No. 01-1469

In the Supreme Court of the United States

HEARTLAND BY-PRODUCTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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 Customs Service correctly applied the text of subheading 1702.90.10/20 of the Harmonized Tariff Schedule of the United States in classifying the imported merchandise involved in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 264 F.3d 1126. The opinions of the Court of International Trade (Pet. App. 24a-62a, 63a-71a) are reported at 74 F. Supp. 2d 1324 and 86 F. Supp. 2d 1339.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2001. A petition for rehearing was denied on December 4, 2001. Pet. App. 22a-23a. On February 25, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to April 3, 2002, and the petition was filed on that date.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of the Harmonized Tariff Schedule of the United States that are set out at Pet. App. 72a-73a, the following statutory provision is involved in this case:

19 U.S.C. 1625(c) provides:

> A proposed interpretive ruling or decision which would—
>
> (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
>
> (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;
>
> shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

STATEMENT

1. Canadian Blending of Windsor, Ontario, is a unit of ED&F Mann, a large, London-based commodities business. Canadian Blending operates a process that combines granular raw sugar with molasses and water by heating and agitating the mixture. This process

produces a mixture that contains approximately 92% sucrose and more than 6% soluble non-sugar solids on a dry-weight basis. C.A. App. 76, 163, 109. After its production, this mixture is imported into the United States by petitioner Heartland By-Products, Inc., an American unit of ED&F Mann. During the times relevant to this case, the same person acted as President of Heartland and Manager of Canadian Blending. C.A. App. 109.

After importation, the molasses added in the Canadian Blending process is removed in a refining process performed by Heartland. The refining process produces liquid sucrose (which is 99% sucrose on a dry-weight basis) and molasses as a by-product. C.A. App. 116. The liquid sucrose is sold by Heartland in the domestic market for the production of food, including cereal, ice cream, and candy. C.A. App. 116-117, 257. The molasses by-product is then shipped by Heartland back to Canadian Blending, where it is reused by that company for the production of additional volumes of the same sugar mixture to be reimported by Heartland.[1] C.A. App. 117.

2. In April 1995, Heartland sought a ruling from the United States Customs Service concerning proposed importations of the sugar syrup mixture from Canadian Blending. Pet. App. 3a; C.A. App. 159. In seeking that ruling, Heartland provided information regarding the composition of the imported article but failed to disclose the post-importation processing of the imported mixture in the United States and the intended use of the liquid sugar in the domestic market. C.A. App. 74-

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[1] Heartland asserts that approximately 5% of the molasses is lost in the refining process, left as an impurity in Heartland's final product, or sold by Heartland for use in animal feed. C.A. App. 117, 257.

77. Based on the limited information made available by Heartland, Customs issued NY Ruling Letter 810328 dated May 15, 1995, which classified the Canadian Blending mixture under subheading 1702.90.40 of the Harmonized Tariff Schedule of the United States (HTSUS). Pet. App. 25a-26a. That subheading, which applies to sugar syrups that contain soluble non-sugar solids over "6 percent * * * by weight of the total soluble solids," is not subject to sugar quota restrictions. *Id.* at 2a-3a; see *id.* at 72a.

The United States Department of Agriculture (USDA) monitors the domestic supply of sugar in setting tariff rate quotas (TRQ) that limit the volume of sugar imports. The objective of the quota is to ensure that an adequate supply of sugar is maintained at reasonable prices in the domestic market. Pet. App. 2a-3a; C.A. App. 1187-1189; HTSUS Additional U.S. Note 5(a)(i). The TRQ applies to all imported sugar classified under HTSUS subheading 1702.90.10/20. As relevant here, that subheading covers sugar syrups "[c]ontaining soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids." See Pet. App. 72a. In setting the TRQ, the USDA uses official forecasts to compare the domestic sugar supply and domestic sugar demand. C.A. App. 1187. The USDA adjusts the TRQ so that the supply level will meet the demand level. *Ibid.* The USDA maintains a minimum limit for the TRQ, however, below which the quota cannot go. C.A. App. 1187-1188.

After Heartland began processing the Canadian Blending importations in mid-1997, Heartland's liquid sugar increased the quantity of sugar available in the United States. C.A. App. 237, 451, 577, 396-397. When

the total amount of domestic supply and the minimum TRQ level exceed the actual need of the United States, the oversupply depresses the price of sugar. C.A. App. 1188. Heartland's importations, free of the TRQ, had precisely that effect on the domestic price. C.A. App. 237, 451, 577, 396-397.

3. Shortly after sales of Heartland's liquid sugar began to impact prices in the domestic market, the United States Cane Sugar Refiners' Association and the United States Beet Sugar Association filed a joint submission with the Customs Service on January 14, 1998. Their submission questioned the appropriateness of classifying Heartland's mixture under HTSUS subheading 1702.90.40, exempt from the TRQ. The Associations alleged that Heartland's liquid sugar product competed directly with sugar subject to the TRQ. Pet. App. 5a-6a.

The Customs Service advised Heartland of the joint petition and invited Heartland to respond to the allegations raised by the Associations. C.A. App. 152-153. The agency asked Heartland (i) to present detailed factual information concerning the commercial identity and use of the product it imported and (ii) to respond to the allegations of the Associations that the sole purpose for the addition and extraction of molasses was to avoid a tariff rate quota. C.A. App. 244-245. Although Heartland responded, its submissions did not address these issues. C.A. App. 250-273, 313-329, 708-710, 711-713.

Following further unsuccessful efforts to obtain relevant information from Heartland, the Customs Service issued a public notice of its proposal to revoke the prior favorable letter ruling to Heartland (NY Ruling 810328) pursuant to 19 U.S.C. 1625(c). The agency's notice of proposed revocation-published in Volume 33, No. 22/23 of the *Customs Bulletin* dated June 9, 1999—

provided a 30-day comment period to close on July 9, 1999. The public comment period was thereafter extended at Heartland's request until August 9, 1999. C.A. App. 402-407. After the notice-and-comment period expired, the Customs Service issued a Headquarters Decision on August 25, 1999, that revoked the prior letter ruling (HQ 961273). This Headquarters Decision was duly published in the *Customs Bulletin* on September 8, 1999. Pet. App. 7a-8a; C.A. App. 884-892. In that final revocation ruling, the Customs Service determined that Heartland's imported mixture had no commercial identity or use in its condition as imported. Pet. App 8a. The agency further concluded that the addition of molasses prior to importation, and the extraction of the same molasses after importation, was merely an artifice to disguise the sugar product that is subject to quota restrictions. *Ibid.*; C.A. App. 889-890. The Customs Service further determined that the molasses and associated impurities added to the raw sugar in Canada constituted a "foreign substance" that must be excluded in determining the applicability of HTSUS subheading 1702.90.10/20. Pet. App. 8a. Pursuant to 19 U.S.C. 1625(c), the Customs Service specified that its revocation ruling was effective as of November 8, 1999.

4. On September 20, 1999, Heartland commenced this action to challenge the Customs Service determination in the United States Court of International Trade. That court granted judgment in favor of Heartland. Pet. App. 24a-62a. The court reasoned that "[t]he plain language of the tariff provision describes the imported product" (*id.* at 35a) and that "Customs was simply wrong to conclude" that the addition of molasses to the sugar introduced a "foreign substance" to be excluded in determining application of the tariff provision. *Id.* at

39a-40a. The court stated that the molasses was not a "foreign substance" because it was "composed of the same chemical ingredients in varying proportions" as the sugar syrup. *Id.* at 40a. The court therefore held that the Headquarters Decision erred in revoking the prior letter ruling. *Id.* at 40a-41a.[2]

5. a. The Federal Circuit reversed. Pet. App. 1a-21a.[3] The court of appeals concluded that the agency's interpretation of the relevant provisions of the HTSUS, as expressed in HQ 961273, was reasonable and persuasive, and therefore entitled to deference under the standards of this Court's decisions in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 16a. The court emphasized that, by its express terms, HTSUS subheading 1702.90.10/20 requires the agency to exclude "foreign substances" in determining whether the sugar syrup contains 6% or less by weight of soluble non-sugar solids. Pet. App. 15a. The court noted that the phrase "foreign substances" in HTSUS subheading 1702.90.10/20 is not defined in the statute and that "Customs therefore had to interpret the term 'foreign substances' in order to classify Heartland's sugar syrup." *Id.* at 16a. The court of appeals emphasized that, in the specific commercial context in which this tariff provision applies, the agency's interpretation of the phrase "foreign substances" to include molasses that is *added* to the raw sugar in Canada and then immediately *extracted* in the United States is reasonable, entitled to "deference * * * under *Mead* and

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[2] The Court of International Trade denied the motion for reconsideration filed by the Customs Service. Pet. App. 63a-71a.

[3] The Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade. 28 U.S.C. 1295(a)(5).

Skidmore" and should therefore not be disturbed by the courts. *Ibid.*

b. In a separate concurring opinion, Judge Friedman concluded that the Customs Service had properly determined that the addition of molasses prior to importation and its extraction after importation is merely an artifice designed to allow Heartland to escape a higher rate of duty and the TRQ. Pet. App. 21a. He noted that the decisions of this Court have long held that "a prescribed rate of duty" may not "be escaped by resort to disguise or artifice." *Id.* at 19a (quoting *United States* v. *Citroen*, 223 U.S. 407, 414-415 (1912)). Because the process employed by Heartland is a mere "artifice" to escape the prescribed rate of duty, and because the original letter ruling had been based on a less than complete description of the relevant facts, Judge Friedman concluded that the Service had properly revoked that ruling in this case. Pet. App. 21a. In response to the suggestion that Heartland had relied on the prior ruling, Judge Friedman explained that "whatever financial or other problems Heartland now faces because of the revocation of the New York Ruling Letter are the result of its own actions, for which it must bear full responsibility." *Ibid.*

c. The court of appeals thereafter denied the petition for rehearing with suggestion for rehearing en banc. Pet. App. 22a-23a.

ARGUMENT

The decision of the court of appeals comports with longstanding precedent. It does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Petitioner errs in contending (Pet. 11) that the decision in this case conflicts with the general principle

that merchandise is ordinarily to be classified for customs purposes in its condition as imported, regardless of its post-importation use. See *Worthington* v. *Robbins*, 139 U.S. 337, 341 (1891). The Customs Service determination challenged by petitioner in this case in fact *does* classify the imported merchandise in its condition as imported. The applicable tariff provision (HTSUS subheading 1702.90.10/20) requires the agency to exclude "foreign substances" in determining whether the sugar syrup contains 6% or less by weight of soluble non-sugar solids. Pet. App. 15a. The agency determined that, in the particular commercial context involved in this case, the introduction of molasses to the sugar syrup before its importation by petitioner was the addition of a "foreign substance" within the meaning of this provision. *Ibid.* See pages 13, 16, *infra*. That determination is based on application of the specific text of this narrow tariff provision to the particular goods imported. Pet. App. 15a.

The Federal Circuit correctly sustained that administrative determination. The court noted that deference to the agency's interpretation of this narrow provision is justified by the "specialized experience" the agency has "in classifying goods." Pet. App. 15a. See *United States* v. *Mead Corp.*, 533 U.S. at 234. The court concluded that (Pet. App. 18a):

> Heartland does not argue that its sugar syrup contains less than 6% by weight of soluble non-sugar solids when the weight of the molasses solids is excluded. Therefore, in view of our determination that Customs' interpretation of the term "foreign substances" should not be disturbed, we uphold the revocation ruling classifying Heartland's sugar syrup under 1702.90.10/20 HTSUS.

The decision of the court of appeals is thus based squarely on the narrow language of this specific tariff provision. It does not rely on the post-importation uses of the classified merchandise. The decision of the court of appeals does not conflict with any other decision, and it does not warrant review by this Court.

b. Moreover, petitioner has misdescribed the general principle on which it seeks to rely. The relevant principle is not that post-importation uses of merchandise may not be considered—it is instead that, absent a "disguise or artifice," an article is to be classified in its condition as imported. *United States* v. *Citroen*, 223 U.S. 407, 415 (1912). See *Simod America Corp.* v. *United States*, 872 F.2d 1572 (Fed. Cir. 1989); *Savannah Sugar Refining Corp.* v. *United States*, 61 Treas. Dec. 401, aff'd, 20 C.C.P.A. 272 (1932), cert. denied, 288 U.S. 615 (1933); *United States* v. *Hannevig*, 10 Ct. Cust. 124, 128 (1920).

The term "artifice" has been defined for this purpose as "a carefully and delicately prepared contrivance for doing indirectly what one could not do directly." *Savannah Sugar Refining Corp.* v. *United States*, 61 Treas. Dec. at 406. In the *Savannah Sugar* case, the Customs Court applied this "artifice" definition in classifying a mixture of sugar, water and formaldehyde as sugar, where the water and formaldehyde were added prior to importation solely in an effort to obtain a lower duty rate. The court noted that (*id.* at 406-407):

> The plaintiff could not import raw sugar directly and get the benefit of the lower rate which it seeks to have applied to this importation. Therefore, it undertakes to procure the more favorable rate by indirection through putting the sugar into a solution of water and preservatives. Sugar was bought,

> sugar was used, sugar was disguised, and on the disguised product plaintiff seeks to pay the tariff applicable to sugar sirups. The facts seem to make a clear case of resort to disguise or artifice.

As this Court emphasized in *United States* v. *Citroen*, 223 U.S. at 415, an effort to disguise a product "described in a particular paragraph of the tariff act" as something else "is simply a fraud on the revenue and cannot be permitted to succeed."

Judge Friedman correctly applied this settled rule in his concurring opinion in this case. He noted that the factual record assembled by the agency plainly demonstrates that the introduction of molasses to the sugar syrup before its importation was "merely 'disguise or artifice' intended to escape a higher rate of duty such as a quota tariff rate." Pet. App. 20a. The operations performed by petitioner and its related Canadian supplier were "not legitimate" business operations but were instead designed solely to evade tariff rules. *Id.* at 19a-20a. As Judge Friedman concluded, there is ample evidence to support the agency's determination that the introduction of molasses to the sugar syrup in Canada, and its immediate removal upon importation in the United States, is merely an artifice that is not to be respected in application of the tariff laws. *Id.* at 20a-21a.[4] See also page 13, *infra*.

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[4] As noted above, the Federal Circuit decided this case on the narrower ground that the molasses in the imported merchandise was a "foreign substance" for purposes of subheading 1702.90.10/20. Pet. App. 18a. The fact that petitioner improperly employed a mere "artifice" in an effort to avoid the correct classification of this article is an additional basis for sustaining the judgment in this case that the panel majority did not reach.

2. a. Petitioner errs in contending (Pet. 18-25) that it is inappropriate for Customs to consider the pre-importation processing of the imported article that added molasses to the imported sugar. Petitioner asserts (Pet. 24) that such processing is irrelevant because it is entitled to fashion its product in whatever manner it desires in order to obtain the most favorable tariff treatment.

The court of appeals correctly concluded in this case, however, that the governing tariff provision in fact *requires* examination of the pre-importation production process. HTSUS subheading 1702.90.10/20 specifies that, in determining whether the sugar syrup contains "non-sugar solids * * * equal to 6 percent or less by weight of the total soluble solids," the Customs Service must first "exclud[e] any foreign substances that may have been added or developed in the product." *Ibid.*; see Pet. App. 2a-3a. Because subheading 1702.90.10/20 requires the exclusion of "foreign substances that may have been added or developed in the product," Customs was expressly required by the statute to examine the entire circumstances of the transaction, including pre-importation processing. Pet. App. 16a-17a. Indeed, no other method exists for evaluating whether a foreign substance was "added or developed in the product" prior to importation. *Id.* at 20a. The plain language of the statute involved in this case thus refutes petitioner's claim that the agency may not examine the pre-importation production process to determine whether an excludable "foreign substance" was "added or developed in the product." HTSUS subheading 1702.909.10/20.

b. The record supports the determination of the Customs Service that the addition of the molasses by the Canadian affiliate of petitioner represented the

addition of a "foreign substance" within the meaning of HTSUS subheading 1702.90.10/20. The term "foreign substance" is not defined in the tariff provisions or in the *Explanatory Notes* to the HTSUS.[5] The legislative history is also silent as to the intended meaning of the term. In this context, the court of appeals correctly concluded that the interpretation of that phrase by the agency that Congress charged with the responsibility for enforcing this statute is entitled to substantial weight. Pet. App. 16a.

In applying that statutory phrase in this case, the Customs Service noted that the industry practice in refining sugar is to *separate* sugar from its impurities, including molasses. Customs noted that, despite this industry practice, petitioner's Canadian affiliate took sugar from which impurities had been removed and then added one of those impurities—molasses—back *into* the sugar product. The addition of molasses to the sugar directly contravened standard refining practices and served no viable commercial purpose—a fact that was demonstrated by petitioner's practice of immediately *removing* the molasses from the sugar syrup following importation and promptly *returning* the molasses to its Canadian affiliate. Pet. App. 6a. On this record, there was ample basis for the agency's conclusion that the addition of the molasses into the sugar product constituted "a foreign substance * * * added or developed in the product" within the meaning

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[5] "While the *Explanatory Notes* do not constitute controlling legislative history, they do offer guidance in interpreting HTS subheadings." *Lonza, Inc.* v. *United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995). See also *Bausch & Lomb, Inc.* v. *United States*, 148 F.3d 1363 (Fed. Cir. 1998); *Sharp Microelectronics Tech., Inc.* v. *United States*, 122 F.3d 1446 (Fed. Cir. 1997).

of this narrow tariff provision. HTSUS subheading 1702.90.10/20. The agency's reasonable interpretation of the statute was therefore properly upheld by the court of appeals. Pet. App. 16a-17a.

c. Although the analysis applied by the agency and the court of appeals in this case is based on, and properly implements, the detailed text of this specific tariff provision, it also comports with the more general method of implementing broader tariff provisions as well. For example, in *Merritt* v. *Welsh*, 104 U.S. 694 (1881), on which petitioner relies (Pet. 18), this Court held that an importer may ordinarily fashion articles to obtain the most favorable rate of duty "provided he can do it without injuring their marketability" and provided that "no deception is practised." 104 U.S. at 704. But commercially "artificial[]" steps may not be employed to effect an evasion or "fraud on the revenue." *Id.* at 705.[6]

That same conclusion was reached in the early decision in *Fries Bros.* v. *United States*, 4 Treas. Dec. 850 (1901). In concluding that an artificial addition to an imported chemical compound hid the true nature of the product vanillin, the decision explained that "merchants

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[6] In *Merritt*, the tariff rate on imported sugar depended on its color as measured by a commercially recognized standard. The tariff contained no express exclusions or limitations as to the source or cause of the color of the sugar. The imported product in *Merritt* was sugar that had been treated with molasses to make it "more salable"; this treatment also made the sugar darker and thus eligible for a lower duty rate. 104 U.S. at 704. In holding in *Merritt* that the color of the sugar for tariff purposes could be based on the color imparted by the molasses during its normal manufacture, the Court emphasized that if this color had instead been "artificially imposed" after the sugar was initially manufactured "it might be a different matter." *Id.* at 705.

have the right to so manufacture their merchandise that it may escape the higher rates of duty; but this must be done during the process of manufacture, and as part of it, not by a separate operation upon a completed article which is specially provided for in the law." *Id.* at 852.

None of the decisions on which petitioner relies supports the proposition that commercially artificial methods may be applied to avoid tariff classification rules. In *United States* v. *Citroen*, 223 U.S. 407 (1912), this Court held that unstrung, drilled pearls were classifiable under that description—rather than as pearls set or strung—even though the pearls had been strung at one time prior to importation. The Court noted that, although the pearls had been temporarily strung prior to importation for purposes of display, they were imported and sold to the ultimate consumer unstrung. *Id.* at 413-414. No commercial "disguise or artifice" existed in *Citroen* (*id.* at 415), for the purchaser had a legitimate reason to buy unstrung pearls and she intended to, and did, add more pearls to form a necklace. *Id.* at 414.[7]

In the present case, by contrast, the pre-importation processing demonstrates in great detail that a deception was planned and executed. Petitioner added molasses for no commercial reason other than artificially to increase the content of soluble non-sugar solids in the

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[7] Neither *United States* v. *Schoverling*, 146 U.S. 76 (1892), nor *Seeberger* v. *Farwell*, 139 U.S. 608 (1891), supports petitioner's position. As with *Citroen*, bona fide commercial activities led to the importation of products recognized in commerce in each of those cases. The evidence in each case also established that neither involved deceptive or artificial processes that reversed normal manufacturing methods in an effort to avoid express tariff restrictions. See 146 U.S. at 80-81; 139 U.S. at 611.

product above 6% at importation in an effort to avoid classification under HTSUS subheading 1702.90.10/20. The addition of molasses to the product prior to importation was plainly a commercially artificial act (see note 6, *supra*) for it was necessary to refine the syrup in the United States to remove the same molasses that had been added prior to importation. Pet. App. 17a. No legitimate commercial reason justified petitioner's obvious attempt to avoid the plain text of the tariff statute. See *ibid.*

d. In any event, the general principles on which petitioner mistakenly seeks to rely are simply not implicated in this case. As the Federal Circuit correctly determined (Pet. App. 18a), the plain language of this specific tariff provision mandates an evaluation of whether the pre-importation processing "added or developed" a "foreign substance" into the product. HTSUS subheading 1702.90.10/20. Applying the text of this narrow provision, the agency properly concluded that the last-minute addition of molasses, and its subsequent removal immediately after importation, represented the addition of a foreign substance within the meaning of this provision. Pet. App. 17a. As the court of appeals emphasized (*ibid.*):

> When the purification of a raw product results in the production of a by-product, it is not illogical or unreasonable to conclude that the addition of that by-product to a purified or partially-purified raw product amounts to the addition of a foreign substance.

That narrow holding was sufficient to resolve this case. Pet. App. 17a-18a. The decision of the court of appeals represents a straightforward application of the specific and narrow text of HTSUS subheading

1702.90.10/20. It does not, as petitioner incorrectly asserts (Pet. 25), introduce broad uncertainty into international commercial transactions. The decision of the court of appeals merely enforces the specific text of a single tariff provision that bars the use or addition of "foreign substances" to evade its restrictions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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