

## Doing Whatever We Want: The Future of the Rules-Based Trading System in a Multipolar World

Nathan Rickard

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# Doing Whatever We Want: The Future of the Rules-Based Trading System in a Multipolar World

NATHAN RICKARD

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## I. THE WTO'S RULES-BASED TRADING SYSTEM

The purpose of the multilateral agreements that form the World Trade Organization (“WTO”) is the creation and maintenance of a “rules-based” trading system. These rules “tend to be taken for granted” and “run in the background,” but “[t]ake them away and trading nations could do whatever they want.”<sup>1</sup> Accordingly, in the absence of these agreements, the WTO believes there would be destructive anarchy: “Without rules, there would be mayhem.”<sup>2</sup>

Nevertheless, rules only have utility if they are complied with. In this vein, the new dispute settlement procedures adopted with the establishment of the WTO were believed to represent a significant improvement over the rules-based trading system operating under the General Agreement on Tariffs and Trade (“GATT”) from 1948 to 1994.<sup>3</sup> But even with the WTO’s dispute settlement system, member countries have proven that it is possible to simply disregard obligations under the WTO agreements and negate the benefits supposedly made available through these multilateral commitments.

The threat posed to any rules-based system by non-compliance is heightened in a multi-polar world where no dominant nation holds

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1. World Trade Organization, *Let's Talk Rules-based Trade*, [https://www.wto.org/english/res\\_e/webcas\\_e/ltt\\_e/ltt10\\_e.htm](https://www.wto.org/english/res_e/webcas_e/ltt_e/ltt10_e.htm) (last visited Mar. 3, 2024).

2. *Id.*

3. World Trade Organization, *History of the Multilateral Trading System*, [https://www.wto.org/english/thewto\\_e/history\\_e/history\\_e.htm](https://www.wto.org/english/thewto_e/history_e/history_e.htm) (last visited Mar. 3, 2024).

capacity to coerce others into following the rules. This weakness in the current rules-based trading system is evidenced through the United States' efforts to utilize trade remedies expressly allowed for under the WTO agreements with respect to imports from the People's Republic of China. This paper will describe how the inability to impose and collect antidumping ("AD") and countervailing ("CVD") duties on Chinese imports has contributed to the United States turning away from strict conformity to a rules-based trading system in favor of unilateral action and how this development likely portends to greater country-of-origin specific trade regulation in the future.

## II. ANTIDUMPING AND COUNTERVAILING DUTIES

For domestic industries seeking relief against import competition, the Uruguay Round Agreements that formed the WTO offer a narrow set of available options. The Agreement on Safeguards sets out the conditions through which temporary trade relief may be implemented in response to goods being imported in "increased quantities" that are causing or threaten to cause serious injury to a domestic industry.<sup>4</sup> The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement") authorizes a member country to impose additional duties in response to sales of imported merchandise at "less than its normal value" in the country's market,<sup>5</sup> while the Agreement on Subsidies and Countervailing Measures authorizes a member country to impose additional duties in response to countervailable subsidies granted by the government of a trading partner.<sup>6</sup>

These collective agreements afford member countries narrow options for applying additional duties to address dislocations caused by trade. Nevertheless, as one of the most ardent proponents of a global rules-based trading system, the United States has made significant use of these options. As of April 2024, the United States government is

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4. World Trade Organization, *Agreement on Safeguards*, (last visited Mar. 4, 2024) [https://www.wto.org/english/docs\\_e/legal\\_e/25-safeg\\_e.htm](https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm).

5. World Trade Organization, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, (last visited Mar. 4, 2024) [https://www.wto.org/english/docs\\_e/legal\\_e/19-adp\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm).

6. World Trade Organization, *Agreement on Subsidies and Countervailing Measures*, (last visited Mar. 4 2024) [https://www.wto.org/english/docs\\_e/legal\\_e/24-scm\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm).

administering a total of 675 AD and CVD orders covering a wide array of different commodities.<sup>7</sup>

Administering these numerous trade remedies entails substantial administrative costs, as each foreign supplier covered by an individual AD/CVD order may pursue a unique duty rate distinct from its competitors and may seek changes to any AD/CVD rate every year. Specifically, U.S. law provides that, upon request, certain parties may, on an annual basis, seek “review” of the “amount of any net countervailable subsidy” and “the amount of any antidumping duty.”<sup>8</sup> In practical terms, this means that at import entry, importers deposit estimated ADs and/or CVDs with CBP, without knowing with any certainty at the time of importation, what their ultimate liability to the U.S. Treasury may be.

This system subsequently permits importers to, post-importation, demonstrate that their foreign supplier responded to an AD order by eliminating or ameliorating sales at less than fair value or to a CVD order by foregoing some or all of the benefits of subsidies. If successful, the importer then receives a refund of estimated duties deposited at import entry. Federal law similarly allows trade-affected U.S. producers to show that the opposite is true and that foreign producers reacted to an AD and/or CVD order by increasing dumping or receiving even larger benefits from countervailable subsidies. In these circumstances, an importer is liable to the U.S. government for additional amounts over and beyond the estimated duties initially deposited at the time of import entry. U.S. Customs and Border Protection (“CBP”) describes the American system of AD/CVD assessment as follows: “Pursuant to U.S. law, the AD/CVD regime operates on a retrospective basis. CBP collects estimated AD/CVD at the time of entry, but the final amount of AD/CVD an importer is required to pay is not known until Commerce issues appropriate liquidation instructions.”<sup>9</sup>

If no party exercises its right to request an administrative review of the amount of the countervailable subsidy or the amount of the antidumping duty, then the deposits made at import entry are

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7. U.S. Department of Commerce, *Data Visualization: ADCVD Proceedings*, (last visited Apr. 17, 2024) <https://www.trade.gov/data-visualization/adcvd-proceedings>.

8. 19 U.S.C. § 1675(a)(1).

9. U.S. Customs and Border Protection, *Antidumping and Countervailing Duty Enforcement and Compliance Initiative: FY 2020*, at 13 (Fiscal Year 2021 Report to Congress) (Aug. 11, 2021), [https://www.dhs.gov/sites/default/files/2021-12/antidumping\\_and\\_countervailing\\_duty\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/2021-12/antidumping_and_countervailing_duty_enforcement.pdf).

collected by CBP as the duties owed.<sup>10</sup> However, where a review is requested, “Commerce reviews are usually completed within one to two years after [import] entry has occurred.”<sup>11</sup> Under this system, an importer does not learn whether it will receive a refund in the amount at which estimated duties exceed actual, calculated duty rates, or whether it will owe additional amounts equal to the amount at which actual, calculated duty rates exceed deposit amounts until at least a year after the imported good has been entered into the United States. In practice, final duty rates are generally not known for many years after import entry. Reviewing entries subject to AD/CVDs made between fiscal years 2001 and 2014, the U.S. Government Accountability Office (“GAO”) found that “[t]he average lag time between entry of goods and CBP issuing a bill for any additional duties . . . was about 2.6 years.”<sup>12</sup>

Where deposit amounts exceed the duty rates calculated in an administrative review, the federal government refunds back the excess amount with interest and the importer is made whole. However, where deposit amounts are insufficient to meet the duty rates calculated in an administrative review, the federal government must attempt to collect amounts owed on goods that likely have already been sold and consumed in the market. “If the actual AD/CVD rate established by Commerce is greater than the estimated AD/CVD at entry, CBP is required to issue a bill to the importer to collect the additional duties.”<sup>13</sup>

At first glance, the retrospective system of assessment of AD/CVDs would appear to create tremendous uncertainty for importers, who must conduct sales with a future potential contingent

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10. “If no review is requested, Commerce will issue automatic instructions requesting CBP to liquidate at the amount of the cash deposit or bonding rate.” U.S. Customs and Border Protection, *Antidumping and Countervailing Duty Enforcement Actions and Compliance Initiatives: FY 2020* (Fiscal Year 2021 Report to Congress) (Aug. 11, 2021) at 10, [https://www.dhs.gov/sites/default/files/2021-12/antidumping\\_and\\_countervailing\\_duty\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/2021-12/antidumping_and_countervailing_duty_enforcement.pdf).

11. *Id.*

12. U.S. Government Accountability Office, *Antidumping and Countervailing Duties: CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk*, GAO-16-542 at 13 (July 2016), <https://www.gao.gov/products/gao-16-542>. Eight years earlier, the GAO reviewed entries subject to AD/CVDs that had been “liquidated” (*i.e.*, final duties assessed) between September 2000 and July 2007 and found that, on average, the time between the initial entry of a product and the final assessment of AD/CVDs “took about 3.3 years.” U.S. Government Accountability Office, *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, GAO-08-391 at 23 (Mar. 2008), [https://www.gao.gov/products/gao-08-391\\_](https://www.gao.gov/products/gao-08-391_)

13. U.S. Customs and Border Protection, *Antidumping and Countervailing Duty Enforcement Actions and Compliance Initiatives: FY 2020*, at 10 (Fiscal Year 2021 Report to Congress ) (Aug. 11, 2023), [https://www.dhs.gov/sites/default/files/2021-12/antidumping\\_and\\_countervailing\\_duty\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/2021-12/antidumping_and_countervailing_duty_enforcement.pdf).

liability hanging over them. However, in actual effect, the retrospective system largely operates as a due process check that more frequently results in no additional duties owed or monies refunded back to the importer than additional amounts demanded. This is because the vast majority of import entries subject to AD/CVDs are finally assessed at rates equal to or less than the deposit level required at importation. In 2008, the GAO reviewed “6 years of CBP data covering over 900,000 entries subject to” antidumping duties.<sup>14</sup> Of those entries, the ultimate amount of duties assessed was the same as the deposit rate imposed at importation sixty percent (60%) of the time, while the ultimate duty rate assessed was lower than the deposit rate twenty-four percent (24%) of the time.<sup>15</sup> When the GAO returned to the subject in 2016 and reviewed import entries made between fiscal years 2001 and 2014, it found that the ultimate amount of duties assessed was the same as the deposit rate imposed at importation sixty-three percent (63%) of the time, while the ultimate duty rate assessed was lower than the deposit rate twenty-nine percent (29%) of the time.<sup>16</sup> Thus, under the American retrospective system of AD/CVD assessment, the amount deposited at importation was sufficient (or more than sufficient) to meet the cost of the trade remedy for over four out of every five import entries.

In its 2008 analysis, the GAO “found that duty rates went up 16 percent of the time,” and found in its 2016 analysis that duty rates “[i]ncreased 18 percent of the time.”<sup>17</sup> Unlike refunds of excess estimated deposits, collections of amounts owed beyond deposits is not automatic and is entirely contingent upon the importer’s willingness to pay. In result, there is a vulnerability in the U.S. system where if a foreign producer and its U.S. importer are able to obtain a low AD/CVD estimated deposit rate through artifice, the importer is thereafter able to import merchandise without addressing its unfair trade practices and may simply abscond when the final duties owed

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14. U.S. Government Accountability Office, *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, GAO-08-391 at 21 (Mar. 2008), <https://www.gao.gov/products/gao-08-391>.

15. *Id.*

16. U.S. Gov’t Accountability Off., GAO-16-542, *Antidumping and Countervailing Duties: CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk*, (2016) at 23, <https://www.gao.gov/products/gao-16-542>.

17. U.S. Gov’t Accountability Off., GAO-08-391, *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, (2008) at 21, <https://www.gao.gov/products/gao-08-391>; U.S. Gov’t Accountability Off., GAO-16-542, *Antidumping and Countervailing Duties: CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk*, (2016) at 23, <https://www.gao.gov/products/gao-16-542>.

come due. The experience of the U.S. government establishes that importers of Chinese-origin goods have exploited this vulnerability with devastating results on the efficacy of AD/CVD relief under U.S. law.

### III. AD/CVD RESPONSE TO CHINESE IMPORTS

Much of this country's facilitation of AD/CVD laws is attributable to trade with China. For a sixteen-year period between 2007 and 2022, China was consistently the single largest source of commodity imports into the United States, accounting for \$526.3 billion in imports in 2022, or 16.3 percent of the \$3.2 trillion in total imports that year.<sup>18</sup> The growth in China's exports has been the story of the last quarter century. At the turn of the new millennium, China was the source of just 8.3 percent of total commodity import value in 2000 (\$99.6 billion out of \$1.2 trillion).<sup>19</sup> In less than two decades, China's share of commodity import value had nearly trebled to a high of 21.6 percent (\$503.7 billion out of \$2.3 trillion) in 2017.<sup>20</sup>

Despite this significant growth, China continues to comprise less than a quarter of the value of commodities imported into the United States annually. Nevertheless, China accounts for a much more significant share of the total trade remedies applied in the United States, as over one-third (233 out of 675) of the current AD/CVD orders cover goods imported from the People's Republic of China.<sup>21</sup> These figures reflect the special challenges that increased trade with China in a rules-based trading system has presented for American industries. Because bilateral trade with China has proven to be the most disruptive of any of this country's trade relationships, U.S. industries have frequently sought relief through the imposition of antidumping and/or countervailing duties. Although there are significant criticisms of the United States' administration of the trade remedies contemplated under the WTO Agreements, China is, far and away, the

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18. U.S. International Trade Commission, *Dataweb* (2024), <https://dataweb.usitc.gov/> (customs value data reported for "All Commodities" by country). In 2023, the value of U.S. imports of Chinese commodities fell by twenty percent (20%) compared to 2022, leading to China falling behind both Mexico (\$473.4 billion) and Canada (\$421.5 billion) as the most significant source of commodity imports into the United States. All told, China accounted for \$421.4 billion in imports in 2023, 13.7% of the \$3.1 trillion in total imports in 2023.

19. *Id.*

20. *Id.*

21. U.S. Dep't of Commerce, *Commerce Data Visualization: ADCVD Proceedings*, (2024), <https://www.trade.gov/data-visualization/adcvd-proceedings>.

largest target for the application of those remedies, with nearly three and half times more AD/CVD orders than the next largest country.<sup>22</sup>

#### IV. PERVASIVE NON-COMPLIANCE HAS UNDERMINED TRADE RELIEF ON CHINESE IMPORTS

For Americans, the utility of AD/CVD relief has been substantially undermined by the inability of the U.S. government to actually collect duties owed on unfairly-traded imports that enter the American market. And, just as the story of trade generally was for the United States in the twenty-first century, the principal concern here has been China. CBP reports that “[t]here are 82,808 unpaid AD/CVD bills from [fiscal year (“FY”)] 2001 through FY 2020 totaling approximately \$4.16 billion for which CBP is pursuing collection.”<sup>23</sup> The vast majority of these uncollected duties are attributable to Chinese-origin goods. As CBP explains, “[o]pen bills from China amounted to approximately \$3.54 billion, or 85.0 percent, of the approximately \$4.16 billion in total uncollected AD/CVD in FY 2020.”<sup>24</sup>

Reviewing the collection experience of CBP, the GAO observed that “[a]s of May 2019, CBP had collected over \$20 billion in AD/CV duties for bills issued during fiscal years 2001-2018.”<sup>25</sup> Of that amount, \$19 billion was collected from the estimated duties deposited at import entry.<sup>26</sup> Comparatively, far less was collected in additional duties owed on past import entries: “CBP collected another \$1.6 billion in revenue as part of retrospective upward adjustments of the final duty rate.”<sup>27</sup> This amount was far less than what was actually owed by importers, as the GAO noted that CBP’s open and uncollected AD/CVD bills was \$4.5 billion.<sup>28</sup> Thus, while CBP had been instructed by Commerce to collect an additional \$6.1 billion in owed AD/CVDs,

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22. *Id.* (stating India = 68 AD or CVD orders).

23. U.S. Customs and Border Protection, *Antidumping and Countervailing Duty Enforcement Actions and Compliance Initiatives: Fiscal Year 2021 Report to Congress* (2021) at 11, [https://www.dhs.gov/sites/default/files/2021-12/antidumping\\_and\\_countervailing\\_duty\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/2021-12/antidumping_and_countervailing_duty_enforcement.pdf).

24. *Id.*

25. U.S. Gov’t Accountability Off., GAO-20-50R, *Antidumping and Countervailing Duties: Information on Actions by Commerce and CBP to Address Reported Weaknesses in Duty Collection Processes*, (2019) at 9, <https://www.gao.gov/products/gao-20-50r>.

26. *Id.*

27. *Id.*

28. *Id.*



the agency was only able to collect 26.2 percent of this amount.<sup>29</sup> In practical effect, for every extra dollar owed in AD/CVDs, just a quarter was ultimately paid into the U.S. Treasury.

Where an importer declines to make good on its debt to the U.S. government, a resource-intensive collection process is kicked off within CBP. The GAO summarized the process as follows:

If CBP does not receive payment within 1 year of issuing the first bill, CBP's Office of Finance (which is responsible for collecting payment) refers the case to CBP's Office of Chief Counsel, which determines the next course of action. According to CBP officials, this may include taking additional collection action, such as identifying importers' assets or demanding payment from the surety company that provided the bond. The Office of Chief Counsel could also refer a case to Justice for further legal action if attachable assets are identified. If the Office of Chief Counsel determines that the debt is uncollectible, it can recommend that it be written off. CBP's Office of Chief Counsel takes steps to collect all bills referred to it, regardless of the location of the importer's assets.<sup>30</sup>

Because under-collection problems are so heavily concentrated with Chinese imports, the substantial portion of uncollected AD/CVDs cannot simply be explained as an anticipated consequence of the retrospective assessment of these duties. Instead, the failure to collect AD/CVDs results from the specific threat posed to legal systems by participants unwilling to comply with rules. As CBP explains, failures to make payment are often the consequence of an intentional design:

Some importers are unwilling or unable to pay the actual duties. Others are no longer in business when CBP issues a bill, leading to uncollected AD/CVD. If still in business when the final AD/CVD bills are issued, undercapitalized importers with few assets often have difficulties paying these bills. Some importers, including those that have formed shell companies and foreign non-resident importers, never intended to pay the final duties and often disappear as soon as there is an indication that final duties may increase. This scenario is

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29. U.S. Gov't Accountability Off., GAO-16-542, *Antidumping and Countervailing Duties: CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk*, (2016) at 56, <https://www.gao.gov/products/gao-16-542> (In its 2016 report, the GAO observed, "[w]hile CBP collects on most AD/CV duty bills it issues, it only collects, on average, about 31 percent of the dollar amount owed.").

30. U.S. Customs and Border Protection, *Antidumping and Countervailing Duty Enforcement Actions and Compliance Initiatives*, FY 2020 10 (Aug. 11, 2021), [https://www.dhs.gov/sites/default/files/2021-12/antidumping\\_and\\_countervailing\\_duty\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/2021-12/antidumping_and_countervailing_duty_enforcement.pdf).

especially true for AD/CVD orders covering imports from China, particularly agriculture and aquaculture imports.<sup>31</sup>

CBP's reference to foreign non-resident importers recognizes that the agency's regulations permit entities not incorporated in the United States to import merchandise into the country.<sup>32</sup> Thus, under U.S. law, Chinese companies have the option of acting as their own importer of record for merchandise shipped to this country. When this is done for goods subject to AD/CVDs, the U.S. government faces substantial obstacles in collecting additional duty amounts owed post-importation. As the GAO explained in a 2008 report, CBP believed that the use of foreign entities to import merchandise into the United States was expanding:

CBP officials pointed out that foreign companies and individuals are allowed to be importers, and that CBP's ability to collect from such importers, especially illegitimate ones, is very limited. According to CBP officials, the number of nonresident importers (i.e., foreign importers of record) seems to be growing and poses unique issues when it comes to collecting AD/CV duties. CBP officials indicated that if foreign importers of record do not pay supplemental duties, the cost of attempting to collect the duties would be high and would likely exceed the amount collected.<sup>33</sup>

The GAO's report additionally summarized the U.S. Department of Justice's ("Justice") belief that there were no viable legal options for collecting duties owed by foreign entities that declined to pay their debts:

When the delinquent importer is a foreign importer of record, the option of pursuing litigation presents certain challenges. According to Justice officials, before pursuing litigation in a foreign country, they consider the ability to collect, the likelihood of success, and the cost of collection efforts versus the amount of debt. Justice also must consider whether the nature of the proposed action is one that can be the subject of a lawsuit in a foreign court. Because foreign courts generally do not enforce taxes or duties imposed by other countries, in the case of a collection action based upon delinquent duties owed by a foreign

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31. *Id.*

32. *See*, 19 C.F.R. § 141.18 (2016) (permitting a "nonresident corporation (*i.e.*, one which is not incorporated within the customs territory of the United States or in the Virgin Islands of the United States)" if the entity has a registered agent within the country and has obtained a bond).

33. U.S. Gov't Accountability Off., GAO-08-391, *Antidumping and Countervailing Duties* 29 (2008).

entity, Justice would have to be satisfied that the foreign court would be willing to hear such an action or enforce a judgment that might otherwise be obtained. In addition, it would be particularly challenging to bring any CV duty cases because, by definition, the foreign government caused the unfair trade by providing a countervailable subsidy. Justice officials stated that given those challenges, it is unlikely that collection actions based upon delinquent duties can be successfully brought in foreign courts. For that reason, Justice officials were not aware of any referrals from CBP to initiate legal cases brought in foreign courts against foreign importers of record that owed AD/CV duties.<sup>34</sup>

Due to Justice's reservations, CBP simply does not refer cases for collection where the importer is located outside of the United States:

None of the closed cases was referred to Justice because, according to CBP's Office of Chief Counsel, Justice has advised CBP that many claims involving a foreign company with no discernable U.S. assets may be classified as uncollectible. CBP has not determined whether it will refer any of the 10 open cases to Justice. According to CBP, it has not referred any cases to Justice involving the collection of AD/CV duties from importers with no attachable assets in the United States in the past 5 years. According to Justice officials, CBP has not referred to them any cases involving the collection of AD/CV duties in foreign courts.<sup>35</sup>

The GAO looked into specific examples of efforts to collect AD/CVDs owed post-importation by foreign entities and found that CBP had largely engaged in an exercise in futility, managing to collect only a tiny portion of amounts due:

CBP's recent efforts to collect payments from importers located outside the United States illustrate the difficulty in collecting from those unwilling to pay their AD/CV duty bills. Since fiscal year 2003, CBP's Office of Finance referred 570 unpaid AD/CV duty bills (totaling approximately \$20 million, including accumulated interest) involving importers located outside the United States to the Office of Chief Counsel for additional collection action. As a result, the Office of Chief Counsel opened 31 cases involving 28 importers—with many cases involving multiple bills for the same importer. The Office of

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34. *Id.* at 19 n.38.

35. U.S. Gov't Accountability off., GAO 08-876r, *Agencies Believe Strengthening International Agreements to Improve Collection of Antidumping and Countervailing Duties Would Be Difficult and Ineffective* 9 (2008).

Chief Counsel closed 21 of these cases, which involved approximately \$14 million in unpaid bills. However, CBP was only able to collect approximately \$600,000, or 4 percent of the amount owed.<sup>36</sup>

As the dates of the GAO's reports imply, the inability to collect AD/CVDs is by no means a new problem. As far back as 2004, CBP had reported that of the \$130 million in AD/CVDs the agency had been unable to collect in FY2003, \$103 million "related to antidumping duties on Chinese imports, such as crawfish, paint brushes, iron castings, roller bearings, silicon metal, brake rotors, garlic and honey."<sup>37</sup> The issue significantly worsened the following year, with CBP reporting that it had failed to collect \$260 million in AD/CVDs, "\$224 million of which related to antidumping duties owed on Chinese imports."<sup>38</sup> In its 2008 report, the GAO observed that importers purchasing products from China "are responsible for 90 percent of uncollected AD/CV duties."<sup>39</sup> At the time, these importers were responsible for \$551 million in uncollected AD/CVDs, with importers from the next largest country contributor (Vietnam) responsible for just \$12 million in uncollected AD/CVDs.<sup>40</sup>

Shortly thereafter, senior federal government officials began emphasizing problems with collection of AD/CVDs. In testimony to the Senate Finance Committee that year, an official from the U.S. Department of Treasury explained that, as a general matter, CBP collected virtually all of duties owed on U.S. imports. Nevertheless, at that time, the collection rate for retrospectively assessed AD/CVDs was less than half, driven by parties that never intended to pay amounts owed in the first instance:

Another area of concern to the Treasury Department, CBP, and other trade agencies has been problems in collecting antidumping and countervailing duties. In response to Congress' interest in this area, the Treasury Department provided a report on this issue last year. Although CBP's collection rate is over 99 percent for duties overall, CBP is able to collect less than 50 percent of antidumping and countervailing duties that have been retroactively assessed in excess of bonds or cash deposits. We concluded in the report that the chief

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36. *Id.* at 8.

37. *China and the WTO: Assessing and Enforcing Compliance: Hearing Before U.S.-China Economic and Security Review Commission*, 109th Cong. (2005) (statement of Terence P. Stewart, Esq., Managing Partner, Stewart and Stewart).

38. *Id.*

39. U.S. Gov't Accountability Off., GAO-08-391, *Antidumping and Countervailing Duties* 14 (2008).

40. *Id.* at 15 fig 3.

obstacle to ensuring collection of such duties is the difficulty of obtaining adequate security (cash deposits, bonds, or other instruments). This problem appears to have been exacerbated in some cases by unscrupulous importers who imported knowing they were likely to incur duties not fully secured by bonds or cash deposits following retrospective duty assessment and who then absconded when payment was due.<sup>41</sup>

Early efforts to address under-collection of AD/CVDs proved unsuccessful. In 2011, the GAO reviewed the various efforts undertaken by federal agencies and Congress to remedy the issue and found that little had changed: “CBP, Congress, and Commerce have undertaken several initiatives to address the problem of uncollected AD/CV duties. However, these initiatives have not resolved the problems associated with collections.”<sup>42</sup> Following the GAO’s 2011 report, CBP created an “AD/CV Duty Collections Team” in its Office of Administration and the agency’s statutorily-created private sector advisory group, the Commercial Customs Operations Advisory Committee (COAC), “established the subcommittee on Trade Enforcement and Revenue Collection that includes an AD/CV duty working group focused on generating advice and developing recommendations pertaining to the collection of AD/CV duties.”<sup>43</sup> Nevertheless, even with more concentrated resources and focus, CBP continued to report hundreds of millions of dollars in uncollected AD/CVDs after fiscal year 2015.<sup>44</sup> Continuing failures to meaningfully address the level of under-collection led to the issuance in 2017 of an executive order, Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws, instructing federal agencies to develop a plan to prevent further unpaid duties from “importers that lack assets located in the United States.”<sup>45</sup>

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41. *Oversight of Trade Functions: Customs and Other Trade Agencies before the S. Finance Comm.*, 110th Cong. (2008) (statement of Timothy E. Skud, Deputy Assistant Secretary for Tax, Trade, and Tariff Policy).

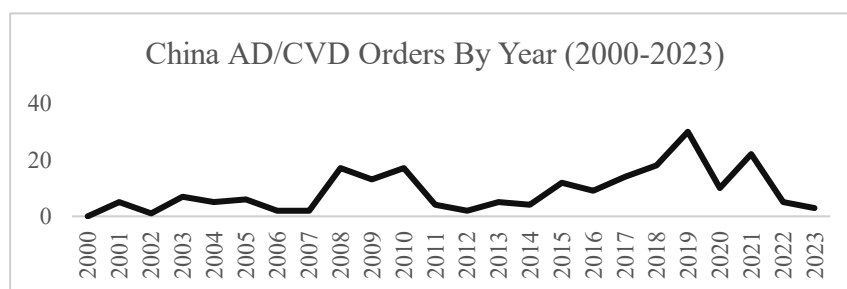
42. U.S. Gov’t Accountability Off., GAO-11-693t, *Antidumping and Countervailing Duties: Options for Improving Collection* 4 (2011).

43. Letter from Eric M. Thorson, Inspector General, Dept. of Treas., to S. Comm. on Finance. (June 30, 2016) (on file with the Dept. of Treas.).

44. See U.S. Customs and Border Protection, *Antidumping and Countervailing Duty Enforcement Actions and Compliance Initiatives: FY 2020* app. C (Aug. 11, 2021), [https://www.dhs.gov/sites/default/files/2021-12/antidumping\\_and\\_countervailing\\_duty\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/2021-12/antidumping_and_countervailing_duty_enforcement.pdf); U.S. Gov’t Accountability Off., GAO-20-50R, *Antidumping and Countervailing Duties: Information on Actions by Commerce and CBP to Address Reported Weaknesses in Duty Collection Processes* slide 4 (2019).

45. Exec. Order No. 13785, 82 Fed. Reg. 16719 (Mar. 31, 2017).

Yet, even with the continued failure to collect AD/CVDs on Chinese-origin goods, U.S. industries have attempted to utilize trade remedies available under U.S. law. The chart below summarizes the years in which currently administered AD/CVD orders on Chinese imports were first implemented, if imposed in 2000 or later (encompassing 213 of the 233 AD/CVD orders on Chinese-origin goods).<sup>46</sup> These data indicate that there was a significant spike in AD/CVD relief imposed on Chinese imports in 2019 and 2021.



Despite reinforcement of the significant dislocations caused by imported merchandise from China, CBP has not publicly issued a report detailing the under-collection of AD/CVDs since FY2020 and there has been comparatively limited discussion of the inability to enforce these targeted trade measures over the last few years. This is likely the result of a new approach to addressing Chinese imports through broad unilateral action.

## V. UNILATERAL ACTION

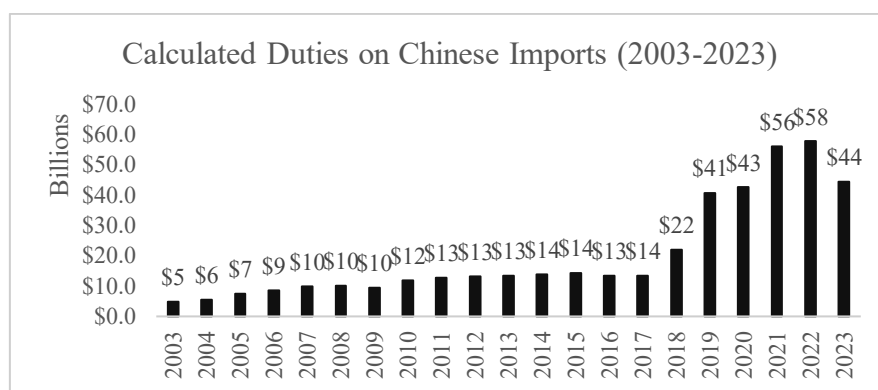
In 2017, the President instructed the Office of the U.S. Trade Representative (“USTR”) to conduct an investigation pursuant to 19 U.S.C. § 2411 (“Section 301”) of China’s practices that “may be harming American intellectual property rights, innovation, or technology development.”<sup>47</sup> Following the Section 301 investigation, the USTR determined that it was appropriate to impose an additional ad valorem duty of 25 percent on a broad spectrum of Chinese-origin

46. U.S. Department of Commerce, Data Visualization: ADCVD Proceedings, <https://www.trade.gov/data-visualization/adcvd-proceedings> (last visited Apr. 17, 2024).

47. Actions by the United States Related to the Section 301 Investigation of China’s Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13099 (Mar. 27, 2018).

goods.<sup>48</sup> The scope of products covered by the additional 25 percent tariff was substantially expanded in 2019.<sup>49</sup>

The impact of these additional tariffs has been significant. Through March 20, 2024, CBP reports that the agency has assessed \$211.22 billion in duties under this Section 301 action.<sup>50</sup> The Section 301 action has caused an explosion in the amount of total overall duties collected by the U.S. government on imports, with CBP reporting that the total duties, taxes, and fees collected by the agency as being \$41.6 billion in FY 2018 before growing to \$71.9 billion in FY 2019, \$74.4 billion in FY 2020, \$93.8 billion in FY 2021, and \$111.8 billion in FY 2022.<sup>51</sup> Although breaking out the specific basis for the duties collected is not publicly accessible, a rough sense of the annual impact of the Section 301 tariff action can be seen in the total calculated duties reported for Chinese-origin imports, as summarized in the chart below.<sup>52</sup>



While the unilateral imposition of additional tariffs had some initial disruptive impact on U.S. imports of Chinese goods, by 2021 the value of this country's imports from China were once again increasing, ascending towards pre-Section 301 levels. As shown in the

48. Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28710 (Aug. 16, 2018).

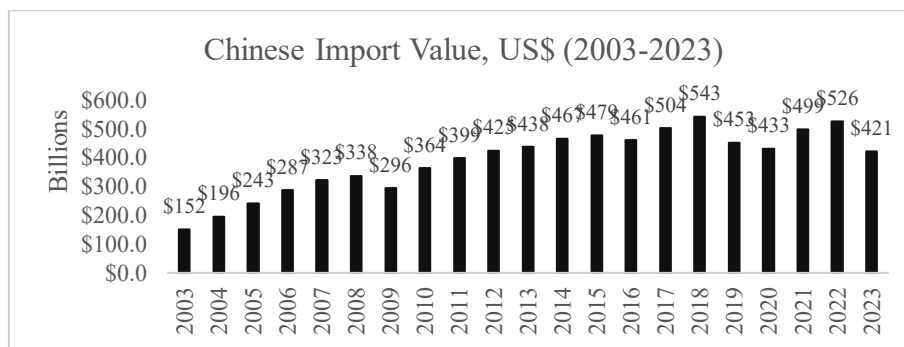
49. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 20459 (May 9, 2019).

50. U.S. Customs and Border Protection, Trade Statistics (2024), <https://www.cbp.gov/newsroom/stats/trade> (last visited Apr. 17, 2024).

51. *Id.*

52. U.S. International Trade Commission, *Dataweb* (calculated duties data reported for Chinese-origin imports by year), <https://dataweb.usitc.gov/> (last visited Apr. 17, 2024).

chart below, the increased duty assessments led to the first decline in the value of Chinese imports into the United States since 2009.<sup>53</sup> But after two years of declines, Chinese imports recovered, with 2022 values nearly reaching the high watermark established in 2018.<sup>54</sup>



In sum, the imposition of additional duties on a large portion of Chinese goods does not appear to have impeded the ability of U.S. consumers to purchase these imports. Further, the Section 301 action corresponds with a significant decline in the efforts of U.S. industries to obtain AD/CVD relief. Among the currently administered AD/CVD orders, the number of such orders imposed in 2023 (3) is fewer than any year since 2012 and the average number of AD/CVD orders imposed annually in 2022-2023 (4) is less than one-third of the annual average of the prior ten years (12.6).<sup>55</sup> Thus, an initial lesson learned from the Section 301 tariffs appears to be that unilateral action to address imports, outside of the WTO's rules-based trading system, can effectively be adopted without substantially injuring international trade or spinning the world into chaos. Moreover, such unilateral action may be undertaken in a manner that does not provide opportunities for actors with histories of non-compliance with trade remedies to evade their financial obligation to the U.S. Treasury, as attested to by CBP's collection of over \$211 billion in additional Section 301 duties on Chinese imports in a little more than five years.

53. U.S. International Trade Commission, *Dataweb* (value data reported for Chinese-origin imports by year), <https://dataweb.usitc.gov/> (last visited Apr. 17, 2024).

54. *Id.* This trend is unlikely to have continued in 2023, as through October, U.S. import values of Chinese-origin goods were down 28.4 percent compared to the same ten-month time period in 2022 (\$352.7 billion in Jan. to Oct. 2023 compared to \$452.9 billion in Jan. to Oct. 2022).

55. U.S. Department of Commerce, *Data Visualization: ADCVD Proceedings*, [https://www.trade.gov/data-visualization/adcvd-proceedings\\_](https://www.trade.gov/data-visualization/adcvd-proceedings_) (last visited Apr. 17, 2024).



## VI. CONCLUSION

The Section 301 tariffs represent a response to the dislocations caused by trade with China that is not contemplated by the rules-based trading system administered by the WTO. Rather than remain tethered to the limited options available under the WTO agreements, the United States took unilateral action to impose additional duties on a single trade partner that had proven to be particularly disruptive to American industries.<sup>56</sup> Prior to imposing Section 301 tariffs, American industries and the U.S. government had attempted to utilize the trade remedy options available through the WTO agreements, principally through AD/CVD relief, but found that additional duties could not effectively be imposed on Chinese-origin goods. In contrast to AD/CVDs, the United States' experience over the last five years with Section 301 duties establishes that additional duties can be imposed and collected on Chinese imports.

The practical impact of both (1) the unwillingness of Chinese suppliers and importers of certain goods to comply with AD/CVD orders; and (2) the United States government's inability to force compliance with its laws from Chinese participants in the U.S. market over the last two decades has been an important contributing factor in waning support in the United States for the WTO's rules-based trading system. By simply declining to adhere to the trade remedies imposed by the U.S. government and continuing to ship merchandise to this market without regard for tariffs owed, Chinese suppliers exposed weaknesses in the rules-based trading system that are likely to be subject to greater abuse in an increasingly multipolar world. Indeed, before the agency stopped providing public accounting of uncollected AD/CVDs, CBP's reporting of open AD/CVD bills in FY 2020 showed that for the first time, over half of the uncollected duties during that year stemmed from merchandise imported from Vietnam, not China.<sup>57</sup>

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56. Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28710 (Aug. 16, 2018).

57. See U.S. Customs and Border Protection, *Antidumping and Countervailing Duty Enforcement Actions and Compliance Initiatives: FY 2020* app. C (Aug. 11, 2021), [https://www.dhs.gov/sites/default/files/2021-12/antidumping\\_and\\_countervailing\\_duty\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/2021-12/antidumping_and_countervailing_duty_enforcement.pdf) (\$171.7 million of the total \$340.3 million in open AD/CVD bills for FY 2020 is attributable to AD/CVD orders on goods from Vietnam, with virtually all of that total relating to the AD order on certain fish fillets (\$167.2 million)).

In light of the poor enforcement of AD/CVDs with regard to Chinese-origin goods, the Section 301 trade action has demonstrated that China's flouting of the rules-based trading system has consequences. Through its failure to address repetitive, massive, and documented evasion of AD/CVDs imposed in the United States, the Chinese government has incentivized its trading partners to explore options to remedy injurious trade outside of those expressly contemplated by the WTO agreements. Pervasive non-compliance has further underscored the importance of flexible approaches to address particular state actors distinct and apart from others.