Americas Food & Beverage Show

WORLD TRADE CENTER MIAMI

SANDLER, TRAVIS & ROSENBERG, P.A.
International Trade, Customs & Export Law

2021 VIRTUAL Americas Food and Beverage Conference

Customs Compliance for Food & Beverage Importers: Maximizing Efficiencies, Minimizing Costs

By Deborah Stern, Esq.
September 21, 2021

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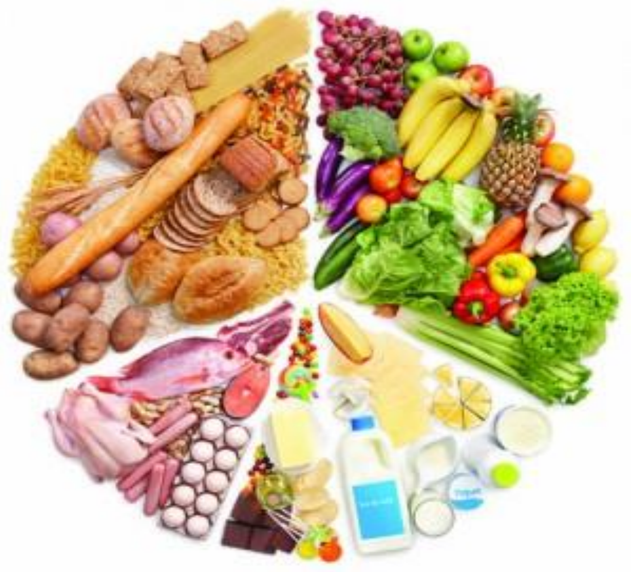
About Deborah Stern

- Deborah Stern is a member in the Customs and Import Practice Group of ST&R, resident in the Miami office. A former senior attorney with U.S. Customs and Border Protection (CBP), Ms. Stern advises domestic and multinational clients on both U.S. and foreign customs compliance and other trade matters. She concentrates her practice in traditional customs areas, including tariff classification, seizures and penalties, country of origin marking, valuation, government procurement, trade preference programs and free trade agreements, as well as the World Customs Organization's Harmonized System. She has substantial experience in every product sector.

AGENDA



- Introduction to US Import Requirements
- Key Concepts in Classifying Food Products
- HTS Tariff Rate Quotas (TRQ)
- Trade Remedies (China 301, Antidumping Duty)
- Duty Savings Strategies
- Compliance Enforcement and Best Practices

KNOW BEFORE YOU GO

- U.S. importers, exporters and manufacturers are continuing to look for ways to mitigate the impact of the additional tariffs the U.S. has levied on hundreds of billions of dollars' worth of imported goods.
- The strategies set forth in this informative program can also help reduce tariffs on many imported goods from around the world.
- Identify you obligations and opportunities before products leave point of origin, ideally well before….

US IMPORT REQUIREMENTS

The U.S. importer of record is statutorily responsible for using "*reasonable care*" to enter, classify and determine the value of imported merchandise, and to provide any other information necessary to enable U.S. Customs & Border Protection (CBP) to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met.

Importer bears the burden of compliance through due diligence. May rely on *recognized customs experts* but cannot delegate authority.

US IMPORT REQUIREMENTS

- Tariff Classification
- Customs Valuation
- Country of Origin and COO Marking
- Customs Entry Requirements (Docs, Docs, Docs!)
- Recordkeeping Requirements
- Other Government Agency Requirements (e.g., FDA, TSCA cert)
- Intellectual Property Rights Compliance (e.g., trademark enforcement)
- Import Security (e.g., Importer Security Filing (“10+2”))
- *Penalties and Liquidated Damages*

KNOW BEFORE YOU GO!

CUSTOMS COMPLIANCE PARADIGM

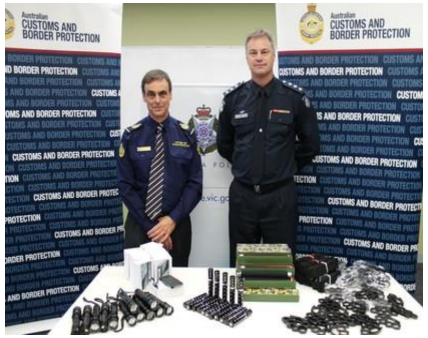
Profit Center

Cost Center

Reasonable Care

CONSEQUENCES OF NONCOMPLIANCE

- **Penalties/Fines:** a monetary punishment for committing a prohibited act or omission by reason of negligence (2x duties), gross negligence (4x) or fraud (8X or domestic value) plus underpaid duties and taxes for the last 5 years.



- **Liquidated Damages:** specific sum of money ("damages") arising from breach of a customs bond (including temp. import bonds, bonded warehouse, FTZ)

- **Detention, Seizures, Forfeitures:** CBP takes possession of property for an alleged violation of law affecting admissibility. Petition rights and judicial process available to challenge and demonstrate acceptable basis for release.

- Customs can cancel or mitigate penalties and liquidated damage claims; Prior Disclosure can avoid penalties.

TARIFF CLASSIFICATION USES

- Duty rate (import costs)
- Quota/Visa/License (sugar, dairy)
- Triggers for Antidumping/Countervailing Duties (pasta, mushrooms)
- Eligibility for special duty rates (preferential and punitive)
- Avoid delay in Customs clearance
- Compliance with Customs laws

HTS FOOD/BEVERAGE PROVISIONS

- Highly interrelated with each other, and with chemicals and medicament provisions. Edible item provisions relate to one another more than other products. Classifier must cross reference heading texts *over multiple chapters*

- Mixtures often provided for by heading/subheading text but covered mixtures may be limited in scope

- Often the subject of lengthy court actions and WCO classification disputes (sauces…)

- Nearly always require knowing composition breakdown, type and impact of processing, and intended use.

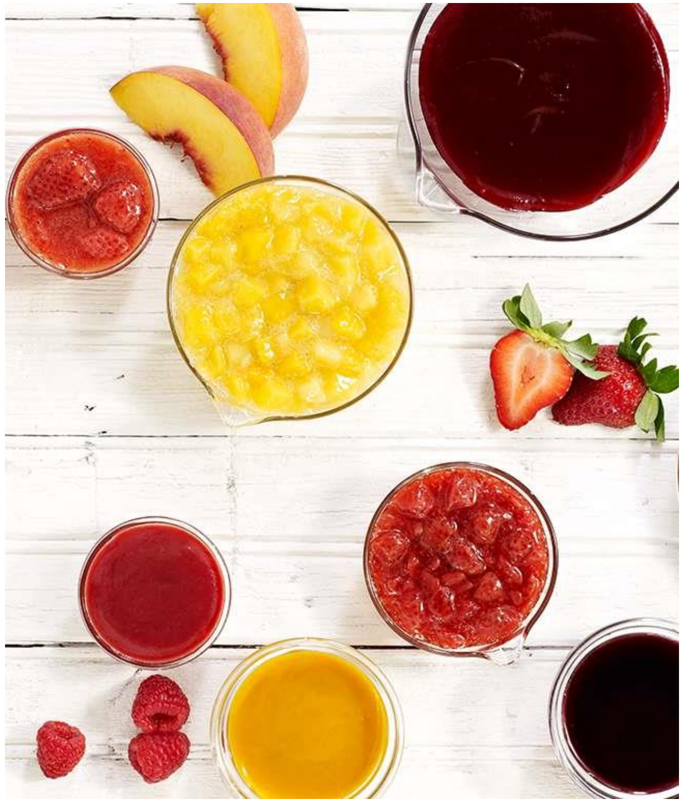
HTS FOOD/BEVERAGE PROVISIONS

Heading	Summary Text
0802-0806	specified fruit, fresh or dried (e.g. bananas, grapes (raisins))
0807-0810	other specified fresh fruit
0811	fruit and nuts, uncooked or cooked by steaming or boiling in water, frozen…
2007	Fruit puree, paste, obtained by cooking…
2008	Fruit, nuts and other edible parts of plants, otherwise prepared or preserved…NESOI
2009	Fruit juices…vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit
2202	Waters…**other nonalcoholic beverages**, other than unfortified fruit or vegetable juices
2106	Food preparations NESOI

HTS FOOD PROVISIONS - COMPARISONS

A fruit by any other name would taste just as sweet

- Pulp (Ch. 8 or 2008)
- Dried (Ch. 8 or 2008)
- Juice (2009 or 2202 w pulp)
- Pulp residue (2308)
- Bars made with pulp (1704)
- Other preparations (2007 and 2008)
- Fruit Snacks Ch. 8, 1704 or 2106



COMPARING HTS FOOD PROVISIONS

- Fish
  - Fresh, frozen or chilled (0304)
  - Dried, salted or in brine, or smoked (0305)
  - Prepared or preserved fish (1604) (*otherwise than above, per Note 1, Ch. 16*)
- Meat
  - Salted, in brine, dried or smoked (0210)
  - Cooked or otherwise prepared or preserved (1602) (*if not covered by Ch. 2, per EN to Ch. 16*)
  - Unfit for human consumption (0510)
- Nuts
  - Fresh or dried (08xx)
  - Uncooked, or cooked by steaming or boiling (0811)
  - Candied (1704)
  - Otherwise prepared or preserved (2008) (*by any processes specified in any other Chapter or heading, per EN to Ch. 20)* – includes dry-, oil-, or fat-roasted, or preserved by sugar

FOOD PREPARATIONS

- "Prepared" in a tariff sense, means, ordinarily, that a commodity has been so processed as to be advanced in condition and made more valuable for its intended use.

- Preserved may include frozen, smoked, cooked, roasted, canned, pasteurized*, processes that prolong shelf life and change its condition.

- Processes which change the taste of a food product, or render it suitable for a particular use, can alter its essential character.

FOOD PREPARATIONS

- Specified found in HTS Provisions are usually defined whether by legal note or otherwise.

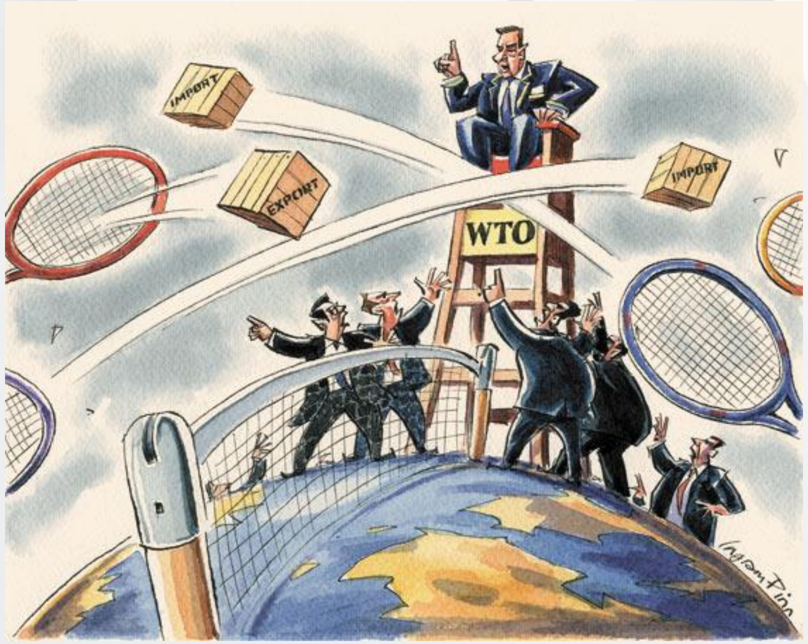
- Vegetables “Prepared or preserved by vinegar or acetic acid” vs. “Prepared or preserved otherwise than by vinegar or acetic acid”
  - 0.5% minimum amount for determining whether vegetables is "prepared or preserved by vinegar or acetic acid"
  - May be determinative of ADD case (mushrooms)

- Prepared “in Oil”*
  - Additional U.S. Note 1, to Chapter 16, HTSUS, states that for the purposes of Chapter 16, "the term ’in oil’ means packed in oil or fat, or in added oil or fat and other substances, whether such oil or fat was introduced at the time of packing or prior thereto."

CLASSIFICATION EXAMPLE

- Rice Krispies Treats (HQ H200575 April 6, 2012) - 1704 sugar confectionary vs 1904 cereals
- Sweet-tasting articles eaten for their sweetness, texture, taste, and other physical properties like a marshmallow, composed mostly of sugar, are ready for consumption, not sold as an ingredient of another food, viewed by Kellogg as a confectionery, marketed and sold as snacks.
- Sugar composes greater than 50% Treats, so cereal coated with **sugar in a proportion that gives it the character of a sugar confectionery** of heading 1704, HTSUS, so excluded from heading 1904, HTSUS.
- 1704.90.35 @ 5.6% vs 1904.10.00 @ 1.1%
- No quota applied and product qualified for NAFTA (now USMCA) so actually duty free, but impact would have been significant if quota applied and/or if FTA did not.

QUOTAS AND TRADE REMEDIES



TRQ AND TARIFF CLASSIFICATION

- Many products containing sugar, cocoa or chocolate
- Any product containing milk, cream, milk solids, whey, casein, milkfats, butterfat
- Beef
- Products classified in:
  - Chapter 4, milk products
  - Chapter 17, raw sugar, confections
  - Chapter 18, e.g., chocolate products (dairy and sugar)
  - Chapter 19, e.g., pastries (dairy and sugar)
  - Heading 2106 food preparations (dairy and sugar)

*Other agricultural restraints not covered today

HTS QUOTA PROVISIONS

- **Additional U.S. Notes** (found in Chapter Notes) – where quotas are set forth
- **"The aggregate quantity…"** – the quota of product, designated in the notes by content, by subheading and by country
- **"In quota"** – subheadings used for designated goods falling within the quantitative restrictions, i.e., meeting quota
- **"Over quota"** – subheadings used once the quantities limits, the quota, has been filled
- **Safeguards** – additional duties indicated in Ch. 99 pursuant to specific agreement or mandate

QUOTA PROVISIONS EXAMPLE

Rates | Chapter

Heading/ Subheading	Stat Suf fix	Article Description	Unit of Quantity	General
1806		Chocolate and other food preparations containing cocoa:		
1806.10		Cocoa powder, containing added sugar or other sweetening matter:		
		Containing less than 65 percent by weight of sugar:		
1806.10.05	00	Described in general note 15 of the tariff schedule and entered pursuant to its provisions	kg	Free
1806.10.10	00	Described in additional U.S. note 1 to this chapter and entered pursuant to its provisions	kg	Free
1806.10.15	00	Other 1/	kg	21.7¢/kg

QUOTA PROVISION EXAMPLE

- Covers cocoa powder and chocolate as an ingredient, unfinished or finished forms specified by designated subheadings, e.g.:
  - 1806.20 Other preparations in blocks, slabs or bars > 2 kg or in liquid, paste, powder, granular or other bulk form in containers or immediate packings > 2 kg
  - 1806.3x Other (than foregoing), in blocks, slabs or bars
  - 1806.90 Other (forms, including finished products)
- Ingredient breakdown needed for sugar content, milk solids, butterfat, e.g.:
  - Preparations consisting wholly of ground cocoa beans, with or without added cocoa fat, flavoring or emulsifying agents, and containing not more than 32 percent by weight of butterfat or other milk solids and not more than 60 percent by weight of sugar
- Retail candy/confections are not subject to quota

TRQ, ORIGIN AND PREFERNTIAL TREATMENT

- Quotas are by product and Country of Origin, different rules and quotas are allotted for our FTA trading partners (e.g., Articles of Mexico are excluded from the cocoa products example quota, and both over-quota and non-quota qualify for duty free)

- Some FTAs and preference programs require "double substantial transformation" to qualify, certain operations, e.g., canning operations, may not qualify if the processing in country does not also include initial preparation of food product (e.g., tuna must be cut and canned in same country/region)

- However, there may be other preferential programs based on where inputs are sourced (e.g., Ch. 98 partial duty exemptions for using U.S. containers).

QUOTA FILL STATUS

- CBP Website: Commodity Status Reports and Tariff Preference Levels
- The weekly commodity status report is for imported agriculture, food products, textile products and other merchandise subject to Tariff Rate Quotas/Tariff Preference Levels
- The Commodity Graph Report is normally posted the first business day of every week. The current report and the 5 previous reports

QUOTA FILL STATUS

Quota/License ID Number	Quota/License Commodity Description	Quota/License Country Name	Quota/License Region Code	Quota Period	Quota Region/Country Effective Begin Date	Quota Region/Country Effective End Date	Quota Region/Country Minimum Access Quantity	Quota Region/Country Maximum Quantity	Quota/License UOM Code	Quota/License Allocated Quantity	Quota Region/Country Percent Filled	Quota Region/Country Status Code	Quota Region/Country Status Date
0201101BEEF03	Beef	ARGENTINA		201601	01/01/2016	12/31/2016		20000000	KG		0.00%	OPEN	
0201101BEEF03	Beef	AUSTRALIA		201601	01/01/2016	12/31/2016		378214000	KG	226965017.8	60.01%	OPEN	
0201101BEEF03	Beef	CANADA		201601	01/01/2016	12/31/2016			KG		0.00%	EXCL	
0201101BEEF03	Beef	JAPAN		201601	01/01/2016	12/31/2016		200000	KG	190896.2	95.45%	OPEN	
0201101BEEF03	Beef	MEXICO		201601	01/01/2016	12/31/2016			KG		0.00%	EXCL	
0201101BEEF03	Beef	NEW ZEALAND		201601	01/01/2016	12/31/2016		213402000	KG	182971308.3	85.74%	OPEN	
0201101BEEF03	Beef	URUGUAY		201601	01/01/2016	12/31/2016		20000000	KG	16732362.37	83.66%	OPEN	
0201101BEEF03	Beef		OTHR	201601	01/01/2016	12/31/2016		64805000	KG	41502910.55	64.04%	OPEN	
04012020WMLK	Whole Milk		OTHR	201601	01/01/2016	12/31/2016			L		0.00%	BAND	
04012020WMLK	Whole Milk		WTO	201601	01/01/2016	12/31/2016		11356236	L	3249397	28.61%	OPEN	
04013005MC05	Milk and Cream	MEXICO		201601	01/01/2016	12/31/2016			L		0.00%	EXCL	
04013005MC05	Milk and Cream	NEW ZEALAND		201601	01/01/2016	12/31/2016	5678117		L		0.00%	OPEN	
04013005MC05	Milk and Cream		WTO	201601	01/01/2016	12/31/2016		1016723	L	673553.76	66.25%	OPEN	
0402217ALL09	Dried Milk and Dried Cream	MEXICO		201601	01/01/2016	12/31/2016			KG		0.00%	EXCL	
0402217ALL09	Dried Milk and Dried Cream		WTO	201601	01/01/2016	12/31/2016		99500	KG	2	0.00%	OPEN	
04022911DR10	Dairy Products	AUSTRALIA		201601	01/01/2016	12/31/2016	1016046		KG	80761	7.95%	OPEN	
04022911DR10	Dairy Products	MEXICO		201601	01/01/2016	12/31/2016			KG		0.00%	EXCL	
04022911DR10	Dairy Products		BEDK	201601	01/01/2016	12/31/2016	154221		KG	154221	100.00%	FILL	03/22/2016 12:20: PM
04022911DR10	Dairy Products		WTO	201601	01/01/2016	12/31/2016		2934733	KG	2934733	100.00%	FILL	01/14/2016 12:00: PM
04029110MC11	Milk and Cream Condensed or Evaporated	MEXICO		201601	01/01/2016	12/31/2016			KG		0.00%	EXCL	
04029110MC11	Milk and Cream Condensed or Evaporated		ANY	201601	01/01/2016	12/31/2016		4415616	KG	4415616	100.00%	FILL	05/11/2016 16:15: PM
04029110MC11	Milk and Cream Condensed or Evaporated		AUCO	201601	01/01/2016	12/31/2016	91625		KG		0.00%	OPEN	
04029110MC11	Milk and Cream Condensed or Evaporated		CACO	201601	01/01/2016	12/31/2016	994274		KG	193597	19.47%	OPEN	

SECTION 301 CHINA DUTIES

- Duties imposed on HTS code plus CN country of origin (not HK or MO)
  - List 1: 818 HTS codes are subject to 25% add'l duties as of July 6, 2018.
  - List 2: 279 HTS codes subject to 25% add'l duties as of Aug. 23, 2018.
  - List 3: over 5000 HTS codes worth $200B in trade, originally subject to 10% now and 25% add'l duties effective Sept 24, 2018.
  - List 4A: $300B more, imposed Sept. 1, 2019 at 15% then reduced to 7.5%

- Most food and beverage are either list 3 or 4A

- Product Specific Exclusions – Most expired now but refund opportunities still exist. Legislation pending in Congress to renew exclusion process and reinstate expired exclusions. USTR reviewing…

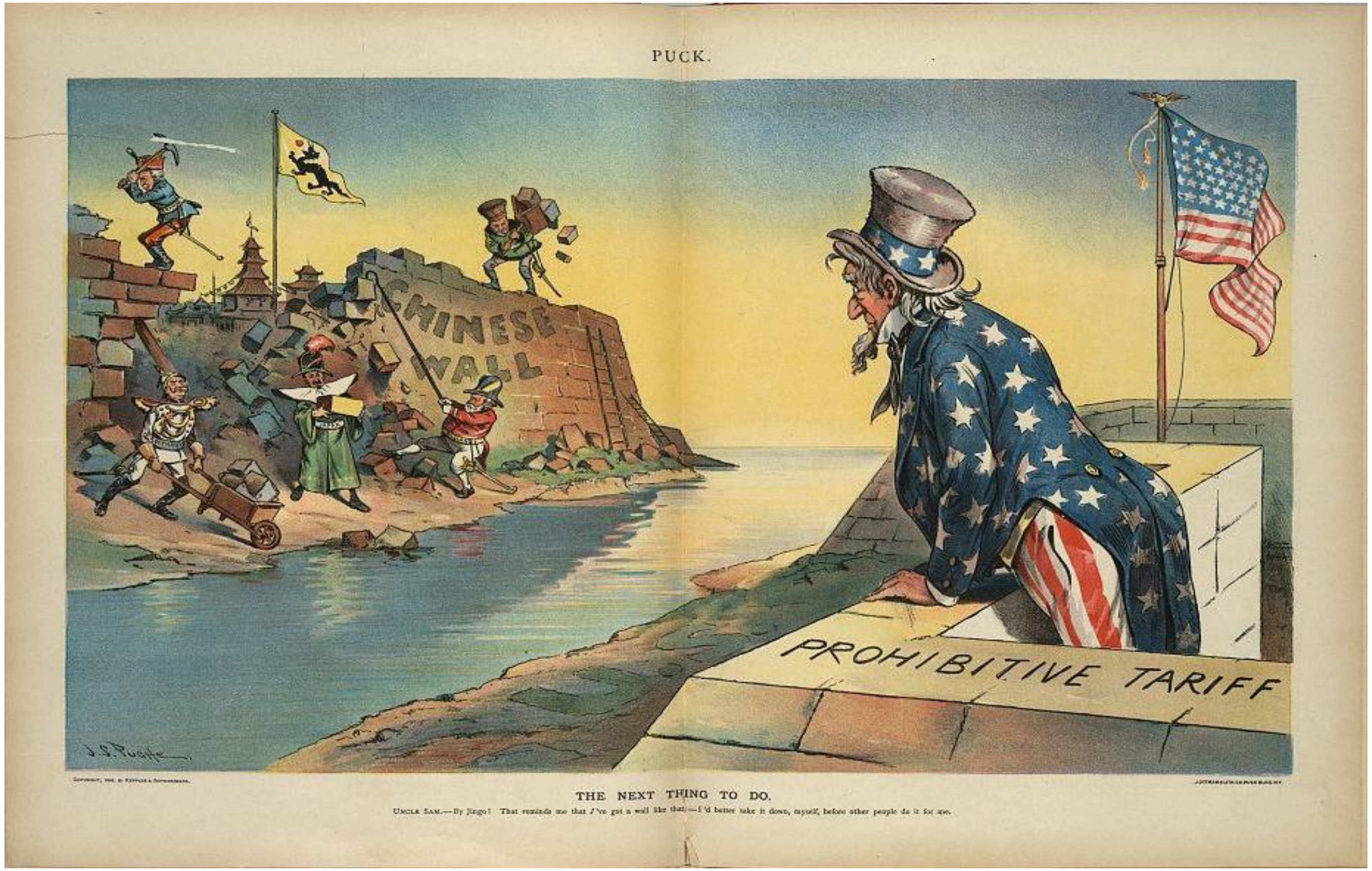
ANTIDUMPING AND COUNTERVAILING DUTIES

- U.S. industries petition the government for relief from imports that are sold in the United States at less than fair value ("dumped") or which benefit from subsidies provided through foreign government programs.

- Investigated by the USITC for injury determinations; then AD/CVD Orders are issued and administered by the Dept of Commerce, and enforced by CBP in consultation with DOC.

- Both ADD and CVD may be imposed on the same goods. ADD rates can be upwards of 150-200% *ad valorem.* Penalties can be failure to declare.

- Food products of designated countries currently subject: Pasta, preserved mushrooms, olives, fish, shrimp, honey, xanthan gum, citric acid



ST&R Trade Actions Resource Page

https://www.strtrade.com/f-tariff-actions-resources.html

Visit us for up-to-date actions, notices, articles, lists, effective dates, exclusion forms

DUTY SAVINGS STRATEGIES

DUTY SAVINGS OPPORTUNITIES

There are a variety of programs available to imports to reduce costs, such as:

- FTA/Preference Programs
- Temporary duty suspensions or reductions under the Miscellaneous Tariff Bill (MTB)
- Tariff Engineering
- First Sale for Export Valuation
- Freight Deductions

All are subject to specific requirements and additional CBP scrutiny, so taking advantage of them requires a commitment to compliance and system of internal controls to ensure claims are valid and substantiated.

DUTY SAVINGS OPPORTUNITIES

- **Tariff Line Reviews:** determine whether using best possible applicable HTS provision; must understand applicable principles of tariff classification and product details
- **Tariff Engineering:** fashion product to qualify for particular tariff code; must understand applicable principles of tariff classification and product details
- **Temporary duty suspensions** or reductions under the Miscellaneous Tariff Bill (MTB) (*commonly obtained for food and chemical products*)
- **Operational Engineering:** origin/sourcing, FTAs or preference program qualification, *special rules for qualifying*)
- **Valuation:** lowering dutiable value through First Sale for Exportation Valuation; Freight Deductions; Incoterm; Buying Agencies
- **Bonded Movements and Facilities:** delay or avoids payment of duties, can avoid some import obligations (IFE program for FDA; FTZ vs Bonded Warehouse)
- **Drawback -** Refund of 99% of the **duties** paid on goods imported into the United States that are subsequently exported, available for 301 duties but not ADD/CVD.

COMPLIANCE AND BEST PRACTICES

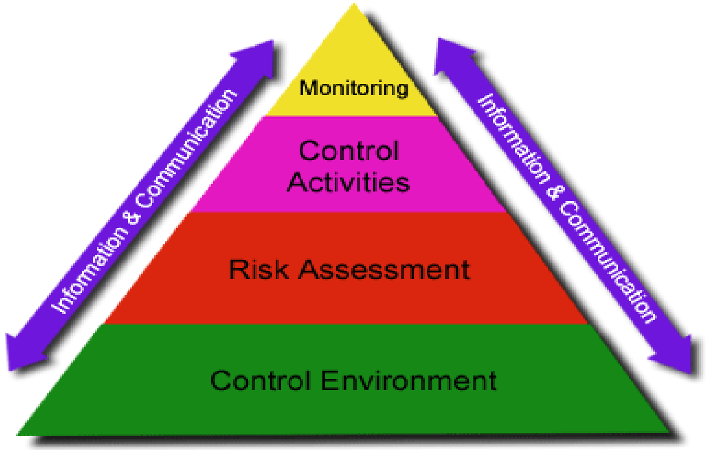
ENHANCED CUSTOMS ENFORCEMENT

- Requests for Information (sometimes fishing…)
- Informed Compliance Letters
- Customs Audit Surveys and Audits
- Trade Facilitation and Enforcement Act Enhancements included Forced Labor Provisions
- New ADD/CVD evasion prevention investigation authority

COMPLIANCE PROGRAM SAFEGUARDS

- Determine Requirements and Reasonable Care *
- Establish Controls to Monitor Conformity with Program Policies and Procedures
- Plan for Errors and Outline Potential Corrective Actions including Procedures for Escalation
- Follow Developments in Agency Practices and Rulings, as well as Federal Laws and Court Decisions
- Understand Potential Penalties and other Consequences for Non-Compliance
- Document Everything and Maintain All Required Records
- Share Success and Credit with Company Management!

INTERNAL CONTROLS



- A company's failure to have established internal controls will not necessarily cause it to be penalized by Customs.

- It could, however, lead Customs to conduct a more extensive review of the company's import operations.

- Likely CBP targets are well-served by implementing internal control mechanisms.

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FOOD/BEV COMPLIANCE BEST PRACTICES

- Reasonable care is your enforcement insurance policy – know before you go!
- Cross reference tariff provisions and search/analyze classification resources often when classifying food/bev products especially (and be mindful of court decisions!)
- Get help to understand quota provisions (and their impact duty free claims) from customs experts and consider getting rulings.
- Have a good food scientist and laboratory on speed dial.
- Have good communication and provide detailed instructions to your manufacturing facilities and throughout the supply chain.
- Ensure all import claims are determined prior to entry and are well-supported by records
- Exercise strong customs broker oversight to ensure, e.g., that preferential claims are not made without authorization and certifications

FOOD/BEV COMPLIANCE BES PRACTICES

- Know your new Food Safety Modernization Act requirements (and exemptions) including Foreign Supplier Verification Programs (FSVP); Mitigation Strategies to Protect Food Against Intentional Adulteration; Preventive Controls for Food; Sanitary Transportation for Food (Note: Former FDA Director of Import Operations is with ST&R!)

- Attend Friday’s Virtual Program: Product Admissibility: Compliance for Food & Beverage Importers---From “Red Lane to “Green Lane” at 10 AM.

Questions?

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