No. 98-1735

In the Supreme Court of the United States

BESTFOODS (FORMERLY KNOWN AS CPC INTERNATIONAL, INC.), PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the peanut butter manufactured by petitioner must be marked to reflect the Canadian origin of the peanut slurry used to produce it.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 165 F.3d 1371. The opinions of the Court of International Trade (Pet. App. 13a-46a, 47a-67a; C.A. Supp. App. 2-13) are reported at 933 F. Supp. 1093, 956 F. Supp. 1014, and 971 F. Supp. 574.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1999. The petition for a writ of certiorari was filed on April 25, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner makes peanut butter from peanut slurry, which is "a gritty, peanut-based paste" (Pet. App. 2a). Most of the peanut slurry used at petitioner's Arkansas plant is made in the United States, but "between 10 and 40 percent * * * is made in Canada" (*ibid.*). In January 1993, petitioner sought a ruling from the Customs Service as to whether the federal marking statute, 19 U.S.C. 1304, requires petitioner to mark its peanut butter to indicate the Canadian origin of the peanut slurry used to produce it. Under that statute, an article of foreign origin must be "marked in a conspicuous place * * * in such manner as to indicate to an ultimate purchaser in the United States * * * the country of origin of the article." 19 U.S.C. 1304(a). The marking requirement applies if the imported article has not undergone a "substantial transformation" following importation into the United States (Pet. App. 2a, citing *United States* v. *Gibson-Thomsen Co.*, 27 C.C.P.A. 267 (1940)). Such a "substantial transformation" is said to occur if, as a result of processing in the United States, the imported article loses its identity and is transformed into a new product having "a new name, character, and use." 27 C.C.P.A. at 273.

Petitioner claimed that the manufacture of peanut butter causes a "substantial transformation" of the imported peanut slurry and that the marking statute is therefore inapplicable. The Customs Service concluded, however, that marking of this product is required under regulations promulgated pursuant to the North American Free Trade Agreement (NAFTA). Under those regulations (19 C.F.R. §§ 102, 134.35(b)), an article imported from a NAFTA nation is considered to have undergone a "substantial transformation" only

if the processing or manufacturing steps that occur in this country are sufficient to change its tariff classification. Applying the NAFTA rules (19 C.F.R. § 102.18(b)(2)), the Customs Service determined that, (i) because the peanut slurry had "the essential character of the finished peanut butter," the same tariff classification applies to both and, (ii) because no "tariff shift" occurred, petitioner's peanut butter must be marked to reflect the Canadian origin of the imported peanut slurry (Pet. App. 4a).

2. Petitioner challenged the agency's ruling in the Court of International Trade. The court held that the regulations issued by the agency under NAFTA were invalid because they did not apply the same case-by-case "substantial transformation" test that governed prior to adoption of NAFTA. The court remanded the case to the agency for application of the case-by-case "substantial transformation" test to the facts of this case (Pet. App. 4a-5a).

On remand, the agency concluded that "the imported peanut slurry was not substantially transformed by being processed into peanut butter, because the essential character of the finished peanut butter was imparted by the peanut slurry" (Pet. App. 5a). The agency therefore ruled that marking of petitioner's peanut butter was required under the "substantial transformation" test.

The Court of International Trade upheld the agency's determination. The court concluded that "peanut slurry is a form of peanut butter, and that the processing * * * to convert peanut slurry into peanut butter did not alter the essential character of the product" (Pet. App. 5a).

3. The court of appeals upheld the agency's determination that petitioner is required to mark its peanut

butter under the NAFTA regulations. In so holding, the court of appeals reversed the determination of the Court of International Trade that these regulations are invalid (Pet. App. 5a, 12a).

The court of appeals noted that NAFTA "required the Secretary of the Treasury to adopt marking rules, based on the tariff-shift approach," for goods moving among the NAFTA signatory nations (Pet. App. 8a). Annex 311 of NAFTA (Pet. App. 76a-80a) specifies that an imported article is not subject to the marking requirement if it undergoes "a tariff shift after importation" (Pet. App. 9a). In enacting 19 U.S.C. 3314(b), Congress expressly authorized the Secretary of the Treasury to promulgate such rules and regulations as are "necessary or appropriate" to implement these NAFTA provisions. *Ibid.* The court of appeals concluded that (Pet. App. 9a):

> [T]he effect of Congress's authorizing the Secretary of the Treasury to promulgate regulations "necessary or appropriate" to make the United States' marking rules comply with the requirements of Annex 311, see 19 U.S.C. §3314(b), was to empower the Secretary to adopt a construction of the federal marking statute, for NAFTA goods, that was based on the tariff-shift approach * * * .

Because the NAFTA regulations properly govern this case, the court of appeals found it unnecessary to consider whether, in the absence of those regulations, marking of petitioner's peanut butter would have been required under the pre-NAFTA "substantial transformation" test (Pet. App. 5a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. As the facts of this case illustrate, the "tariff shift" test and the case-by-case "substantial transformation" test will often yield the same result. A good whose tariff classification and "essential character" is unchanged is ordinarily one that has not been "substantially transformed" (Pet. App. 5a). In the present case, for example, the Customs Service concluded *both* (i) that the tariff classification of the imported good was not changed because its "essential character" was not altered by the processing and (ii) that the processing of the imported good did not cause a "substantial transformation" of it (*ibid.*). The question whether one or the other of these closely related standards ultimately governs in such cases is not properly framed for review here, for a determination of the governing legal standard would not alter the ultimate disposition of the substantive controversy. Indeed, the legal test that petitioner contends should govern *was* applied in the Court of International Trade, and the agency's determination was upheld under that standard (*ibid.*).

In this context, review of the abstract question that petitioner frames is not warranted. This Court sits "to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)).

2. a. Petitioner errs in asserting (Pet. 16-18) that Congress has traditionally withheld from the agency any authority to interpret and implement the marking requirements of 19 U.S.C. 1304. In the Tariff Act of 1930, Congress expressly delegated broad rulemaking

authority to the Secretary of the Treasury to adopt "such rules and regulations as may be necessary to carry out" the tariff laws, including in particular the marking requirements of Section 1304. 19 U.S.C. 1624. See also 19 U.S.C. 66.

Petitioner nonetheless asserts that, in enacting the Customs Administration Act of 1938, Congress "explicitly denied" (Pet. 16) the agency any authority over the marking provisions. As originally enacted, the first sentence of the Tariff Act of 1930, ch. 497, Tit. III, § 304, 46 Stat. 687 (emphasis added), provided:

> (a) *Manner of Marking.*—Every article imported into the United States, and its immediate container, and the package in which such article is imported, shall be marked, stamped, branded, or labeled in legible English words, in a conspicuous place, in such manner as to indicate the country of origin of such article, *in accordance with such regulations as the Secretary of the Treasury may prescribe.*

In contrast, the first sentence of the Customs Administration Act, ch. 679, § 3, 52 Stat. 1077 (19 U.S.C. 1304(a)), provides:

> (a) *Marking of Articles.*—Except as hereinafter provided, every article of foreign origin (or its container * * *) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

Petitioner claims that, by removing the phrase "in accordance with such regulations as the Secretary

* * * may prescribe" from the first sentence of the 1930 statute, Congress "expressly repealed" the Secretary's authority to define, by regulation, the terms included in the basic marking requirement.

The deleted phrase, however, concisely and directly referred to the Secretary's authority to regulate *how*, not *whether*, imported articles were to be marked—even the title of the relevant section of the 1930 statute is "*Manner* of Marking." (Emphasis added). Instead of limiting the agency's preexisting authority to adopt all "necessary" regulations to administer the substantive provisions of the Tariff Act (19 U.S.C. 1624), the 1938 amendment actually expanded it by authorizing the adoption of regulations to establish exceptions from the marking requirements. 19 U.S.C. 1304(a)(3).[1] Nothing in the history of the 1930 and 1938 provisions supports

[1] The focus of the 1938 amendment was to eliminate the requirement of the 1930 statute that the article, its immediate container, and outer package all be marked. *Customs Administrative Bill: Hearings on H.R. 6738 Before the House Comm. on Ways & Means*, 75th Cong., 1st Sess. 34 (1937); see also *Customs Administrative Act: Hearings on H.R. 8099 Before the Subcomm. of the Senate Comm. on Finance*, 75th Cong., 3d Sess. 4 (1938). The debate over the amendment focused on the theoretical implictions of the proposed statutory language designed to eliminate the unnecessary triple marking of the article, its immediate container, and outer package. *Hearings on H.R. 6738*, *supra*, at 41-50. Because the proposed amendment began with the phrase "under such regulations as the Secretary of the Treasury *may* prescribe," some members of Congress expressed the concern that the basic requirement of marking imports might become discretionary rather than mandatory. *Ibid.* (emphasis added). The focus of the debate concerned how to delineate circumstances in which the Secretary could prescribe, by regulation, exceptions for certain articles without authorizing the Secretary to eliminate the mandatory character of the basic marking requirement. See *ibid.*; *Pabrini Inc.* v. *United States*, 630 F. Supp. 360, 361 (Ct. Int'l Trade 1986).

the assertion of petitioner that Congress sought to deny the agency a power—that had in fact been granted in 19 U.S.C. 1624—to adopt rules and regulations to implement the marking requirements of Section 1304.

b. Petitioner errs in asserting (Pet. 19) that, in authorizing the agency to adopt rules and regulations to implement the provisions of NAFTA (19 U.S.C. 3314(a)(2)), Congress did not intend to confer any power on the agency to determine marking rules for NAFTA goods. Petitioner's assertion is primarily based on the contention that Congress had historically withheld such interpretive power over marking requirements from the agency. As we have just shown, however, the historical foundation on which petitioner rests this contention is incorrect. Congress granted that authority to the agency in 1930, and did not withdraw it in 1938. When, in 1994, Congress authorized the agency to adopt rules to implement the provisions of NAFTA (19 U.S.C. 3314(b)), Congress merely continued its longstanding policy of delegating interpretive authority over marking requirements to the agency.

c. Contrary to petitioner's contention (Pet. 24-25), the NAFTA regulations promulgated by the Secretary of the Treasury, and implemented by the Customs Service, are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), and *United States* v. *Haggar Apparel Co.*, 119 S. Ct. 1392 (1999). The challenged regulations are a reasonable interpretation of the requirement of Annex 311 of NAFTA that imported NAFTA goods be exempt from marking when "the condition of the good * * * has undergone [a] * * * change[] in tariff classification" (Pet. App. 79a; *id.* at 6a).

The facts of this case demonstrate the reasonableness of the agency's regulation. The regulation continues to apply the marking requirement by reference to whether the imported article has undergone a "substantial transformation." The sole difference between the two approaches is that, consistent with NAFTA Annex 311, the application of this standard for NAFTA goods is determined through the mechanism of tariff shift and related rules. 19 C.F.R. § 102.20 (1995). This regulatory approach seeks to accomplish the substance of the former case-by-case adjudicatory method through a more predictable and consistent method. As the agency has explained, the regulation seeks to "provide the results that would be reached under a case-by-case application of the substantial transformation rule." 59 Fed. Reg. 142 (1994); see 60 Fed. Reg. 22,314-22,330 (1995). The principal advantage of the tariff shift rules is that they lend more certainty and uniformity to the "substantial transformation" test. 60 Fed. Reg. at 22,313-22,314; 59 Fed. Reg. at 141.[2]

The Secretary has ample discretion to adopt a rule-oriented approach, in lieu of an adjudicatory case-by-case approach, in making these determinations. See, *e.g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293

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[2] The Customs Service provided a detailed explanation of the reasons for adopting the administrative approach set forth in the NAFTA regulations. See 58 Fed. Reg. 69,460-69,462 (1993); 59 Fed. Reg. at 110, 141 (cited in *Target Sportswear, Inc.* v. *United States*, 875 F. Supp. 835, 842 (Ct. Int'l Trade), aff'd, 70 F.3d 604 (Fed. Cir. 1995), cert. denied, 517 U.S. 1208 (1996)). See also J. LaNasa, III, *Rules of Origin Under NAFTA: A Substantial Transformation Into Objectively Transparent Protectionism*, 34 Harv. Int'l L.J. 381, 383-386, 390-391, 406 (1993) (discussing advantages of rule-oriented methodology to determine issue of "substantial transformation").

(1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). In view of the specific endorsement of the "tariff shift" method for implementing marking rules under NAFTA Annex 311, the court of appeals correctly concluded (Pet. App. 8a-9a) that the regulations conform to the text and the purpose of the statute and should therefore be sustained. As the court explained (*id.* at 9a):

> [T]he effect of Congress's authorizing the Secretary of the Treasury to promulgate regulations "necessary or appropriate" to make the United States' marking rules comply with the requirements of Annex 311, see 19 U.S.C. § 3314(b), was to empower the Secretary to adopt a construction of the federal marking statute, for NAFTA goods, that was based on the tariff-shift approach * * * .

Petitioner argues that, in upholding this delegation of rulemaking authority to the agency, the court of appeals "completely overlook[ed] Congress' clear direction * * * that nothing in the Act [implementing NAFTA] shall be construed to amend or modify any law of the United States, except as 'specifically provided' therein" (Pet. 22). The provisions of NAFTA plainly contemplate, however, that marking rules were to be adopted, for Annex 311 specifies that all "Parties shall establish by January 1, 1994, rules for determining whether a good is a good of a party ('Marking Rules')." Annex 311, ¶ 1 to NAFTA (Pet. App. 76a). To accomplish that undertaking, Congress supplemented the broad, preexisting rulemaking authority of the Secretary to implement and administer the Tariff Act of 1930 (19 U.S.C. 1624) with a similarly broad authority to promulgate all rules and regulations "necessary or appropriate" to implement and administer NAFTA. 19 U.S.C. 3314(b).

The court of appeals correctly concluded that the Secretary's adoption of a rule-oriented tariff-shift method in determining whether goods imported from a NAFTA country are "substantially transformed" during domestic processing constitutes a "permissible interpretation" of the governing statutes (Pet. App. 8a-9a). By issuing that regulation, the agency was simply utilizing the specific authority granted by Congress to fulfill the obligation of the United States under NAFTA to adopt rules to implement the NAFTA marking requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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