

# CRS Report for Congress

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## Trade Remedies: “New Shipper” Reviews

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### Summary

Some U.S. producers of the kind of merchandise subject to antidumping (AD) or countervailing (CV) duties have complained that U.S. Customs and Border Protection (CBP) has not been able to successfully collect the full amount of duties owed on targeted imports. One of the “loopholes” often cited is a U.S. law that allows importers receiving goods from new exporters of the subject merchandise to post bonds instead of cash deposits while the International Trade Administration (ITA) conducts a review of the “new shipper.”

Legislation has been proposed in the 109<sup>th</sup> Congress to suspend or to eliminate entirely the new shipper bonding privilege. H.R. 3283 (English, passed House July 27, 2005) and its companion bill S. 1421 (Collins, introduced July 19, 2005) seek to suspend the privilege for three years, as do S. 695 (Cochran, introduced April 4, 2005) and its companion bill H.R. 1039 (Pickering, introduced March 2, 2005). H.R. 3306 (Rangel, introduced July 14, 2005) seeks to strike the measure.

This report will be updated as events warrant.

### Background

U.S. antidumping (AD) laws (19 U.S.C. 1673 *et seq.*) authorize the imposition of remedial duties if (1) the International Trade Administration (ITA) of the Department of Commerce determines that foreign merchandise is being, or likely to be sold in the United States at less than fair value, and (2) the U.S. International Trade Commission (ITC) determines that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded, due to imports of that merchandise. A similar statute (19 U.S.C. 1671 *et seq.*) authorizes the imposition of countervailing duties (CVD) if the ITA finds that the government or any public entity of a foreign country has provided a subsidy on the manufacture, production, or export of the merchandise, and the ITC determines injury. These laws are part of a larger body of statutes also known as *trade remedies*. In the United States, AD and CVD actions represent the vast majority of activity under the trade remedy statutes.

Duty collections resulting from trade remedy actions are distributed pursuant to the Continued Dumping and Subsidy Offset Act (CDSOA), commonly known as the “Byrd Amendment.” This law provides for the distribution of import duties collected as a result of AD or CV duty orders to petitioners and other interested parties in the investigations that resulted in the orders. CDSOA disbursements amounted to \$231 million in FY2001, \$330 million in FY2002, \$190 million in FY2003 (with an additional \$50 million held in reserve pending the outcome of a legal challenge), and \$284 million in FY2004.<sup>1</sup>

## “New Shipper” Reviews

In the course of an AD or CVD investigation by the ITA, the agency generally determines a weighted average dumping margin or subsidy rate for each exporter or producer of the targeted merchandise that was investigated individually during the period of investigation (POI), and an estimated “all-others rate” for exporters and producers not individually investigated.<sup>2</sup> These are the duty rates assessed if the investigation results in final affirmative determinations by the ITA and ITC, and an AD or CV order is issued.

Since exporters who are individually investigated are likely to receive significantly lower rates than the “all-others rate,” it is often in the interest of an exporter to request an investigation in order to receive the separate rate. After the conclusion of an AD or CVD proceeding, if the ITA receives requests from an exporter or producer who (1) did not export the subject merchandise during the initial POI; and (2) is not affiliated with any producer or exporter who exported the merchandise, it must conduct a review to establish an individual AD or CV duty rate for the exporter.<sup>3</sup> This type of review, commonly known as a “new shipper review,” may take from 270 to 450 days to complete, depending on its complexity.

A firm from a non-market economy (NME) country, such as China, must also demonstrate the absence of *de jure* and *de facto* government control over its export activities in order to be assigned a separate rate in AD investigation; similar restrictions apply to new shippers from NME countries.<sup>4</sup>

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<sup>1</sup> 19 U.S.C. 1675c. The CDSOA has been found to violate U.S. obligations under the WTO through the WTO dispute settlement process. Legislation has been introduced seeking to repeal the Act. See CRS Report RL33045 *The Continued Dumping and Subsidy Offset (“Byrd Amendment”)*, by Jeanne J. Grimmett and Vivian C. Jones.

<sup>2</sup> 19 U.S.C. 1673d(c)(1)(B); 19 U.S.C. 1671d(c)(1)(B). The ITA can also determine instead a single estimated country-wide subsidy rate if it determines that it is not practicable to determine individual rates. See 19 U.S.C. 1671d(c)(1)(B)(i)(II); 19 U.S.C. 1677f-1(e)(2)(B).

<sup>3</sup> 19 U.S.C. 1675(a)(2)(B).

<sup>4</sup> China was first determined a nonmarket economy country for purposes of an AD investigation in *Preliminary Determination of Sales at Less than Fair Value, Greige Polyester Cotton Print Cloth from China* (48 F.R. 9897 (1983)). Any such determination remains in effect until revoked by the ITA (19 U.S.C. 1677(18)(C)(i)). Regarding applicability to new shipper reviews, see 19 C.F.R. 351.214(b)(2)(iii)(B), and, e.g., *Notice of Preliminary Results of New Shipper Review: Honey from the People’s Republic of China*, 68 F.R. 33099.

While a new shipper review is ongoing, any importer purchasing from the shipper under investigation receives the benefits of (1) the right, at its option, to post a bond or security, in *lieu* of a cash deposit to cover the additional AD or CV duties to be assessed after the review is conducted; (2) an accelerated review schedule; and (3) an individual dumping margin or countervailing duty rate at the completion of the review provided the necessary conditions are met.<sup>5</sup>

When the ITA publishes the final results of the new shipper review, the ITA instructs CBP to terminate the bonding privilege, and instead to collect cash deposits of estimated AD/CV duties on future entries at the company-specific rate determined (or “all others” rate, if applicable) during the review. In addition, CBP is instructed to liquidate all subject merchandise reviewed during the investigation at the final assessment rate, and to determine the final duties to be assessed on any other subject merchandise that entered while the review was ongoing.<sup>6</sup>

## Duty Collection Issues

U.S. Customs and Border Protection (CBP) reportedly has had considerable difficulty collecting the actual amount of duties owed on merchandise subject to AD and CVD actions. These problems have especially come to light since 2001, the first year in which U.S. industries were eligible to receive disbursements under the CDSOA. According to CBP records, these uncollected duties amounted to about \$130 million in FY2003 and \$260 million in FY2004.<sup>7</sup> For example, Louisiana crawfish producers estimated, and CBP’s annual disbursement reports confirmed, that between 2002 and 2004, CBP collected only \$25.5 million of about \$195.5 million in AD duties owed on crawfish, with about 90 percent of the duties owed on merchandise imported from China.<sup>8</sup>

Any shortfall in collections of AD or CV duties affects U.S. producers of the subject merchandise in two ways: (1) the protection afforded by the AD or CV action, intended to assist the domestic industry to compete against unfairly traded, lower-priced goods, is diminished; and (2) domestic producers do not collect all of the duties available to them under the CDSOA.

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<sup>5</sup> 19 U.S.C. 1675(a)(2)(B)(i), (iii), (iv).

<sup>6</sup> Department of Commerce. International Trade Administration. Import Administration Policy Bulletin. *Application of the Interest Provision in Section 778(a) of the Tariff Act to Entries Made Pursuant to a Subsequently Rescinded New Shipper Bonding Privilege*. Policy Bulletin No. 03.3, August 26, 2003. [<http://www.ita.doc.gov>]

<sup>7</sup> Prior to FY2001, all AD and CV duties were deposited in the general fund of the U.S. Treasury. CBP has included a listing of all uncollected duty amounts by case number in its CDSOA annual report since FY2003. See [[http://www.customs.gov/xp/cgov/import/add\\_cvd/cont\\_dump/](http://www.customs.gov/xp/cgov/import/add_cvd/cont_dump/)]. See also Government Accountability Office, *Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act*, GAO-05-979 (September 2005). Hereafter referred to as “GAO Report.”

<sup>8</sup> GAO Report, p. 26.

## Alleged Abuse of New Shipper Rules

Many U.S. producers of goods subject to AD or CVD orders have cited the new shipper bonding privilege as one of the ways that importers circumvent duty orders. Several methods are reportedly used. For example, some exporters subject to high antidumping duty rates have reportedly set up “shell” companies in the source country to act as new shippers. Other shell companies may be set up to act as the importer of record, or arrangements may be made with other collusive importers. These “new shippers” may then send a few shipments of the goods to the importer at a “fair” price and subsequently request that the ITA undertake a new shipper review of its export sales price.<sup>9</sup> Some exporters have also allegedly forged documents in an effort to misrepresent themselves as a new shipper subject to investigation. While the new shipper review is underway, the importer is permitted to post a bond — generally covering a far lesser duty amount than will be assessed at the end of the investigation.<sup>10</sup>

Administrative authorities sometimes discover fraudulent arrangements between the importing and exporting companies in the course of the new shipper review. If not discovered, however, the new entity may receive a very low dumping margin and continue to supply the market with the original shipper’s merchandise. Even if the arrangement is discovered, the receiving company may have succeeded in importing unlimited quantities of the subject merchandise for many months.<sup>11</sup> In addition, since the time between the entry and final liquidation of the subject merchandise is often more than a year, the shipper under investigation, the importer, or both, may have gone out of business or declared bankruptcy.<sup>12</sup> Therefore, in many cases, the higher duties owed are uncollected.

## ITA and CBP Efforts

The ITA and CBP have both made significant policy changes in an effort to restrict abuses of the new shipper bonding privilege and other forms of duty circumvention. In new procedures, implemented in October 2002, the ITA began requiring additional certifications and qualifying paperwork from all exporters requesting new shipper reviews in order to (1) ensure that these exporters actually meet all regulatory requirements and (2) limit the application of the bonding privilege so that the new shipper under review could not become a conduit for exports from producers not involved in the review.<sup>13</sup>

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<sup>9</sup> U.S. Congress. House. Committee on Ways and Means. Hearing. “United States-China Relations and China’s Role in the Global Economy.” October 30-31, 2003. Statement of the Customs Bond Committee of the American Surety Association (ASA). Hereafter referred to as ASA Statement.

<sup>10</sup> WTO, Negotiating Group on Rules, United States. “New Shipper Reviews (ADA Article 9.5)”, July 14, 2004. No. TN/RL/GEN/11. Hereafter referred to as WTO Submission.

<sup>11</sup> WTO Submission, p. 2.

<sup>12</sup> GAO Report, p. 25.

<sup>13</sup> The ITA began requiring these additional certifications in *Preserved Mushrooms from Indonesia: Initiation of New Shipper Antidumping Duty Review*, 67 FR 62437. For further clarification, see U.S. Department of Commerce, International Trade Administration, Import

In response to complaints on the part of some domestic interested parties that the bond amounts established were not sufficient to cover the AD duties likely to be owed, CBP amended its guidelines for setting continuous bond amounts in July 2004.<sup>14</sup> Specifically, CBP now requires that continuous bond amounts for all importers of certain “special categories” of merchandise subject to AD or CV duty orders (currently only agriculture/aquaculture merchandise), be increased to the ITA rate established on the final AD or CV order (new shippers are assessed at the “all others” rate), multiplied by the value of the importer’s entries of the subject merchandise in the previous 12-month period. For example, if an importer has imported subject merchandise with a value of \$1 million during the previous 12 months, and the ITA rate is 40 percent, the importer’s continuous bond amount will be increased by \$400,000.<sup>15</sup> Continuous bonds must be posted *in addition to* any regular duties, single-entry bonds, or cash deposits required to cover each entry of the merchandise.<sup>16</sup> Bond amounts will also be periodically reviewed to monitor whether the bonds are sufficient, and rates may be adjusted as circumstances warrant.<sup>17</sup>

Although the measures taken by ITA and CBP were implemented some time ago, officials at the agencies say that it is too early to tell whether the new procedures are working due to the lag time between posting the bonds and the final liquidation of duties. A recent Government Accountability Office (GAO) report revealed that since the duty collection problem first became known, the amount of duties uncollected has more than doubled.<sup>18</sup> The report notes, however, that CBP is working with the Department of the Treasury and other agencies to develop legislative proposals and other solutions to better address the AD/CVD duty collection problems.<sup>19</sup>

## Proposed Legislation

Domestic interested parties have also called on Congress to deal with the “new shippers” duty collection issue; consequently, several bills have been introduced in the

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<sup>13</sup> (...continued)

Administration Policy Bulletin No. 03.2 of March 4, 2003, *Combination Rates in New Shipper Reviews*. [<http://www.ita.doc.gov>]

<sup>14</sup> U.S. Customs and Border Protection. Amended Customs Directive 99-3510-004, July 9, 2004. The minimum bond amount was previously 10% of the duties, taxes, and fees paid by the importer during the previous year.

<sup>15</sup> Ibid. See also U.S. Customs and Border Protection, “Amendment to Bond Directive Clarification of July 9, 2004 Amended Monetary Guidelines for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases,” issued August 10, 2005. Bonds for exporters with no prior history of imports (e.g., new shippers) will be assessed on the basis of the ITA deposit rate in effect on the date of entry, multiplied by the estimated annual import value of the subject goods.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> GAO Report, p. 26.

<sup>19</sup> Ibid, p. 28.

109<sup>th</sup> Congress to address the new shipper review “loophole.” Section 4 of **H.R. 3283**, the “United States Trade Rights Enforcement Act” (English, introduced July 14, 2005) and its companion bill **S. 1421** (Collins, introduced July 19, 2005) seek to amend section 751(a)(2)(B)(iii) of the Tariff Act of 1930,<sup>20</sup> suspending the new shipper bonding privilege for three years. The legislation would also require the Secretary of Commerce, in consultation with other agencies, to submit a report to Congress no later than two years after enactment, (1) recommending whether or not the suspension should be extended; and (2) assessing the effectiveness of administrative measures in addressing the difficulties that have risen to the suspension of new shipper bonding privileges. The House passed H.R. 3283 on July 27, 2005. **S. 695**, “The New Shipper Review Amendment Act of 2005,” (Cochran) and **H.R. 1039** (Pickering), its companion bill in the House, contain language similar to H.R. 3283 and S. 1421.

Section 7 of **H.R. 3306**, the “Fair Trade with China Act of 2005,” (Rangel, introduced July 14, 2005) seeks to strike the new shipper bonding privilege entirely and would require cash deposits for all entries of merchandise while a new shipper review is underway.

## Conclusion

If passed, suspension or elimination of the new shipper bonding privilege would require that importers using these shippers post cash deposits for entries of the subject merchandise. This might be an effective means of ensuring that AD and CV duties are collected. However, the requirement of a cash deposit may also make the sale of the subject merchandise less attractive in the U.S. market, which could lead to considerably reduced imports. In turn, lesser duty amounts would be available for disbursement to the affected domestic producers. Therefore, if domestic manufacturers supporting the legislation are interested in more effective collection of duties so that they will receive higher CDSOA disbursements, suspending or eliminating the bonding privilege may frustrate that purpose. However, if producers and other interested parties seek the optimal protection afforded by AD and CVD actions, (e.g., the ability to compete with the subject merchandise due to fair pricing of the imports), requiring cash deposits may be an effective approach.

The United States has also communicated to the World Trade Organization (WTO) Negotiating Group on Rules its desire to discuss clarifications and improvements to the WTO Antidumping and Subsidies Agreements in order to “take steps to put a stop to this abusive practice that undermines the effectiveness of trade remedy laws, and delays the conduct of new shipper reviews.”<sup>21</sup>

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<sup>20</sup> 19 U.S.C. 1675(a)(2)(B)(iii).

<sup>21</sup> WTO Submission, p. 2.