China’s Unique Role In World Trade And The U.S. Response

The Editor interviews Alan H. Price, Chair of the International Trade Practice, and Timothy C. Brightbill, Partner in the International Trade Practice at Wiley Rein LLP.

Editor: Please tell us about your professional backgrounds.

Price: I have been practicing international trade law for 30 years. In law school I was a member of the International Trade Journal and interned at the ITC. I clerked at the U.S. Claims Court. Since I left the Claims Court in 1984, I have been working on various trade remedy matters, first at Daniels, Houlihan & Palmeter and Mudge Rose, before I joined Wiley in 1987, where I have built a large practice. I have authored numerous papers on trade issues relating to China and have been lead counsel on many trade remedy cases and counsel on many WTO cases. Among the industries I have worked for are photographic paper, newspaper printing presses, steel products of almost every variety, lined paper, hand tools, etc.

I have practiced before the ITC, the Commerce Department, the federal courts and the WTO. I am president of the Committee to Support U.S. Trade Laws, which is the leading trade association representing U.S. producer interests on trade law issues.

Brightbill: Before joining Wiley Rein in 1996, I worked on Capitol Hill both before and after law school. After law school, I was counsel to the House Small Business Committee. Since joining Wiley, I have focused on trade remedy cases and trade policy issues, working very closely with Alan. I am also the vice-chair of the Industry Trade Advisory Committee on Services and Finance Industries, also known as ITAC 10. This is the private-sector group that advises the U.S. government on trade negotiations, enabling us to review the language of trade agreements as they are being negotiated and provide government negotiators with input and advice. This is also my 11th year as an adjunct professor at Georgetown University Law Center, where I teach international trade and regulation.

Editor: Many countries other than the usual suspects (the EU, the U.S., etc.) are now using trade remedies. Is China participating in this trend?

Price: Such countries as China, India, and Brazil are increasingly using trade remedies, but there is great variation in the degree to which they are actually complying with WTO requirements in the usage of the law. This is a logical outgrowth of our trade agreements and, if done correctly, augurs for the opening of markets where trade laws can be used effectively. The problem is, in many cases, particularly China, the laws are not being used in a WTO-consistent manner but are being used for political purposes. For example, cases are filed as direct retaliation in reaction to U.S. cases brought against China rather than because an industry is actually injured.

Brightbill: Countries, particularly developing countries, are free to use these trade laws and are making increasing use of them. In some cases they do not conduct their investigations of possible violations in an impartial and transparent way, thus violating the international rules that are set in this area. We have seen that time and again where China imposes trade restrictions on the U.S. without the facts to back them up. Wiley Rein primarily represents U.S. companies and U.S. industries that are using the trade laws because they are suffering from unfair trade practices from China and other countries. We are one of the very few law firms that specializes in helping U.S. companies use these trade laws to their benefit.

Editor: Please discuss the challenges for the American steel industry vis-à-vis Chinese trade barriers.

Price: China has built the world’s largest steel industry even though it is the least profitable steel industry in the world, which the Chinese acknowledge. The main chal-

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Challenges that we face relate to the fact that this is all being done with state support and state control—most of the steel companies are directly or indirectly state-owned enterprises. China has prevented foreign investment in the Chinese steel industry because it is considered a national priority. Essentially, China has embarked on the classic Communist plan of controlling the “commanding heights” of the economy. Their main quest is to be able to produce cheap steel unmindful of economic returns. That basically means there is enormous excess global overcapacity challenging the entire global market. U.S. industry has to compete in this unfair environment, where decisions on investment and pricing are not being made by classical market principles. It is an enormous challenge for the U.S. steel industry, but this challenge is repeated in other industries such as aluminum and solar. China systematically distorts the overall competitive environment to encourage production not only of steel but also steel-containing goods in China. We see this pattern over and over again throughout the Chinese economy. It is a very deliberate effort to transfer the world's production and economic power from the rest of the world to China.

We represent Nucor, the largest steel producer in the United States, in tackling many of these major challenges—whether it is misaligned currency (potentially the biggest trade-distorting subsidy) or excess capacity in China based on state ownership. Normally, when too much capacity is built, the market corrects it, but with China there is no correcting mechanism except to drive companies in the free world out of business. Chinese dominance causes tremendous harm to U.S. producers of steel but also steel-containing goods, aluminum-containing goods, and solar panels.

**Brightbill:** The challenges that the American steel industry faces with respect to China are: (1) unprecedented growth in Chinese steel capacity, equivalent to six times the entire North American steel industry and more excess capacity than Japanese, European, and U.S. production combined; (2) massive subsidies—grants, loan guarantees, regulatory preferences; (3) state-owned enterprises where U.S. companies are competing against the Chinese government, not just Chinese industries; (4) and blockage of U.S. companies from investing in the Chinese steel industries by China’s law and regulation.

**Editor:** Don’t other countries have antidumping laws that would make it difficult for China to export its excess capacity?

**Price:** There are a large number of antidumping cases on steel products against China. These are remedies that address discrete issues representing the symptoms, not the problem. The root cause of the problem is that the Chinese government is essentially financing and supporting an industry without concerns about market returns. China’s steel industry has grown from approximately one hundred million tons of production in 2000 to about one billion tons of capacity in 2013. No market economy with environmental standards could finance such expansion that quickly. In view of the vast construction, many of the companies involved borrow from state banks but default on their loans, which are written off. This is essentially an industry that grows in a completely unfettered manner causing massive disruption to producers in the rest of the world.

Not only have we addressed this individual problem in bringing antidumping cases, we have written widely about the distortions caused by these state-owned enterprises to various policy-making bodies, thus sensitizing officials at the OECD and the WTO and U.S. policymakers to these sets of larger considerations.

**Editor:** Tim, you were lead counsel to SolarWorld Industries America, Inc. and the Coalition for American Solar Manufacturing in November 2012. Please tell us about your role.

**Brightbill:** This was another example of China setting out to dominate a growing industry. We saw a surge of imports of dumped and subsidized solar products in the United States, which increased more than 1,000 percent over the period of our investigation, causing prices to fall significantly and harming large segments of the U.S. industry. More than two dozen U.S. companies were either forced into bankruptcy or had to make significant layoffs. We brought the case in late 2011, beginning a year-long investigation on behalf of SolarWorld and a coalition of more than 200 members. This resulted in a strong win both at the Commerce Department and the International Trade Commission, with duties imposed on Chinese solar products ranging from 30 percent to about 250 percent. While this has sharply reduced the level of unfairly traded Chinese solar products, it is still a very challenging environment for U.S. industries as we continue to work with our client in terms of ensuring that China’s unfair trade practices are prohibited.

**Editor:** Alan, you have served as lead counsel to the Wind Tower Trade Coalition in U.S. antidumping and countervailing duty cases involving renewable energy products. Please tell us about your role.

**Price:** We have been very active in the renewable energy space. Wind Tower is another classic example of how there was a huge surge in imports, principally from China but also from Vietnam. We successfully brought this case, achieved very substantial duties, and as a result there are virtually no imports from either of these countries today. The two major U.S. producers that survived, our clients, are doing much better as a result of the case. It is a classic example of how a trade remedy case is supposed to solve problems for U.S. industry, allowing an industry to recover and succeed and compete with market-based competitors. There are foreign producers that still exist and trade fairly in the U.S.

**Editor:** Since finally becoming a WTO member in 2001, China’s economy has grown enormously, but its relationship with the organization is not without its troubles. My understanding is that they have not advanced to the full status within the WTO that they had hoped for.

**Brightbill:** China has failed to live by many of the commitments made in 2001 when it joined the World Trade Organization. Our firm has provided input to the U.S. government regarding all the ways in which China has failed to remove trade barriers. One example is that China pledged in 2001 to open its government procurement markets as quickly as possible, but even today (as of late 2013) this has not yet happened. Another primary problem is China’s use of the trade laws as retaliation against other countries. For example, when the European Union filed a solar trade case against China, China responded by retaliating against the U.S. and European Union polysilicon industries and threatening trade cases against the European Union on luxury cars and wine. And after the U.S. imposed relief for the U.S. tire industry against a surge of Chinese imports, China retaliated by filing a case against American chicken products. The U.S. challenged that action at the WTO and successfully showed that China had no basis for bringing their case.

**Price:** When we agreed to admit China to the WTO, many of the world governments miscalculated the net economic benefits in the belief that there would be an expansion of exports from the U.S. and Europe.
Unfortunately, that has not occurred. Conversely, we naively believed there would be mass economic liberalization in China. However, China has maintained control of the banking system, its currency and its investments in a way that has not been sufficiently liberalized. We have two problems: the WTO agreement envisioned, incorrectly, further liberalization in China of critical economic areas that have not been realized, coupled with the fact that China has not lived up to the terms of the agreement. As a result, we continue to try to address these problems as much as possible through WTO trade case litigation, but there are fundamental flaws in the way that these agreements were negotiated and enforced.

Editor: Please tell us about your work with U.S. industry and the U.S. Trade Representative (USTR) in connection with WTO disputes regarding China's raw material export restrictions.

Price: We have been involved in a number of WTO cases. Because we represent U.S. industries we are in the position of assisting the USTR and the WTO in those cases, but we do not make direct appearances before the WTO. The WTO is a government-to-government entity, so companies do not have a right to bring a case. We work on behalf of U.S. companies and industries to convince the U.S. government to bring the case and to give them all the evidence and data they need to win the case, helping by pulling the facts together and suggesting legal arguments. Recently, we have been active in prosecuting two cases: one is the first raw materials case where the U.S. government successfully challenged China's quotas and tariffs on raw materials that were inconsistent with assessment agreements China had signed with the WTO. We are also now actively representing U.S. interests on the matter of rare earths in challenging restrictions that are clear violations of China's WTO requirements. Our WTO practice is broader than these two cases. We are very active also in a number of trade remedy issues at the WTO. We are regulars in Geneva, working on both trade remedy and trade negotiations issues.

Editor: It has been said that many bilateral trade agreements are sidestepping the WTO. Might the Doha talks be revived?

Price: There are obviously significant problems in developing a consensus that would allow a new multilateral round to succeed, because the gulf of issues to be negotiated is just too wide to achieve on a multilateral basis. In other respects, dispute resolution has taken too large a role at the WTO, which discourages negotiations needed on a multilateral basis. At this point, the Doha round is quite old. Many of the original negotiating points no longer make sense, particularly a development round, when you have China, the world's second-largest economy, actively involved. The WTO has been very reluctant to declare an end to the round, and there are specific areas that can be agreed to, such as trade facilitation.

Brightbill: The WTO is able to make some limited progress at its annual ministerial meetings. It will be interesting to see if WTO members are able to reach an agreement in early December on removal of trade barriers. The broader point is that the U.S. has a very open market with our trade barriers and traffics being very low. Our U.S. corporate clients are interested in removing trade barriers around the world. And so the question is, what is the best way to do that? In the last few years it has been obvious that the WTO moves very slowly and normally acts on consensus. The Obama administration decided to pursue trade liberalization more aggressively through free trade agreements, leading to very important trade negotiations that are now underway – the Trans-Pacific Partnership, the Trade in Services Agreement, and the U.S. EU Free Trade Agreement, known as the Trans-Atlantic Trade and Investment Partnership (TTIP).

Editor: Might the Trans-Pacific Partnership (TPP) have an effect on U.S.-China Trade relations, even though China is not a party to this particular trade agreement?

Brightbill: Yes, the TPP will have a very significant effect on the U.S.-China trade relationship. The Obama administration has made it clear that it wants the TPP, an eleven-country free trade agreement, to be the gold standard for free trade agreements going forward. It would be the largest free trade agreement ever negotiated by the United States, involving billions of dollars of trade every day with all the other TPP parties. This is not just an effort to remove trade barriers but also an effort to align the other important powers in the Asia-Pacific region with the United States instead of with China. And so if these talks are successful, it will set the tone for trade and trade liberalization throughout the Asia Pacific region. Japan has joined very recently. The administration has the ambitious goal of concluding TPP in 2013 or early 2014.

Price: One of the things about the TPP which is interesting is it will likely be the first agreement to address the issue of state-owned enterprises (SOEs). The market distortions created by SOEs are not currently addressed either by the WTO or by our existing free trade agreements. Wiley Rein has always tried to help its clients by using these agreements, such as the TPP, as building blocks for developing long-term solutions. We lay out the groundwork, such as by publishing a research paper on SOEs — something we did in building consensus in the steel industry seven years ago. We then work on developing consensus on some of these issues at the OECD, which often functions as a think tank on these issues. We follow up by trying to get these ultimately addressed in various free trade agreements — again trying to develop an international consensus to solve and address these problems. Because our clients have ultimately to deal with these problems in a macro sense, we try not only to solve the discrete problem, e.g., invoking the antidumping laws, but also the larger-scale global problem. We are one of the few firms that works on all levels of an issue. We have the luxury of working from Washington, DC and do not have to worry about the implications of our legal positions on any overseas offices.

Editor: In June of this year, Obama named Michael Froman to be the new U.S. trade representative, which seemed to make a statement about the importance of trade in Obama’s second term. Has this been borne out?

Brightbill: The Obama administration has increased the priority of trade and trade negotiations as it has moved from 2008 to the present. Ambassador Froman has taken the helm as the USTR at a very critical time, given all the negotiations going on by U.S. companies in an effort to achieve concrete results in their trade talks. Ambassador Froman is well positioned to help these companies with these issues and finalize these talks. Also, the USTR is very important in terms of continuing to bring cases against China and other countries when they violate WTO rules. He has a very important dual role in terms of negotiations and dispute resolution, and he is moving ahead on both of those fronts.