



School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ Georgia Law

Scholarly Works

Faculty Scholarship

1-1-2019

...And Trade

Harlan Cohen

Gabriel M. Wilner/UGA Foundation Professor in International Law and Faculty Co-Director of the Dean Rusk International Law Center
University of Georgia, hcohen@uga.edu

University of Georgia School of Law
Research Paper Series
Paper No. 2019-16

Dean Rusk International Law Center
Research Paper Series
Paper No. 2019-06



Repository Citation

Harlan G. Cohen, *...And Trade*, 2019 U. Ill. L. Rev. Online 48 (2019),
Available at: https://digitalcommons.law.uga.edu/fac_artchop/1297

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Georgia Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Georgia Law. [Please share how you have benefited from this access](#)
For more information, please contact tstriepe@uga.edu.

...AND TRADE

Harlan Grant Cohen*

INTRODUCTION

Prior to the discovery of oxygen, scientists' best explanation of fire was that it was caused by "phlogistons," a mysterious fire-like substance found in flammable materials, released during combustion, and reabsorbed by plants. As Thomas Kuhn recounts in *The Structure of Scientific Revolutions*,¹ a field of phlogiston studies emerged, with scientists across Europe experimenting on, theorizing, and debating the substance and its attributes. This continued even as experiments raised doubts about the theory or challenged its core assumptions. Eventually, Antoine-Laurent de Lavoisier discovered oxygen, turning the assumptions of phlogiston theory on its head. But even as news of the discovery spread, and even though oxygen solved many of the problems raised by the increasingly complex theories of phlogistons, scientists had trouble changing their views and their focus. Perhaps oxygen was a phlogiston? Or maybe oxygen worked with phlogistons in creating fire? Rather than simplifying their theories, the new discovery made many of them more complex. As Kuhn explains, it took a generation before oxygen and its study became the new scientific paradigm around which scientists and their assumptions, theories, and experiments revolved.²

After two decades of seeming calm following the 1994 creation of the World Trade Organization ("WTO"), international trade law in 2019 is in flux. At the surface level, states are actively rethinking and renegotiating the terms of trade between them. In Europe, the United Kingdom is involved in protracted negotiations to leave the European Union after a popular referendum supported "Brexit."³ At the heart of those efforts is a belief that the United Kingdom should be able to negotiate its own trade deals with the rest of the world rather than as part of the European bloc.⁴ In the United States, the Trump ad-

* Gabriel M. Wilner/UGA Foundation Professor in International Law, University of Georgia School of Law. Thank you to Ashley Henson and Zachariah Lindsey.

1. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 53 (1962).

2. *Id.* at 152.

3. Anushka Asthana, Ben Quinn & Rowena Mason, *UK Votes to Leave EU after Dramatic Night Divides Nation*, *THE GUARDIAN* (June 24, 2016), <https://www.theguardian.com/politics/2016/jun/24/britain-votes-for-brexit-eu-referendum-david-cameron>.

4. Bruce Stokes, *Brexit Vote Highlighted UK's Discontent with EU, but other European Countries are Grumbling too*, *PEW RES. CTR.* (June 24, 2016), <http://www.pewresearch.org/fact-tank/2016/06/24/brexit-vote-highlighted-uks-discontent-with-eu-but-other-european-countries-are-grumbling-too>; *Brexitland Versus Lon-*

ministration has decried the trade deals negotiated by its predecessors, accusing prior administrations of rolling over as other states took advantage of the United States and stole U.S. jobs.⁵ With rhetoric shifting regularly between the combative and the conciliatory, the administration has withdrawn the United States' signature from the Trans-Pacific Partnership ("TPP")⁶ and renegotiated the Korea-United States Free Trade Agreement ("KORUS")⁷ and the North American Free Trade Agreement ("NAFTA").⁸ It has attacked the WTO and threatened its dispute settlement system by vetoing all appointments to its Appellate Body.⁹ As a result, by December 2019, the Appellate Body will have fewer than the three members required to hear appeals and effectively cease to function.¹⁰ These attacks persist, even as the United States continues to bring disputes to the WTO over China's trade practices.¹¹

Meanwhile, the United States has issued tariffs on steel and aluminum from countries in Europe, North America, Latin America, Asia, and Oceania, and an even broader array of tariffs on Chinese products.¹² Perhaps most controversially, the United States has invoked the security exception, Article XXI, of the General Agreement on Tariffs and Trade ("GATT") to justify the former tariffs and to potentially insulate them from WTO review.¹³ It has threatened to do the same regarding tariffs on automobiles.¹⁴ And in breaking this taboo against using Article XXI, it has joined others like the United Arab Emirates in

donia, *ECONOMIST* (June 30, 2016), <https://www.economist.com/britain/2016/06/30/brexitland-versus-londonia>.

5. Nina Lakhani, *Trump's Nafta Threats would Severely Harm US, Mexican Chief Negotiator Says*, *THE GUARDIAN* (Nov. 15, 2016), <https://www.theguardian.com/world/2016/nov/15/nafta-donald-trump-mexico-economy> ("The property mogul vowed throughout his campaign to redraft or withdraw from Nafta which he described as the 'worst deal ever' . . .").

6. Adam Davidson, *What the Death of the T.P.P. Means for America*, *THE NEW YORKER* (Jan. 23, 2017), <https://www.newyorker.com/business/adam-davidson/what-the-death-of-the-t-p-p-means-for-america>.

7. Jim Tankersley, *Trump Signs Revised Korean Trade Deal*, *N.Y. TIMES* (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/us/politics/south-korea-trump-trade-deal.html>.

8. Jim Tankersley, *Trump Just Ripped Up Nafta. Here's What's in the New Deal*, *N.Y. TIMES* (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/business/trump-nafta-usmca-differences.html>.

9. See Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 *YALE J. INT'L L. ONLINE* 3 (2018).

10. Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms*, *REUTERS* (Aug. 27, 2018), <https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN11C190>.

11. Tom Miles, *China and U.S. Accuse each other of Hypocrisy as WTO Litigation Begins*, *REUTERS* (Nov. 21, 2018), <https://www.reuters.com/article/us-usa-trade-wto-tariffs/china-and-u-s-accuse-each-other-of-hypocrisy-as-wto-litigation-begins-idUSKCN1NQ1KU>.

12. Ana Swanson, *White House to Impose Metal Tariffs on E.U., Canada and Mexico*, *N.Y. TIMES* (May 31, 2018), <https://www.nytimes.com/2018/05/31/us/politics/trump-aluminum-steel-tariffs.html>; *China and Europe join WTO Challenge to Trump Metals Tariffs, Opening New Front in Trade War*, *SOUTH CHINA MORNING POST* (Oct. 19, 2018), <https://www.scmp.com/news/china/diplomacy/article/2169238/china-and-europe-join-wto-challenge-trump-metals-tariffs>.

13. See J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 *YALE L.J.* (forthcoming 2020).

14. William Mauldin, *U.S. Tariffs Prompt Anger, Retaliation from Trade Allies*, *WALL ST. J.* (May 31, 2018), <https://www.wsj.com/articles/u-s-slaps-steel-aluminum-tariffs-on-canada-mexico-european-union-152774283>.

blurring the lines between trade and security.¹⁵ Observing the trend, Anthea Roberts, Henrique Choer Moraes, and Victor Ferguson have declared a new era of Geoeconomics.¹⁶ For their part, other states have brought their complaints to the WTO against the United States, but rather than wait for their disputes to be resolved, many have issued their own tariffs against U.S. productions in retaliation.¹⁷

In the midst of these Anglo-American attacks on the status quo, initiatives like the Transatlantic Trade and Investment Partnership (“TTIP”) and the Trade in Services Agreement (“TiSA”) seem to have been abandoned. The other states involved in the TPP negotiations, however, have decided to move forward without the United States to create the re-dubbed Comprehensive and Progressive Trans-Pacific Partnership (“CPTPP”),¹⁸ and negotiations for free trade agreements among others continues apace.¹⁹ China and India, previously cast as the upstarts blocking progress through the WTO, have now found themselves starring as cheerleaders for the system.²⁰

But the flux runs much deeper than this sudden jockeying for position. At the heart of these moves lies a broader, popular anxiety over the trading system and its benefits, evidenced in the electoral victories for Donald Trump and his anti-trade rhetoric in the United States and the Brexit movement in the United Kingdom.²¹ In both countries, many feel left behind by economic globalization. Trade may be benefitting some in their countries, but not them. And it is not only voters in the United States and United Kingdom that feel that way.

Much like phlogiston scientists working at the time of oxygen’s discovery, trade lawyers are in the uncomfortable position of seeing their experiments fail, but without fully understanding why. For those committed to the belief that trade liberalization and deeper integration are the best paths to common

15. Marc L. Busch, *Trump Claims that a National Security Exception Allows Him to Block Imports. Is He Right?*, WASH. POST (Jan. 11, 2019), https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/11/trump-claims-that-a-national-security-exception-allows-him-to-block-imports-is-he-right/?utm_term=.88744f3a9feb.

16. Anthea Roberts, Henrique Choer Moraes, & Victor Ferguson, *Geoeconomics: the U.S. Strategy of Technological Protection and Economic Security*, LAWFARE (Dec. 11, 2018), <https://www.lawfareblog.com/geoeconomics-us-strategy-technological-protection-and-economic-security>.

17. See, e.g., José-Miguel y Villarino, *Trade Retaliation in the Time of Trump*, EJIL: TALK! (Aug. 3, 2018) <https://www.ejiltalk.org/trade-retaliation-in-the-time-of-trump/>; Joseph Weiler, *Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System*, EJIL: TALK! (July 25, 2018), <https://www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system/>; Henry Gao, *How Can China Respond to the Trump Tariffs in a WTO-Consistent Manner?*, INT’L L. & ECON. POL’Y BLOG (April 7, 2018), <https://worldtradelaw.typepad.com/ielpblog/2018/04/how-can-china-respond-to-the-trump-tariffs-in-a-wto-consistent-manner.html>.

18. CTR. FOR STRATEGIC & INT’L STUDIES, *From TPP to CPTPP* (Mar. 8, 2018), <https://www.csis.org/analysis/tpp-cptpp>.

19. Sarah Porter, *A Whole New World for Free Trade*, BBC (Dec. 28, 2018), <https://www.bbc.com/news/business-46601315> (for an overview of the EU-Japan Economic Partnership Agreement).

20. See Rachel Brewster, *Monkey Cage: Trump is breaking the WTO. Will China Want to Save it?*, WASH. POST (May 2, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/02/trump-is-breaking-the-wto-will-china-want-to-save-it/?utm_term=.04c861af032b&noredirect=on.

21. Harlan Grant Cohen, *What is International Trade Law for?*, 113 AM. J. INT’L L. 326, 326 (2019).

prosperity and to the normal science of trade negotiations, the current problems reflect either flaws in the specific agreements negotiated (perhaps they are not liberal enough) or failures by other actors, specifically domestic policymakers, to do their part to redistribute the gains of trade so that all might benefit.²² Like the mass protests at the 1999 Seattle WTO Ministerial Conference or the failure of the Doha round of trade negotiations, the current issues reveal where policies need to be tweaked to better serve the system's goals; they are not threats to the broader direction or logic of trade law. For others, the current trade flux is a wake-up call, a reflection that something is wrong with the inherited wisdom. Together with prior warnings, the current crises suggest a more fundamental rethinking of trade law is in order. But while there is a general sense that something is wrong with the pre-2016 consensus, figuring out what might replace it remains elusive.

Gregory Shaffer is at the forefront of international trade lawyers searching for the oxygen that might sustain a new vision of trade law. *Retooling International Trade for Social Inclusion*²³ is a noble and sensitive effort to take the complaints of trade's discontents seriously, to ask hard questions about why the system is facing so many challenges, and to suggest concrete policies to reform international trade. In doing so, he picks up the baton from economists like Dani Rodrik²⁴ and leads the way for a group of like-minded legal scholars including Timothy Meyer,²⁵ Frank Garcia,²⁶ Nicolas Lamp,²⁷ and myself,²⁸ among others.

The lingering, anxiety-inducing question, however, is whether trade law is capable of solving the problems with the trade regime. Any effective reform, this essay suggests, must (a) start with a new normative narrative, fueling a new political conversation about trade's purpose, and (b) resituate trade within a broader set of normative concerns about both the international and domestic orders, from the human rights regime to international financial regulation, from regulation of the data economy, artificial intelligence, and the future of work to climate change. Trade lawyers may lack the vision to accomplish those goals. Like the phlogiston scientists of old, our expertise may act as blinders. And

22. *Id.* at 12.

23. See Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1 (2019).

24. See DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2011); DANI RODRIK, *STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY* (2017). See also Gregory Shaffer, *How Do We Get Along? International Economic Law And The Nation-State*, 117 MICH. L. REV. __ (forthcoming 2019).

25. Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 1014–20 (2017) (proposing that free trade agreements include an “Economic Development Obligations” chapter to soften the domestic loses from trade liberalization).

26. Frank J. Garcia & Timothy Meyer, *Restoring Trade's Social Contract*, 116 MICH. L. REV. ONLINE 78, 93–100 (2018).

27. Nicolas Lamp, *How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements*, (Nov. 26, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290590.

28. Cohen, *supra* note 21.

while efforts like Shaffer's to diagnose the problems and suggest reforms may be necessary, we may need help from outside to find a truly new way of thinking about trade.

Two-Step Leap of Faith

At the center-point of Shaffer's analysis is a diagnosis that the two-step model of trade and social welfare has failed.²⁹ Orthodox trade policy has been built around a normative narrative that liberalized international trade, through the power of comparative advantage, grows the economic pie for all states.³⁰ All states, says the orthodoxy, are better off after international trade than they would be without it.

What liberalizing trade cannot do on its own, though, is guarantee the fair distribution of international trade's benefits within states. Inevitably, some industries will profit off of new markets abroad, while other will suffer from cheaper competition. Some workers will lose their jobs while others will thrive, in part because cheaper products give them greater purchasing power.

This is where the two steps come in. International trade agreements could be arranged to deal with some of these distributional concerns, allowing states to protect or subsidize particular industries. This, though, according to trade orthodoxy, would be both economically and normatively sub-optimal. From an economic standpoint, growing the overall pie through liberalized trade is simpler, more efficient, and more manageable than trying to engineer fair international distribution. Moreover, while such engineering would be nearly impossible to get right, it would be guaranteed to shrink the overall welfare benefits states receive. From a normative standpoint, questions of redistribution involve tradeoffs between different groups and interests that are most legitimately made through democratic politics. Along with questions about what a "fair" distribution might be, redistribution could be achieved through different forms of taxation or through the provision of any number of benefits from direct payments to health care, education, infrastructure spending, etc. In the absence of a global demos,³¹ that sort of politics can only take place within states, the only sites of sufficient social solidarity to legitimate such tradeoffs.³² Recognizing these two points, current trade law and policy orthodoxy adopts a two-step approach to social and material justice. In step one, international trade law will work towards the freest and most efficient allocation of resources to grow the overall pie and make all states better off. In step two, these benefits of freer trade will be distributed within states through domestic taxation and social welfare policies.

29. Shaffer, *supra* note 23, at 4. ("The two-step model has become a harmful ideology because it elides the need to make sustainable development the organizing principle for international cooperation, as reflected in the United Nations sustainable development goals.")

30. For more on this normative narrative, see Cohen, *supra* note 21.

31. See generally Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596 (1999).

32. See Shaffer, *supra* note 23.

The problem with this two-step model, as Shaffer details, is that while trade lawyers have been running apace to achieve step one, domestic policy-makers have dropped the baton on step two. As trade agreements have deepened across the trans-Atlantic world, the welfare state has been rolled back, taxation systems have become less progressive, and income gaps between rich and poor have widened dramatically.³³ Most importantly, this reality demonstrates an inherent flaw in the two-step model. Not only is there no guarantee that step one will be followed by step two, but the success of step one increases the economic and political power of capital relative to labor and other interests, granting it outsized authority over the shape and pace of step two. Increasingly mobile in a world of low trade barriers, private companies can now negotiate the terms of their location in particular states, including their tax and regulatory burdens.

This realization leads Shaffer to suggest a variety of reforms that might re-engage and re-empower those other stakeholders.³⁴ These reforms include tying negotiations of trade liberalization to fairer allocations of taxes among states,³⁵ strengthening the social safety net,³⁶ introducing mechanisms that labor and other groups can use to protect domestic social welfare policies from being undermined by less-regulated foreign competition,³⁷ and granting states greater space to experiment with industrial policy.³⁸ In my own work, I have endorsed many of the same policies,³⁹ but Shaffer admirably develops them at a level of functional detail beyond what others have proposed.

Smashing the Frame

The question though is not just what reforms would be useful or wise, but how to make them achievable. The two-step model is not just a policy process; instead it is the reflection of a deeply seeded normative narrative about how trade should work and where it fits into the political-social economy. As I have described at much greater length,⁴⁰ the “grow the pie” narrative plays a key, foundational role in the consensus over international trade policy of the past few decades. It operates not only at the level of the trade experts, but also among the broader interested public, providing a short-hand justification for the GATT, WTO, and the negotiation of other free trade agreements. But it goes further still, justifying and structuring a bifurcated politics, in which trade and social welfare policy are debated separately, in different fora, by different participants, and according to different logics. The trade “grows the pie” narrative constructs international trade policy as fundamentally a question of economics

33. Shaffer, *supra* note 23, at 3–4, 10–11.

34. *Id.* at 17–42.

35. *Id.* at 17–22.

36. *Id.* at 23–26.

37. *Id.* at 26–29, 33–38.

38. *Id.* at 38–41.

39. Cohen, *supra* note 21.

40. *Id.* at 12.

and efficiency, separate from other policy questions, in which technocrats, economists, and business leaders are necessary experts. Trade liberalization is the assumed goal, and negotiations concern only the specific pace and form it will take. Other policy concerns, including redistribution, are purposely left to domestic politics, where all stakeholders can battle it out over value trade-offs. Structured that way, the fact that trade liberalization moves forward while social policy stagnates is hardly surprising. While trade is partly insulated from domestic politics, social welfare policy, operating in the shadow of existing trade commitments, is not. In essence, the two-step model that the grow-the-pie narrative feeds has structured a politics and policy process that reinforces the dominance of that narrative and model.

Breaking free from that model requires an entirely new political discussion about trade that reframes its purpose and reshuffles its stakeholders. A new normative narrative is needed that can reconnect the benefits of trade liberalization with other political goals, both economic and non-economic, from questions of domestic economic distribution, financial regulation, and regulation of the digital economy, to issues like climate change and the social meaning of work in an economy built around data and artificial intelligence. In a recent paper of mine, *What is International Trade Law For?*, I propose a new narrative, distilled from principles of embedded liberalism and human rights, focused on the state's obligation to provide for the welfare of its people.⁴¹ Such a narrative would re-embed trade's economic benefits within the broader range of domestic policy concerns, tying the pace and shape of trade liberalization to other policy goals, yoking the gains from trade to policies for social and economic redistribution. It would also make trade law part of an international strategy of cooperative capability promotion. Notably, the policy prescriptions such a narrative would suggest—negotiations over increased tax coordination and cooperation, roles for labor and other stakeholders in regulatory enforcement, and opening agreements up to trades of policy flexibilities—overlap considerably with those presented by Shaffer.

But we should not harbor any illusions that we can produce these changes through academic papers and policy proposals. While support from trade lawyers and negotiators will certainly help smooth the path to reform and may generate valuable ideas, it is questionable whether it alone can produce a fundamental shift of paradigms. And at a time when questions about the trading system are joined by concerns about the growing gap between the gains to capital and labor;⁴² the resilience of the human rights system;⁴³ the transformation

41. *Id.* at 16.

42. *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014); SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018). *See also* MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY (2015).

43. *See generally* Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279 (2017).

of the economy through big data, artificial intelligence, and automation;⁴⁴ and the dangers of climate change; a fundamental paradigm shift may be needed.

Any successful new normative narrative will emerge organically from politics and political movements. The best that scholars like Shaffer and me can hope to do is start conversations and seed ideas. Shaffer, who has elsewhere written incisively about the importance of democratic legitimacy and the need for local experimentation,⁴⁵ would undoubtedly agree.

Re-centering the Frame

But should those movements even focus on trade? Trade lawyers are hardly alone in the current anxiety—the adjacent field of investment law faces issues as well. Investor-state dispute settlement is actively being renegotiated as states withdraw from the International Centre for the Settlement of Investment Disputes and from bilateral investment treaties.⁴⁶ The availability and terms of dispute settlements are being renegotiated in those states’ model treaties, their regional agreements,⁴⁷ and through the United Nations Commission on International Trade Law (“UNICTRAL”).⁴⁸ Every possible reform seems on the table somewhere, from arbitrator selection and ethics, to procedure, to access, and to substantive protections like “Fair and Equitable Treatment” (“FET”).⁴⁹ Human rights are under attack from both the right and left. Right-wing populists in Poland, Hungary, Brazil, and the Philippines attack the human rights system and rule of law and have joined autocrats in Russia, Saudi Arabia, and China in ignoring human rights law’s protections and prohibitions.⁵⁰ On the left, human

44. See generally RICHARD BALDWIN, *THE GLOBOTICS UPHEAVAL: GLOBALIZATION, ROBOTICS, AND THE FUTURE OF WORK* (2019).

45. See generally Shaffer, *supra* note 23.

46. See Nandakumar Ponnaiya, *Withdrawal from Investment Treaties: An Omen for Waning Investor Protection in AP?*, BAKER MCKENZIE (May 12, 2017), <https://www.bakermckenzie.com/en/insight/publications/2017/05/withdrawal-from-investment-treaties>; Aditi Shah, *India’s proposed investment treaty terms leave foreign partners cold*, REUTERS (Jan. 19, 2018, 12:13 AM), <https://www.reuters.com/article/india-investment-treaty/indias-proposed-investment-treaty-terms-leave-foreign-partners-cold-idUSL4N1P72N1>.

47. See Martin J. Valasek, et al., *Major changes for investor-state dispute settlement in new United States-Mexico-Canada Agreement*, NORTON ROSE FULBRIGHT (Oct. 2018), <http://www.nortonrosefulbright.com/knowledge/publications/170779/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement/>.

48. See generally Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT’L L. 1 (2019); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT’L L. 361 (2018); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45 (2013).

49. See Lorenzo Cotula, et al., *Investor-State Arbitration: An Opportunity for Real Reform?*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (Dec. 7, 2018) <http://ccsi.columbia.edu/2018/12/07/investor-state-arbitration-an-opportunity-for-real-reform/>; Bart-Jaap Verbeek, *ISDS reform: The need For a Substantive Overhaul to Investment Protection*, CENTRE FOR RESEARCH ON MULTINATIONAL CORPORATIONS (May 7, 2018), <https://www.somo.nl/isds-reform-need-substantive-overhaul-investment-protection/>; Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation?*, 64 NETH. INT. L. REV. 50 (2017).

50. See Max Bergmann et al., *The Rise of Far-Right Populism Threatens Global Democracy and Security*, CTR FOR AM. PROGRESS (Nov. 2, 2018),

rights law has been criticized for its silence in the face of growing economic inequality,⁵¹ with some even arguing that it has been complicit.⁵² Similar critiques have been levied against the global financial system. For many, the 2008 financial crisis demonstrated that the existing system was built, first and foremost, to protect the interests of capital; in the emergency response, banks were saved, even at the cost of public finances, underwater homeowners, or the newly unemployed.⁵³ International Criminal Law—along with the WTO, the other great hope of the 1990s—is teetering. South Africa, Gambia, Burundi, and the Philippines have all threatened to withdraw from the International Criminal Court,⁵⁴ with the latter two following through.⁵⁵ And the law of armed conflict could not stop Russia’s annexation of Crimea, nor the seeming free-for-all in Syria. As many have observed, it is the entire imagined order of the 1990’s that is in flux.⁵⁶

But the disorder within these regimes seems only symptomatic of the broader public policy anxiety rippling around the world. Little progress has been made in responding to climate change, even as its danger is more widely felt. Cyber-attacks, manipulation of social media, privacy intrusions, and identity theft, together with the massive, growing power of big data companies, raise serious questions about the proper regulation of the Internet. Together with rapid advances in artificial intelligence and automation, they also raise questions about the future of work. When robots take the service jobs that replaced manufacturing, what will people do? How will states respond?

In the face of all these brewing questions, the challenges facing the trade regime look merely epiphenomenal. The world is facing epochal changes with rippling effects across every legal regime. The world is interconnected by trade, and, as such, trade rules implicate and are implicated by all these other con-

<https://www.americanprogress.org/issues/security/news/2018/11/02/460498/rise-far-right-populism-threatens-global-democracy-security/>.

51. See Moyn, *supra* note 42, at 216.

52. See generally Susan Marks, *Four Human Rights Myths*, in HUMAN RIGHTS: OLD PROBLEMS, NEW POSSIBILITIES 217 (David Kinley, Wojciech Sadurski & Kevin Walton eds., 2013). See also Umut Özsü, *Neoliberalism and Human Rights: The Brandt Commission and the Struggle for a New World*, 81 LAW & CONTEMP. PROBS. 139, 141–47 (2018) (discussing the debate).

53. See ADAM TOOZE, *CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD* (2018).

54. See, e.g., Patryk I. Labuda, *Africa and the ICC: Shattered Taboos, and the Status Quo*, EJIL: TALK!, Nov. 23, 2016 <https://www.ejiltalk.org/africa-and-the-icc-shattered-taboos-and-the-status-quo/>.

55. See Jennifer Tridgell, *The Departed: Implications of the Philippines’ Withdrawal from the ICC*, OPINIOJURIS (Dec. 4, 2018), <http://opiniojuris.org/2018/04/12/the-departed-implications-of-the-philippines-withdrawal-from-the-icc/>.

56. See Harlan Cohen, *Multilateralism’s Life Cycle*, 112 AM. J. INT’L L. 47, 47 (2018). See also Thomas Wright, *The Return to Great-Power Rivalry Was Inevitable*, THE ATLANTIC, Sept. 12, 2018, <https://www.theatlantic.com/international/archive/2018/09/liberal-international-order-free-world-trump-authoritarianism/569881/>; Graham Allison, *The Myth of the Liberal Order: From Historical Accident to Conventional Wisdom*, FOREIGN AFFAIRS (2018), <https://www.foreignaffairs.com/articles/2018-06-14/myth-liberal-order>; Daniel Deudney and G. John Ikenberry, *Liberal World: The Resilient Order*, FOREIGN AFFAIRS (2018), <https://www.foreignaffairs.com/articles/world/2018-06-14/liberal-world>; Paul Staniland, *Misreading the “Liberal Order”*: *Why We Need New Thinking in American Foreign Policy*, LAWFARE (July 29, 2018), <https://www.lawfareblog.com/misreading-liberal-order-why-we-need-new-thinking-american-foreign-policy>.

cerns. The question is how central trade and trade rules should be in responding to them.

The siloing of trade into a separate legal regime over the past decades, abetted by the narrative of growing the pie, has allowed trade agreements to move forward according to the logic of comparative advantage, relatively insulated from these other concerns. Other policy areas are forced to catch up and find some accommodation within the already agreed-upon rules. Concerns about access to medicine, pushed to the fore by the AIDS epidemic, had to contend with the already existing strictures of the Agreement on the Trade Related Aspects of Intellectual Property Rights (“TRIPS”),⁵⁷ before finding some accommodation in the Doha Declaration⁵⁸ and an amendment to TRIPS.⁵⁹ Concerns about labor and human rights have similarly been playing a game of catch-up with the complex value chains trade agreements have fostered. Questions about how best to regulate data or how to deal with climate change are now finding themselves in the same position.⁶⁰

The anxieties of 2019 raise intricately complex policy questions. Should states be allowed to subsidize research, development, and manufacturing of green technologies? Which serves competing goals better: freer trade in solar panels or the development of domestic green industries? Should states be allowed to tax financial transactions or data flows? Should data be allowed to travel freely across borders or localized? How should local or global competition law respond to the growing power of “big data”?⁶¹ Trade law and trade logic plays a role in all these questions, but whether or not it is the dominant concern or the right frame is an open question.

The siloing of trade is far from pre-ordained.⁶² The separation of international trade from investment, monetary policy, development, energy policy, antitrust, or human rights is far from obvious. In fact, many of these issues have recently appeared alongside trade, if albeit in free trade agreements, leading many to talk of a “trade and...” agenda. The planned postwar International Trade Organization would have also put trade in a broader policy context than

57. See generally Carmen Otero Garcia-Castrillon, *An Approach to the WTO Ministerial Declaration on the TRIPS Agreement and Public Health*, 5 J. INT’L ECON. L. 212 (2002), available at <http://eprints.ucm.es/6962/>.

58. See Steve Charnovitz, *The Legal Status of the Doha Declarations*, 5 J. INT’L ECON. L. 207 (2002); James Thuo Gathii, *The Legal Status of the Doha Declaration on Trips and Public Health Under the Vienna Convention on the Law of Treaties*, 15 HARV. J. L. & TECH. 291 (2002).

59. See *WTO IP Rules Amended to Ease Poor Countries’ Access to Affordable Medicines*, WORLD TRADE ORG. (Jan. 23, 2017), https://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm.

60. See Dan Ciuriak, *A Trade War Fuelled by Technology*, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION (Jan. 11, 2019), <https://www.cigionline.org/articles/trade-war-fuelled-technology>; Shawn Donnan, *Fortnite’s Digital Goods Are Key to the Future of Global Trade*, BLOOMBERG BUSINESSWEEK (Jan. 11, 2019), <https://www.bloomberg.com/news/articles/2019-01-11/fortnite-skins-are-key-to-the-future-of-global-trade>; Sally Burch, *Why WTO is Not an Appropriate Forum for Negotiating E-Commerce Rules*, THE WIRE (June 6, 2018), <https://thewire.in/trade/why-wto-is-not-an-appropriate-forum-for-negotiating-e-commerce-rules>.

61. See, e.g., Ciuriak, *supra* note 60.

62. Though as Quinn Slobodian has explained, the neoliberals who built the current system did believe in a division between the political sphere of imperium and the economic one of dominium. See QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 16 (2018).

the General Agreement on Tariffs and Trade did.⁶³ Instead, trade's current status is a reflection of the particular politics and power structures of the past few decades. This is the value of the historical work published by Andrew Lang,⁶⁴ Samuel Moyn,⁶⁵ Quinn Slobodian,⁶⁶ Adam Tooze,⁶⁷ Mona Pinchis-Paulsen,⁶⁸ and Nicolas Lamp,⁶⁹ among others: not only does the scholarship reveal the contingency of our current regimes of international economic law, it disinters the varied alternative ordering ideas that once vied for authority but have now been forgotten. And, it reminds us that, in answering the international and domestic challenges facing us, we need not accept the legal frames we have inherited, nor their respective contents. And, as Roberts, Moraes, and Ferguson have pointed out, that process of reframing has already begun.⁷⁰ One response to the current uncertainty, pursued by states like the United States and China, has been to embrace Geoeconomics, the reframing of international economic relations as essentially questions of national security.⁷¹ A frame of cooperative growth is replaced by a frame of competition. There is no reason why we need to cede the (re)framing to them.

Conclusion

Invisible, the oxygen we breathe can be easy to ignore—so too, the narratives and assumptions underlying the regime of international trade. If we want to reform that regime, however, those narratives need to be rendered visible and tested. An awkward period of critical introspection seems necessary. But Shaffer's commitment to empiricism and pragmatism,⁷² orientation toward law and society,⁷³ and immersion in interdisciplinary approaches⁷⁴ make him uniquely well placed to lead the search for new ways forward. *Retooling International Trade Law*⁷⁵ should serve as a beacon for future work questioning the existing paradigm and rigorously reimagining it.

63. See Daniel Drache, *The Short but Significant Life of the International Trade Organization: Lessons for Our Time*, CENTRE FOR THE STUDY OF GLOBALIZATION AND REGIONALISATION 25–27 (Nov. 2000), <https://core.ac.uk/download/pdf/47530.pdf>.

64. See generally ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* (2011).

65. See Moyn, *supra* note 42.

66. See Slobodian, *supra* note 62.

67. See Tooze, *supra* note 53.

68. See Mona Pinchis-Paulsen, *Fair and Equitable Treatment in International Trade and Investment Law: 1918–1956* (2017) (unpublished Ph.D. dissertation, King's College London) (on file with author).

69. See Nicolas Lamp, *Value and Exchange in Multilateral Trade Lawmaking*, 4 LONDON REV. INT'L L. 7, 13–17 (2016).

70. See Roberts, et al., *supra* note 16.

71. *Id.*

72. See Shaffer, *supra* note 23.

73. *Id.*

74. See TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday and Gregory Shaffer eds., 2014); Gregory Shaffer & Tom Ginsberg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012).

75. Shaffer, *supra* note 23.