Can Geopolitics Help Restore Missing Tools to the U.S. Trade Toolbox?

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Matthew Schaefer, Yeutter Institute

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When U.S. trade negotiators and trade litigators seek to increase market access for U.S. goods and services abroad, they look in their toolbox to see what might be the best tool. The more well-stocked the toolbox, the more possibilities for increasing foreign market access. Today, when U.S. trade negotiators look in their toolbox, they see several traditional tools missing, specifically legally-binding, comprehensive (including tariff-cutting) regional and bilateral free trade agreements (FTAs) and large package deals within the World Trade Organization (WTO). Their trade litigator colleagues face a similar circumstance of missing traditional tools, specifically the loss of binding two-level dispute settlement within the WTO. Domestic politics and geopolitical developments have pulled some tools from the toolbox. Domestically, more and more members of Congress and presidential candidates voice skepticism over the benefits of international trade – and this in spite of much more alignment on how to address labor and environmental concerns within trade agreements. Internationally, increased tensions between the U.S. and the West, on the one hand, and China and Russia on the other, as well as nationalistic turns in other countries, have left U.S. trade negotiators and litigators with fewer traditional tools to pursue market access.

Ironically, the geopolitical developments, and in particular the trending U.S. response to those geopolitical developments, may hold the key to overcoming domestic political limitations and ultimately place traditional tools back in the toolbox.

Trade Negotiators' Missing Tools

For trade negotiators, a traditional robust toolbox contains a full panoply of tools – global (or broad multilateral), regional, and bilateral legally binding agreements of various scope, buttressed by neutral third-party dispute resolution, as well as legally non-binding possibilities (such as ministerial declarations) at each of these levels, with the realization that legally binding is preferred for the greater predictability and certainty it provides. Today, trade negotiators find many of these tools missing, especially U.S. trade negotiators. At the global level, the WTO negotiating pillar for binding agreements has shrunk in size, relegated to being a tool used infrequently and for largely modest goals and tasks. The last major comprehensive trade round, the Uruguay Round creating the WTO, was completed in 1994 – twenty-eight years ago. In the few years after the conclusion of the Uruguay Round, important sectoral deals on telecommunications, financial services and information technology products were concluded, but progress through one-off sectoral deals soon halted as countries balked at what some considered U.S. hand-picked topics for negotiation. The WTO negotiating arm has had some sporadic, though important, sectoral or topic-specific agreements in the 2000s, such as the updated government procurement agreement in 2012, the trade facilitation agreement in 2014, and the fisheries subsidies agreement [https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm] concluded at the twelfth ministerial conference in June 2022. However, the promise of even these limited agreements remains unfilled and their implementation often a slow, laboring process. The trade facilitation agreement did not enter into force until 2017 although negotiations concluded in 2014, and many nations did not join until 2018 or 2019. Additionally, flexibilities in implementation built into the agreement further delay fulfillment of the promise economists saw in it– one reason why the United States might seek to build upon it within its newly launched Indo-Pacific Economic Framework [https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/statement-on-indo-pacific-economic-framework-for-prosperity/] (IPEF). Similarly, the recently concluded fisheries subsidies agreement—proof of sustainability possibilities within the WTO and perhaps a model or prod for other such agreements—may take some time to enter into force as it still awaits acceptance by member states.

As the WTO negotiating pillar largely languishes, many other major countries, including the European Union (EU), China, Canada and other major economies, have turned up the pace of negotiating regional and bilateral FTAs during the past decade. However, for U.S. trade negotiators, the regional and bilateral FTA path has been blocked as the political leaders in successive administrations have rejected pursuing FTAs with new partner countries. The last new FTA partner countries for the United States were Columbia, Korea and Panama in 2012 – over a decade ago. The U.S. concluded negotiation of a Trans-Pacific Partnership (TPP) FTA in 2016 that would have encompassed countries constituting over 40% of world GDP, but that agreement was never voted on by the U.S. Congress as President Trump withdrew the U.S. signature and foreclosed pursuit of its approval by Congress. The remaining countries went forward with a Comprehensive and Progressive Agreement for a Trans-Pacific Partnership (CPTPP) that left U.S. exports at a disadvantage in the region and left greater possibilities for China to influence policies in the region. TPP negotiations had beneficial effects by influencing provisions and providing useful models within the US-Mexico-Canada Agreement (USMCA) (and its Protocol of Amendment) concluded in December 2019 that updated the North American Free Trade Agreement (NAFTA) of 1994. USMCA provisions could likewise influence future FTAs if U.S. politics would allow binding FTA tools back in the toolbox. Some specific concerns with new FTAs that damage the politics surrounding them are the possibility of China free-riding on FTAs and the related issue of rules of origin—especially for autos— particularly how flexible to keep such rules that determine whether a good is eligible for duty-free treatment provided by the FTA. Indeed, one significant concern of the Trump administration with TPP expressed in testimony before Congress was the agreement's rules of origin for autos. Subsequently, one of the key demands in NAFTA renegotiations was creating stricter rules of origin for autos within that agreement as well as including provisions seeking to discourage Canada and Mexico from entering FTAs with China. TPP was not the only failed attempt at creating new FTA partner countries for the United States the past decade. Negotiations on an FTA with the United Kingdom and another with Kenya were launched in the last year of the Trump administration. However, no bilateral FTAs were concluded. The Obama administration also engaged in FTA negotiations with the EU, the Transatlantic Trade and Investment Partnership (TTIP), but those efforts were not continued in the Trump administration.

The IPEF Model

The Biden administration has not renewed any of these prior bilateral or regional FTA negotiations or launched any other regional or bilateral FTA negotiations. Instead, the Biden administration launched IPEF in May with 13 other countries, including many TPP economies, with four key pillars: trade; supply chains; clean energy, decarbonization, and infrastructure; and tax and anti-corruption. The trade pillar will be negotiated by the U.S. Trade Representative (USTR) but will not include discussion of tariff barriers or traditional market access. It will include discussion on trade facilitation, transparency, and good regulatory practice issues. Much good can be done with trade facilitation and limiting regulatory barriers, but implementation of the former can prove difficult, and the latter can be very time consuming since many regulatory barriers may have other legitimate policy objectives— at least in broad scope and on the surface. Discussion of tariff barriers and traditional market access can also raise the level of ambition on these other issues. The success of IPEF's trade pillar will in fact depend on the level of ambition and details of the commitments but the scope of the negotiations is narrower than traditional regional and bilateral FTA negotiations. The Biden administration intends for the agreements arising out of IPEF on trade to be legally binding, but it is unclear what Congressional involvement will be, whether Congressional approval will be sought, or whether the administration will rely on arguments of implied approval based on any agreement's consistency with current U.S. law [https://www.lawfareblog.com/presidents-and-ustrs-trade-agreement-authority-fisheries-ipef]. Implied approval may provide sufficient legal authority for the President to enter certain trade agreements. Indeed, such arguments have been used with respect to over a thousand other trade "mini-deals" or so-called "trade executive agreements [http://ttps//yeutter-institute.unl.edu/trade-deals-under-radar]" – with many of these impacting particular sectors or industries – and those tools remain possible, at least until Congress objects to such arguments and takes legislative action to prevent future use.

In June of 2022, the Biden administration announced an IPEF-modeled arrangement for the Americas at the Summit of the Americas – the Americas Partnership for Economic Prosperity [https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/08/fact-sheet-president-biden-announces-the-americas-partnership-for-economic-prosperity/] (APEF). In July 2022 the Biden administration announced trade and investment partnership talks with Kenya that will not involve tariff matters either, instead limiting itself to IPEF-type topics. Similarly scoped discussions have also been launched with Taiwan. A year earlier in June 2021, the Biden administration also created a Trade and Technology Council with the EU to ensure trade policies and deployment of emerging technologies respect national security priorities as well as commercial priorities. But none of these negotiations or discussions have the full, broad scope of traditional FTA negotiations, specifically discussion of traditional market access and tariffs. In the context of the IPEF, USTR has noted the low overall level of U.S. tariffs, but other countries are still keen on discussions with the United States about tariffs and traditional market access. More importantly, many IPEF countries maintain much higher tariff levels than the United States and have much higher levels of imports from China than from the United States, suggesting gains for U.S. industry and agriculture from mutual tariff reductions and an opportunity to close the gap.

Congress for its part has not renewed trade promotion authority ("fast-track") since it expired in summer of 2021. Trade promotion authority enhances the credibility of the executive branch as it virtually guarantees Congress will give a trade agreement a single up-or-down vote with no bottling up of the agreement in committees nor filibuster in the Senate. No trade agreement has ever been voted down by Congress when submitted under the fast-track process. The Trump administration did conclude a few not-so-mini "mini-deals" without express ex-post approval of Congress, including one with Japan that gave many U.S. agricultural products CPTPP treatment, along with a digital trade agreement similar to the one in the USMCA. However, the authority of the executive branch to conclude the tariff portions of such agreements expired with trade promotion authority in July 2021 [https://crsreports.congress.gov/product/pdf/IF/IF11400], perhaps one reason IPEF does not include tariffs within the scope of its negotiation. The administration could include tariffs within the scope of IPEF and then seek Congressional approval after concluding negotiations, but no advance delegation of such authority exists currently. Trade promotion authority also lays out a consultation process between the executive branch and Congress. Given concerns over the degree of consultations with the IPEF and APEF initiatives expressed by members of Congress on both sides of the aisle, this may be another benefit of renewal of such authority.

Trade Litigators' Missing Tools

For government trade litigators, market-opening tools have also been reduced in the past several years. The WTO dispute settlement system, considered by some the crown jewel of the system for providing two-level (including appellate level) neutral third-party binding dispute resolution backed up by authorized sanctions in event of non-compliance, is now largely defunct. The United States refused to join a consensus to replace WTO Appellate Body members whose terms expired such that the Appellate Body no longer had the minimum required number of members to hear an appeal – specifically three – as of December 2019. Cases can still be brought – and still are – to the first-level panels. However, without the guaranteed right to appeal being possible, those original panel rulings often simply remain unadopted – and do not create any sort of international obligation on parties to the dispute. Over 40 countries, including the EU, China, Canada, Brazil and Australia, created an arbitration mechanism to replace the Appellate Body on an interim basis – the Multiparty Interim Appeal Arrangement (MPIA) – but the United States is not a party to that arrangement. FTA dispute settlement for trade disputes has generally been much more infrequent than the number of cases brought by or against the United States under the WTO. The USMCA improved NAFTA's dispute settlement mechanism for trade disputes by making it much more difficult for a defendant country to block the process [https://blog.bakerinstitute.org/2022/01/27/state-to-state-dispute-settlement-under-the-usmca-is-working/]. The agreement covers trade with the United States' two largest trading partners, and even created a unique mechanism for labor disputes at the factory level, the Rapid Response Mechanism. But, again, the United States only has 20 FTA partner countries while WTO membership stands at 164. Mechanisms of enforcement for the IPEF are very much an open question.

The Rise of Unilateral Tools

In parallel with the decline in the number of tools in trade negotiators' and trade litigators' respective toolboxes, there has been a rise in (or at least new fondness of) tools that can be used to impose trade restrictions unilaterally. The use of several long-standing trade-restrictive tools was reignited for the first time in decades under the Trump administration, but their effectiveness as leverage to open foreign markets has a mixed record at best. The Trump administration used Section 232, which allows for tariffs in response to imports threatening to impair U.S. national security, to impose additional tariffs on steel and aluminum in March 2018, including against many allies, despite China's overcapacity and subsidization being the main problem in those sectors. Foreign retaliation, much of it on agriculture, followed the Section 232 tariffs. The Trump administration did use threats of Section 232 tariffs on autos and auto parts to create leverage in NAFTA renegotiations. Prior to the Trump administration, the last imposition of tariffs under Section 232 occurred in 1986. The Biden administration has reduced tensions and retaliatory tariffs by allies by reaching agreements with several countries, including the EU, Japan and the UK, creating tariff-rate quotas for steel imports, effectively exempting steel from those countries from the increased duties, provided imports remain below certain levels.

The Trump administration also used Section 301 unilaterally for the first time in decades to impose additional tariffs up to 25% on roughly two-thirds of imports from China in response to that country engaging in or allowing cyber theft of industrial secrets and intellectual property and forcing technology transfer from investors. These tariffs remain despite a very non-traditional bilateral agreement negotiated with China (the so-called Phase One deal) that reduced some of the Section 301 tariff levels in exchange for Chinese purchasing commitments with respect to U.S. exports—almost a managed trade-type system—and intellectual property protection improvements. China has not met its purchasing commitments under the agreement and yet no enforcement action has been taken while the Biden administration continues to assess the best path forward with China. Private companies challenged certain aspects of the Section 232 and Section 301 tariffs, but to date, such litigation efforts have failed to eliminate such tariffs due to the broad delegation of power to the executive branch in those statutes. Despite some calls from members of Congress to restrict future use of one or more of these domestic trade-restrictive tools, Congress has not yet acted on such calls, and any such attempt may need to overcome a presidential veto as presidents are generally against scaling back their existing delegated powers.

Causes of a Smaller Toolbox

One cause of a smaller toolbox for trade negotiators and litigators is a U.S. political system that has fewer pro-trade members of Congress and lead candidates for the presidency from both parties who are less strong advocates for trade than several decades ago. Trade has become a scapegoat for the unequal impacts of globalization and for lost manufacturing jobs in the United States, when many factors are present, including increased manufacturing productivity and less-labor intensive methods of production (e.g. automation). Trade must be accompanied by buttressing competitiveness in a variety of ways domestically, including strengthening the education system, and stimulating technological capabilities, but also through effective and strengthened social safety nets for workers and communities significantly negatively impacted by trade. Politicians traditionally have difficulty agreeing on bipartisan long-term solutions in competitiveness, education, and safety nets for those impacted by trade, with trade then becoming an easy target of political rhetoric. Indeed, trade adjustment assistance for workers losing jobs due to trade just expired for purposes of new claims on July 1, 2022.

The other cause of a smaller toolbox, especially at the WTO level, is major geopolitical developments. The first, and most important, is a realization by U.S. and other Western policy makers that China's market-oriented reforms reversed in the past 15 years, and that China, the world's 2nd largest economy, was not living up to the spirit of its commitments made when it joined the WTO in 2001 and engaging in forced labor in certain regions. Added on to these economic developments is the Chinese government's more aggressive stance regionally with regard to territorial claims in the South and East China Seas over the past decade and the recent reaction to House Speaker Nancy Pelosi's visit to Taiwan. The second development is increased friction with Russia, the world's 11th largest economy, over the past decade, escalated dramatically by Russia's invasion of Ukraine in

February 2022. A WTO panel ruling in 2019 on the so-called national security exception within the trading system in a dispute between Ukraine and Russia may have been one reason the Trump administration let the Appellate Body collapse, fearing its application to Sec. 232 actions by the administration.

Can Geopolitics Drive a Bipartisan Trade Agenda and Restore the Toolbox?

The geopolitical developments ironically might lay the groundwork to overcome the domestic political constraints on trade negotiators' use of certain tools. There is some evidence of this already. Examples include bipartisan legislation requiring additional measures to combat state-sponsored forced labor by China in the Uyghur Forced Labor Prevention Act [https://www.csis.org/analysis/uyghur-forced-labor-prevention-act-goes-effect] and revoking Russia's most-favored-nation (MFN) status, as well as the recently passed bipartisan CHIPS and Science Act. The latter includes $52 billion in semiconductor subsidies in light of U.S. share of global manufacturing falling to 12% in 2020 from 37% in 1990 as well as parts of broader bills focused significantly on competitiveness and China issues. The administration's outreach to Europe, Japan and others on China trade issues (such as proposed changes to WTO provisions on subsidies in light of China's state-owned enterprises) and the great degree of continued cooperation on Russia sanctions following the invasion of Ukraine offer further proof of Congressional and executive branch alignment on geopolitical developments across party lines.

While geopolitics-driven bipartisanship on industrial policy and sanctions for illegal invasions and forced labor is alone not enough to restore traditional tools for trade negotiators, it does create momentum to continue such bipartisanship in a manner that might drive an offensive trade agenda that places traditional tools back into the toolbox.

Tools for market access are important economically, but also important leverage points in broader geopolitical terms for protecting and advancing democratic, open-market, good-government developments globally.

Revitalizing the WTO negotiating agenda in a more fulsome way will be difficult given the concerns with China's state-owned enterprises and subsidies, but U.S. participation in regional and bilateral FTAs can potentially spur incentives for countries to be more forthcoming in multilateral negotiations and also create economic pressure on China for reforms. Labor and environment debates that used to hamper trade bipartisanship have been resolved to some significant degree (with the exception of climate issues) over the past decade. The passage of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 providing trade promotion authority, along with the USMCA's novel provisions on trade and environment, provide evidence of this. However, the USMCA was the only agreement approved under the 2015 Act, a stark contrast with the 11 FTAs encompassing 16 countries that were approved under the 2002 trade act's trade promotion authority before it expired in 2007 — evidence that other political limits linger as trade agreements this past decade turned into an election tool by both parties' presidential candidates.

Yet, U.S. policymakers in the Congress and executive branch can utilize the current momentum to create a bipartisan "offensive" trade agenda that returns a full set of tools to trade negotiators, maximizing the degree and scope of "friend shoring," with the realization that "defensive" measures (such as sanctions and export controls) alone will not provide the necessary response to the geopolitical challenges posed by China and Russia.

High standard, enforceable trade agreement commitments that provide increased market access but are also full-scope, "modern" agreements are in the interest of the United States and advance open-markets and boost democratic, transparent government. These are unique tools the United States can use better than China. They can counteract China's influence-wielding infrastructure investment through the Belt and Road Initiative that the United States will have a difficult time matching. Trade agreement wrapping (or the packaging in which they are sold) must include geopolitical response rationales to maximize bipartisanship. Such wrapping was tried to some extent with TPP in 2016-2017, but it could be increased significantly, and today's geopolitical dynamics would likely increase its effectiveness. Naturally, the packaging must also include persuasive reasons why the agreement is good for America's businesses and workers economically, but the geopolitical developments since 2016 will increase the effectiveness of arguments relying on those rationales. Additionally, provisions can be included to ensure no free riding by China on FTA deals struck by the United States. Supply chain awareness and study, particularly on sensitive products, can provide the basis for such provisions. One can see inklings of the momentum behind this thinking in Congressional hearings and bills. Indeed, Congress may need to lead the move towards restoring traditional tools to the toolbox. An executive branch without authority to cut tariffs is less likely to pursue such cuts and seek approval afterward. Congress passing a bill providing for new trade promotion authority along with renewal of trade adjustment assistance, particularly if it also included other provisions on competitiveness and China to link those efforts to the recent strong bipartisan response to geopolitical developments, might provide the necessary spark for a more robust offensive trade agenda.

Restoring a two-level, third-party dispute mechanism in the WTO will be a longer-term task since it would require not just fixing procedural concerns (e.g. going beyond time limits for rulings and Appellate Body members serving beyond their terms) and substantive concerns (the Appellate Body filling in too many gaps in trade remedy agreements thus limiting their use) raised by the United States. It will also require correcting or improving substantive rules relating to subsidies and state-owned enterprises and other gaps in WTO rules that leaders from both political parties in the United States believe need to be corrected in order to ensure China lives up to the spirit and letter of the WTO agreements. However, FTAs can continue to make improvements to their dispute mechanisms allowing greater use of those forums for market opening while WTO rule reform awaits. Indeed, the TPP made improvements to NAFTA's trade dispute mechanism model – and USMCA borrowed some of these improvements and now reduces the ability of a country to block establishment of a panel in the case of a dispute. These USMCA dispute provisions indicate that with strong rules, including on state-owned enterprises, the U.S. is willing to submit to binding third-party dispute settlement, realizing that even binding rulings within the international system leave room for parties to elect not to comply at the end of the day. A growing realization of the benefits of traditional tools of trade negotiators and litigators, not just economically, but also geopolitically given the gravity of the current geopolitical environment, needs to be nurtured so that such tools can be returned at least initially at the regional and bilateral level.

About Matthew Schaefer
Schaefer is the Clayton Yeutter Chair at the Yeutter Institute and the University of Nebraska College of Law. View biography [https://law.unl.edu/matthew-schaefer/].

3625 East Campus Loop South
Ag Comm Building, Room #4
Lincoln, NE (Nebraska) 68583-0928

402-472-2119

yeutterinstitute@unl.edu

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