistency and coherence which are not part of the DSU. Shea argues that MPIA members act beyond their WTO authority when it comes to the pool of arbitrators or the financing of MPIA procedures through WTO budget (ibid., p.2). By stating that the goal of MPIA members would be "to create an ersatz Appellate Body" (ibid.), the Ambassador communicates that the US opposes both the establishment of MPIA structures within the WTO framework and the financing of the former by the latter. In this regard, *(H4.2)* can be verified as the US resistance to proposals displays a **policy conflict**. To complete the image, the initial US trade strategy and criticism towards AB practice need to be incorporated to account for the US decision against joining the MPIA.

In addition to these inherent US concerns, I have found that the **discord** between the US and Chinese national trade strategies from 2017 to 2021 led to a **policy conflict** *(H3.1)*. Given a less pronounced **asymmetry** in light of the declining US hegemony, this **policy conflict** might be the most decisive factor for a different behaviour regarding the MPIA *(H3.2)*.

Arguing that "the core problem at the WTO is not a lack of trust but a lack of like-mindedness" (US Mission Geneva, 2020a), US officials openly criticise Chinese trade-related actions. Among these are China's self-declaration as developing country, the unsettled status of market economy, intellectual property theft, cyber espionage, and unfair competition rules (ibid.). This rivalry extends through dispute settlement. Ambassador Shea puts it as follows: To "believe the WTO can manage this system's trade-disruptive impact under current rules and through the dispute settlement process is fantasy" (ibid.).

The US decided not to join the MPIA while China is a member of the first hour. China's move is interpreted by the US as giving China "flexibility to circumvent WTO rules" (USTR, 2019, p.40f.). In the aforementioned letter to DG Azevêdo, Shea repeatedly speaks of the MPIA as 'China-EU arrangement' even though it unambiguously was an EU-initiative building on prior agreements with Norway and Canada (EC, 2019; EC, n.d.). When explaining the US opposition, Shea criticises the "establishment of what appears to be a new WTO Division for the benefits of participants in the China-EU arrangement" (US Mission Geneva, 2020b, p.3).

China's participation seems to be more troubling for the US than other state's MPIA membership. However, Lighthizer, Graham, and Shea explain the US opposition towards the MPIA with the perceived replication of the AB's flaws. Given the critical assessment of AB proceedings, the MPIA is seen as "exacerbating the erroneous appellate practice rather than reforming it" (ibid., p.1). The Chinese MPIA membership is a further reason for the US not to join, but only secondary to the US's systemic criticism. From the US point of view, *(H3.2)* needs to be falsified. The US-Chinese **policy conflict** is not the most decisive motivation for a different behaviour regarding the MPIA, but only a subordinate one. I will investigate the Chinese side for *(H3.2)* in chapter 4.2.2.

4.2. China and the WTO – repurposing Western models?

Following 15 years of negotiations, China's accession to the WTO as 143rd member was perceived as "victory for free trade and economic liberalization" (CSIS, 2019). The process of joining is particular for three reasons: First, China only adhered to the WTO in 2001[30] and had no 'seat at the table' during the Uruguay Round.[31] Second, China joined the neo-liberal WTO as a state-capitalist economy under a communist party regime (Jain, 2016, p.57). And third, in addition to the multilateral framework, WTO obligations for China comprise a unique Transitional Review Mechanism (TRM), mandated to review compliance (CSIS, 2019).

Being highly-trade dependent, China has "expressed a strong commitment to sustaining an open global trade order" (Hoekman et al., 2021, p.7) and became integrated in global supply chains. However, several conflicts between China and other WTO members, mainly the US, are linked to diverging interpretations. Following the WTO accession in 2001, "pro-liberalization forces lost momentum" (Tan, 2021). At the latest since Xi Jinping became President in 2013, state-involvement in the economy grew. Internationally, this is perceived as a zero-sum approach, violating WTO rules (Jain, 2016, pp.57&63).

Another controversial issue is China's continued self-designation as developing country within the WTO, which grants for 'special and differential treatment'[32] (SDT) despite significant economic growth (Mavroidis & Sapir, 2021). As explained by former Chinese trade minister Gao Hucheng, this status enables China to support other developing countries. The related rise in South-South trade permits China to expand its scope in future negotiations "while effectively using the differences within the developed members" (Singh, 2019).

Since 2013, China makes use of this leverage not only within the WTO, but increasingly in alternative Chinese-led institutions. The model pursued by China is often called 'Beijing consensus' in allusion to the neo-liberal 'Washington consensus' (Shaffer & Gao, 2020, p.3). Through projects such as the Belt and Road Initiative (BRI), the Made in China 2025, China Standards 2035 and the 5G network, China aspires to dominate in manufacturing and technology. This dominance is supposed to be backed by parallel institutions such as the Asian Infrastructure Investment Bank[33] (AIIB) and the China International Commercial Court

[30] "China was one of the original contracting parties to the GATT in 1947, but its status was deactivated in 1950 after the formation of the People's Republic. For the next three decades, China had practically no contact with the GATT. The situation changed in the 1980s, following Chairman Deng's economic reforms. After seeking and obtaining observer status at the GATT, China informed the Director General in a communication dated 10 July 1986 that it had decided to "seek the resumption of its status as contracting party to GATT" and to this end was prepared "to enter into negotiations with GATT contracting parties"" (Mavroidis & Sapir, 2019, p.3f.).

[31] "Countries that joined the WTO after 1995, including China, acceded through the process outlined in Article XII of the Marrakesh Agreement. These "Article XII members" have typically been required to make more extensive commitments than original members that joined through GATT. China's reform commitments were deeper than all other Article XII peers, except for Russia, which acceded to the WTO in August 2012" (CSIS, 2019).

[32] SDT: "several benefits, such as extended windows for implementing WTO commitments and assistance with handling disputes and technical matters" (CSIS, 2019).

[33] "China officially proposed the creation of the Asian Infrastructure Investment Bank (AIIB) in 2013. The fact that it proposed both the AIIB and the BRI in 2013 suggest a coordinated strategy of China to enhance its influence regionally and globally. China signed a Memorandum of Understanding in Beijing to create the AIIB in 2014 and AIIB operations started in 2016. […] the AIIB is controlled by China, has permanent headquarters in Beijing, and is run by a Chinese president. […] The AIIB, in complement to the BRI, conveys China's soft power, providing a symbol of Chinese leadership in regional governance" (Shaffer & Gao, 2020, p.14ff.).

(CICC). In differing from the market-based, "liberal, multilateral, law-centered model built by the United States and Europe" (ibid., p.5), they are attractive to authoritarian regimes because of reduced transparency and less regulations.[34]

This, however, does not mean that China ceased to support the WTO. Rather, the country aims to play a leading role within the multilateral WTO as a status-quo power, while at the same time challenging Western dominance from within and from the outside through the creation of parallel institutions which interact with existing ones.[35] In light of the stalemate of two out of three WTO mandates (negotiation and dispute settlement), China thereby "reserves the option of going either way, whether to be a status quo or a revisionist power" (ibid., p.6). From an institutionalist perspective, this '*repurposing of Western models*' might, in the case of further WTO stalemate, "shift the center of geopolitical gravity away from the U.S. and back to Eurasia" (ibid., p.27). I will investigate the extent to which this can be found in the Chinese trade strategy from 2017 to 2021 and the degree of explanatory power for the Chinese position towards the MPIA in the following sub-chapters.

4.2.1. Chinese Trade Strategy 2017 - 2021

In 1953, China first implemented 'Soviet-style' Five-Year Plans (FYP) to align national economy and overall policy goals as well as government and local authorities (Koleski, 2017, p.4). The Chinese trade strategy from 2017 to 2021 comprises the 13th FYP (2016-2020) and the 14th FYP (2021-2025). As the political structure is determined by the Chinese Communist Party (CCP), I additionally focus on statements by Chinese President Xi Jinping, with Zhong Shan[36] and Wang Wentao[37] as Ministers of Commerce and Zhang Xiangchen[38] and Li Chenggang[39] and as Chinese Ambassadors to the WTO in Geneva.

In 2017, President Xi held a much-quoted keynote speech at the World Economic Forum in Davos. Xi accentuates that by joining the WTO and having taken the "brave step to embrace the global market" (Xinhua, 2017), China has not only benefited from economic globalisation,

[34] "Formal law and formal dispute settlement play reduced roles and are displaced by soft law (set forth in memoranda of understanding) and informal state-to-state and private negotiation to resolve disputes. The approach has parallels to what contract law scholars theorize as "relational contracts" under which the ongoing relationship is more important for the contracting parties than formal legal commitments" (Shaffer & Gao, 2020, p.5).
[35] "China's model mimics and repurposes Western laws and institutions. China is developing new institutions and structures that build from and interact with existing ones, such as the WTO for trade, ICSID for investment arbitration, the World Bank for finance, the London Commercial Court for transnational contract disputes, and various other Western institutions for intellectual property. China is mimicking these institutions with its own, while repurposing them to advance its interests in ways that are more accommodating of state sovereignty and state involvement in the economy, and that are less demanding in terms of domestic social regulation and the use of judicialized dispute settlement" (Shaffer & Gao, 2020, p.3).
[36] Zhong Shan: Chinese Minister of Commerce from 2017 to 2020 (Unknown c), n.d.).
[37] Wang Wentao: Chinese Minister of Commerce since 12/2020 (MOFCOM, 2020).
[38] Zhang Xiangchen: Chinese Ambassador to the WTO in Geneva from 2017 to 2020 (Unknown d), 2021).
[39] Li Chenggang: Chinese Ambassador to the WTO in Geneva since 02/2021 (Reuters, 2021).

but also contributed to the benefit of other states. After clearly situating the future trade policy in multilateralism, Xi bridges to the 2013 Belt and Road Initiative, through which the 'circle of friends' has grown bigger, and which "delivered benefits well beyond its borders" (ibid.).

These statements are in line with the **13th Five-Year Plan for Economic and Social Development of the People's Republic of China (2016-2020)**.[40] The 80-chapters document sets the tone to move the Chinese economy away from polluting industries towards service and consumption, "illustrating a national shift towards the middle to high end of the value chain" (KPMG, 2016, p.89). Key issues are innovation, coordinated development, green growth, openness, and inclusive growth. As chapter XI on 'All-Round Opening Up' (CTB, 2016) targets an enhanced role in the global economic governance, I henceforth concentrate on this.

Within the 13th FYP, the term 'openness' comprises the land-based and maritime Belt and Road Initiative,[41] the loosening of restrictions on foreign investment and the import of certain products. The choice of words indicates that the promoted 'openness' is tailored to foster "China's role in driving the international economic agenda and setting international standards" (Koleski, 2017, p.21). Critical voices read this in the sense that the "theme centers on opening the world to China, not China to the world" (ibid.). Further, the decisive role allocated to the CCP hints towards increased government intervention via state-owned enterprises (SOE) instead of a WTO-required market-based approach.

The 14th FYP for National Economic and Social Development and Long-Range Objectives for 2035 (2021-2025) [42] passed by the National People's Congress (NPC) in March 2021, takes a different approach. The 14th FYP does not evolve around concrete economic targets. The CCP rather sets the goal of systemic resilience against external risks (Grünberg & Brussee, 2021). Priorities are a self-reliant China focusing on quality of growth instead of quantity, urbanisation strategies and – most pertinent to the RQ – a gradual liberalisation of the economy. This incorporates managing US rivalry and elevating "China's leadership role in regional and global economic governance" (Cooper, 2021).

To address internal and external dimensions, the plan contains a 'dual circulation strategy'. Seen by some as an "early sign of decoupling" (Grünberg & Brussee, 2021), the focus patently is on the 'internal cycle' and domestic development. The 'international cycle' is seen

[40] Translated to English by the Compilation and Translation Bureau (CTB), Central Committee of the Communist Party of China Beijing, China.

[41] "President Xi's One Belt, One Road initiative, first announced in 2013, is a cornerstone of the 13th FYP's openness objective, accounting for an entire chapter in the plan. This initiative is composed of a land-based economic corridor through Central Asia and a maritime counterpart that will run through Southeast Asia and the Indian Ocean to Africa and the Mediterranean Sea […]. The goal of the One Belt, One Road initiative is to facilitate access to natural resources and encourage economic development in China's poorer western provinces. Vice Premier Zhang Gaoli further explained the priorities of the One Belt, One Road as strengthening transportation infrastructure, easing investment and trade, enhancing financial cooperation, and deepening cultural exchanges. […] The One Belt, One Road will be supported not only by the Silk Road Fund, created specifically for this purpose, but also by the China Development Bank, the Export-Import Bank of China, and the newly created China-led Asian Infrastructure Investment Bank and New Development Bank. OBOR could provide significant economic benefits for the region through greater connectivity and development. However, because it prioritizes China's economic interests, OBOR could create regional dependence, especially among less developed countries, allow China to delay reining in its excess capacity, and limit access for non-Chinese firms to projects. For example, OBOR's state-directed financing and preference for Chinese SOEs raises concerns about the openness of OBOR to U.S. and other foreign firms' participation" (Koleski, 2017, p.23).

[42] Translated to English by Etcetera Language Group, Inc., edited by Ben Murphy (CSET) and published by CSET Center for Security and Emerging Technology.

"as a means to both strengthen the domestic economy and enhance efficiency" (ibid.) and in this manner as support for the 'internal cycle'. However, this does not represent a setback for ambitions in the international trade regime. Wang, Chinese Minister of Commerce, stresses that the "domestic market cannot be separated from the global market and external circulation can boost domestic circulation" (Cooper, 2021).

This 'boosting' potential of the international market is displayed in the 14th FYP under the category of 'Actively participate in the reform and construction of global economic governance systems' (CSET, 2021). At the multilateral level and the bilateral and regional levels (Regional Comprehensive Economic Partnership[43] (RCEP); China-EU Comprehensive Agreement on Investment (CAI); negotiations on a free-trade agreement with Japan and South Korea; considering joining the successor of the Trans-Pacific Partnership[44] (TPP), China is actively engaged in negotiations within the 'international cycle' to strengthen its position "as the foremost leader of the next round of globalization" (Cooper, 2021).

While China emphasises aspirations as leader in the global trade regime, the country is increasingly involved in bilateral and regional networks, as accentuated in the 13th and 14th FYPs. Parallel structures like the AIIB or the BRI support this trend, described by some as the '*repurposing of Western models*'. The first part of *Hypothesis 2 (H2.1)* concerning the shift towards bilateral aspirations can thus also be verified on the Chinese side.

The closely interlinked *Hypothesis (H5.1)* on a zero-sum approach and a resulting **discord** with the rules-based and non-discriminatory status of the WTO principle of non-discrimination (Article 2.1. of the TBT Agreement[45]) is less evident. The phrasing of the FYPs as well as statements by country officials are very diplomatic. Whilst China actively pursues bilateral relations outside the WTO, the text of the 13th and 14th FYPs do not offensively attack WTO rules. However, in a strict interpretation, the notion of **discord** as conceptualised in chapter 2.2. targets a situation in which states see other states' policies as hindering their own objectives. Within the 'dual circulation strategy', the 'internal cycle' is prioritised. Recalling the Chinese strategy to '*repurpose Western models*' by creating parallel institutions, the violation of non-discrimination becomes evident. The example of the China International Commercial Court (CICC) illustrates this. While non-Chinese experts can assist, judges are exclusively of Chinese

[43] "Member states of Asean and their FTA partners are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam, China, Japan, India, South Korea, Australia and New Zealand. The 16 countries negotiating the RCEP together account for a third of the world gross domestic product (GDP) and almost half the world's population, with the combined GDPs of China and India alone making up more than half of that. RCEP's share of the world economy could account for half of the estimated $0.5 quadrillion global (GDP, PPP) by 2050" (Business Standard, n.d.).

[44] As the TPP could not enter into force, six states negotiated the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTTP).

[45] Article 2.1. TBT Agreement: "Parties shall ensure that technical regulations and standards are not prepared, adopted, or applied with a view to creating obstacles to international trade. Furthermore, products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards. They shall likewise ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade" (WTO, n.d.e.).

nationality and next to English, Chinese is a required working language. The Singapore International Commercial Court, in contrast, has not established such nationally-oriented requirements (Schaffer & Gao, 2020, p.13). This, and other examples from the last chapter, confirm that the Chinese strategy violates the rules-based and non-discriminatory status of the WTO. *(H5.1)* can be validated.

As for *(H3.1)* concerning **discord** between US and Chinese national trade strategies leading to a **policy conflict**, the Chinese trade strategy is less direct in its wording than the US strategy. Under the topic of managing great-power rivalry with the US, the 14th FYP accentuates that the CCP will "promote the growth of mutually beneficial China-U.S. business relations on the basis of equality and mutual respect" (Cooper, 2021).

The above-mentioned speech by President Xi, though, is more outspoken. Despite not directly mentioning the US, Xi makes some allusions to Trump's America First policy. While saying that "the role of traditional engines to drive growth has weakened" (Xinhua, 2017), Xi states that "protectionism is like locking oneself in a dark room. [...] No one will emerge as a winner in a trade war" (ibid.). Further, Xi calls upon the international community to uphold multilateralism and in the direction of the US: "One should not select or bend rules as he sees fit" (ibid.). Even if less explicitly voiced, the **discord** between Chinese and US trade policies is present on the Chinese side as well, validating *(H3.1)*. In the next chapter, I assess the role of this **policy conflict** as motivation for a different behaviour regarding the MPIA *(H3.2)*.

4.2.2. Chinese position towards AB deadlock and MPIA

Along with the Chinese 'dual circulation strategy', the country's position towards AB deadlock and MPIA requires an assessment from the national and international perspective. In this chapter, I outline the Chinese position based on the trade strategy from 2017 to 2021, as well as statements by former Ambassador Zang Xiangchen, former AB member Hong Zhao, a spokesperson of the Ministry of Commerce (MOFCOM), and the country mission to the WTO.

In the above chapter, I have identified a shift towards bilateral aspirations in the Chinese trade strategy following the stalemate of the Doha Round *(H2.1)*. This might have weakened 'institutional' obligations also in the WTO dispute settlement pillar. Consequently, this might have minimised the importance of **cooperation** in dispute settlement *(H2.2)*.

China was actively involved in various reform proposals pre[46]- and post[47]-AB deadlock. Solving the looming crisis was labelled a pressing issue to be dealt with first, to not repeat the failure of Doha negotiations (Singh, 2019). When the AB deadlock occurred in December 2019, it is identified by Ambassador Zhang as "most severe blow to the multilateral trading system since its establishment" (Chinese Mission Geneva, 2019). Making use of images when explaining the choice of wearing a black tie, Zhang compares the AB deadlock to a funeral. In distinction from US statements, Zhang divides WTO members into those upholding the multilateral order and – with a hint to the US – those "who prefer the laws of jungle" (ibid.). While for the former, the AB presents an 'invaluable asset', it is classified as 'worthless' to the latter by Zhang. The Ambassador refuses a falling back to GATT rules, as they "will have no enforcement teeth" (Stewart, 2020). Zhang even goes as far as saying that "[regional] free trade agreements and any dispute settlement contained therein cannot replace the WTO" (ibid.).

Analogous statements can be found in the farewell speech of former AB member Hong Zhao. Hong declares that "[witnessing] the attrition of Appellate Body Members until the AB was unable to work was painful" (WTO, 2020c). While speaking of "the phoenix and its rebirth" (ibid.), Hong repeats that fixing the dispute settlement should be a WTO priority. Towards the end of the speech, Hong emphasises China's support for the multilateral dispute settlement by saying that "farewells are meant to be reunions" (ibid.).

Shaffer & Gao (2020) and Hoekman & Wolfe (2020) propose similar explanations for this position. China shows a better record of winning cases against e.g. the US under the WTO AB than under ad hoc tribunals without an inherent appellate stage (Shaffer & Gao, 2020, p.21). Related to this, Chinese trade law experts made the country sophisticated in using the AB as protection from unilateral US actions (Hoekman & Wolfe, 2020, p.18). In this sense, *(H2.2)* can be falsified from the Chinese perspective. While trade strategies clearly describe advantages of bilateral or regional networks, the AB is a pivotal part of Chinese WTO membership as it represents a rules-based protection from unilateral actions of other members (ibid.).

As I have confirmed with *(H3.1)*, these unilateral actions predominantly concern the US and are reflected – conjointly with Chinese deviations from WTO principles – in **a policy conflict** stemming from **discord** between the US and Chinese national trade strategies from 2017 to

[46] "China's position paper on WTO reforms, released on November 23, 2018, and its WTO Reform Proposal, released on May 13, 2019, have given primacy to issues like the Appellate Body reforms" (Singh, 2019).
[47] "After the paralysis of the Appellate Body, 119 members, including China and the European Union, put forward proposals to immediately start the selection of members of the Appellate Body. China, together with 42 members such as the European Union, submitted proposals on institutional reforms of the Appellate Body. They have participated in WTO negotiations to create conditions for starting the selection" (Xinhua, 2020).

2021. Given a less pronounced **asymmetry** in light of the declining US hegemony, this **policy conflict** might be the most decisive factor for a different behaviour regarding the MPIA *(H3.2)*.

While in the 13th and 14th FYP, the US is not mentioned by name, criticism by Chinese officials regarding the AB deadlock is more explicit. Zhang speaks of "someone [who] attempts to use its might rather than WTO adjudications to change trade polices of other Members" (Chinese Mission Geneva, 2019) in allusion to the US. Indirectly, Zang furthers this in that WTO reform should be initiated by "fighting against trade protectionism and upholding the basic principles and core values of the WTO" (ibid.).

With closer reference to the AB blocking, Chinese media published in 2020 that "dismantling the Appellate Body became a clear goal of the Trump administration" (Xinzhen, 2020). Hua Chunying, spokesperson of the Foreign Ministry, declares that "the WTO Appellate Body has become another victim of U.S. unilateralism and protectionism" (Xinhua, 2019). She calls upon the international community to "uphold fairness and justice, and [not] let individual countries or individuals do whatever they want" (ibid.).

The answer to *(H3.2)* requires a balanced assessment. Chinese officials clearly distinguish between the US, following an 'anti-globalization agenda', and those countries upholding the multilateral trade regime. For the latter, and in the eyes of China, the vast majority in "a situation of 1 versus 163" (Chinese Mission Geneva, 2019), the AB blocking created serious difficulties in international trade dispute settling. However, joining the MPIA is not an act of revenge against the US, but a logic consequence of the general Chinese WTO strategy which builds on the 'dual circulation strategy'. Joining the MPIA is thus inspired by inherent motivations and not primarily by the **policy conflict** with the US. From the Chinese point of view, *(H3.2)* hence needs to be falsified. The US-Chinese **policy conflict** is not the most decisive motivation for a different behaviour regarding the MPIA, but only a subordinate one. This mirrors my results of the US side in chapter 4.1.2.

A third point I previously considered is the **discord** of the Chinese trade strategy with the rules-based and non-discriminatory status of the WTO *(H5.1)*. In this context, the Chinese MPIA membership might be explained with a **policy adjustment** following from a realisation that China as aspiring economic power needs allies within the international trade regime. The MPIA membership might hence be attributed to China making use of the boosting effect of the 'international cycle' on the 'internal cycle' within the 'ducal circulation strategy' *(H5.2)*.

Both the EU as initiator of the MPIA and China are highly trade-dependent and hence dependent on reliable and rules-based dispute settlement (Hoekman et al., 2021, p.7).

Giovannini (2020) assesses MPIA membership as "avoiding the temptation to focus on domestic needs given by pure opportunism". He further accentuates that by joining, "China shows the world its responsibility as a leading actor on the global stage" (ibid.). Therefrom, Giovannini deduces interests as to the realisation of a "highly anticipated Eurasia mega continent" (ibid.). This might support the hypothesis of Chinese self-interest in the MPIA.

From my content analysis, however, I come to an ambivalent conclusion. While the above chapters on the role of China within the WTO and the Chinese trade strategy painted a picture of the pursuit of national interests, neither statements by Zhao, nor by Zhang, nor general statements by WTO officials depart from the Chinese commitment to multilateralism for the sake of multilateralism. In all the declarations, Chinese national priorities are directed towards support for the MPIA. While it is not clear which policy ends are stipulated in confidential correspondence, the official and publicly available information falsifies *(H5.2)*.

Although this limited information leaves a question mark behind the falsification of *(H5.2)*, I can invalidate the hypothesis with a theory-inherent reasoning. For China, the term **policy adjustment** is not pertinent in the case of the MPIA. While a **discord** between the overall Chinese trade strategy and WTO principles has been confirmed *(H5.1)*, the official Chinese position has always been in **harmony** with the AB procedure pre-deadlock. Therefore, the support for the MPIA as replication of a two-tiered dispute settlement is not in need of a **policy adjustment**. From the information publicly available, Chinese MPIA membership is in line with the support of the AB and the call to restore its function (WTO, 2020c).

4.3. Answer to the Hypotheses

The following table presents my research results in the form of verification or falsification of hypothesis. An elaborated text-based assessment is part of the Conclusion to avoid redundancy.

	Hypotheses (see chapter 2.3.)	***verified / falsified***
(H1)	*(H1) The WTO principle of unanimity in appointing AB members requires **harmony** or **cooperation** to uphold the agreed rules of the DSU.*	*(H1) verified*
(H2)	*(H2.1) The deadlock of the Doha Round led to a shift towards bilateral aspirations in national trade strategies.* *(H2.2) These 'realist' trade strategies weakened 'institutional' obligations also in the WTO dispute settlement pillar and minimised the importance of **cooperation** in dispute settlement.* *(H2.3) This culminated in the US blocking of the AB.*	*(H2.1) verified for the US; verified for China* *(H2.2) partly falsified for US; falsified for China* *(H2.3) falsified*
(H3)	*(H3.1) The **discord** between US and Chinese national trade strategies from 2017 to 2021 led to a **policy conflict.*** *(H3.2) Given a less pronounced **asymmetry** in light of the declining US hegemony, this **policy conflict** is the most decisive motivation for a different behaviour regarding the MPIA.*	*(H3.1) verified for the US; verified for China* *(H3.2) falsified for the US; falsified for China*
(H4)	*(H4.1) The US trade strategy pursues a zero-sum approach which is in **discord** with the rules-based and non-discriminatory status of the WTO.* *(H4.2) The US resistance to proposals by other WTO members displays a **policy conflict** which resulted in the decision against joining the MPIA.*	*(H4.1) verified* *(H4.2)* verified, *but the initial US trade strategy and criticism towards the AB practice need to be incorporated to account for the US decision against joining the MPIA*
(H5)	*(H5.1) The Chinese trade strategy pursues a zero-sum approach which is in **discord** with the rules-based and non-discriminatory status of the WTO.* *(H5.2) However, China as aspiring economic power needs allies within the international trade regime. It thus uses its accession to the MPIA to make use of the boosting effect of the 'international cycle' on the 'internal cycle' within the 'dual circulation strategy' by means of **policy adjustment**.*	*(H5.1) verified* *(H5.2) falsified (not pertinent, as the Chinese position was in **harmony** with the AB pre-deadlock. Therefore, the upholding of a two-tiered system with the MPIA does not require a **policy adjustment***

Table 5: Answer to the Hypotheses established in chapter 2.3.

4.4. Answer to the Research Question

I have investigated the relation between national trade strategies from 2017 to 2021 and the respective decision of the US not to join the MPIA and China to join. In this chapter, I once again seize on predominant results to combine their substance in my answer to the RQ.

RQ: To what extent can the national US and Chinese trade strategies from 2017 to 2021 explain the respective decision (not) to join the plurilateral Multi-Party Interim Appeal Arbitration Arrangement (MPIA) within the WTO framework?

Following the structure of the analysis, I take a two-pronged approach towards answering the RQ. The first component concerns the respective **trade strategies from 2017 to 2021**. I have found that US and Chinese policies place an emphasis on bilateral, regional or plurilateral agreements following the Doha Round stalemate. Both focus on domestic advantages to be supported through favourable trade deals. On the US side, this is displayed by the America First approach of the Trump Administration. While President Biden abandoned this policy, the promotion of multilateralism is currently overshadowed by the COVID-19 pandemic. On the Chinese side, this is expressed with the boosting effect of the 'international cycle' on the 'internal cycle' within the 'dual circulation strategy'. In addition to violating the rules-based and non-discriminatory status of the WTO, the US and Chinese trade strategies show a mutual **policy conflict**, which is visible in the Sino-American trade dispute. The most pronounced difference related to the RQ is criticism of the AB on the US side and support for the AB on the Chinese side. While the US reproaches the AB for 'judicial overreach' impeding WTO member's sovereignty, China explicitly supports a multilateral two-tiered judicial procedure in WTO dispute settlement.

The second component displays the **respective position towards the MPIA and, by consequence, the AB deadlock**. As the AB deadlock immediately followed from the US refusal to consent to the (re-)appointment of AB members, the US position is supportive of the AB deadlock. The Chinese position, however, opposes the AB blocking and calls upon the international community to uphold a two-tiered dispute settlement. The position towards the MPIA reversely mirrors the respective position towards the AB deadlock. The US opposes the MPIA for two reasons. First, US officials claim the MPIA to replicate flaws of the AB in that it similarly departs from agreed rules. Second, former US Ambassador Shea claims that MPIA members overstep their authority in the establishment of a pool of arbitrators and the request to

finance MPIA procedures through WTO budget. China, as MPIA founding member, takes the opposite side and defends the MPIA as interim solution providing a two-step legal structure similar to the blocked AB.

In **combining the two components**, I found that – with respect to the AB blocking and the case of the MPIA – the US and Chinese trade strategies provide a pronounced explanatory power for the respective decision (not) to join the MPIA. The US trade strategy opposes the AB, is supportive of the AB deadlock and in consequence the US opposes the MPIA as replication of the AB. The Chinese trade strategy supports the AB, opposes the AB deadlock and in consequence China supports the MPIA, which it is member of.

Especially for the Chinese side, however, this statement is broken down to its essentials and sets aside the policy priority on the 'internal cycle'. I do not intend to paint a black or white picture of the US completely opposing the WTO and China completely supporting the WTO. This thesis is a case study on the MPIA and therefore primarily targets the WTO pillar of dispute settlement. While decisions regarding the MPIA can be well explained through the trade strategies, this might look completely different in other parts of the WTO mandate.

V. Conclusion and Discussion

Throughout history, trade and foreign policy have been closely linked, while the latter is often tailored to foster the former – this first sentence of the thesis has been confirmed once more in my case study on the 'Multi-Party Interim Appeal Arbitration Arrangement' (MPIA). In its status as member-driven organisation, the WTO fulfils three mandates: multilateral negotiations, dispute settlement, and monitoring. With a diversification of members and policy areas, the multilateral approach is increasingly challenged. Following the stalemate of the Doha Round (2001-2015), the negotiation pillar came to a halt.

This also impacts the dispute settlement pillar, mandated to interpret law established in multilateral negotiation rounds. Following years of criticism, the US started to refuse to consent to the (re-)appointment of Appellate Body (AB) members. In December 2019, only one of the seven AB members remained, rendering the supreme instance of the two-tiered WTO jurisdiction inoperable. The Dispute Settlement Understanding (DSU) provides two solutions to this problem: prior to the Dispute Settlement Body (DSB) ruling, parties can either make an

agreement not to appeal or they can agree to have recourse to Article 25 DSU in case of an appeal. Article 25 DSU, however, is not compulsory and thus requires an ex-ante agreement by both parties. To circumvent this unpredictability, so far 51 out of the 164 WTO members have joined the EU-initiated MPIA providing a two-step legal structure similar to the blocked AB.

I have investigated the decision of the US not to join and China to join the MPIA based on the respective trade strategies from 2017 to 2021. In terms of trade, the US and China are the two most important WTO members. Their divergent behaviour concerning the MPIA provides for a noteworthy counterbalance and thus offers the possibility of comparing trade strategies and MPIA positioning as well as a cross-country evaluation. In terms of methodology, I conducted a directed qualitative content analysis building on theoretical considerations and textual data. My units of analysis for the case study are the US and China as states pursuant to International Law. To account for the inherent state motivation stemming from trade strategies, I opted for an *'inside-out'* operationalisation, while incorporating the institutional WTO framework.

This choice of operationalisation is grounded in the theoretical framework of the thesis. For the purpose of explaining incentives and principles guiding state behaviour in trade matters, I have delineated the IR theories of Constructivism, Institutionalism and Realism in their fundamentals. I found that Constructivism does not sufficiently account for the underlying dynamics of trade dispute settlement. Institutionalism sees the need for stable institutions but understates the member-driven nature and Realism accentuates the struggle for power but neglects the institutional setting. I therefore decided to combine core assumptions of both by drawing on elements of Institutional Realism by Keohane (1984). This enabled me to rely my arguments on a member-driven WTO in a post-hegemonic institutional setting and thereby bridge two strands of existing research. While the AB deadlock is commonly either explained with a general WTO governance crisis or the blocking behaviour of the US, I combined both perspectives under the concepts of **hegemony**, **harmony**, **cooperation**, and **discord**.

Against this theoretical backdrop and guided by the overall Research Question: ***To what extent can the national US and Chinese trade strategies from 2017 to 2021 explain the respective decision (not) to join the plurilateral Multi-Party Interim Appeal Arbitration Arrangement (MPIA) within the WTO framework?***, I conducted the analysis on a two-pronged structure. The framework of Institutional Realism combines realist assumptions of states' interests with an institutional setting. Following the AB deadlock, WTO members needed to decide to either join the MPIA and uphold a two-level judicial dispute procedure, or not to join the MPIA and

retain the possibility to 'appeal into the void'. This necessity to decide builds a groundwork to establish hypothesis relating the respective national trade strategy and the decision. I established hypotheses to account for the US decision not to join and the Chinese decision to join the MPIA.

I first hypothesised that the WTO principle of unanimity in appointing AB members requires **harmony** or **cooperation** to uphold the agreed rules of the DSU *(H1)*. This is validated by the US refusal of various reform proposals supported by a vast majority of WTO members and the unilateral and unconditional refusal to consent to the (re-)appointment of AB members.

Second, the stalemate of the Doha Round hints towards bilateral aspirations in national trade strategies *(H2.1)*. By extension, I assumed that these 'realist' trade strategies might have weakened 'institutional' obligations also in the WTO dispute settlement pillar and minimised the importance of **cooperation** in dispute settlement *(H2.2)*. I additionally hypothesised that this might have culminated in the US blocking of the AB *(H2.3)*. On the US side, I verified the abandoning of unfavourable multilateral agreements and a favouring of bilateral or regional agreements with *(H2.1)*. I falsified *(H2.2)* and consequently *(H2.3)* as US criticism towards the AB is of systemic nature and not directly linked to the emergence of bilateral alternatives. On the Chinese side, I equally verified *(H2.1)*. While China emphasises aspirations as leader in the global trade regime, the country is increasingly involved in bilateral and regional networks and the establishing of parallel institutions. However, I falsified *(H2.2)* for China. While trade strategies describe the advantage of bilateral or regional networks, support for the AB is a pivotal and frequently supported part of Chinese WTO membership.

In a third step, I assumed a possible **discord** between the US and Chinese trade strategies *(H3.1)*. Given a less pronounced **asymmetry** in light of the declining US hegemony, I hypothesised that this **policy conflict** might be the most decisive factor for a different behaviour regarding the MPIA *(H3.2)*. On the US side, the **policy conflict** became pronounced in 2017 first with the picture of China as threat to the WTO. The 2021 report of the Biden Administration announces a more systematic approach to the 'China challenge'. *(H3.1)* is thus verified for the US side. However, I found that the US-Chinese **policy conflict** is only subordinate to the US's claim of 'replication of AB flaws' in the MPIA. Hence, I falsified *(H3.2)*. On the Chinese side, I found that the 13th and 14th FYP are less direct when it comes to a possible **discord** with the US policy. However, I could confirm a **policy conflict** based on a speech by President Xi and thus verify *(H3.1)*. The answer to *(H3.2)* on the Chinse side mirrors results from the US investigation. I falsified *(H3.2)* as the US-Chinese **policy conflict** is subordinate compared to the general Chinese support of two-tiered WTO dispute settlement.

Building on this, and to acknowledge the 'realist' part of Institutional Realism, I separately looked at the US and China in hypotheses on motivations (not) to join the MPIA. I assumed the US and Chinese trade strategies to both be in **discord** with the rules-based and non-discriminatory WTO system *(H4.1 & H5.1)*. In a further step, I presumed that the **discord** turns into a **policy conflict** on the US side *(H4.2)* and **policy adjustment** on the Chinese side *(H5.2)*. On the US side, I verified a **discord** with the mentioned WTO principles *(H4.1)*. As for a **policy conflict** following from US resistance to proposals by other WTO members resulting in the decision against joining the MPIA, I verified *(H4.2)*. However, the US trade strategy and criticism towards the AB need to be incorporated to account for the US decision against joining the MPIA. The motivation does not only stem from the **policy conflict**, but is inherent to past US criticism towards the AB. On the Chinese side, I equally validated *(H5.1)* on a **discord** between trade strategy and the mentioned WTO principles. Content-wise, I could only falsify *(H5.2)* based on the weak argument of the diplomatic nature of publicly available information. From a theory-inherent reasoning, however, I could solidly invalidate *(H5.2)*. The official Chinese position has always been in **harmony** with the AB procedure pre-deadlock. Therefore, the support for the MPIA as replication of a two-tiered dispute settlement is not in need of a **policy adjustment** and *(H5.2)* is not pertinent.

Guided by these hypotheses, I found that US and Chinese trade strategies provide a pronounced explanatory power for the respective decision (not) to join the MPIA. The US trade strategy opposes the AB, is supportive of the AB deadlock and in consequence the US opposes the MPIA as replication of the AB. The Chinese trade strategy supports the AB, opposes the AB deadlock and in consequence China supports the MPIA, which it is member of.

Especially for the Chinese side, however, this statement is broken down to its essentials and sets aside the policy priority on the 'internal cycle'. I do not intend to paint a black or white picture of the US completely opposing the WTO and China completely supporting the WTO. This thesis is a case study on the MPIA and therefore primarily targets the WTO pillar of dispute settlement. While decisions regarding the MPIA can be well explained through the trade strategies, this might look completely different in other parts of the WTO mandate.

These research results contribute to the literature on (post-hegemonic) trade dispute settlement on three levels. As for the *theory*, I found that in addition to state-inherent and institution-inherent settings, the voting procedure of International Organisations (IOs) represents a pivotal aspect. While e.g. the IMF and the World Bank build on a weighted voting system, the WTO

principle of unanimity grants a de facto veto power (Wong, 2015). This makes the handling of **discord** particularly critical. In decisions potentially leading to a stalemate of WTO mandates, the only way to uphold multilateralism is **cooperation** in the sense of **policy coordination** or **policy adjustment**. The *empirical* relevance stems from my approach of combining the realist assumptions of states' interests with an institutional setting. This, in turn, bears relevancy on the *political/policy* level. I have found that bilateral aspirations following the Doha stalemate do not represent the main US incentive to block the AB. However, with a rising number of 'appeals into the void', this newfound latitude for the first-instance losing party to avoid an appeal might bring about more severe infringements of WTO principles.[48] While the MPIA is open for all WTO states to join, it is equally open to leave the agreement. Thus, if the majority of WTO members really is concerned with maintaining multilateral and compulsory dispute settlement in the long term, WTO reform is inevitable.

Next to the relevancy, the research design also comes with some limitations. As mentioned, case studies provide for little generalisability. I have found explanations for the decision of the US and China as my units of analysis. Other states' motivations (not) to join the MPIA might be different. Second, my units of observation are limited by the diplomatic nature of WTO statements. As the RQ explicitly targets trade strategies which are publicly available and not inherent motives, this does not pose a problem to my research results. However, it constrains a possibly broader field of explanations. In a further study, these limitations could be addressed by generating more data in terms of e.g. interviews in a summative approach to content analysis, which grants structured insights into the words used as a means of conveying information. A future study could build on the results of this thesis and contribute to further relevance especially on the *empirical level* through a different research design.

Word count (excluding charts): 17.846

[48] As of mid-August 2021, the WTO registers 20 notified appeals, of which 11 were appealed post-AB deadlock. An overview of ongoing appeals (into the void) is provided by the WTO: https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (WTO, n.d.b.).

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Appendix

Appendix I: 'Ordinary' WTO Dispute Settlement Procedure following Articles 16 and 17 DSU

These approximate periods for each stage of a dispute settlement procedure are target figures – the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.	
60 days	Consultations, mediation, etc
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	(without appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	(with appeal)

Source: WTO. (n.d.d.). Understanding the WTO - A unique contribution. Retrieved 13/06/2021 from https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm#appeals

Appendix II: Articles 16, 17 and 25 DSU – full text

Article 16 DSU

Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

Article 17 DSU

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph

2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.
6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.
7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.
8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.
10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.
11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.
12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.
13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

Article 25 DSU

Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.

Source: WTO. (n.d.c). Understanding on rules and procedures governing the settlement of disputes. Retrieved 20/01/2020 from https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#25

More information on Article 25 DSU can be found in the WTO Analytical Index concerning:

- Scope of the Arbitrator's mandate,
- Jurisdiction and burden of proof,
- Matters dealt with,
- Nullification or impairment of benefits,
- Treatment of confidential information,
- Differences compared with panel proceedings,
- Relationship with other provisions of the DSU.

Source: WTO. (n.d.f.). WTO ANALYTICAL INDEX: DSU – Article 25 (Jurisprudence). Retrieved 18/08/2021 from https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art25_jur.pdf

Appendix III: Multi-Party Interim Appeal Arbitration Arrangement (MPIA) – full text

STATEMENT ON A MECHANISM FOR DEVELOPING, DOCUMENTING AND SHARING PRACTICES AND PROCEDURES IN THE CONDUCT OF WTO DISPUTES
Addendum

The following communication, dated 30 April 2020, is being circulated at the request of the Delegations of Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay.

MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT PURSUANT TO ARTICLE 25 OF THE DSU

Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay (hereafter the "participating Members"),
Re-affirming their commitment to a multilateral rules-based trading system,

Acknowledging that a functioning dispute settlement system of the WTO is of the utmost importance for a rules-based trading system, and that an independent and impartial appeal stage must continue to be one of its essential features,

Determined to work with the whole WTO Membership to find a lasting improvement to the situation relating to the Appellate Body as a matter of priority, and to launch the selection processes as soon as possible, so that it can resume its functions as envisaged by the DSU,

Resolved, in the interim, to put in place contingency measures based on Article 25 of the DSU in order to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports, and thereby to preserve their rights and obligations under the WTO Agreement,

Desiring to also preserve the possibility of a binding resolution of disputes at panel stage, if no party chooses to appeal under this arrangement, through the adoption of panel reports by the DSB by negative consensus,

Re-affirming that consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members and that arbitration awards cannot add to or diminish the rights and obligations provided in the covered agreements,

Underlining the interim nature of this arrangement,

In view of these extraordinary circumstances, envisage resorting to the following multi-party interim appeal arbitration arrangement (hereafter the "MPIA"):

1. The participating Members indicate their intention to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure (hereafter the "appeal arbitration procedure"), as long as the Appellate Body is not able to hear appeals of panel reports in disputes among them due to an insufficient number of Appellate Body members.

2. In such circumstances, the participating Members will not pursue appeals under Articles 16.4 and 17 of the DSU.

3. The appeal arbitration procedure will be based on the substantive and procedural aspects of Appellate Review pursuant to Article 17 of the DSU, in order to keep its core features, including independence and impartiality, while enhancing the procedural efficiency of appeal proceedings. The appeal arbitration procedure is set out in Annex 1.

4. In particular, the participating Members envisage that, under the appeal arbitration procedure, appeals will be heard by three appeal arbitrators selected from the pool of 10 standing appeal arbitrators composed by the participating Members in accordance with Annex 2 (hereafter the "pool of arbitrators"). The pool of arbitrators will comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They will be unaffiliated with any government. They will not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. The composition of the pool of arbitrators will ensure an appropriate overall balance.

5. Members of the pool of arbitrators will stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration proceedings under the MPIA. In order to promote consistency and coherence in decision-making, the members of the pool of arbitrators will discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable.

6. The selection from the pool of arbitrators for a specific dispute will be done on the basis of the same principles and methods that apply to form a division of the Appellate Body under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review, including the principle of rotation. The WTO Director General will notify the parties and third parties of the results of the selection.

7. The participating Members envisage that appeal arbitrators will be provided with appropriate administrative and legal support, which will offer the necessary guarantees of quality and independence, given the nature of the responsibilities involved. The participating Members envisage that the support structure will be entirely separate from the WTO Secretariat staff and its divisions supporting the panels and be answerable, regarding the substance of their work, only to appeal arbitrators. The participating Members request the WTO Director General to ensure the availability of a support structure meeting these criteria.

8. The participating Members also envisage limited adjustments to panel procedures in disputes covered by the MPIA, to the extent it is necessary to facilitate the proper administration of the appeal arbitration procedure, should a party decide to appeal under this procedure. If no party appeals the panel report under the appeal arbitration procedure, the participating Members envisage that the panel report will be formally circulated for adoption by the DSB by negative consensus.

9. The MPIA applies to any future dispute between any two or more participating Members, including the compliance stage of such disputes, as well as to any such dispute pending on the date of this communication, except if the interim panel report, in the relevant stage of that dispute, has already been issued on that date.

10. In order to render the appeal arbitration procedure operational in particular disputes, the participating Members indicate their intention to enter into the arbitration agreement (the "appeal arbitration agreement") contained in Annex 1 to this communication and to notify that agreement pursuant to Article 25.2 of the DSU within 60 days after the date of the establishment of the panel. For pending disputes where, on the date of this communication, the panel has already been established but an interim report has not yet been issued, the participating Members will enter into the appeal arbitration agreement and notify that agreement pursuant to Article 25.2 of the DSU within 30 days after the date of this communication.

11. With respect to a specific dispute, parties to that dispute may, without prejudice to the principles set forth in this communication, mutually agree to depart from the procedures set out in the appeal arbitration agreement.

12. Any WTO Member is welcome to join the MPIA at any time, by notification to the DSB that it endorses this communication. In relation to disputes to which such WTO Member is a party, the date of that Member's notification to the DSB will be deemed to be the date of this communication for the purposes of paragraphs 9 and 10.

13. The participating Members will review the MPIA one year after the date of this communication. The review may concern any feature of the MPIA.

14. A participating Member may decide to cease its participation in the MPIA, by notifying to the DSB the withdrawal of its endorsement of this communication. However, subject to paragraph 9, the participating Members intend for the MPIA to continue to apply to disputes pending on the date of such withdrawal. Furthermore, any appeal arbitration agreement entered into under paragraph 10 will remain in effect.

15. The participating Members remain committed to resolving the impasse of the Appellate Body appointments as a matter of priority and envisage that the MPIA will remain in effect only until the Appellate Body is again fully functional. However, any appeal arbitration agreement entered into under paragraph 10 will remain in effect, unless the parties agree otherwise.

ANNEX 1

AGREED PROCEDURES FOR ARBITRATION UNDER ARTICLE 25 OF THE DSU IN DISPUTE DS X

1. In order to give effect to communication JOB/DSB/1/Add.12 in this dispute [the parties to the dispute] (hereafter the "parties") mutually agree pursuant to Article 25.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report as issued to the parties in dispute DS X. Any party to the dispute may initiate arbitration in accordance with these agreed procedures.

2. The arbitration may only be initiated if the Appellate Body is not able to hear an appeal in this dispute under Article 16.4 and 17 of the DSU. For the purposes of these agreed procedures, such situation is deemed to arise where, on the date of issuance of the final panel report to the parties, there are fewer than three Appellate Body members.

For greater certainty, if the Appellate Body is able to hear appeals at the date on which the final panel report is issued to the parties, a party may not initiate an arbitration, and the parties shall be free to consider an appeal under Articles 16.4 and 17 of the DSU.

3. In order to facilitate the proper administration of arbitration under these agreed procedures, the parties hereby jointly request the panel to notify the parties of the anticipated date of circulation of the final panel report within the meaning of Article 16 of the DSU, no later than 45 days in advance of that date.

4. Following the issuance of the final panel report to the parties, but no later than 10 days prior to the anticipated date of circulation of the final panel report to the rest of the Membership, any party may request that the panel suspend the panel proceedings with a view to initiating the arbitration under these agreed procedures. Such request by any party is deemed to constitute a joint request by the parties for suspension of the panel proceedings for 12 months pursuant to Article 12.12 of the DSU.

The parties hereby jointly request the panel to provide for the following, before the suspension takes effect:

> i. the lifting of confidentiality with respect of the final panel report under the Working Procedures of the panel;
>
> ii. the transmission of the panel record to the arbitrators upon the filing of the Notice of Appeal : Rule 25 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*;
>
> iii. the transmission of the final panel report in the working languages of the WTO to the parties and to the third parties.

Except as provided in paragraphs 6 and 18, the parties shall not request the panel to resume the panel proceedings.

5. The arbitration shall be initiated by filing of a Notice of Appeal with the WTO Secretariat no later than 20 days after the suspension of the panel proceedings referred to in paragraph 4 has taken effect. The Notice of Appeal shall include the final panel report in the working languages of the WTO. The Notice of Appeal shall be simultaneously notified to the other party or parties and to the third parties in the panel proceedings. Rules 20-23 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*.

6. Subject to paragraph 2, where the arbitration has not been initiated under these agreed procedures, the parties shall be deemed to have agreed not to appeal the panel report pursuant to Articles 16.4 and 17 of the DSU, with a view to its adoption by the DSB. If the panel proceedings have been suspended in accordance with paragraph 4, but no Notice of Appeal has been filed in accordance with paragraph 5, the parties hereby jointly request the panel to resume the panel proceedings.

7. The arbitrators shall be three persons selected from the pool of 10 standing appeal arbitrators composed in accordance with paragraph 4 of communication JOB/DSB/1/Add.12 (hereafter the

"pool of arbitrators") . The selection from the pool of arbitrators will be done on the basis of the same principles and methods that apply to form a division of the Appellate Body under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review, including the principle of rotation. The WTO Director General will notify the parties and third parties of the results of the selection. The arbitrators shall elect a Chairperson. Rule 3(2) of the Working Procedure for Appellate Review shall apply, *mutatis mutandis*, to the decision-making by the arbitrators.

8. In order to give effect to paragraph 5 of communication JOB/DSB/1/Add.12 in this dispute, the arbitrators may discuss their decisions relating to the appeal with all of the other members of the pool of arbitrators, without prejudice to the exclusive responsibility and freedom of the arbitrators with respect to such decisions and their quality. All members of the pool of arbitrators shall receive any document relating to the appeal.

9. An appeal shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel. The arbitrators may uphold, modify or reverse the legal findings and conclusions of the panel. Where applicable, the arbitration award shall include recommendations, as envisaged in Article 19 of the DSU. The findings of the panel which have not been appealed shall be deemed to form an integral part of the arbitration award together with the arbitrators' own findings.

10. The arbitrators shall only address those issues that are necessary for the resolution of the dispute. They shall address only those issues that have been raised by the parties, without prejudice to their obligation to rule on jurisdictional issues.

11. Unless otherwise provided for in these agreed procedures, the arbitration shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review. This includes in particular the Working Procedures for Appellate Review and the timetable for appeals provided for therein as well as the Rules of Conduct. The arbitrators may adapt the Working Procedures for Appellate Review and the timetable for appeals provided for therein, where justified under Rule 16 of the Working Procedures for Appellate Review, after consulting the parties.

12. The parties request the arbitrators to issue the award within 90 days following the filing of the Notice of Appeal. To that end, the arbitrators may take appropriate organizational measures to streamline the proceedings, without prejudice to the procedural rights and obligations of the parties and due process. Such measures may include decisions on page limits, time limits and deadlines as well as on the length and number of hearings required.

13. If necessary in order to issue the award within the 90 day time-period, the arbitrators may also propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.

14. On a proposal from the arbitrators, the parties may agree to extend the 90 day time-period for the issuance of the award.

15. The parties agree to abide by the arbitration award, which shall be final. Pursuant to Article 25.3 of the DSU, the award shall be notified to, but not adopted by, the DSB and to the Council or Committee of any relevant agreement.

16. Only parties to the dispute, not third parties, may initiate the arbitration. Third parties which have notified the DSB of a substantial interest in the matter before the panel pursuant to

Article 10.2 of the DSU may make written submissions to, and shall be given an opportunity to be heard by, the arbitrators. Rule 24 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*.

17. Pursuant to Article 25.4 of the DSU, Articles 21 and 22 of the DSU shall apply *mutatis mutandis* to the arbitration award issued in this dispute.

18. At any time during the arbitration, the appellant, or other appellant, may withdraw its appeal, or other appeal, by notifying the arbitrators. This notification shall also be notified to the panel and third parties, at the same time as the notification to the arbitrators. If no other appeal or appeal remains, the notification shall be deemed to constitute a joint request by the parties to resume panel proceedings under Article 12.12 of the DSU. If an other appeal or appeal remains at the time an appeal or other appeal is withdrawn, the arbitration shall continue.

19. The parties shall jointly notify these agreed procedures to the panel in DS X and ask the panel to grant, where applicable, the joint requests formulated in paragraphs 3, 4, 6, and 18.

ANNEX 2

COMPOSITION OF THE POOL OF ARBITRATORS PURSUANT TO PARAGRAPH 4 OF COMMUNICATION JOB/DSB/1/ADD.12

After the notification of the present communication to the DSB, the participating Members will promptly commence the composition process. The following will apply:

1. Each participating Member may nominate one candidate, by notifying the other participating Members.

2. The deadline for nominations will expire 30 days after the date of this communication.

3. The candidates will undergo a pre-selection process in order to ensure that the pool of arbitrators comprises only persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.

The participating Members envisage that this pre-selection process will be carried out by a pre-selection committee composed of the WTO Director General, and the Chairperson of the DSB, the Chairpersons of the Goods, Services, TRIPS and General Councils. The pre-selection committee will, after appropriate consultations, recommend to the participating Members the candidates who meet the above criteria.

The participating Members envisage the completion of this pre-selection process within one month following the expiry of the deadline to nominate candidates.

4. The participating Members will compose the pool of arbitrators by consensus. The participating Members will endeavour to compose the pool of arbitrators within three months following the date of this communication. They will notify the pool of arbitrators to the DSB, as addendum to this communication. The composition of the pool of arbitrators will ensure an appropriate overall balance.

5. The composition of the pool of arbitrators may be modified by agreement of all participating Members at any time. The participating Members underscore the interim nature of this

arrangement. Should the conditions laid down in paragraph 15 of the communication remain for a longer period of time, the participating Members will, periodically, partially re-compose the pool of arbitrators, starting two years after composition, in line with the procedures established in this Annex.

6. Should a need arise to complete the pool of arbitrators, for instance following the resignation of a member of the pool, the procedure set out above will apply.

Source: WTO. (2020a). *MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT PURSUANT TO ARTICLE 25 OF THE DSU* . JOB/DSB/1/Add.12. Retrieved 17/05/2021 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504

Appendix IV: MPIA Timeline, members, and arbitrators

List of 51 MPIA members (as of July 2021)
The EU with its 27 member states (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden) and Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Hong Kong SAR, Iceland, Macao SAR, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Peru, Singapore, Switzerland, Ukraine, and Uruguay (EC, 2021).

Timeline of the MPIA

Date	Stages of agreement
25 July 2019	EU-Canada Agreement on Article 25 DSU (pre-MPIA) (EC, 2019)
21 October 2019	EU-Norway Agreement on Article 25 DSU (pre-MPIA) (EC, n.d.)
30 April 2020	"EU and 19 other World Trade Organization Members ("WTO") announced the terms of an interim arrangement enabling appeals of WTO panel decisions to be decided in the absence of a functioning WTO Appellate Body" (Gladstone, 2020)
31 July 2020	MPIA members presented to the WTO the ten arbitrators who will hear appeals of WTO panel reports (see V.II.)

Sources:

European Commission EC. (2021). Dispute Settlement. Retrieved 01/05/2021 from https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/

European Commission EC. (2019). Interim Appeal Arbitration Pursuant to Article 25 of the DSU [EU and Canada]. Retrieved 01/05/2021 from https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf

European Commission EC. (n.d.). Interim Appeal Arbitration Pursuant to Article 25 of the DSU [EU and Norway]. Retrieved 01/05/2021 from https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158394.pdf

Gladstone, J. (2020). The WTO's INTERIM Appeal Arbitration arrangement - a bridge Over troubled waters? Retrieved 17/06/2021 from https://www.cliffordchance.com/briefings/2020/06/the-wto-s-interim-appeal-arbitration-arrangement---a-bridge-over.html

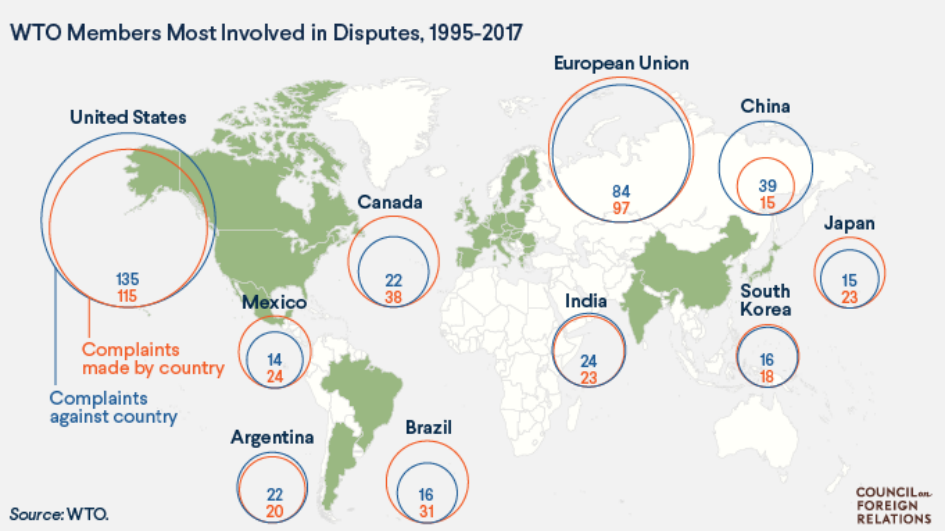
Pool of ten standing arbitrators (MPIA)

The following pool of ten standing arbitrators who will hear appeals under the MPIA has been presented by the then 24 signatory states to the MPIA on 31 July 2020:

1. Mr. Mateo Diego-Fernández Andrade (Mexico)
2. Mr. Thomas Cottier (Switzerland)
3. Ms. Locknie Hsu (Singapore)
4. Ms. Valerie Hughes (Canada)
5. Mr. Alejandro Jara (Chile)
6. Mr. José Alfredo Graça Lima (Brazil)
7. Ms. Claudia Orozco (Colombia)
8. Mr. Joost Pauwelyn (EU)
9. Ms. Penelope Ridings (New Zealand)
10. Mr. Guohua Yang (China)

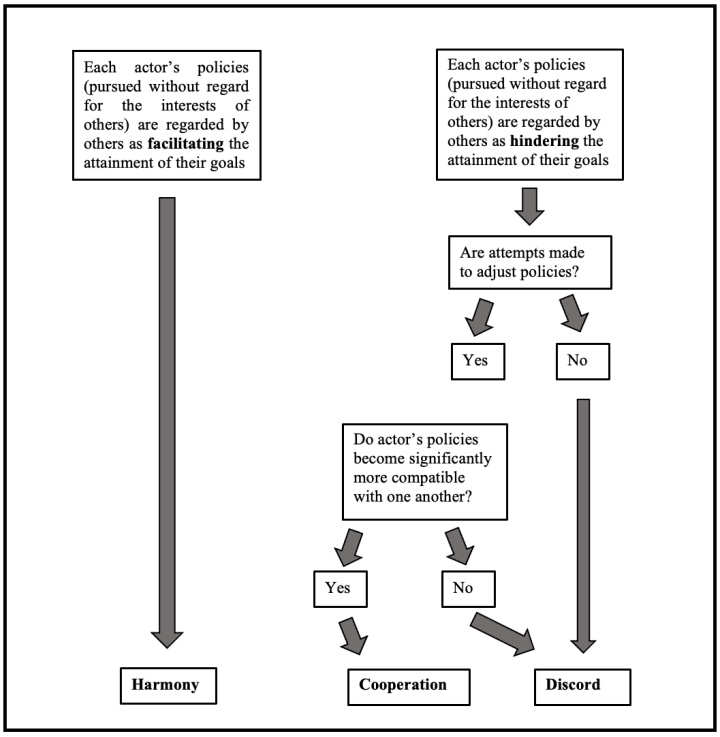
Source: Hohnstein, D., & Tereposky, G. (2020). Pool of Ten APPEAL Arbitrators established for the WTO Multi-party INTERIM Appeal Arbitration Arrangement (MPIA). Retrieved 17/06/2021 from https://www.lexology.com/library/detail.aspx?g=5d84b477-ba5c-4e0e-be25-0e291883b6d3

Appendix V: WTO Members most involved in Disputes (1995 – 2017)



Source: Council on Foreign Relations. (n.d.). What's Next for the WTO? Retrieved 20/01/2020 from https://www.cfr.org/backgrounder/whats-next-wto

Appendix VI: Graphical representation of the terms Harmony, Cooperation, and Discord according to Keohane (1984)



Source: Keohane, R. O. (1984). *After hegemony cooperation and discord in the world political economy*. Princeton University Press, p.53. Own depiction.

Appendix VII: Text-based data sources for the analysis

Data sources	Selected Examples	Purpose
International Treaties & Legal documents	WTO Dispute Settlement Understanding (Articles 16, 17, 25 DSU), MPIA Agreement full text	Close textual work: distinguish relevant legal framework from areas of no relevance; different types of interpretation (textual, historical or teleological) to compare and differentiate the scope of the articles from each other
EU, US & Chinese Missions to the WTO in Geneva (WTO Country Representatives)	Reaction letter to WTO DG, Speeches by Ambassadors, Trade Representatives etc., Reports concerning AB and MPIA, WTO Meeting Minutes, AB rulings, Farewell Speeches of AB members	First-hand information on behaviour and remarks made by relevant actors (EU, but mainly US and China) during WTO negotiation processes and meetings; Direct reaction to AB deadlock and MPIA by country representatives is relevant to determine the respective position
US & Chinese Presidents, national ministers of Trade or similar	Keynote Speech at World Economic Forum, Appearance of statements e.g. by Robert Lighthizer in official documents published on the government's website	similar to above field, but not only focused on WTO-related statements → broader framework
Trade-related institutions like, Eurostat, CRS, …)	documents concerning trade disputes and settlement; criteria: significance for WTO and trade dispute settlement	different databases to ensure reliability and validity; used for justification of selection of US and China
Newspaper Articles	Xinhua (Chinese state-run press agency), Giovannini (2020), background information on MPIA (EU press)	Information on how the behaviour of the US and China is perceived in the national and international press; Information on terms of office of ministers etc.
Secondary Literature (not as data, but background for research design)	Academic literature from the field of Economics & Trade, International Law and Distribution of Preferences, and (post-hegemonic) dispute settlement	Literature Review chapter II; evidence on comparable and past events in WTO history → parallels or discontinuities with current case → developing research agenda; temporal and spatial limitations of the research → existing studies in the same field can provide a supportive background

Declaration on Plagiarism