

## Obama, WTO Trade Enforcement, and China\*

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### 1. Introduction

Since US President Obama entered office in 2009, his administration filed 20 WTO cases and won every one that was decided.<sup>1</sup> At the time of this assertion, there were 11 filings against China. The cases filed against China that have been won by the US have concerned, among others: Chinese duties or restrictions on the US high-tech steel exports;<sup>2</sup> violation of intellectual property rights;<sup>3</sup> dumping of Chinese tires into the US marketplace;<sup>4</sup> restrictions on imports of autos into China;<sup>5</sup> and restricted use of electronic payment systems (credit cards) in China.<sup>6</sup> It also involved Chinese restrictions on exports of rare Earth elements<sup>7</sup> and other raw materials from China.<sup>8</sup>

### 2. Recent US – China Litigation in the WTO.

This certainly sounds like a great achievement for the US trade enforcement that would reflect a sterling record in the WTO dispute resolution system. But is it a great achievement? It might be, but the whole story is much more nuanced and important to understand. The Obama administration does not point out that China

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has prevailed in a number of cases against the US.

Take, *e.g.*, the 2012 case decided against the US that involved the use of ‘zeroing’ as a method for calculating antidumping duties.<sup>9</sup> Another case was decided in 2014 against the US regarding its application of non-market status in calculating dumping and countervailing duties for certain Chinese imports.<sup>10</sup> Yet, another case decided in 2015 involved the wrongful determination that a state-owned enterprise is a public body and thus capable of providing illegal government subsidies.<sup>11</sup> Indeed, just in May 2016, China requested a compliance procedure against the US for its failure to implement a decision involving countervailing duties on Chinese exports by state-owned enterprises.<sup>12</sup>

Newer cases that have been brought by the US are pending and involve Chinese taxation on aircraft<sup>13</sup> and ‘demonstration bases’ (special manufacturing zones) that seem to be in the process of settling before litigation.<sup>14</sup> Both involve issues of subsidies. The 12th and 13th cases against China were filed this June and July by the Obama administration. They involve Chinese compliance with a prior decision regarding the dumping and countervailing duties imposed on the import of the US broiler chickens<sup>15</sup> and Chinese export restrictions on nine minerals.<sup>16</sup> The only other compliance case ever filed by a WTO member was also filed by the US, and it was decided in 2015.<sup>17</sup> As recently observed: “It is becoming clear that the US and its geopolitical rival are already skirmishing ahead of what could be a combative summer.”<sup>18</sup>

Perhaps the most important metric to look at when determining a member’s compliance with the WTO’s decisions is whether it has authorized sanctions against a country for not implementing its panel or Appellate Body recommendations. Surprisingly, it is not China but the US that holds the honor of being sanctioned the most. China has never been sanctioned. No such sanctions have ever been authorized in the US-China disputes.

*E.g.*, the US was sanctioned in 2015 for not complying with the “Country of Origin Labeling” (“COOL”) requirements in two cases brought by Canada and Mexico concerning the import of beef and pork.<sup>19</sup> The US rules required the identification of the foreign source of imports, which violates the WTO rules.

An examination of the most recent WTO report on sanctions covers its first 20 years (1995-2014).<sup>20</sup> It indicates that sanctions were authorized against the United States in three distinct cases involving the use of foreign sale corporations,