The World Trade Organization’s Dispute Settlement Body and International Economic Relations in the 21st Century

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Since the conversion of the General Agreement on Tariffs and Trade (GATT) to the World Trade Organization (WTO) in 1995, the Organization has faced severe difficulties in reaching trade-liberalizing agreements. One potential cause of this inability to reach new agreements is the waning of mutual interest between Member States on the norms of the regime.

The norm of the GATT was well-described by John Gerard Ruggie as “embedded liberalism” – free trade with exceptions to ensure domestic stability. However, agreement on this norm has come under fire as some groups push for increased liberalization in line with more orthodox economic principles, while others continue to cling to the safety net of embedded liberalism.

Using case studies from the WTO’s Dispute Settlement Body, I pinpoint these tensions between orthodox and embedded liberalism, demonstrating how states, transnational actors, and the WTO itself have contributed to these tensions.

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List of Abbreviations

Agreement on Agriculture – AA
Agreement on Subsidies and Countervailing Measures – SCM
Antidumping – AD
Appellate Body – AB
Countervailing Measures – CVM
Dispute Settlement Body – DSB
European Communities – EC
European Union - EU
General Agreement on Tariffs and Trade – GATT
International Monetary Fund – IMF
Non-Governmental Organization – NGO
Sanitary and Phytosanitary - SPS
The World Trade Organization – WTO
Introduction

International economic relations affect everyone’s life in one way or another, and are, therefore, some of the most contentious issues in international relations. From the very practical debate and protest of ordinary citizens – mirrored daily on CNN and less frequently in events such as the 1999 World Trade Organization (WTO) protests – to academic debate among economists and political scientists on the future of the WTO, International Monetary Fund (IMF), and the world economy, the controversy over economic policy is played out in all segments of society. Most of the practical debate – and a good amount of the academic debate – expects that protectionism will have the biggest impact on the global economy, whether the results of this isolationism are viewed as positive or negative. However, in 1994, John Gerard Ruggie provided a thoughtful analysis of where the risks to the current global economic regime lie, concluding that it is not the protectionist movements that pose the biggest threat to the status quo, but rather pressures to liberalize trade faster than economies can adjust to the changing rules and patterns. This analysis was based on Ruggie’s novel 1984 description of the global economic regime as “embedded liberal”. Embedded liberalism views the post-war economic regime as one where the need for free-market and free-trade policies to facilitate continuing economic expansion is tempered by the need for domestic stability attained by softening the adjustment costs associated with trade liberalization and free-market capitalism.
Ruggie’s 1994 analysis is well-founded in observation of the facts of the global economy and academic inquiry in the late 20th century. The transformation of the General Agreement on Tariffs and Trade (GATT) to the WTO in 1995, the decline of traditional industrial sectors in the Western world and phenomena such as outsourcing, and the proliferation of free trade agreements and other preferential trading arrangements all seem to point to a decline in the salience of embedded liberalism. Authors and theorists have also noted a change in the underlying principles of the international trade regime. Keohane and Nye note that “domestic polities will be under pressure from the erosion of economic inefficiency, tensions around the redistribution and inequality that accompany economic globalization, and the increasing roles of transnational and third sector actors. The compromise of embedded liberalism that created a social safety net in return for openness was successful in the second half of the twentieth century but is under new pressure” (Keohane and Nye 36) and go on to propose a general plan for governance of the new global economy they call “networked minimalism” as a way to harmonize the benefits from economic integration and the need for domestic stability – in other words, a vision of embedded liberalism for this century (Keohane and Nye 37-38). While promoting global federalism as a solution to governance problems, Dani Rodrik recommends intermediate governance solutions including “international harmonization and standard setting with generalized exit schemes, opt-outs, and escape clauses.” (Rodrik 348) Again, a reincarnation of embedded liberalism for a changed world. Thomas Friedman’s book *The World is Flat* details the decline of Ruggie’s embedded
liberalism and provides suggestions for a new embedded liberalism with policies such as wage insurance and better job training for the information economy. The aforementioned events of the last two decades combined with these theoretical insights into the changes in the world economy highlight the current tension between embedded liberalism and classical liberalism and demand an examination of these tensions and their possible effects. Specifically, we must ask whether tensions between embedded and orthodox liberalism are wearing away agreement over the fundamental principles guiding the international trading regime.

While Ruggie was correct in arguing that liberalizing forces, if triumphant, could force a change in the international trade regime from an embedded liberal to a more orthodox liberal regime, a second component must be analyzed along with these liberalizing forces – forces holding tight to the embedded liberal paradigm. Analyzing these competing forces together shows a real threat to the stability of the international trade regime embodied in the WTO. As liberalizing forces push for more orthodox international trade rules, destabilizing tensions emerge with the groups and states invested in the embedded liberal regime. The shared norms and principles required for international regime formation and maintenance no longer materialize, and less confidence in the WTO and more difficulty in negotiating new agreements emerge. An examination of both classical liberal and embedded liberal policies and factions at the supranational, national, and transnational levels will provide an understanding of the
current state of the international trading regime, the tensions in this regime, and possibilities for the future of the international trading order.

I have chosen to frame this discussion of the tension between embedded liberal and orthodox liberal policies and factions in the WTO’s Dispute Settlement Body (DSB). The DSB encompasses most of the rules encompassed in the multilateral trading regime by allowing “WTO Members to base their claims on any of the multilateral trade agreements included in the Annexes to the Agreement establishing the WTO.”

(Summary) Moreover, the DSB itself is a lesson in the contradiction of orthodox liberalism and embedded liberalism, at once looking to better enforce trade-liberalizing agreements and allowing exceptions to these agreements and even the decisions of the panel itself. Cases taken up by the DSB cover multilateral trade agreements, involve domestic international trade law, and incorporate transnational social movements and other non-governmental organizations (NGOs) into the international trade process – providing a fertile crop of case studies covering the lion’s share of issues in the international trade regime in which many of the conflicts between orthodox and embedded liberalism at all different levels can be seen (Steinberg 251; Understanding Article 13). Of course this analysis could be made more complete by analyzing the positions of various states during the negotiations of the WTO’s current Doha Round of multilateral trade negotiations. Unfortunately, the submissions of individual states are only made available after an agreement has been reached. However, DSB cases that have been completed are published, providing insight into all participants’ viewpoints.
Additionally, the DSB may be a way for states to settle conflicts of interest that could not be ironed out in negotiations, providing another useful insight into the dynamics of multilateral trade policy formation.

While many neoliberal institutionalist authors focus solely on the systemic level of analysis, Keohane notes in the preface to the 2005 edition of After Hegemony:

Were a new volume on ‘cooperation and discord in the world political economy’ to be written today, it would have to integrate three forms of analysis. Like After Hegemony, it would have to investigate how states form international regimes and comply or not with their rules. But it would also have to discuss how the decisions of states and intergovernmental organizations are affected by the activities of non-governmental organizations (NGOs) and the transnational and transgovernmental networks in which they are embedded. And it would have to link the analysis of both state and transnational action to domestic politics, making use of contemporary theory and research in comparative politics. (xvii)

While I do not intend to create an entirely new theory of international regime formation in this short space, analyzing the tension between embedded and orthodox liberalism in all three of these spheres should give a more complete understanding of the dynamics of this tension and its potential impacts on the system. In short, locating this discussion in the DSB involves most of the international trade regime and all three important components of regimes – transgovernmental organizations, states and their domestic polities, and transnational groups – in its workings, cases, and decisions.
In order to accomplish this goal, I will first summarize the arguments of neoliberal institutionalists in general as well as Ruggie’s embedded liberalism specifically. With a firm grasp on the theoretical insights underlying my analysis, I then move on to present cases highlighting the current tensions between orthodox and embedded liberalism at the supranational, transnational, and national levels. In this section, I rely on the cases presented to the WTO’s DSB to show how the tensions between orthodox and embedded liberalism, as expressed through dispute settlement cases, have served to narrow the scope of possible exceptions from WTO agreements, while continuing to allow some types of exceptions. It is precisely this disconnect between the effects of some cases – reducing the possibilities for exceptions to WTO agreements – and other decisions – legitimizing states’ abilities to take advantage of exemptions from responsibilities under the WTO – that signals a weakening of the multilateral trade regime embodied in the WTO. Cases that highlight this tension alternately narrow the possible exceptions to WTO agreements and reaffirm states’ abilities to take advantage of certain of these exceptions. Even in cases where a state is permitted to take an exception, the scope of an exemption may be narrowed by a limited reading of the exclusion by the Dispute Settlement Panel. Next, I present a theory of non-majoritarian democracy that may justify the way the Dispute Settlement process works in the WTO. Finally, I draw some conclusions summarizing what these developments mean for the WTO and highlighting areas for further research.
Chapter 1: Neoliberal Institutionalism and International Economic Cooperation

The cooperation schemes needed to build both liberal and embedded liberal trading regimes are founded in the ideas of neoliberal institutionalism. Neoliberal institutionalists believe if self-interested states have interests in common then by acting as rational egoists, they may look to maximize their absolute gains in international relations by cooperating to more closely approximate Pareto-optimal outcomes (Stein 35; Keohane, After Hegemony 67-88). In order for this type of cooperation to emerge, the system must be positive-sum and states must be more interested in creating larger absolute gains for both themselves and others rather than maximizing relative gains (Stein 47). David Ricardo’s theory of comparative advantage shows the international political economy as positive-sum. In this theory, conditions of perfect free trade will provoke industry in different countries to specialize in producing goods that their attributes allow them to manufacture efficiently – for example, states with large populations will likely focus on producing labor-intensive products while those with highly educated citizens might concentrate on high-technology goods. Comparative advantage states that countries will not produce all of those goods in which it has an efficiency advantage, but only those which it produces most efficiently compared to both others and themselves. This specialization leads to the most efficient production of all goods, eliminates repetition of production, and widens the market for producers to include all countries participating in the open trading scheme. Hence, when trade is
conducted in a free and open manner, the resulting specialization across countries leads to Pareto-optimal economic outcomes (Salvatore 35-51). Empirical evidence also bolsters the claim that free trade holds significant welfare benefits for states, accelerating growth rates and increasing national income (Frankel and Romer). When combined with the fact that defections from a liberal trade policy stance are relatively easily observable – since the defecting state must apply the tariff or non-tariff barrier – and do not cause immediate and dramatic damage to other states like defection from a security agreement make the international economy an especially fertile field for cooperation (Lipson 75).

Cooperation in an anarchic international system, however, is not easy, and so states may form regimes in order to facilitate the making of mutually beneficial agreements (Stein 35; Keohane, After Hegemony 85-97; Krasner, “Structural Causes” 2-3). Regimes are “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue area” (Krasner, “Structural Causes” 1). Regimes work to circumscribe national behavior so that longer-term benefits are achieved, sometimes at the expense of immediate welfare gains (Stein 31, 35-37; Axelrod and Keohane 98). In the international political economy, regimes supporting liberal trading principles deter states from erecting trade barriers, which provide benefits for domestic labor and increase national income in the short-term but cause other states to retaliate and can lead to system closure in the long-run (Stein 37-38).

Regimes operate to correct several crucial problems in the international political economy that can stymie cooperation towards free trade. Using a theory of market
failure, Keohane outlines three problems in the international political economy and the ways that regimes can ameliorate two of them. A lack of binding legal authority establishing liability for actions, imperfect information, and positive transaction costs all make beneficial agreements in world politics harder to achieve. Regimes stop short of providing binding legal authority as seen in national governments. However, they do provide better information than would otherwise be available on other actors’ preferences and actions and reduce transaction costs for agreements conforming to the principles of the regime while simultaneously increasing the costs of defection and deception (Keohane, *After Hegemony* 85-97; Axelrod and Keohane 98). Regimes also create a situation where similar issues are lumped together and states believe that they will continue to have a relationship in a specific issue-area with other states (Axelrod and Keohane 99). These issue linkages and the increased shadow of the future change the calculations involved in decision-making from an analysis of the costs and benefits of one decision to a scrutiny of the overall costs and benefits of a whole package of related decisions and bring the consideration of reputation into the decision calculus. In the language of game theory, regimes make Prisoner’s Dilemma games repeated and can reduce multi-player games to a series of games with a smaller number of players, making cooperation more easily achievable (Axelrod and Keohane 98; Keohane, *After Hegemony* 105). While regimes can be more or less formalized and complex, the necessity of policy coordination to achieve economic benefits from freer trade requires a relatively high degree of formalization, which can be and is embodied in institutions.
These institutions also contribute to the regime benefit of providing information by providing clear guidelines for action and monitoring state behavior (Stein 41-42, 46).

How regimes come to be is a matter of some contention, but the role of hegemony and the costs of cooperation deserve some attention. Realists believe that hegemony is a crucial element to the development of regimes (Krasner, “State Power”), and neoliberal institutionalists concede that the current set of regimes in the international economy arose out of U.S. hegemony and that a global system lead by a hegemon makes regime development easier (Lipson 76-77; Axelrod and Keohane 102; Keohane, After Hegemony 31, 46, 135-181). The game theoretic models showing how repeated plays of a Prisoner’s Dilemma game can lead to cooperation require that one player cooperate first and then take a contingent strategy that they will do in the future what the other player does – continued cooperation for cooperation, retaliation for defection (Stein 35-38, Lipson 63-65, Axelrod and Keohane 88-98). However, this TIT-for-TAT strategy requires one state to undertake the costs and risks of the initial cooperation. Moreover, the benefits that regimes provide – information and a stable forum for negotiation – are not free. At the very least, someone must monitor the actions of states to ensure that regime rules are being followed, and the institutional staffs that provide this service must be paid. In the case of the WTO specifically, the organization not only provides monitoring, but also supplies dispute resolution and expert assistance in research and analysis of economic issues related to trade. Neoliberal institutionalist theorists provide a detailed recounting of the costs the U.S. undertook in creating our current international
economic regimes (Keohane, *After Hegemony* 138-150; Lipson 77-78). Keohane and others who argue that states can build regimes for cooperation even without a hegemonic state taking the lead still admit that this non-hegemonic construction of regimes is significantly more difficult. In analyzing the example of the International Energy Agency, an example of a regime constructed since the decline of America’s hegemony, Keohane notes that “the IEA was aided by an unusually favorable conjunction of other conditions” (*After Hegemony*, 240). These favorable conditions included strong mutual interests, a long shadow of the future, well-developed formal and informal diplomatic ties between cooperating states, and – in the case of the IEA and debt rescheduling – an emergency situation that necessitated immediate and decisive action. These factors are frequently referred to, along with the distribution of power and national characteristics, as determining state interests which consequently determine the likelihood, chances of success, strength, and content of regimes and their formation. Even when all of these stars align, however, cooperation still may not emerge because of the contentiousness of linked issues, domestic political considerations, and a disconnect between economic and security issues (Keohane, *After Hegemony* 224-240; Stein 48-50; Axelrod and Keohane 103, 113; ).

How regime changes operate is another crucial element of neoliberal institutionalist theory. When the rules and decision-making procedures of a regime change, these are changes within the regime, and some regimes – including the international trade regime embodied in the WTO – are designed to go through frequent
changes of this type. On the other hand, changes to the principles and norms of a regime are changes to a regime and could be a source of regime decay or failure. In other words, principles and norms are the crux of where state interests converge, and when these underlying interests change, the regime must change, be completely replaced, or fade away to accommodate this change in underlying interest structures (Krasner, “Structural Causes” 3-4; Stein 50). This process of regime change is not always as straightforward as it sounds. Regimes pattern behavior so that the costly process of interest reevaluation is conducted less frequently, so changes in regimes may lag behind changes in the underlying determinants of interests – including the distribution of power. Then again, changes in the structure of the system also do not always lead to changes in regimes because not all changes in the distribution of power change state’s preferences from the preferences that created the regime (Stein 50-51). Because changes in structure may or may not lead to changes in preferences, and these changes in preferences may or may not be recognized by states in a timely fashion, regimes may fail because negotiations to restructure the cooperative relationship may not take place. Even when a successful cooperative relationship is formed and incarnated in a regime, the regime may decay as states attempt to find loopholes in the system or power structures change so that previously unimportant defections by smaller states begin to have significant impacts on the operation of a regime. Additionally, this previous success at creating a regime does not mean that future success in cooperation is a given. Policy makers do not always learn the lessons about cooperation that they need to in order to continue cooperation in the
future, and the structure of the system and the ordering and intensity of state preferences at a time when change is needed may not align in a way that is conducive to continued cooperation (Axelrod and Keohane 111-113, Lipson 67).

Gilpin provides an account of how changes in preferences come to change regimes using an economic framework. The foreign policy of a state can be viewed as the purchase of a bundle of goods, consistent with the indifference curve for the state as a whole. This bundle of goods may consist of certain levels of national security, economic activities, and other objectives. Within each of these categories, there are also goods classifications, such as offensive or defensive national security and protectionist or liberal trade policies. Depending on the relative costs of each of these goods, the citizens of a particular state will demand particular combinations of them. However, as the structure of the international system or the relative costs of these goods change, the state’s location on the current indifference curve will change or the state will move to a point along a different indifference curve. For example, if the costs of offensive weapons change, this may change a state’s preference for their national security bundle from more defensively-oriented to more offensively-oriented defenses. Moreover, as the structure of the system changes, preferences change along with it. If a state is in alliance with the hegemon – relying on the powerful state for much of their national security provision – and the hegemon begins to decline, that state may begin to demand a greater focus on national security at the expense of economic, moral, or other interests (Gilpin 18-25).
All of these theoretical possibilities for cooperation yield a few conclusions. The basic requirements for cooperation are mutual interests, a long shadow of the future, extensive formal and informal diplomatic ties, and a focus on absolute instead of relative gains. In addition to these necessary – but not sufficient – conditions, a hegemon who is willing to bear the costs of initial cooperation and regime formation can be extremely helpful in beginning the process of cooperative relationships. Without a hegemon, the necessary conditions for cooperation must be more extensive, and an immediate need for a solution to a crisis is helpful in spurring cooperation. After regimes are in place, changes in the structure of the system that lead to changes in preferences can cause the regime to decay or fail, and here again, a hegemon or an urgent need for cooperation significantly increase the chances for successful regime change. Regimes themselves condition states to follow their basic principles and forgo frequent reassessments of their interests, so regimes can also play a role in the continuation of cooperation after structural changes occur. While neoliberal institutionalists believe that cooperation can occur with or without a hegemon and in the presence or absence of a crisis, hegemonic leadership of cooperation efforts and urgent needs for cooperation are strong intervening variables that along with the necessary conditions for cooperation can increase the chances for success of cooperative agreements.
Chapter 2: Embedded Liberalism and the World Trade Organization

Embedded liberalism as advanced by Ruggie is compatible with the neoliberal institutionalist view that cooperation can exist in the absence of a hegemon. Ruggie disagrees with the Realist paradigm that the presence of a hegemon will create a regime founded on economic liberalization and the decline or absence of a hegemon will lead to closure of the international economic system. He argues, rather, that when power is analyzed along with social purpose, a more complete understanding of both the prevalence and content of international economic regimes is acquired. Allowing for movement along two lines – the distribution of power and state preferences – provides four possible situations in the international economy: hegemonic power combines with a legitimate social purpose, hegemonic power exists without agreement on a social purpose, neither a hegemon nor agreement on social purpose exist, and a social purpose exists without a hegemon. As far as regime change is concerned, Ruggie argues that there is no reason to believe that regimes will be destroyed when agreement on social purpose exists in the absence of a hegemonic power; rather, the norms and principles of the regime may persist while the rules and decision-making procedures of the regime are altered to reflect the current distribution of power and the specific challenges that distribution presents (195-201). This analysis provides a more specific prediction than the neoliberal institutionalist arguments do as to how cooperation can persist after the decline of hegemony.
After the Second World War, the United States and other Western countries looked to create a trading regime founded on the principles of open trade, with exceptions. While the original proposal for an International Trade Organization with a broad scope covering most aspects of international economic relations was rejected by the US Congress, some parts of the agreement survived and became the General Agreement on Tariffs and Trade (GATT). The GATT was designed to be a forum for negotiating trade agreements, without much formality or enforcement power (Goldstein 149). Its basic principles included nondiscrimination and reciprocity. While the agreement did provide for certain tariff level reductions and restrictions on the use of non-tariff barriers, there were many exceptions to these agreed-upon rules. For example, all existing preferential trading arrangements were excepted from the rule of Most-Favoured Nation (MFN, or nondiscriminatory) treatment, quantitative import restrictions were deemed unacceptable unless they were used to preserve the balance of payments or in agricultural trade coupled with a price-support program, and a state could be completely excused from its GATT responsibilities with the approval of two-thirds of GATT members (Ruggie, 1997 4). From the time of its inception in 1948, the GATT became more formalized and its rules increasingly complex and legalistic, culminating in the transformation of the GATT to the WTO in the 1990’s (Goldstein 149). One of the most important changes made to the GATT by the WTO was the strengthening of the dispute settlement system. While the GATT did have provisions for dispute settlement, several problems existed. First, any state could block the adoption of a dispute settlement
panel report, meaning that the finding of a violation would not be recognized. Clearly, the state found guilty of violating WTO rules had a strong incentive and the ability to block the adoption of that report. Trade in services was added as an area of WTO coverage. Finally, focus was placed on the reduction and regulation of non-tariff barriers to trade (World Trade Organization; Goldstein 149-151). What was maintained in the transition from the GATT to the WTO was the balancing act between orthodox and embedded liberal principles – free trade with exceptions for adjustment costs and special circumstances (World Trade Organization).

Ruggie’s embedded liberalism views this post-war international trading regime as not one of rampant cheating on orthodox liberal principles, but as one intentionally designed to allow states to intervene in economic affairs in order to maintain domestic stability. It differs greatly from orthodox economic liberalism in that it embraces exceptions to the rule that free trade is the only way to achieve desirable outcomes. Embedded liberalism is a way to balance the need for countries to trade in order to achieve economic growth and the need for leaders – especially in Democracies – to undertake some protectionist measures when serious economic detriments are caused by internationalization. Even with the benefits from trade, adjustment costs can often be severe, and these adjustment costs can cost political leaders their careers. If free-trading leaders are replaced with those promoting a protectionist agenda, or adjustment costs are so severe that the economic balance of power is changed significantly, the international trading regime will be unstable and subject to a retreat to a closed system. However, by
allowing states to intervene to soften adjustment costs, embedded liberalism provides more domestic stability and possibly more stability to the regime. To be sure, Ruggie rightly realizes that the *economic* outcomes under embedded liberalism will be Pareto-deficient, and greater gains from trade could be realized under a more orthodox trading regime, but the results of embedded liberalism are still more efficient and beneficial than those of a closed trading regime (Ruggie 215).

Very important to this conception of the international trading regime is an understanding of how this view fits the definition of a regime. Recalling the definition of regimes as “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area” (Krasner, “Structural Causes” 1), at first glance, it appears that a “regime” which allows states to violate its norms and principles is not a regime at all. However, the institutionalization of embedded liberalism in the GATT and then the WTO has provided the needed structure for an embedded liberal trading regime to be considered a regime. The norm embodied in the embedded liberal trading regimes of the GATT and now the WTO is that benefits from trade exist and should be exploited, but without sacrificing domestic stability. The principles of the GATT regime – unchanged by the transformation of the GATT to the WTO – were well-defined by Ruggie as nondiscrimination (most-favoured nation treatment), reductions in tariffs, protections for balance-of-payments difficulties, allowances for existing systems of preferences as well as new customs unions and free trade agreements, protections for injured industries, elimination of quotas except in the case of balance-of-payments issues
and agriculture, and dispute settlement for overseeing exceptions and determining compensation for injuries (Ruggie 213). It is these principles, especially dispute settlement arrangements, that primarily constitute the classification of embedded liberal trading orders as regimes, for they place restrictions and requirements on exceptions to the norm of free trade. As Ruggie states, “international regimes limit the discretion of their constituent units to decide and act on issues that fall within the regime’s domain.” (Ruggie 196) It is precisely the limitations on independent state action when invoking an exception from the established rules of the regime that make embedded liberalism a regime. Briefly, these rules include items such as tariff level and subsidy restrictions; and the decision-making procedures include bi-annual Ministerial conferences, methods for deciding modalities for negotiation, and the procedures for dispute settlement. Second and most importantly, as previously mentioned the rules and decision-making procedures of a regime can change without changing the regime itself, so long as the norms and principles of the regime remain intact, and the WTO is designed so that these rules are supposed to change quite frequently in the pursuit of gradually freer trade (Krasner, “Structural Causes” 3-4).

Finally, Ruggie outlines some of the events that may lead to changes in the embedded liberal regime, and these events underscore the need for the analysis conducted here. Ruggie notes that developing countries had shouldered a disproportionate load of externalized adjustment costs, being forced to undertake orthodox economic reforms and having their fates tied to expansion in the developed world. Recently, however,
developing states have demanded not only the “Special and Different” treatment afforded them under the WTO agreements, but also concessions from developed states in areas where the core countries were previously unwilling to make compromises, such as agricultural subsides. As parts of the developing world grow rapidly, provide alternatives to expensive core-country industrial production, and exercise their voice in the WTO, strains on the embedded liberal system continue to mount. Another method by which states externalize adjustment costs is through inflation, which after the experiences of the U.S. in the 1970’s and 1980’s is generally avoided. By “sacrificing economic efficiency to social stability” (Ruggie 231) inflation is inevitable, so either states must deal with high inflation rates or work to increase productivity (Ruggie 229-231). It is easy to see that these threats to the embedded liberal international trading regime have been realized, and so an understanding of the tension between the old and new incarnations of embedded liberalism and orthodox liberalism is more important than ever to understand the future prospects for the international trading regime.

All of the neoliberal institutionalist authors surveyed here, including Ruggie, believe that cooperation can persist after the decline or disappearance of hegemony, but all agree that hegemony is beneficial in forming regimes. Ruggie specifically talks about regime change when he refers to cooperation after hegemony, and many of the examples given by Keohane and the other neoliberal institutionalist authors outlining how cooperation can occur without hegemony deal with regime changes, not the formation of new regimes. Because the current tension between embedded liberalism and orthodox
liberalism represents a shift in the norms and principles of the international trading
regime and not simply the rules and decision-making procedures, this change represents a
change to the regime, not within it. Therefore, the foregoing analysis of the tension
between orthodox liberalism and embedded liberalism in the international trade regime
will allow the implications of this tension to be more fully understood.
Chapter 3: Sources of Tension in the International Trade Regime

Tensions in the World Trade Organization

As new WTO agreements are produced, it is expected that trade will become more and more liberal. Never was this effect so profound as in the Uruguay Round, the last completed WTO agreement. Not only did that agreement convert the GATT to the WTO, it made several tremendously liberalizing adjustments to the GATT regime. Non-tariff barriers were specifically targeted for reduction or elimination. Trade in services was introduced in the WTO as an area for negotiation and rule development. And, most importantly, the Dispute Settlement Understanding (DSU) was introduced, establishing the Dispute Settlement Body and the Appellate Body (AB).

All of these changes, especially the establishment of the DSB, had significant liberalizing effects. The obligatory nature of DSB jurisdiction and the nearly automatic acceptance of its rulings made it much more difficult for states to invoke exceptions. The GATT did have a formal dispute settlement mechanism; however, because the rules allowed any state to block adoption of the dispute panel’s findings – including the “loser” in the dispute – the mechanism really had no teeth. In the WTO, panel findings are automatically adopted unless all states reject the ruling. States can also apply to withdraw concessions from states as retaliation for refusal or inability to implement policy changes recommended by the Dispute Panel in an amount equivalent to the harm
done to the complaining state. Several types of cases demonstrate how the new dispute settlement procedures and WTO rules exacerbate the tensions between embedded and orthodox liberalism. The decisions reached in these cases fall on both sides of the embedded-orthodox liberal divide. In some of the cases, the scope of exceptions is limited in a way that reduces the ability of states to take advantage of these exclusions, clearly a liberalizing move. Some of these cases allowed states to take exceptions. The rules of the WTO and DSB highlighted here also highlight both sides of the embedded-orthodox liberal tension. While the agreements reached in the Uruguay Round by and large are liberalizing, some of the rules actually create new exceptions to WTO rules. Taken together, these cases point decisively to increased tension between orthodox and embedded liberalism.

The crucial point of embedded liberalism is that states are permitted to soften adjustment costs through the use of domestic policies that, on their face, do not fit in with the “free trade” principle of the regime. The application of antidumping (AD) and countervailing (CVM) duties is one of the most frequently used mechanisms to reduce the adjustment costs associated with freer trade. The technical definition of dumping is selling products at a price below those charged in the home market or below production cost. When imports at this lower-than-normal price cause injury to the domestic competing industry, a duty can be imposed by the importing country at such as level as to offset the injury caused to their domestic industry.
However, the process of determining dumping, assigning causation, calculating injury, and applying appropriate tariffs is a quite complicated one that leaves room for states to use antidumping duties in cases where this pure definition is not met. In the United States, a company or group of companies files a petition with the International Trade Commission and the Department of Commerce providing some evidence of dumping and injury and requesting an investigation. If the petition is accepted, a preliminary investigation into the alleged dumping is completed. 79% of these preliminary investigations result in a finding of dumping (Lindsey 3). A more thorough investigation is then undertaken, with information being requested from large producers in the countries in question to determine the “normal price” for items produced there. Because of this leeway in determining whether or not a product has been “dumped,” antidumping duties can be viewed as an exception to the principle of free trade.

Countervailing measures are quite similar to antidumping duties, except that they are imposed to offset the harm caused to domestic industry by imports that are subsidized by the exporting country’s government (Glossary, Summary).

Both of these exceptions to WTO rules have come under fire in recent dispute settlement cases. Of the 98 DSB cases where a decision had been handed down by September, 2006, 22 involved application of antidumping duties by the defending state (WTO Dispute Settlement). One of the major stumbling blocks for states attempting to apply AD duties is the determination of injury requirement, which mandates that states not only consider whether the price of imports from a certain country are below a normal
price, but also show harm to the domestic industry and consider and dismiss other factors that may be causing that harm. So even if a country can demonstrate that imports of a certain good are below the world price and the domestic industry has been harmed, unless they can show a causal link between the price and level of imports and the harm to the domestic industry, they cannot apply the antidumping duty (Summary).

Two cases highlight the recent DSB activity on antidumping. In the case US-DRAMS, Korea successfully argued that the United States’ methods for determining whether an exporter is likely to dump were flawed. The US standard at the time required the classification of an exporter as “not likely” to dump in order for antidumping duties to be removed. The Panel ruled that even if an exporter does not qualify for a “not likely” to dump classification, it does not mean that they are therefore “likely” to dump, and the US procedures must be refined to provide a more definitive determination of the likelihood of a state to dump (WTO Dispute Settlement 33). Again in the US-Stainless Steel case, the US’s methods for determining dumping were successfully challenged by Korea. In this case, the methods by which the US constructed a normal export price were found to be flawed, and the US was to improve its investigative procedures (WTO Dispute Settlement 66). As for countervailing duties, nearly all of the cases brought to the DSB have focused on methodologies for determining domestic support and injury, and these cases are therefore analogous to the antidumping cases outlined here (WTO Dispute Settlement). For example, in the US-Countervailing Duty Investigation on DRAMS case, several of the key terms in the Agreement on Subsidies and
Countervailing Measures were clarified, and the proper procedures for determining whether a country was subsidizing production were better defined. While the Appellate Body eventually upheld the US’s determination of support and injury, the case contributed significantly to WTO procedural rules (WTO Dispute Settlement 109). It can be argued that in cases like these, the states are trying to stretch the antidumping and countervailing allowances to provide a wider exception to WTO commitments than is permitted. However, the fact that procedures surrounding the determination and application of antidumping and countervailing measures are being tightened provides evidence to the fact that embedded liberal exceptions to orthodox free trade principles are being winnowed down.

While both of these measures are quite technical in how normal prices, injury, and the level of remedy are determined, they both fit in with embedded liberalism in the fact that they allow an exception to purely free trade. With antidumping, it could be argued that the products are not being “dumped,” they are simply being produced more efficiently in one or a few countries than in the rest of the world. In some cases, it is clear that the exporter is selling their products below cost to gain an initial foothold, much like domestic predatory business practices, but selling below cost is not required for a determination of dumping to be made. (Glossary, Summary).

One of the main exclusions from the original GATT agreement was agriculture. The GATT had no rules specifically designed for agriculture, but the Uruguay Round included the Agreement on Agriculture (AA). One of the principles of the GATT and
now the WTO was that trade-distorting domestic policies were limited or prohibited. Especially in the Uruguay Round agreements, export subsidies, price supports, and specifically targeted domestic support programs were severely restricted. However, some of these programs were permitted, although limited, in agriculture by the AA. The rules on agriculture themselves highlight some of the tensions between orthodox and embedded liberalism. Two main types of subsidies are listed in the AA: “green box” subsidies are targeted at domestic purposes that have limited trade impacts – such as environmental conservation, rural development, or infrastructure provision; “amber box” subsidies are those that have a significant impact on trade and would otherwise be prohibited by other WTO agreements – such as subsidies based on export performance or the use of domestic over imported products. While the types of subsidies included in the “amber box” category are prohibited by other WTO agreements, they are permitted in agriculture up to a certain dollar figure calculated for each state (Agreement on Agriculture).

Agricultural supports have been the target of a number of WTO cases. One of the most recent and important examples to challenges of domestic support for agriculture is the US-Cotton case, brought by Brazil. Brazil not only contended that many of the US agricultural programs – such as export credit guarantees, market loss assistance payments, payments to users of products, and counter-cyclical payments – were prohibited export subsidies, they also claimed that these programs violated the US’s schedule of concessions for the reduction of agricultural subsidies. For most of the
programs listed by Brazil in their complaint, the panel found that the US was indeed exceeding their agricultural support limits (Subsidies on Upland Cotton).

The principle of limitations on domestic agricultural support will again be tested as Canada is now challenging the US’s agricultural support programs. While the US did change some of their programs after the Brazil-Cotton decision, both Brazil and Canada claim that the US still exceeds its limits for agricultural support (Subsidies and Other Domestic Support). The complaint by Canada – tentatively known as the Canada-Corn case – is especially interesting because the Canadian Supreme Court recently found that Canadian agriculture is not harmed by US agricultural support programs (Hang on). Usually a country shows harm to their domestic industry when bringing a complaint. If Canada is successful in this case, it will provide more than the theoretical basis that now exists for the principle that violations of WTO law can be both in fact – meaning that the policy can be demonstrated – and in law – meaning that, regardless of whether the law is applied or what its effects are, if a law that violates WTO policy exists the state is in violation. Right now, there is DSB precedent to the opposite of the in fact or in law rule. A US law permitting the United States Trade Representative to undertake retaliatory actions if a country is found not to have complied with a DSB decision technically violates WTO rules that require a determination to be made and a retaliation amount determined by a compliance panel. However, in a case brought by European Communities (EC), the DSB ruled that the US law only violated WTO rules if applied in such a way that retaliation was undertaken without WTO consultation and determination.
The US made assurances that no retaliation would be undertaken without WTO consultation, and the law was allowed to stand (WTO Dispute Settlement 54). These cases clearly demonstrate that the types and amounts of agricultural support provided by countries are now strictly limited by the Agreement on Agriculture.

Yet another area where WTO rules and DSB activity have highlighted the tensions between orthodox and embedded liberalism is in protections for health – sanitary and phytosanitary (SPS) measures. The SPS agreement was another addition of the Uruguay Round, and limited the measures states could take for the protection of plant, animal, and human life and health. The SPS agreement basically requires all SPS measures to conform to international standards when those standards are available, be based in scientific fact when international standards are not available, and allow other states time to adjust to new regulations through publication and notification requirements (Agreement on Sanitary and Phytosanitary Measures). Again, SPS issues have drawn a significant number of DSB cases.

Perhaps the most well-known and longest-running DSB case regarding SPS measures is the EC-hormones case. This case is a carry-over from the GATT dispute settlement process, and was first registered in the WTO DSB in 1996. The United States and Canada claimed that the EC’s policies banning the use of hormones in the raising of livestock violated the EC’s commitments regarding sanitary and phytosanitary measures. Both the US and Canada stated that significant evidence existed that hormones were safe for use in livestock that would provide food products, and therefore the EC’s policy was
not consistent with international standards or based in scientific study. The Panel ruled in favor of the US and Canada, claiming that the EC had not applied the proper risk-assessment mechanisms in reaching their conclusion that hormones were unsafe (WTO Dispute Settlement 7). Since the completion of this case in 1998, the EC claims that they have changed their programs. The truth is that the EC maintains the ban on hormones for use in livestock farming, but now has a study that shows these hormones to be unsafe. The EC claims that this study fulfills their requirement to conduct a risk-assessment before applying SPS measures. Of course, the US and Canada disagree with the EC’s statement that they are now WTO-compliant, and the EC has filed cases against the US and Canada for removal of retaliatory duties applied when the EC did not comply with the Panel ruling within the time allowed (European Communities, United States - Continued). While measures to protect health and life are still recognized as potential exceptions from the ideal of free trade, these exceptions are limited by the SPS agreement and the cases brought under this agreement, as demonstrated by the EC-Hormones case.

Finally, a number of other domestic policies that can be categorized as embedded liberal have been the subject of DSB cases. These cases cover a range of embedded liberal policies including patents, trademarks and copyrights, and balance-of-payments protections. In these cases, decisions have been split between protection and liberalization.

In the case of patents, trademarks, and copyrights, the DSB has largely upheld the obligations of states to provide adequate protection of intellectual property, requiring
modification of several states’ laws in order to provide protections for rights-holders. For example, in the case of India-Patents, the DSB ruled that India must provide sufficient measures to protect the rights-holders for pharmaceutical and agricultural chemicals (WTO Dispute Settlement 17). In the case of US-Section 110(5) Copyright Act, the Panel submitted a decision which further clarified the allowed exceptions to copyrights, upholding one US exception to copyrights while striking down another (United States – Section). These cases show that the DSB recognizes, in accordance with the Agreement on Trade and Intellectual Property Rights, the necessity of protection of intellectual property as an exception from general free trade principles.

On the other hand, the DSB has ruled, in the two completed cases concerning balance-of-payments protection, on the side of trade liberalization. Both of these cases were brought against India, and, in the most relevant one, India-Quantitative Restrictions, the Panel ruled that a country could not place quantitative restrictions on imports except to prevent a serious decline in monetary reserves. The provision cited by the Panel allows states also to apply measures to forestall the threat of a serious decline in reserves. While the Panel, in this case, was not deciding a case where there even may have been a threat of a drain in reserves, the Panel did note that India’s monetary reserves were “adequate.” By making this determination, the Panel was treading on grounds once reserved for states in making and executing domestic monetary policy, or at least delegated to more political groups within the WTO with a greater sensitivity for political and economic circumstances. While the GATT agreement does limit quantitative
restrictions for the maintenance of monetary reserves, a determination of the level of adequate monetary reserves is surely going further than the agreement envisioned. In fact, India argued in their defense that the BOP Committee and the General Council should decide this issue, not the DSB. (WTO Dispute Settlement 31)

At the same time, DSB agreements still include what can be called a blanket escape clause. If a state that has been found in violation of the WTO agreements doesn’t want to change its policy, it can allow the harmed states to impose retaliatory duties to recoup their losses (Understanding).

In the US-Offset Act (Byrd Amendment) case, the US’s policy of redistributing revenues from antidumping duties and countervailing measures to harmed producers was found to be in violation of WTO rules. While the US claims that they have complied with the DSB ruling in this case by repealing the Byrd Amendment, arbitrations between the US and the EC and Japan have found continuing harm to the EC and Japan from the redistribution of funds collected from antidumping and countervailing duties. In January, 2003, the DSB panel report, finding that this practice violated WTO rules was adopted. Even though the US claimed to remedy the violation by repealing the Byrd Amendment, the EC and Japan requested authorization to suspend concessions on certain US products to recoup losses from this policy. In November, 2004, authorization was granted for these states to revoke tariff concessions on certain US products (Communication from the European Communities; Dispute Settlement News, 24 April, 2007). While the US, in this case, has not openly admitted that they are not willing to comply with the DSB
ruling, the fact that US Customs and Border Protection published a report detailing disbursements of antidumping and countervailing duties to business for 2006 belies the US statements. The US continues to redistribute AD and CVM revenues to businesses in violation of their WTO commitments, and is not required to change this policy because the states injured by the policy are being compensated for their losses (Communication from the European Communities). Whether or not the Byrd Amendment and the practice of distributing antidumping and countervailing duties revenues to domestic producers is a crucial policy for the maintenance of domestic stability is unclear, but certainly this policy practice seems to comply with the ideas of embedded liberalism.

Another excellent example of the use of this generalized opt-out from DSB rulings is the case EC-Bananas III. In one of the longest-running cases in WTO history, the EC’s regime for the importation, sale, and distribution of bananas was found in violation of WTO rules. The original Appellate Body decision was handed down in September, 1997. After the EC failed to bring its policies in line with WTO rules, the United States first requested to suspend concessions to the EC in January, 1999, and their request was granted and suspension of concessions began in April, 1999. After this initial move by the US, several of the other complainants in the case also requested suspension of concessions, and these suspensions were also granted. In July, 2001, the EC reached understandings with the US and Ecuador on how the bananas dispute would be resolved. As of today, the issue still has not been resolved. While the EC has implemented the mutually agreed solution notified in 2001, the original complainants and
third parties have requested another hearing to determine if the new EC regime is in compliance with WTO rules. The EC, of course, took much longer than the agreed upon reasonable time to implement changes to their regime. After the original decision, it was agreed that recommendations of the panel should be instituted within fifteen months and one week, nowhere near the nearly ten years it has taken (European Communities).

While it can be a costly decision for a state to continue a domestic policy in light of a known violation of WTO rules, the opt-out from DSB decisions afforded by this option is the crux of embedded liberalism. When a policy is popular or necessary for the maintenance of domestic stability, a state can choose to continue the policy after a violation of WTO rules has been found, as in the US-Offset Act case. In cases such as EC-Bananas, through the use of suspension of concessions in lieu of immediate policy change, states can “buy themselves time” to negotiate agreeable solutions on sensitive issues or delay the modification of domestic policies to placate special interests when their policies are found in violation of WTO obligations.

The causes of the increasing tensions between orthodox and embedded liberalism at the institutional level are three-fold. First and foremost are the new agreements included in the Uruguay Round package. Many of the agreements cited above – such as the Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Trade-Related Intellectual Property Rights – were negotiated and agreed upon by the member states during the course of the Uruguay Round. In this way, some of the tensions between orthodox and embedded liberalism can
be said to be reflections of tensions between domestic groups reflected at the supranational level. The negotiation of a new agreement in the absence of a hegemon does provide evidence to support the neoliberal institutionalists’ theory that cooperation can be achieved regardless of the power structure of the international system. On the other hand, this particular feature of the Uruguay Round – that is the reduction in embedded liberal exceptions to free trade while still maintaining some strong opt-outs – is also symptomatic of a waning of mutual agreement on the norms of the regime. In many instances the embedded liberal structure of the GATT was moved towards a more orthodox liberalism by agreement of the states, while in some cases – such as the allowance of states to indefinitely delay implementation of Panel recommendations through compensation – embedded liberalism is stronger than ever in the multilateral trading regime.

The second cause of the confusion between orthodox and embedded liberalism caused by the Uruguay Round is the strengthening of the dispute settlement system. The strengthening of the DSB was also agreed upon during the Uruguay Round. However, the strengthening of the dispute settlement system leads to a degree of hypocrisy by Members. States wish to take full advantage of some or all exceptions to WTO rules, but their trade partners (other Members) want them held to a high standard so as not to reduce the benefits these other Members receive, and the Member taking the exception does not want other Members to abuse the exceptions, either. This leads to a conflictual situation that can be solved in one of two ways: either the states can negotiate a solution –
which is often arduous and doesn’t always resolve the conflict – or some over-arching authority can intervene and decide the dispute for them. The Members opted for the second of these choices in strengthening the DSB.

Because states are now forced to accept the findings of a Panel, the third cause of increasing tensions between orthodox and embedded liberalism becomes that exceptions that Members thought existed in the agreements may not be realized. It is clear that the DSB and Appellate Body Panels have frequently clarified agreements and made them more specific through their interpretation and application of language and rules in reaching decisions. More will be said about the phenomenon of Panels seeming to make new rules in the next section, but the overall issue is that, as states’ policies are challenged in the DSB, a growing body of precedent is established that makes the more liberal agreements of the Uruguay Round lean ever-closer to orthodox liberalism.

The establishment of the Dispute Settlement Body in the Uruguay Round of Multilateral Trade Negotiations marked a major turning point for the international trading regime. Cases and decisions in the DSB have contributed to what may be already-present tensions between orthodox and embedded liberalism in international trade policy. The agreements contained in the Uruguay Round package were significantly liberalizing, while still granting large exceptions in line with embedded liberal ideologies. The decisions of the DSB have further restricted exceptions to WTO rules and increased the tensions between orthodox and embedded liberalism.
Tensions Created by Third-Party Actors

Third parties, such as interest groups and non-governmental organizations (NGOs) are permitted to participate in the dispute settlement process through the submission of amicus curiae briefs. The briefs submitted in dispute settlement cases represent both domestic interest groups and transnational organizations.

Even though the DSB panels and Appellate Body do not frequently consider amicus briefs in making their decisions, their submission can have an impact by influencing states and other organizations. Regardless of whether or not the brief is accepted, considered, or adopted by one of the parties to the dispute, allowing amicus briefs provides a world stage for groups to make their opinions heard. This is just one example of how the information age has made it easier for groups to influence multiple states and polities.

Not all interest groups can be neatly categorized as mostly on the side of trade liberalization or protectionism, but there is a strong argument that most of these groups are on the side of protectionism. When the benefits accrued from a policy – such as free trade – are widely distributed over a large segment of the population, but the costs and risks are concentrated on a small group, the harmed group has more of an incentive to organize and lobby for protection (Goldstein 140). While there certainly are active groups on the side of trade liberalization, many of these groups can be included in the free-trade epistemic community consisting of experts such as university professors,
policy advisors, and think-tank researchers that will be discussed in the next section. By submitting the briefs outlined here, these organizations have the ability to exert influence on a worldwide scale as described above.

The submission of amicus curiae briefs by non-state actors alters the ways in which preferences are formed. Additionally, these briefs limit the ability of states to pursue policy objectives considered important to domestic interests as international or transnational interests now can voice their opinions directly to the DSB. Taken together with the above concept that most interest groups are for protectionist policies, cases where amicus briefs are submitted make clear another incarnation of the tension between orthodox liberal interests – those disputing the policy – and embedded liberal groups – those supporting protectionist policies.

One interesting example of the transnational character of interest groups is highlighted in the amicus briefs for the EC – Asbestos dispute. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), an American interest group focusing on labor issues, submitted a brief supporting the EC’s restrictions on the use of asbestos. The EC adopted the amicus brief as a part of their submission. In this way, interest groups can have a broader influence than they once could.

While the text of the amicus brief submitted by the AFL-CIO is not available for review, the available evidence and logic makes it obvious that this brief supported the EC’s restriction on the importation, sale, or use of asbestos-containing products. First of all, the EC, who was defending their import restriction on asbestos, adopted the AFL-
CIO’s brief into their submission, lending credence to the theory that the brief supported the restriction. Moreover, the AFL-CIO focuses on the protection of workers’ rights. Laborers in environments where asbestos-containing products were used may be harmed by the product. Finally, in a November, 1999 statement at the National Press Club, John J. Sweeney decried this DSB case as an example of the winnowing of workers’ rights in the global economy (Sweeney). This assessment makes it obvious that the AFL-CIO’s brief was in support of the trade restriction.

This case, in particular, is a good example of the tensions between orthodox liberalism and embedded liberalism. Under embedded liberalism, states are free to pursue policies that protect their citizens in certain cases. In the industrialized world, protection of workers from health risks is considered not just acceptable but absolutely necessary. This is not the case in many other countries, and does not fit the model of orthodox liberalism. Under orthodox liberalism, the market would shun the products containing asbestos because workers made unhealthy by the product would be less productive, without government restrictions banning the use of the product. While historical experience tells us that this theoretical application does not usually pan out in the real world, and the case did not really take the issue so far into an orthodox liberal viewpoint, it can still be said that trade protections designed to safeguard workers’ health are a feature of an embedded liberal trade system.

Other theoretical evidence further suggests that the NGO’s submitting amicus curiae briefs to the WTO are mostly on the side of trade protection or protection of the
embedded liberal system. As Goldstein argues, the benefits from freer trade are more widely distributed among a larger group, and these groups are less likely to organize and lobby for liberalization. Petros C. Mavroidis noted in 2001 that consumers’ organizations had not used amicus briefs in the dispute settlement system (Mavroidis). A case can be made that these briefs, if submitted, may support protectionism in the form of quality and safety regulations of products. However, consumers are one of the key groups that benefit from free trade, enjoying a wider variety of less expensive goods.

As many of the neoliberal institutionalist authors argued, one of the main functions of an international regime is to provide information. Providing access to the dispute settlement process to non-state actors allows information on preferences of members’ constituencies to be introduced to the debate. These non-state actors sometimes provide technical information that may influence regulatory action and the state and supranational level. They also introduce opinions that may be adopted by other states, organizations, or citizens. Allowing the submission of amicus curiae briefs provides non-governmental actors a platform to promote their views to the entire world and have an impact on preference formation.

This access to the dispute settlement process and the consequent ability for non-governmental actors to not only influence policy in their own states but also across borders is in direct conflict with Gilpin’s conception of how national preferences are formed and change. Instead of “purchasing” a package of economic policy consistent with the internal preferences of the different groups in their societies, state policies and
domestic preferences can now also be influenced from abroad. When and if the DSB decides to pay more credence to amicus curiae briefs – which seems likely to happen soon given the current WTO negotiations – non-governmental actors will have direct influence in the international trade regime, skewing the regime from the reflection of the constellation of state preferences – themselves a constellation of domestic preferences – to a reflection of both state and third party actor preferences. This would constitute a “double representation” of interest group and NGO preferences for protection in both states’ official negotiating platforms and the considerations and decisions of the DSB.

On the other side of the orthodox-embedded liberal dispute in the international trade regime are epistemic communities. Epistemic communities are groups of experts with: “(1) a shared set of normative and principled beliefs…; (2) shared causal beliefs…; (3) shared notions of validity…; and (4) a common policy enterprise.” (Haas, “Introduction” 3) In times of uncertainty, decision-makers can call upon epistemic communities to explain the likely results of various courses of action, illuminate the externalities of an action or failure to act, help define state interests in light of these consequences of actions, and assist in formulating policies (Haas, “Introduction” 3, 15). The assistance and information that epistemic communities provide is informed by the above-mentioned normative and causal beliefs on the relevant issue. By influencing the decisions of one state that consequently influences the decisions of other states, or through contributing to the formation and continuation of international institutions, epistemic communities may gain influence internationally; however, the international
influence of epistemic communities is bounded by the structural realities that limit policy flexibility (Haas, “Introduction” 4, 7). As the world has become more complex and decisions more technical, states and international organizations have come to rely more and more on expert analysis and advice, as evidenced by a growing number of regulatory agencies and budgetary allocations for expert groups and agencies (Haas, “Introduction” 9-13). Epistemic communities gain influence through holding positions in regulatory agencies, think tanks, and the bureaucratic rolls of national governments and international organizations (Haas, “Introduction” 30-32).

In areas where regulation is to be undertaken for the first time, epistemic communities can help to define preferences and policies in the above-mentioned ways; but in areas where practices are already established, epistemic communities exert influence in two ways. First, an epistemic community that was involved in the development of policies and practices may perpetuate these choices through the institutionalization of practice. Recall that neoliberal institutionalists believe that regimes defer the re-evaluation of interests, so if the preferred policies of an epistemic community are embodied in a regime, they are likely to persist until a crisis forces states to re-evaluate their preferences. Second, when and if this crisis occurs, a new epistemic community may be able to step in and provide the information states need to establish new preferences and policies to overcome the uncertainty the crisis breeds (Haas, “Introduction” 33-34). A regime may also “[introduce] new actors who [influence] national behavior and [contribute] to the development of coordinated and convergent
policymaking... In the face of uncertainty, a publicly recognized group with an unchallenged claim to understanding the technical nature of the regime’s substantive issue area [is] able to interpret for traditional decision makers facts or events in new ways and thereby lead to new forms of behavior.” (Haas, “Epistemic Communities” 401) As epistemic communities use international regimes as fora to express their normative beliefs, power and knowledge fuse to provide an explanation for state behavior (Haas, “Epistemic Communities” 402). In a similar way, Sebenius argues that an epistemic community can define the range of possible policy choices in light of their expert understanding of the issue at hand, and can therefore alter the possible cooperation points by limiting the cooperation area, changing value of the no-cooperation alternative, and expanding the possible mutual gains from cooperation by highlighting new linked areas for agreement or cooperation (“Negotiation Analysis”).

The epistemic community reflected in the WTO’s DSB is pro-liberalization and is most obvious in the Appellate Body. Members of the Appellate Body are recognized scholars in international trade and international law, most of whom are professors of law or economics at top universities around the world. Those who are not scholars have participated in the WTO as representatives for countries. In their capacity as members of the Appellate Body, Panelists are not affiliated with any country, and their duty is to interpret WTO rules, practice, and previous dispute settlement decisions in deciding current dispute cases (Appellate Body Members). Since 68% of dispute cases have been appealed (Appellate Body 4), and the members of the Appellate Body also provide
arbitration assistance to states in determining implementation procedures for DSB decisions requiring policy adjustment (Appellate Body 15), the Appellate Body is involved in a good majority of trade disputes. Beyond their regular duties hearing formal trade disputes and providing arbitration, the members of the Appellate Body provide training and research as participants in the WTO’s Technical Assistance and Training program (Appellate Body 17), and host and participate in conferences designed to provide expert information on issues in dispute settlement and international trade more generally such as the WTO’s 10th anniversary events (Appellate Body 18). Therefore, the Appellate Body can be said to have significant influence in the DSB and the WTO as a whole.

The Appellate Body is a very influential group whose involvement in the international trade regime provides a strong voice for more orthodox economic policies, including trade liberalization. The AB fulfills this role by deciding cases, providing technical assistance and training, and hosting conferences and debates. In these activities, a strong orthodox liberal stance can be seen. In their role deciding dispute cases, the AB directly contributes to the tension between orthodox and embedded liberalism by narrowing the scope of embedded liberal exceptions to WTO rules. Through hosting conferences and providing technical assistance and training, the AB influences the preferences of WTO Member States, with a decidedly orthodox liberal slant.

Evidence of the pro-liberalization slant of the Appellate Body is seen in both their decisions and their Technical Assistance and Training activities. Over 75% of DSB
decisions can be classified as trade liberalizing, either striking down trade-restricting
national policies or narrowly defining WTO rules so that the range of acceptable policies
is reduced from what the text of agreements would seem to allow (WTO Dispute
Settlement). In fulfilling the Technical Assistance and Training requirements of the
Appellate Body, the panelists have hosted a number of seminars. Most notably, during
the WTO’s 10th Anniversary activities, the Appellate Body sponsored conferences
entitled “Special and Different Treatment in the WTO Agreements and its Relationship to
the Basic Principles Underlying the Multilateral Trading System”, “The Role of the
Appellate Body and its Contribution to the Development of the Law”, and
“Implementation of WTO Rulings: The Role of Courts and Legislatures in the United
States and Other Jurisdictions”. In the first discussion, the tension between principles
such as national treatment and non-discrimination and provisions for special and different
(S&D) treatment of developing states was discussed. Of course there is a tension
between a system premised on open market access and the exceptions afforded to
developing states, but the conduct of a panel discussion on the effectiveness and
compatibility of S&D treatment with liberalizing principles appears to show a bias for
liberalization. The second discussion points to the Appellate Body’s recognition that
they not only interpret and help to enforce agreements, but also make WTO law in the
process. While none of the authors writing on epistemic communities spoke directly to
groups that knew of their influence, the fact that the Appellate Body recognizes its own
power not only clearly identifies is as operating as an epistemic community but also
means that it could exert more influence. Because the epistemic community that the Appellate Body belongs to recognizes its own influence also means that its members know how they manipulate the system. With a specialized understanding of the complex technical issues of WTO law, a bias towards trade liberalization, and knowledge of how they can achieve their goals in their positions on the Appellate Body, the members of the AB can exert significant influence. Finally, the discussion of how domestic courts and legislatures are involved in compliance with DSB decisions shows exactly how the Appellate Body members expect their influence to be internalized in the WTO Member States. Instead of transmitting ideas through equal bureaucracies, the Appellate Body expects ideas to be transmitted from their group to state politicians and bureaucrats. The process of idea transmission is the same, just through different channels.

The Dispute Settlement Panels and the Appellate Body have also been accused of judicial activism and making new WTO rules instead of simply interpreting existing WTO law. While arguing that there are limits to the DSB’s ability to make new international law, Steinberg claims that the establishment of formal dispute settlement procedures in the WTO agreements has resulted in dispute settlement decisions that have produced “an expansive body of new law.” (251) While this was not the intended consequence of the legalization of dispute settlement procedures, the Dispute Settlement Understanding has opened the door to judicial lawmaking and DSB Panelists and Appellate Body members have walked through it.
Taken at face value, the charge of judicial lawmaking is credible. DSB Panels and the Appellate Body frequently interpret language in agreements and determine the “spirit of the agreement” to issue their rulings. This interpretation of WTO rules does lead Panelists and Appellate Body members beyond the text of the agreements and leave some leeway for rules that didn’t seem to previously exist to materialize. In many of the previously cited examples, Panelists and the Appellate Body narrowly interpreted rules, defined terms, and determined the context of agreements in issuing their decisions, and this can be considered a form of lawmaking (Steinberg 251-254). Even Appellate Body members realize that they are, in effect, making new rules. In statements at a conference of the Council of the Americas, James Bacchus, former Appellate Body member, stated that the Appellate Body frequently had to clarify agreements, and that these issues really should be settled by the states through new rule-making (Bacchus). Regardless of Mr. Bacchus’s feelings about the practice, this clearly shows that WTO DSB officials know that they are engaged in judicial activism and rule-making.

The activities of transnational actors such as non-governmental organizations and epistemic communities greatly complicates the process of regime formation and maintenance as described by neoliberal institutionalist theorists. States are no longer purchasing a “package” of preferences based on the distribution of preferences within their borders, but having interest groups and intellectuals take their preferences global. Preferences themselves are formed differently as information and arguments are given a world stage to broadcast from. The ability of non-state actors to announce their
preferences, persuade others, and exert influence not only demonstrates but also greatly aggravates the divergence between those preferring an embedded liberal system and those who would prefer a more orthodox international trading order.

While the inclusion of third parties in the Dispute Settlement system is clearly an aggravating factor in the development of destabilizing tensions between orthodox and embedded liberalism, the WTO has no good options for resolving this issue differently. NGOs and interest groups represent powerful factions in the political landscape. These groups demand to be heard, as is seen in protests and riots surrounding major economic summits. While it would be more practical and theoretically convenient for these groups to act through the governments of states in which they reside – lobbying their leaders for particular action or providing information through their governments in Dispute Settlement cases – the ability for third sector actors to participate through their governments cannot be guaranteed by the WTO. The WTO cannot make rules requiring states to allow the participation of third parties, and so the only feasible solution is to allow their direct participation in the Dispute Settlement process. While the participation of non-state actors in Dispute Settlement greatly complicates the situation, there are no effective tools at the WTO’s disposal to allow these states to participate indirectly.
Tensions Created by States

In assessing the weaknesses of an embedded liberal regime, Ruggie points out that developing states are forced to bear high costs, having orthodox reforms thrust upon them. While this was and is still true, the WTO today provides a number of special exceptions for developing states, most pertinent to this analysis the general principle of Special and Different (S&D) treatment. Developing states, under this principle, are given more time to implement new agreements, can be excepted from obligations due to severe adjustment costs, and are given the opportunity to negotiate safeguard measures with developed states that are not as severe as those that would be applied to a developed country. The Dispute Settlement Body, in accordance with WTO rules, recognizes the S&D treatment principle and allows developing states to argue the need for S&D treatment in defending themselves in a case against them or making some claims against developed states.

The cases outlined below demonstrate the application of S&D treatment in the WTO, and as upheld by the DSB. By moving away from Ruggie’s principle that developing states are forced to shoulder a disproportionate amount of the adjustment costs associated with liberalization, they signal a distinct departure from embedded liberalism. In addition, cases where developing states have challenged developed countries’ application of exceptions from WTO rules highlight growing tensions between orthodox and embedded liberalism. Developing states are at once demanding more
exceptions from their WTO commitments and insisting that developed states conform more fully with the liberalizing principles of the WTO.

In the case EC-Bed Linens, brought against the European Communities by India, one of the S&D treatment principles was highlighted. When the EC imposed duties on bed linens under WTO antidumping rules, India challenged their method for calculating dumping margins. Along with finding that the EC’s methods for determining dumping margins and injury were inconsistent with WTO rules, the Dispute Settlement Body also ruled that the EC should have entered into negotiations with India to find a “creative solution” to the problem, without applying full antidumping measures to India (WTO Dispute Settlement 51). Developed states, under WTO rules, are required to make a good faith effort to find ways to take advantage of the exceptions to WTO rules for serious injury from trade without harming developing states in the process. In a review of the actions taken by the EC to remedy the problem, the Dispute Settlement panel ruled that the EC’s suspension of antidumping duties on Indian imports was a sufficient measure to prevent harm to a developing state (WTO Dispute Settlement 52). This case is a good example of how developing states can both pressure developed states to act in a more liberal manner and how they can invoke special privileges. Not only was the EC forced to change their dumping calculations in a way that reduces the protection they receive from invoking the antidumping exceptions, but they were also forced to completely exempt India from the duties to protect a developing state.
Another similar case shows the limits of this ability of developing states to invoke special privileges. In the case US-Pipe Line, Korea contended that, much like in the EC-Bed Linens case, the US’s method for determining dumping injury was flawed. Korea also challenged the US’s application of antidumping duties to them as a developing state. The panel ruled that the US’s dumping injury determination was flawed, but that, since they had attempted to negotiate a solution other than imposition of full antidumping duties with Korea but failed, the US’s obligations to give consideration to developing states was fulfilled (WTO Dispute Settlement 71). While this case shows that developing countries do not have unlimited power to force developed states to alter their policies to protect developing country interests, the DSB recognizes S&D treatment and will force developed states to at least take into account development considerations.

The only completed case where a developing state has used S&D principles as a defense is the Brazil-Aircraft case. In this case, among other arguments, Brazil argued that Canada’s challenge to their export financing program was invalid because export-promotion programs were permitted for developing states under the S&D principle. While the panel rejected this argument, they did so because of the way the program was administered. Developing states are, in fact, permitted to provide export financing programs, but they are subject to limits and phase-out periods. Because Brazil did not adhere to the limits and phase-out programs, they were forced to modify their program (WTO Dispute Settlement 14). While the panel did not ultimately permit Brazil to invoke S&D principles as a justification for what would have otherwise been a policy
inconsistent with WTO rules, they did consider the S&D allowances as a valid means for a developing state to defend themself in a dispute. Had the export financing program followed the rules set forth in the WTO agreements, this defense would likely have been successful.

These three cases demonstrate the ability of developing countries to secure special benefits when dealing with developed states. The antidumping exceptions to WTO commitments are well-established practices frequently used by members to soften adjustment costs. AD duties are one of the main WTO policies that make the regime embedded liberal, and the fact that AD duties can be challenged by developing states on the grounds that they are entitled to S&D treatment reverses Ruggie’s argument that developing states shoulder a disproportionate load of the adjustment costs created by freer trade. The Brazil-Aircraft case demonstrates one of the many exceptions to WTO rules that developing states enjoy. Several cases have shown that export subsidy programs are not acceptable for developed states, including Canada-Aircraft, EC-Sugar, and US-Upland Cotton (WTO Dispute Settlement 25-26, 82, 97, 98). Not the least notable feature of these three examples is that all of the cases were brought by developing states against the developed countries accused of providing export subsidies.

At the same time, more and more developing states are bringing cases against developed countries. This turns the tables on Ruggie’s observation, with developing states now demanding that the Western world uphold their WTO obligations. Thus, the architects of embedded liberalism – the US and European Union (EU) – are now having
the protection it once afforded them stripped away. In three separate cases against the US, the application of safeguard measures or AD duties was successfully challenged by a developing state acting independently or as part of a larger group of states.

In the case of US-Wool Shirts, India successfully argued that the US’s application of transitional safeguard quotas on wool shirts violated their WTO obligations. According to the panel, the US had failed to establish that trade caused injury to the domestic woven wool shirts and blouses industry, and therefore applied barriers to trade in excess of those allowed by WTO agreements (WTO Dispute Settlement 11). In the US-Stainless Steel case, Korea challenged the US’s method for determining dumping injury and margins and was successful (WTO Dispute Settlement 66). Finally, a large group of countries including Brazil, China, and Korea brought the US-Steel Safeguards case, and the DSB concluded that the US determinations of injury by dumping were flawed (WTO Dispute Settlement 92).

In each of these cases, the opt-outs designed by the architects of the international trading regime that make it embedded liberal were eroded. While safeguards can and are still applied in the WTO, they are frequently challenged and overturned by the DSB. Developed states also bring cases against developing states and other developed states with regards to safeguards, and these cases are no less likely to result in a determination of improper application of safeguards, but it is especially instructive to look at these cases brought by developing states in light of the arguments of embedded liberalism. By simultaneously securing additional exceptions from WTO commitments for themselves
and demanding that developed states be held to a high standard with regards to their adherence to their WTO obligations, these cases brought by developing states against developed states go to the heart of the embedded liberal-orthodox liberal tensions currently developing. At once, cases such as these both reaffirm the principles of embedded liberalism – that the liberalization of trade should be tempered with exceptions to soften adjustment costs – and move the organization in a more liberal direction – reducing the opportunities for states to take advantage of these exceptions. These cases are also especially poignant because it was originally developed states who demanded the flexibility that embedded liberalism offered while requiring that others undertake liberalizing reforms more quickly.

Two facts become obvious from this discussion of the new dynamics in relations between developed and developing countries at the WTO. First, Ruggie’s observation that developing states will be forced to shoulder a disproportionate amount of the adjustment costs due to trade liberalization is no longer entirely true. Through the allowance of S&D treatment for developing states, the WTO now limits the amount of adjustment costs that can be pushed off of core states on to the periphery. With more time to implement agreements, exceptions from WTO obligations, and special requirements for developed states in dealing with developing countries – when taken with all the other evidence that exceptions to WTO rules are becoming harder to take advantage of by developed states – it seems that developing states are now enjoying more
benefits from the embedded liberal idea of “free trade with exceptions” than developed
countries.

Second, state actions in the WTO contribute to the tensions between orthodox and embedded liberalism. As previously mentioned, the formalization of the dispute settlement process has led to a degree of hypocrisy on the part of Member states, which is also evident in the core-periphery relationship described here. At once, states are looking to take advantage of exceptions to WTO rules while simultaneously reducing the ability of other states to utilize those exceptions in a ways that may be inconsistent with regulations for these exceptions. This obviously leads to tensions between orthodox and embedded liberal groups both within and between states. As states apply exceptions to WTO rules, challenge other states’ applications of these same or other exceptions, and are challenged themselves on the use of exemptions, different groups are alternately winners and losers, and this can lead to confusion and frustration with the system.
The concept of a “democracy deficit” has frequently been used to describe the system of governance in the European Union. With no directly elected representation, scholars have theorized and conducted surveys showing that citizens of EU member states do not feel particularly well-represented by the EU governing bodies. This idea of a lack of democratic representation seems appropriate to apply to the WTO in light of the power and influence of the DSB. Even though agreements are negotiated by representatives of member states of the WTO, and agreements usually must be ratified by governing bodies within each member state, as previously demonstrated the DSB has a large role in clarifying agreements that goes as far as to constitute a form of judicial lawmaking. Therefore, it seems appropriate to analyze the DSB using a model of the democracy deficit, to see if this analysis can shed any light on the future prospects for the WTO.

One theorist in particular has applied a novel approach to understanding the workings of a mostly non-democratic government as seen in the EU. Matthew J. Gabel argues that the lack of democratic representation in the EU-level government bodies is actually beneficial for the operation of the system, and makes the EU government stable. The EU is a unique collection of states that is heavily culturally segmented – a situation that can lead to instability when attempts are made to implement majoritarian democracy. In order for a governed populous to qualify as a “segmented society” – and therefore be
amenable to alternative forms of governance – it must meet several requirements. 
Segmented societies have “distinct subcultures with reinforcing social cleavages.” (465) 
These social cleavages are compounded because each group closely associates with 
particular political parties, interest groups, media, schools, and voluntary associations. 
Because of the deep division within the society, the party system does not aggregate 
interests properly, which leads to a failure to compromise and immobilization or majority 
decisions perceived as “unfair” by minorities. The divisions within the society can 
ultimately lead alienated groups to reject the political system. Clearly, in a case such as 
this, other forms of government may be more desirable than majoritarian democracy 
(465).

This is where Gabel, borrowing from Lippert, introduces the concept of 
“consociational” democracy. Lippert asserted that successful governance through 
consociational democracy requires four institutional practices: interelite accommodation, 
minority veto power, proportional representation, and delegation of policymaking rights. 
Interelite accommodation requires the governing elites to reach decisions through 
consensual deliberation conducted in a private forum. Veto power must be extended to 
minority groups on matters of particular importance. Subcultures must be proportionally 
represented to ensure that no group is over- or under-represented in the decision-making 
process. Finally, issues that only affect one group, or that can be decided in different 
ways with the same outcome must be delegated to the individual groups, much like a 
federal society (465-466).
Societies wishing to use a consociational model of democracy must also meet several characteristic requirements. Gabel outlines the two most important of Lippert’s characteristics as the absence of a majority subcultural segment and the absence of major socioeconomic differences between groups that can impede cooperation on issues of distribution (466).

Gabel argues that, in these particular circumstances, a model of government that is quasi-democratic, but without direct representation or majority rule, can be an effective means to maintain political stability. The institutional characteristics described by Gabel seem to fit the WTO in general fairly well. Clearly, many distinct and divisive subcultures exist in the WTO – each state can be said to represent its own distinct group, with individual circumstances, political parties, interest groups, and the like. In fact, Gabel defines the various groups in the EU as individual member states, so stating that each member is an individual subculture is not unprecedented and seems appropriate.

The WTO is based on the concept of consensual rule, where decisions are made in private to some extent. While the final agreements of the WTO are publicly available, the negotiating positions of states are often kept secret until after the agreements are concluded. Because of the consensual nature of decision-making, the minority veto in WTO negotiations is strong. Certain divisive issues – such as labor and the environment – are relegated to state-level decision or left to other bodies. On only one count does the WTO General Assembly fail to fully conform to the standards of consociational governance: proportional representation. All states are represented equally in the general
assembly, and all have equal power. However, states tend to form coalitions and have different levels of representation in the various subcommittees and working groups of the WTO, so this characteristic not completely absent in the Organization.

On the other counts – the most important characteristics for success of consociational democracy – the WTO in general outright fails. While it can be argued that no one subcultural group has a majority representation, the relevant issue in the WTO is free trade, which all states must at least somewhat agree is a desirable common goal. As for the second important characteristic, a lack of major socioeconomic differences, the WTO clearly does not qualify. Members of the WTO range from the desperately poor to the incredibly wealthy. These extreme socioeconomic differences can lead to serious gridlock and impede decisions on distributional issues – and all of the issues the WTO deals with can be categorized as such.

When applying this analysis to the DSB, an even greater deviation can be seen. The only institutional requirement that the DSB meets is that its deliberations be carried out in private, and the body only partially fulfills this requirement. Dispute Settlement cases are news-worthy events, and the complaints and final reports are available for public review. In addition, the allowance of third-party involvement in Dispute Settlement proceedings takes the decision-making out of the realm of private negotiations among political elites. There is really no consensual decision-making among political elites, no proportional representation, and it can definitely not be said that a minority veto is allowed, with Panel reports being accepted except by consensual rejection.
As demonstrated when discussing the DSB and Appellate Body as an epistemic community, it cannot be said that there is no majority subculture represented. While all states can have citizens as Panelists and Appellate Body members, it has already been demonstrated that these individuals have a strong pro-liberalization bias. Socioeconomic differences between members are also represented in the DSB panelists and Appellate Body membership.

While consociational democracy provides a promising outlook for certain governing groups that cannot be called democratic, the WTO and especially the DSB do not meet the requirements for this form of government to be successful. Therefore, a lack of representation could have disastrous effects for the Organization as states may feel that they are not adequately represented by the structure of the Dispute Settlement Body.

An additional hurdle for the WTO in attempting to create an effective governing structure is the previously mentioned problem of participation by third sector actors. Truly participatory democracy requires the inclusion of interest groups and non-governmental actors, but the inclusion of these groups has exacerbated the problems facing the WTO, including with regards to the democracy deficit. These groups may highlight and magnify differences or similarities between states that can further intensify the socioeconomic and political differences between states or create cross-cutting cleavages across national borders, preventing consociational democracy from being an effective governance model for the DSB.
Chapter 5: Conclusions

It is not simply the fact that liberalizing factions are gaining strength in international economic relations, but also the fact that groups and states benefiting from embedded liberal principles are still powerful that poses a risk to the international trade regime embodied in the WTO. Many events point to the weakening of the WTO – the collapse of the Seattle Round, the difficulty in completing the Doha Round negotiations, the proliferation of regional and bilateral preferential trading agreements, and frequent calls in the United States to abandon the Organization.

As neoliberal institutionalists argue, to cooperate in the absence of a hegemon requires an unusually favorable set of circumstances – including strong mutual interests. Even those theorists, like Ruggie and Keohane, who argue that there is strong theoretical evidence that regimes can persist or even be formed after the decline of a hegemon, agree that there must be a shared purpose for the cooperation. While I have highlighted the differences between factions here that are more likely to exist within states than between them, the increasing direct influence of non-state actors in international relations and the increasing tensions between embedded liberal and orthodox liberal factions within states provide good reason to conclude that the strong shared interest in free trade with exceptions for domestic stability is waning.

A change from an embedded liberal to a more orthodox liberal trading regime would be a change to the regime, not within it. The underlying norm of the WTO and the
trade regime within which it is embedded would be changing. As Keohane demonstrated in his account of the formation of an international regime for oil, regime formation in the absence of a hegemon is exceedingly difficult. Without very strong mutual interests, the regime is likely to fail.

There are signs that some state may be willing to “step up to the plate” and lead the charge for a more liberal trading regime. In the Seattle and Doha negotiations, states have called for the elimination of all tariffs or all barriers to trade. While this suggestion is not palatable to most WTO members, the fact that one state is at least willing to suggest it opens the possibility that a more liberal trade regime could be formed. However, even though states are willing to suggest this solution, no one appears willing or able to accept the costs of a more liberal regime. The significant reduction or elimination of all tariffs or barriers to trade would produce massive adjustment costs in all states. A recent breakthrough in the Doha negotiations has developed states accepting calls for decreased barriers to agricultural trade from developing states. Whether or not these reductions are successfully negotiated and adopted, how they are received, and their impacts on domestic polities will be telling for the future of the international trade regime and the WTO. Finally, the fact that WTO members are still coming to the table and negotiating free trade agreements outside of the WTO in light of the Organization’s recent failures provides evidence that there is still a strong mutual interest in maintaining some form of an open trade regime. Whether or not this basic agreement is enough to overcome disagreements on a specific norm for the regime remains to be seen.
An alternative view of the method of governance represented by the DSB is seen in the idea of consociational democracy. However, the WTO in general and the DSB specifically fall short on several important counts for this model of government to be successful. Therefore, a lack of representation may combine with the increasing tensions between orthodox and embedded liberalism to further weaken the WTO. Negotiations are underway to improve the functioning of the DSB, but with the future of the Doha negotiations uncertain, these reforms may never be realized.

In this short space, it is, of course, impossible to cover all the bases with regards to tensions in the WTO. This analysis suggests that much more research needs to be conducted on the influence of NGOs on states’ and supranational actors’ behavior. Of particular interest would be analysis of the influence of a social group residing and primarily acting in one state on other states, such as what kind of impact an action like the AFL-CIO’s submission of an amicus curiae brief on behalf of the EC had on both Americans and Europeans and their leaders. It is also clear, as Keohane points out, that new analysis needs to be conducted on the sources and effects of cooperation. Improved communication technologies have radically altered the way preferences are formed, and it is no longer sufficient to take behavioral analysis and transnational non-state actors for granted. A slightly different but still related area of research that could be useful in understanding international relations would be the effects on policy enterprise of the waning of established policy tools. As previously mentioned, preferential trade arrangements (PTA’s) outside of the WTO have flourished in the wake of the
Organization’s failures. It would be interesting to see if this pattern is repeated in other time periods, if these agreements are substantively different from PTA’s negotiated in the past, and what the effects of this policy shift may be.
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