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No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

IRA M. MILLSTEIN
A. PAUL VICTOR
JEFFREY L. KESSLER
WEIL GOTSHAL & MANGES
New York, New York
Counsel for the Matsushita Petitioners

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
METZGER SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the Hitachi Petitioners

DONALD F. TURNER
Washington, D.C.
HENRY T. REATH
DUANE MORRIS & HECKSCHER
Philadelphia, Pennsylvania
Counsel for the MELCO Petitioners

DONALD J. ZOELLER
Counsel of Record
JOHN L. ALTIERI, JR.
HAROLD G. LEVISON
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510-7000
Counsel for the Toshiba Petitioners

PETER J. GARTLAND
WENDER MURASE & WHITE
New York, New York
Counsel for the Sharp Petitioners

JAMES S. MORRIS
KEVIN R. KEATING
WHITMAN & RANSOM
New York, New York
Counsel for the Sanyo Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, New York
Counsel for the Mitsubishi Petitioners

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QUESTIONS PRESENTED

1. Whether, in an antitrust conspiracy case based upon alleged "parallel" acts and other circumstantial evidence, summary judgment for the defendants may be reversed when the district court found that there could be no rational motive for the economically implausible conspiracy alleged and that all of the evidence was entirely consistent with the independent economic self-interest of each defendant, and the court of appeals never considered whether defendants' actions were more consistent with an inference of conspiracy than with an inference of independent action.

2. Whether a court of the United States may: (i) disregard the duly issued statement of a friendly foreign government attesting that certain export controls entered into by its nationals were compelled by that government; (ii) permit a trier of fact to adjudicate the veracity of such an official government statement; or (iii) hold such government-mandated conduct to constitute or be a "feature" of a conspiracy in violation of the antitrust laws of the United States.

PARTIES TO THE PROCEEDING

Petitioners-defendants are Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Ltd., Matsushita Electronics Corporation, Toshiba Corporation, Toshiba America, Inc., Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, Hitachi Sales Corporation of America, Mitsubishi Electric Corporation, Mitsubishi Electric Sales America, Inc., Mitsubishi Corporation, Mitsubishi International Corporation, Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., Sanyo Manufacturing Corporation, Sharp Corporation, and Sharp Electronics Corporation.*

Respondents-plaintiffs are Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE").**

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* The defendants in the district court were: seven Japanese manufacturers of television receivers; four Japanese trading companies; one Japanese component manufacturer; ten American subsidiaries of the Japanese defendants; a former American television manufacturer (Motorola); and an American retailer which purchased Japanese television receivers for resale (Sears).

References to the Petition Appendix are cited as "Pet. App. —a." References to the 45 volume appendix before the court of appeals, which has been transferred to this Court in lieu of the record below, are cited as "Rec. —a, vol. ——."

The statements required by Rule 28.1 of this Court are contained in the Appendix to the Petition. (Pet. App. 1a-5a). Amendments to petitioners' Rule 28.1 statements are attached hereto.

** The court of appeals affirmed summary judgments in favor of defendants Sony Corporation, Sony Corporation of America, Motorola, Inc. and Sears, Roebuck & Co. (Pet. App. 180a-185a; 196a; 223a). These companies are designated as respondents pursuant to Rule 19.6 of this Court. However, references to "respondents" do not include these former defendants.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals are reported at 723 F.2d 238 (Pet. App. 34a-197a) and 723 F.2d 319. (Pet. App. 198a-223a). The opinions of the district court granting summary judgment are reported at 494 F. Supp. 1190 (Pet. App. 1111a-1214a) and 513 F. Supp. 1100. (Pet. App. 236a-667a). The district court's evidentiary opinions are reported at 505 F. Supp. 1125, 505 F. Supp. 1190 and 505 F. Supp. 1313. (Pet. App. 668a-776a; 777a-987a; 988a-1110a).

JURISDICTION

The judgments of the court of appeals were entered on December 5, 1983. (Pet. App. 224a-228a; 229a-233a). Timely petitions for rehearing and rehearing in banc were denied on March 9, 1984. (Pet. App. 234a; 235a). The petition for a writ of certiorari was filed on June 7, 1984 and granted on April 1, 1985. This Court has jurisdiction to review the judgments of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents' complaints allege violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, section 73 of the Wilson Tariff Act, 15 U.S.C. § 8, the Revenue (Antidumping) Act of 1916, 15 U.S.C. § 72, section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and section 7 of the Clayton Act, 15 U.S.C. § 18. (Pet. App. 27a-32a).

STATEMENT OF THE CASE

A. The Alleged Conspiracy

Respondent Zenith manufactures and sells consumer electronic products ("CEPs") and is America's most successful television manufacturer. Together with RCA, Zenith has dominated the U.S. television industry for more than thirty years, jointly accounting for over forty percent of U.S. color television sales throughout the relevant period. (Rec. 2575a-2576a, vol. 6). Respondent NUE, the successor to the Emerson Radio Corp., once manufactured and sold television receivers under the Emerson label, but ceased such sales in the early 1970's. (Pet. App. 246a-247a & n.5).

In their complaints, respondents alleged that, from the mid-1950's to at least 1977, seven Japanese television manufacturers and seventeen other named defendants participated in a "low price" export conspiracy to destroy their competitors and take over the U.S. market for television receivers and certain other CEPs. (Pet. App. 45a-46a).[1] Respondents also claimed that more than seventy co-conspirators participated in this scheme, including such major American companies as General Electric, Teledyne Packard Bell, J.C. Penney, W.T. Grant, Montgomery Ward, Magnavox, Singer, and Westinghouse. (Rec. 748a-751a, vol. 3).

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[1] In its complaint, NUE alleged a conspiracy related to television sets only. Four years later, Zenith alleged that the conspiracy also included radios, tape recorders, audio equipment and components. (Pet. App. 247a & n.7). As the district court noted, however, television receivers were the "heart and soul of Zenith's complaint." (Pet. App. 622a).

Respondents alleged that the predatory scheme consisted of two parts which together formed a "unitary" conspiracy. First, petitioners allegedly agreed to fix artificially "high prices" for television receivers sold in Japan.[2] Second, petitioners allegedly agreed to use purported excess profits generated by this "high price" conspiracy in the Japanese domestic market to fund an agreement to fix "low," predatory export prices to the United States (which allegedly were lower than the prices they charged for comparable products in Japan). The purported objective of this unitary conspiracy was to destroy the U.S. television receiver industry so that petitioners ultimately would be able to charge monopoly prices in the United States. (Pet. App. 45a-46a; 246a-250a; 257a-259a; 483a-484a).

Respondents did not allege an agreement to fix any particular "low price" or price level in the United States. Rather, as the district court pointed out, respondents consistently alleged an agreement to sell at "whatever price was necessary to make the sale." (Pet. App. 301a; 478a-479a & n.204). Indeed, it is undisputed that petitioners sold television receivers in the United States at every conceivable price, "ranging from the lowest to the highest." (Pet. App. 476a, n.202).

As critical elements of the alleged "low price" conspiracy, respondents pointed to petitioners' participation in export control arrangements which established *minimum* prices for certain exports to the United States (the so-called "check prices") and which prescribed the number of direct U.S. export customers (the so-called

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[2] In support of this allegation, respondents principally relied upon various documents generated in connection with certain proceedings of the Japanese Fair Trade Commission which purportedly showed activities by the television manufacturer petitioners to stabilize prices in the Japanese domestic market. (Pet. App. 172a-174a). For purposes of their summary judgment motions, petitioners assumed that respondents could raise a genuine issue of fact concerning this alleged price stabilization in Japan.

"five-company rule").[3] Despite the fact that these export control arrangements were compelled by the Japanese Government pursuant to its foreign trade policy (see Point II, *infra*), and would naturally tend only to *raise* (not lower) export prices, respondents contended that these arrangements were central features of the "low price" export conspiracy alleged. (Pet. App. 258a; 323a-328a; 378a-379a). Further, respondents contended that additional evidence of the alleged export conspiracy was provided by the purportedly parallel "low prices" and "secret rebates" granted by petitioners in order to "get the business" in the United States. (Pet. App. 258a-259a; 484a-485a).

In sum, respondents alleged that it would be reasonable for a fact finder to infer that, from the mid-1950's to at least 1977, petitioners, who were new entrants, participated in a "low price," loss-generating, predatory export conspiracy for the purpose of trying to drive all of their competitors out of business in the hope that they would someday be able to recoup their losses by charging monopoly prices in the U.S. television market. (Pet. App. 484a).

B. The District Court Proceedings

The original complaint in this action was filed almost fifteen years ago. Following more than eight years of

[3] The Government of Japan, through its Ministry of International Trade and Industry, required and supervised the establishment and implementation of these export controls in the form of: (a) written agreements among Japanese manufacturers of television sets destined for export to the United States (the "manufacturers' agreements") (Pet. App. 379a-380a); and (b) written regulations of the Japan Machinery Exporters Association which governed Japanese exporters of television sets to the United States (the "JMEA regulations"). (Pet. App. 381a). The manufacturers' agreements and the JMEA regulations, which were in effect from 1963 to early 1973, established, among other things, the minimum prices at which certain screen sizes and types of television receivers could be sold for export to the United States. (Pet. App. 381a). The JMEA regulations also contained a provision requiring the registration of export customers and, beginning in 1967, limiting the number of such registrations to five. (Pet. App. 382a-383a).

extensive discovery, then District (now Circuit) Judge Edward R. Becker (the seventh judge to preside over the consolidated cases) implemented a series of case management procedures, pursuant to which the court: (a) required respondents to file a preclusive Final Pretrial Statement ("FPS") setting forth *all* of the evidence they intended to rely upon at trial; and (b) conducted evidentiary hearings to determine the admissibility of portions of respondents' proffered evidence. (Pet. App. 268a-273a; 278a-285a).

Respondents' 17,500 page FPS, which cited approximately 250,000 pages of documents (Pet. App. 268a), revealed that respondents intended to prove the alleged conspiracy solely from the materials referenced in the FPS, without any fact testimony as to what occurred at any alleged conspiratorial meetings. (Pet. App. 403a-405a; 605a). Respondents' entire case was thus set forth with *preclusive* effect in their FPS, providing the best possible record—"something cognate to a trial record"—for summary judgment consideration. (Pet. App. 270a; 294a & n.56).

Petitioners filed summary judgment motions on the ground that respondents had not adduced sufficient proof of the alleged "low price" export conspiracy to raise a genuine issue of material fact for trial. With respondents' exhaustive FPS before it, and following seven days of argument and the submission of thousands of pages of briefs by each side, the district court addressed these motions. (Pet. App. 244a-245a & n.2). Since "[i]t [was] plain (and essentially conceded by [respondents]) that their case [was] a circumstantial one" (Pet. App. 259a-260a), the district court applied this Court's controlling standard for determining whether an antitrust conspiracy may permissibly be inferred. *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). Under that standard, the district court held that "if the inferences of rational independent choice and concerted action are equally drawable, the proof is insufficient." (Pet. App. 353a-354a).

Although respondents had attempted to portray a "unitary" conspiracy consisting of agreements to restrain competition in both Japan and in the United States, the district court recognized that the only *actionable* restraint alleged was the purported agreement to fix "low," predatory export prices to the United States. Thus, the determinative question on summary judgment was whether respondents had come forward with "any significant probative evidence that the [petitioners] entered into an agreement or acted in concert with respect to exports to the United States in any manner which could in any way have injured [respondents]." (Pet. App. 244a).

After an "intensive examination of the enormous record in this case" (Pet. App. 244a), the district court concluded that the evidence did not lead to a permissible inference of, or indeed suggest in any way, the alleged "low price" export conspiracy.[4] To the contrary, as set forth below, the district court found respondents' evidence to be fundamentally inconsistent with such a predatory scheme.

First, from a review of "the entire record," whether deemed admissible or not (Pet. App. 422a), the district court determined that there was no evidence (other than the Japanese Government-compelled export control arrangements discussed below) "which refers or relates to the setting or coordination of export prices, the exchange of export price information relative to the claimed conspiracy, the impermissible dissemination of other export-related economic data, or any other aspect of the

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[4] The district court's conclusion that there was no evidence from which a fact finder might find or infer this alleged conspiracy was *not* dependent upon its opinions concerning the admissibility of respondents' evidence. Instead, the district court reached its summary judgment decision only after it either assumed the admissibility of respondents' proffered evidence or assumed the key factual propositions which respondents were attempting to prove from that evidence. (Pet. App. 418a; 436a, n.167; 438a, n.168; 442a-443a; 447a; 453a; 456a, n.188; 473a-474a; 483a; 488a-489a & n.211; 496a & n.221; 523a-524a; 605a-608a).

'export' component of the 'unitary' conspiracy claimed by [respondents]." (Pet. App. 421a-422a).

Second, the district court concluded that petitioners' participation in the Japanese Government-compelled export control arrangements (*i.e.*, the "check prices" and "five-company rule") provided no probative support for the "low price" conspiracy alleged, and was actually contrary thereto. (Pet. App. 378a-385a).[5] Since these arrangements set only *minimum* export prices and a *maximum* number of direct export customers, the district court concluded that these arrangements would have naturally tended to *raise* export prices, and thus could not constitute evidence of a conspiracy to *lower* them. Further, the district court pointed out that respondents' own evidence demonstrated that the "five-company rule" did not have the effect of allocating U.S. customers among the petitioners. (Pet. App. 383a-385a).

Third, as to purported "secret rebating" by petitioners to various mass merchants (Pet. App. 264a-265a; 485a), the district court concluded that such alleged rebating would sound "more in competition than in antitrust conspiracy." (Pet. App. 496a). The district court pointed out that: (i) the methods and amounts of the alleged rebating varied greatly among petitioners (Pet. App. 490a); (ii) there was no evidence that the petitioners discussed their alleged rebating with each other and, indeed, the evidence indicated that each petitioner tried to keep it secret from the others (Pet. App. 495a-496a); and (iii) there was "widespread evidence" of efforts by U.S. customers "to 'whipsaw' or induce [petitioners], competing

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[5] Because of this ruling, and because respondents as competing manufacturers lacked standing to complain of any increase in export prices that might have been caused by the export control arrangements, the district court found it unnecessary to reach the sovereign compulsion and act of state issues discussed at pp. 36-46, *infra*. It did, however, note its receipt of an official pronouncement of the Government of Japan (Pet. App. 6a-14a) attesting that petitioners' participation in such export controls was *compelled* as an integral part of Japan's foreign trade policy. (Pet. App. 387a-390a).

among themselves, to give better discounts, rebates, allowances, etc. in order to get the business." (Pet. App. 502a).

Fourth, although it recognized that the record showed that petitioners' prices for television receivers in the United States ranged "from the lowest to the highest" (Pet. App. 476a, n.202), the district court nevertheless assumed for purposes of its analysis that respondents could somehow establish that petitioners engaged in the "parallel" act of charging "low prices" in the United States "necessary to get the sale," and that those prices were lower than those charged by petitioners for comparable products in Japan. (Pet. App. 476a). The district court concluded that such "parallel" "low prices" would have been far more consistent with vigorous competition than with any inference of conspiracy. (Pet. App. 478a-479a). Specifically, it observed that "[a] parallel price reduction ordinarily reflects a series of market-compelled individual responses, not agreement" (Pet. App. 478a), and that "companies do not need to conspire to sell at prices 'necessary to get the sale,' " because that is precisely the individual motivation and result one would expect from free and unfettered competition *without any agreement.* (Pet. App. 479a). Moreover, the district court concluded that the evidence purporting to show "sales at losses" was also consistent with the individual interests of petitioners, who were seeking to become established in a new market, and thus was indicative of nothing but "legitimate independent competitive activity." (Pet. App. 482a-483a).

Fifth, the district court found no evidence to support an inference that petitioners had fixed high prices or secured high profits in the Japanese domestic market in order to create a "war-chest" to subsidize "low," predatory export prices to the United States. (Pet. App. 420a-421a). Instead, it found that there was, at most, some evidence of a limited effort to stabilize rapidly declining prices and "plummeting profits" in the Japanese domestic market for a two-year recessionary period during

1964-1966. (Pet. App. 412a-421a). Further, the court expressly found that there was no evidence of any "connection" between such price stabilization efforts in the Japanese domestic market and petitioners' exports to the United States. (Pet. App. 421a-463a).

Finally, the district court found that the alleged predatory export conspiracy made no economic sense. (Pet. App. 483a-484a). The court concluded that, in the face of a United States television market without high barriers to entry, and with competition from Europe, the Far East and the United States (including from such dominant, entrenched competitors as Zenith and RCA), it would have been irrational for petitioners to have conspired to charge predatory export prices when there was no hope that they could ever have acquired and maintained the monopoly power necessary to recoup the "losses" which they would have incurred from such a scheme. (Pet. App. 484a; 611a).

Applying the *Cities Service* conspiracy inference standard, the district court held that there was no basis for a fact finder to conclude that petitioners' pricing activities in the United States were more consistent with the alleged conspiracy than with independent action. Accordingly, it granted summary judgment in favor of petitioners on respondents' antitrust claims. As summarized by the district court:

> "[D]espite years of discovery, the [respondents] have failed to uncover any significant probative evidence that the [petitioners] entered into an agreement or acted in concert with respect to exports to the United States in any manner which could in any way have injured the [respondents]." (Pet. App. 244a).[6]

This same conclusion had been independently reached by the Antitrust Division of the Department of Justice,

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[6] The district court also granted summary judgment dismissing respondents' claims under the 1916 Antidumping Act. (Pet. App. 1111a-1214a; 632a, n.372).

which, at respondents' request, had spent six months reviewing respondents' "best evidence," including approximately 35,000 pages of documents, only to find that there was "no evidence of concerted predatory conduct [by petitioners] intended to destroy and supplant the U.S. color TV industry, either at an earlier period or at the present time." [7]

C. The Court Of Appeals Proceedings

The court of appeals agreed with the district court that the only actionable conspiracy alleged was the purported agreement to fix "low," predatory export prices and that such an agreement would have to be proven by *inference* from petitioners' export pricing activities and other circumstantial evidence. (Pet. App. 165a-166a). The court of appeals also relied upon the same factual predicates as the district court in determining whether an inference of such a conspiracy was permissible. Nevertheless, the court of appeals reached a different conclusion as to the permissible inferences that could be drawn from those facts and reversed the grant of summary judgment in favor of petitioners. (Pet. App. 163a-197a).[8]

The court of appeals premised its decision upon a newly created exception to the *Cities Service* conspiracy inference standard.[9] In particular, the court of appeals held that the normal "limitations of the inference drawing process" do not apply to this case because it:

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[7] Statement by John H. Shenefield, Assistant Attorney General, Antitrust Division, before the Senate Judiciary Committee, 3-4 (April 12, 1978). (Pet. App. 21a-24a, at 23a).

[8] Most of the court of appeals' lengthy opinion (Pet. App. 64a-162a) related to evidentiary matters immaterial to the questions presented here. See p. 6 n.4, *supra*.

[9] Although the court of appeals did not cite *Cities Service* by name, it expressly declined to follow the line of Third Circuit authority which has applied the *Cities Service* standard. (Pet. App. 164a).

> "presents a record in which there is both direct evidence of certain kinds of concert of action [*i.e.*, alleged price stabilization in Japan and the Japanese Government-mandated export controls] and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred. Thus none of [the decisions applying the *Cities Service* inference standard] can be dispositive on the propriety of summary judgment in this case." (Pet. App. 165a).

On the basis of this new exception, the court of appeals held that the alleged "low price" export conspiracy could be inferred. The court did not reject (or even review) the express findings of the district court that this alleged conspiracy was so economically implausible that petitioners would not have had any rational motive to enter into it and that petitioners' alleged export pricing activities would have been more consistent with independent action and competition than with conspiracy.

The court of appeals also rejected petitioners' argument that, under the sovereign compulsion and act of state doctrines, the export control arrangements could not support respondents' claims. (Pet. App. 188a-189a). In doing so, it disregarded an official pronouncement of the Japanese Government (the "1975 Japanese Government Statement," Pet. App. 6a-14a), which established that petitioners' participation in those arrangements was compelled by the Government of Japan acting within its sovereignty. While "assum[ing], without deciding, that a government mandated export cartel arrangement . . . would be outside the ambit of section 1 of the Sherman Act" (Pet. App. 188a), the court of appeals held, without mentioning the 1975 Japanese Government Statement, that: (i) "it cannot be said with any degree of certainty that the [check prices] . . . were in fact determined by the Japanese Government"; and (ii) "there is no record evidence suggesting that the five-company

rule originated with the Japanese Government." (Pet. App. 188a-189a). Accordingly, the court of appeals held that a fact finder could treat petitioners' participation in those export control arrangements as a central "feature" of the alleged conspiracy in violation of U.S. law. (Pet. App. 166a-168a; 177a-179a; 188a-189a).

Finally, in a separate opinion, the court of appeals reversed the district court's dismissal of respondents' claims under the 1916 Antidumping Act. First, it held that the district court misapplied the standard of product comparability under the 1916 Act (Pet. App. 213a-214a)—a holding not challenged by the petition. Second, as to the showing of specific predatory intent required by the 1916 Act, the court of appeals based its determination that there was sufficient evidence to create a genuine issue of material fact upon the identical inference of a predatory export conspiracy which it found to be permissible in its antitrust decision (Pet. App. 218a-223a)—a holding directly challenged by the petition.

SUMMARY OF ARGUMENT

1. *The court of appeals applied an erroneous standard for permitting an inference of conspiracy.* In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), this Court held that an antitrust conspiracy may not be inferred from "parallel" acts and other circumstantial evidence unless the defendants' conduct is shown to be more consistent with an inference of the alleged conspiracy than with an inference of independent action—*i.e.*, unless the evidence shows: (i) a rational motive by defendants to enter into the alleged conspiracy; and (ii) conduct against the independent economic self-interest of each of the defendants. The court of appeals disregarded the district court's finding that the *Cities Service* inference standard had not been met in this case. Instead, it carved out an exception to the *Cities Service* standard and held that it should not be applied because

respondents' mix of circumstantial evidence included "direct evidence of certain kinds of concert of action" (although not of the "low price" export conspiracy held to be actionable).

The court of appeals' exception to the *Cities Service* standard is unwarranted and dangerous. That standard is a necessary safeguard against speculative inference drawing in antitrust conspiracy cases, and there is no basis for departing from it in any case in which the actionable conspiracy alleged can only be established by *inference*. Direct evidence of non-actionable forms of concert of action in no way eliminates the danger that an inference of the actionable conspiracy alleged will be based upon speculation. Nor does the mere allegation of a two-part "unitary conspiracy" to raise domestic prices and to lower export prices remove the necessity of inquiring whether direct evidence of the former warrants a nonspeculative inference of the latter.

Departing from the *Cities Service* inference standard is especially unwise in a "low price" conspiracy case such as this. "Low pricing" is the paradigm of the vigorous competition that is the primary goal of the antitrust laws. Protecting such behavior from being penalized or deterred is one of the basic objectives of this Court's conspiracy inference standards. *See Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S. Ct. 1464, 1470 (1984). As the Solicitor General has emphasized, rather than presenting an appropriate case for relaxing the *Cities Service* safeguards, respondents' attempt to infer an antitrust conspiracy from such pro-competitive behavior as the charging of "low" export prices by new entrants significantly heightens the need to apply the *Cities Service* standard "in order to avoid imposing penalties on independent unilateral conduct that has the effect of reducing prices, increasing competition and thereby directly benefitting consumers." (U.S. Gov. Cert. Br. 8-9).

2. *Applying the Cities Service inference standard to the factual predicates assumed by both the district court and the court of appeals, summary judgment was clearly warranted.* First, there could have been no rational motive for the alleged predatory conspiracy to destroy competition and monopolize the U.S. market because such a conspiracy would have made no economic sense. Unlike high price conspiracies, which confer immediate benefits on the participants, a low price conspiracy would impose immediate and continuing costs which could only be recovered in the event that collective monopoly power could be acquired and sustained. As the district court concluded, and the court of appeals did not dispute, petitioners, as new entrants, could not rationally have expected to obtain and maintain monopoly power in a market characterized by the absence of barriers to entry, the presence of strong domestic competitors such as Zenith and RCA, increasing competition from European and other Far Eastern companies, and political and legislative barriers to monopolization of United States markets by imports.

Second, none of the factual predicates relied upon by the court of appeals shows conduct against the independent economic self-interest of any petitioner or any other basis for a nonspeculative inference of the alleged export conspiracy. Petitioners' alleged export pricing activities—secret rebating, charging "low prices," and incurring initial losses—are characteristic features of individual pro-competitive conduct by companies seeking to establish themselves in a market. And it would be sheer speculation to infer from an alleged agreement to stabilize prices in Japan that the parties also agreed to engage in a "low price" conspiracy to monopolize the United States market.

Under *Cities Service*, these two failings provide independent grounds for granting summary judgment against respondents' antitrust conspiracy claims. Respondents'

attempt to have a fact finder infer that normal competitive conduct by new entrants was really the product of a hopeless and irrational predatory export scheme presents precisely the type of situation in which it is most important to apply the *Cities Service* safeguards.

3. *The court of appeals erred in relying upon export control arrangements compelled by the Japanese Government.* Another ground for reversal is provided by the court of appeals' holding that a fact finder may treat petitioners' participation in the export control arrangements (*i.e.*, the "check prices" and the "five-company rule") as a central "feature" of the alleged antitrust conspiracy. The court of appeals improperly disregarded an official statement of the Government of Japan attesting that petitioners' participation in these export control arrangements was compelled by the Japanese Government acting within its sovereign powers pursuant to established regulatory laws. Such an official declaration by a friendly foreign government attesting to its own laws, actions and policies is entitled to be given conclusive effect by United States courts. *See United States v. Pink*, 315 U.S. 203, 218-21 (1942).

Once the 1975 Japanese Government Statement is given its proper conclusive effect, it is clear that the sovereign compulsion and act of state doctrines prevent a U.S. court from holding petitioners' participation in the export control arrangements to constitute a basis for antitrust liability. As the Solicitor General has attested, and diplomatic notes by the Japanese Government and six other foreign governments have demonstrated, the court of appeals' improper treatment of these arrangements "threatens to do serious damage" to trade relations between the United States and its major trading partners. (U.S. Gov. Cert. Br. 6, 18). The court of appeals' failure to apply the sovereign compulsion and act of state doctrines to prevent this unwarranted judicial disruption of U.S. foreign trade policy provides an independent ground for reversal.

4. *The Antidumping Act claims also fail.* Because the court of appeals premised its finding of a genuine issue of specific predatory intent under the 1916 Antidumping Act upon the same erroneous rulings and inference of conspiracy which it relied upon in its antitrust decision, reversal of the court of appeals' 1916 Act judgment is also required.

5. *Principles of sound judicial administration warrant reinstatement of summary judgment by this Court.* The district court and the court of appeals did not disagree as to the factual predicates of this case, but disagreed only as to the permissible inferences which could be drawn from those facts and the legal standards to be applied in drawing such inferences. Accordingly, once this Court rules on the correct legal standards to be applied, it can determine from the opinions below that summary judgment should be reinstated. *See Kleppe v. Sierra Club*, 427 U.S. 390, 414-15 (1976).

Reinstatement would forcefully demonstrate: (i) to the lower courts, that appropriate safeguards against inferring an antitrust conspiracy from speculation must be applied and that summary judgment continues to be an important tool for managing large and complicated antitrust conspiracy cases; (ii) to other competitors, that they may not misuse United States courts and the antitrust laws to suppress import competition; and (iii) to United States trading partners, that cooperation with our Government in establishing export control arrangements will not expose their nationals to the burden of endless judicial proceedings. After almost fifteen years of litigation, this Court should reaffirm the availability of summary judgment in appropriate antitrust conspiracy cases by bringing this case to an end.

ARGUMENT

I. SUMMARY JUDGMENT FOR PETITIONERS WAS APPROPRIATE UNDER THIS COURT'S ANTITRUST CONSPIRACY INFERENCE STANDARD

A. The Court Of Appeals Erred By Failing To Apply The *Cities Service* Conspiracy Inference Standard

1. *An Antitrust Conspiracy Cannot Be Inferred in the Absence of a Rational Motive to Conspire and Conduct Against Independent Economic Self-Interest*

In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), this Court established a fundamental safeguard against meritless antitrust conspiracy claims by holding that a fact finder may not infer an antitrust conspiracy from parallel acts and other circumstantial evidence unless the plaintiff can demonstrate that the challenged conduct is more consistent with an inference of the alleged conspiracy than with an inference of independent action. The plaintiff in that case had alleged that Cities Service entered into a conspiracy with other oil companies to refuse to deal with the plaintiff in order to prevent it from selling Iranian oil. This Court affirmed summary judgment in favor of Cities Service because a rational motive to enter into the alleged conspiracy could not reasonably be inferred from the facts, *id.* at 286-87, and because Cities Service's refusal to deal, although parallel to the refusals of the other alleged co-conspirators, was consistent with its independent business interests. *Id.* at 278-80. Accordingly, this Court concluded that:

> "the inference that Cities' failure to deal was the product of factors other than conspiracy [was] at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence . . . ." *Id.* at 280.

To satisfy the *Cities Service* inference standard, an antitrust plaintiff must adduce "sufficient evidence from which the jury could conclude, on the basis of reasonable

inferences and *not mere speculation*," that the defendants' activities were "the product of concerted action." *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1312 (3d Cir. 1975) (emphasis added). Two tests must be satisfied: first, there must be a satisfactory demonstration of a rational motivation to enter into the alleged conspiracy; and second, there must be a showing of acts by the alleged co-conspirators which would be contrary to their individual economic self-interests but consistent with the alleged collusion. *See, e.g., Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.12 (D.C. Cir. 1984); *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 884-85 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); *Venzie*, 521 F.2d at 1314. Absent such evidence, an inference of conspiracy "does not logically follow." *Cities Service*, 391 U.S. at 287.

Just last Term, the principle that a fact finder may not infer an antitrust conspiracy from marketplace behavior without sufficient evidence to render the requested inference of collusion more compelling than independent action was affirmed by this Court, in the context of a vertical conspiracy claim, in *Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S. Ct. 1464 (1984). In that case, the Court explained that permitting such an inference, in the absence of evidence "that tends to exclude the possibility of independent action," could penalize and deter "perfectly legitimate conduct." *Id.* at 1470-73.

2. *The Court of Appeals' Exception to the Cities Service Standard is Contrary to Law, Dangerous to Competition Policy and a Threat to Sound Judicial Administration*

Although the court of appeals recognized that the alleged "low price" export conspiracy could only be found by *inference* (Pet. App. 165a-166a; 179a), it refused to apply the *Cities Service* standard because respondents' mix of circumstantial evidence consisted of "both direct

evidence of certain kinds of concert of action" (although not of the actionable conspiracy alleged) and "circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." (Pet. App. 165a). In such a case, the court of appeals held, the normal "limitations of the inference-drawing process" (*i.e.*, the *Cities Service* safeguards against speculative inferences of conspiracy) do not apply. (Pet. App. 165a).

The court of appeals' failure to apply *Cities Service* is contrary to both logic and law. The issue in this case is whether there is a rational basis for inferring that petitioners violated the U.S. antitrust laws by participating in a conspiracy to charge "low," predatory export prices. "Direct evidence" that petitioners engaged in *other* kinds of concert of action would not obviate the need to determine whether a *non-speculative* inference could be drawn that petitioners participated in the *actionable* conspiracy alleged.

The other kinds of concert of action alleged in this case—agreements concerning price stabilization in Japan, establishment of "check prices" (*i.e.*, minimum prices) and the "five-company rule" for exports to the United States —"did not have any necessary tendency to prove the alleged agreement to charge low, predatory prices in the United States, which the court of appeals found that respondents were required to prove in order to establish antitrust injury." (U.S. Gov. Cert. Br. 10). In fact, as discussed below (pp. 31-35, *infra*), those other kinds of concert of action were either inconsistent with or irrelevant to the "low price" export conspiracy alleged. They clearly did "not obviate the need for the central inquiry required by *Cities Service*." (U.S. Gov. Cert. Br. 10).[10]

[10] The absence of any "direct evidence" of the alleged "low price" export conspiracy is further demonstrated by the court of appeals' affirmance of summary judgment in favor of the Sony defendants. The court of appeals held that the very same categories of "direct evidence of certain kinds of concert of action" that it found applicable to petitioners (*i.e.*, alleged price stabilization in Japan

Nor is there any merit to respondents' attempt to distinguish *Cities Service* and its progeny on the ground that those cases did not involve any "direct evidence." (Opp. Br. 15-17). Direct evidence of certain kinds of concert of action—*but not of the conspiracy alleged*—was also present in *Cities Service* and many of the lower court cases applying its inference standard. For example, in *Cities Service* itself, this Court affirmed summary judgment on a record containing a mix of not only "parallel" acts, but also of "other evidence" which, in the court of appeals' lexicon, could be classified as "direct evidence of certain kinds of concert of action" (*e.g.*, an agreement between Cities Service and one of its alleged co-conspirators relating to Kuwait oil, proof of negotiations between Cities Service and other alleged co-conspirators to join an oil consortium, etc.). 391 U.S. at 263-64, 276-77, 280-81, 283-84.[11]

The error in the court of appeals' conspiracy inference analysis was made strikingly clear by this Court's recent decision in *Monsanto*. In that case, this Court considered

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and Japanese Government-compelled export control arrangements) were also applicable to the Sony defendants (Pet. App. 183a-184a), but nevertheless affirmed summary judgment in their favor—a result which would not have been possible had the "direct evidence of certain kinds of concert of action" constituted "direct evidence" of the actionable "low price" export conspiracy alleged. (Pet. App. 185a).

[11] *See also Weit v. Continental Illinois Nat'l Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (affirming summary judgment despite proof not only of parallel interest rates, but also of opportunities to conspire, periodic discussions of rates, and an agreement among the alleged conspirators establishing a compatible credit card system, where collusion was not the "compelling . . . rational inference"); *Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 334 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982) (affirming summary judgment where, despite claims of "direct evidence" of collusion, including meetings and communications among the defendants, the challenged parallel acts were found to be "in the economic self-interest of each of the individual [defendants]").

a distributor's antitrust claim that it had been terminated pursuant to a two-pronged conspiracy to: (1) maintain resale prices; and (2) terminate non-complying distributors. Notwithstanding "substantial *direct* evidence" of the first prong of the alleged conspiracy (which would not, in and of itself, have been actionable by the terminated plaintiff), this Court ruled that an inference of the actionable second prong of the alleged scheme could only be drawn on the basis of evidence that "tends to exclude the possibility of independent action." 104 S. Ct. at 1471, 1473. Similarly, in the present case, "direct evidence" of certain non-actionable portions of the alleged conspiracy does not dispense with the need to apply this Court's antitrust conspiracy inference standards to the only actionable restraint alleged—*i.e.*, the purported agreement to fix "low," predatory export prices on sales to the United States.

Rather than providing a basis for relaxing this Court's safeguards against speculative inferences of conspiracy, respondents' "low price" conspiracy claims present the quintessential case for application of the *Cities Service* standard. The antitrust conspiracy inference standards of this Court are grounded in the concern that the Congressional policy of promoting competition and consumer interests may suffer a grievous blow if normal competitive activities are mischaracterized as conspiratorial. *See Monsanto*, 104 S. Ct. at 1470-71. This danger is particularly great in the present case, in which respondents seek to have the alleged conspiracy inferred from such pro-competitive behavior as the charging of "low prices" and the granting of "secret rebates." The chilling effect of such a "predatory" pricing claim can be severe. As the Second Circuit has cautioned:

> "Predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote." *Northeastern Telephone Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

Dispensing with the *Cities Service* standard and "inadvertently condemning" aggressive competition would encourage the filing of vexatious lawsuits by protectionist-minded competitors seeking to insulate themselves from foreign competition. The likely result will be to "discourage foreign companies from engaging in vigorous price competition in the United States." (U.S. Gov. Cert. Br. 6, 13).[12]

Finally, rejection of the court of appeals' exception to the *Cities Service* standard is necessary to preserve summary judgment as a meaningful tool in appropriate antitrust conspiracy cases. (U.S. Gov. Cert. Br. 6).[13] As this Court explained in *Cities Service*:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." 391 U.S. at 290.

Without an appropriate standard for summary judgment, the burdens and risks of prolonged antitrust lawsuits would all too frequently induce windfall settlements of even baseless claims. Moreover, summary judgment is necessary to prevent unwarranted antitrust trials—such as this one estimated to take a year to complete (Pet.

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[12] *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (Courts must "be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition."); *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979) ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition.").

[13] *Cf.* Statement of the American College of Trial Lawyers, 90 F.R.D. 207, 226-31 (1981); Report of the National Commission for Review of Antitrust Law and Procedures, 80 F.R.D. 509, 565-67 (1979); Rogers, *Summary Judgments in Antitrust Conspiracy Litigation*, 10 Loy. U. Chi. L.J. 667, 689 (1979); 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 316 (1978).

App. 666a)—which would impose an onerous burden on the already strained federal courts. *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) ("[Antitrust litigation] need not result in administrative chaos . . . or 'windfall' settlements if the district courts exercise sound discretion and use the tools available.").[14] Indeed, "the very nature of antitrust litigation would encourage summary disposition of such cases when permissible. . . . The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way." *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).[15] Expansive exceptions to the *Cities Service* inference standard, such as that created by the court of appeals, would substantially curtail the availability of summary judgment to dispose of baseless antitrust conspiracy claims prior trial.

In sum, because the court of appeals failed to apply the correct legal standard, its judgments should be reversed.

B. Application Of The *Cities Service* Conspiracy Inference Standard Demonstrates That Summary Judgment Was Appropriate

Respondents' conspiracy claims cannot survive scrutiny under *Cities Service* for two reasons. First, the undisputed facts show that the alleged "low price," predatory export conspiracy would have been so economically implausible that petitioners would not have had any rational motive to enter into it. Second, respondents have

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[14] *See also Weit*, 641 F.2d at 464; *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 668-69 (D.C. Cir. 1977); *Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102, 109-10 (2d Cir. 1975).

[15] *See also Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service*, 701 F.2d 1276, 1281 (9th Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 88 (1983) ("[A]ntitrust litigation, if made immune from summary judgment, could become an anticompetitive activity itself.").

failed to show conduct against any petitioner's independent economic self-interest or any other evidence suggestive of the actionable export conspiracy alleged.

1. *There Could Be No Rational Motive for the Economically Illogical Conspiracy Alleged*

As pointed out by the Solicitor General, "the court of appeals' failure to apply the *Cities Service* standard" to this case "led it to disregard the economic logic of respondents' allegations." (U.S. Gov. Cert. Br. 11). This failure was fatal to the court of appeals' decision because petitioners would not have had any rational motive to enter into the economically illogical conspiracy alleged. *See Cities Service*, 391 U.S. at 287.[16]

Putative "predatory" pricing schemes, unlike price-elevating schemes (which confer direct and immediate benefits upon sellers), impose substantial costs upon sellers, provide few incentives and thus are rarely likely to exist. For such predatory schemes to make sense, it is essential that the predators have some reasonable expectation that they can recoup their losses by driving their competitors out of business, achieving and sustaining a monopoly, and collecting "supranormal returns" in the "not-too-distant future." *Northeastern Telephone*, 651 F.2d at 88-89. Such economic circumstances are exceedingly rare. *Id.*[17]

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[16] It was because a rational motive to enter into the conspiracy alleged was present in both *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) and in *Poller v. CBS, Inc.*, 368 U.S. 464 (1962), but not in *Cities Service*, that a permissible inference of conspiracy was found in the former cases, but not in the latter. 391 U.S. at 284-87.

[17] Courts and commentators have consistently recognized that predatory pricing, *even by a single firm with a leading market position*, let alone by a group of new entrants with no market power, is extremely rare. *See, e.g., Northeastern Telephone*, 651 F.2d at 88 ("There is considerable evidence, derived from historical sources . . . that predation is rare. . . . Indeed, nowhere

In the present case, as found by the district court (and not questioned by the court of appeals), there was "no evidence" that petitioners "ever raised their prices to recoup their [alleged] losses, or earned monopoly profits," even after the conspiracy had allegedly been in effect for some twenty years. (Pet. App. 484a). Indeed, "the notion that this might happen made no sense" because the undisputed facts demonstrated that:

> "the defendants, as new entrants with relatively small market shares, could not rationally have hoped to recoup sustained losses in the United States in view of both the dominant market positions already held by RCA and Zenith (maintained, according to the record, to this day) and the ability of European manufacturers, other Far East companies, and major American firms swiftly to increase their United States CEP sales if higher 'monopoly' prices were ever charged. We also note in this regard that there is no evidence of high entry costs or barriers in the U.S. CEP manufacturing and distribution industry." (Pet. App. 484a).

A predatory export conspiracy dependent upon recoupment of losses would have been an especially futile endeavor for foreign competitors, like petitioners, who could not have hoped to achieve, much less maintain, a monopoly in the U.S. television market in light of the political and legislative restraints and other barriers to imports that have been and can so readily be erected. Moreover, the economic impossibility of successful monopolization and recoupment has been underscored by the

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in the recent outpouring of literature on the subject do commentators suggest that such pricing is either common or likely to increase."); R. Bork, *The Antitrust Paradox* 148-54 (1978) ("A firm contemplating predatory price warfare will perceive a series of obstacles that make the prospect of such a campaign exceedingly unattractive. . . . [P]redation by such techniques is very improbable."); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 711b (1978) ("The prospects of an adequate future payoff . . . will seldom be sufficient to motivate predation.").

conclusion of the court of appeals that Sony, the most successful of the Japanese television manufacturers in the United States market, could not be found to have participated in the alleged conspiracy. (Pet. App. 183a-185a). Sony's non-participation would have presented yet another insuperable obstacle to any predatory scheme.

The irrationality of any recoupment plan by petitioners was recently summarized by then Professor (now Circuit Judge) Frank H. Easterbrook as follows:

> "If the Japanese firms drive some United States firms out of business, they could not recoup. Fifteen years of [alleged] losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the [petitioners] should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from other foreign firms (Korea and many other nations make TV sets), and from [petitioners] themselves. . . . The predation-recoupment story therefore does not make sense . . . ." F. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 27 (1984).

Finally, the implausibility of the alleged conspiracy is also demonstrated by respondents' failure to show any "administrative mechanism capable of effectively managing or policing the alleged joint strategy or of a means to share profits or recoup losses." (Pet. App. 483a). As the district court found, it would have made no sense for companies like Sanyo and Sharp (with comparatively large shares of the Japanese television exports to the United States and relatively small shares of the Japanese domestic television market) to have:

> "agreed to enter into a 'conspiracy' in which they were to incur sustained losses in the United States, while their coconspirators with proportionately fewer

> U.S. exports were receiving the greatest share of the 'high price' market in Japan, . . . at least in the absence of evidence of reciprocal arrangements." (Pet. App. 616a).

Respondents' experts agreed that the alleged conspiracy "would have included as one of its key elements" a mechanism to share profits and losses. (Pet. App. 483a). But respondents have not even described, much less produced evidence to show, any such sharing mechanism. (Pet. App. 483a).

Under these circumstances, petitioners would not have had a rational motive to enter into the economically illogical conspiracy alleged. Hence, under *Cities Service*, summary judgment was warranted on this ground alone.

2. *Respondents' Evidence Does Not Show Conduct Against Independent Economic Self-Interest or Provide Any Other Support for the Alleged "Low Price" Export Conspiracy*

Respondents' conspiracy claims fail, as a matter of law, for the additional independent reason that there is no evidence of conduct against the independent economic self-interest of any petitioner. Respondents pointed to a collection of circumstantial "features" from which it is claimed the alleged "low price" export conspiracy can be inferred. An analysis of these features shows that neither singly nor collectively do they satisfy the *Cities Service* standard or provide any other support for the conspiracy alleged.

(a) *Petitioners' export pricing was consistent with independent economic self-interest and vigorous competition.* Although the undisputed record shows that petitioners sold their television receivers in the United States at "prices ranging from the lowest to the highest" (Pet. App. 476a, n.202),[18] respondents assert that petitioners

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[18] For example, a comparison of the lowest manufacturers' suggested list prices for various color television screen sizes sold in the U.S. during the five year period from 1973 to 1977 (taken from an industry trade publication, *Television Digest*), evidences both

were engaged in the purportedly "parallel" act of charging "low prices" in the United States and that this "parallel" behavior was suggestive of conspiracy. The contrary inference, however, is the only permissible one, since such behavior would have been far more probative of competition than collusion.

The charging of such "low prices" plainly would have been in each petitioner's independent economic self-interest. (U.S. Gov. Cert. Br. 10-11). The court of appeals failed to recognize the fundamental difference between parallel *high* prices and parallel *low* prices. While, in the absence of alternative explanations, a conspiracy might be suspected if a substantial number of competitors reacted to a price increase with matching price increases of their own, the parallel charging of "low" prices is simply "what a reasonable seller is likely to do to avoid a loss in sales." (Pet. App. 478a). As the district court explained, such "low" pricing "ordinarily reflects a series of market-compelled individual responses, not agreement"; and, under *Cities Service*, it provides no basis for inferring anything but independent action. (Pet. App. 478a).

Respondents do not even attempt to claim that petitioners agreed upon any particular "low" price level in the United States. (Pet. App. 475a-476a & n.202). Rather, respondents have alleged that petitioners conspired to sell in the United States at whatever "low prices" were "necessary to get the business." (Pet. App. 301a; 478a-479a & n.204). As explained by the district court, it is not rational to infer collusion from such competitive pricing behavior:

> "[C]ompanies do not need to conspire to sell at prices 'necessary to get the sale.' Indeed, when competitors make their investment, marketing, and pricing decisions, they necessarily assume that the

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the wide disparity in pricing among the petitioners, and the fact that, in most instances, one or more of the petitioners had *higher* suggested list prices than even those of Zenith. (Rec. 16338a-16343a, vol. 35).

> competition 'will price to get the business.' While the result of such practices may be a depression of prices in the market, it is the kind of price depressing effect which flows from normal competitive pricing behavior and is precisely that which the Sherman Act is intended to secure, not condemn." (Pet. App. 479a).

The same principles apply to respondents' claim that petitioners charged lower prices in the U.S. than they did in Japan and that this was also "parallel" conduct suggestive of conspiracy. As pointed out by the district court, the charging of *different* prices in *different* markets on opposite sides of the world—each market having different supply, demand and other economic conditions—is precisely the result one would expect from competition, not conspiracy. (Pet. App. 480a). Indeed, since "[i]t is undisputed that the Japanese [petitioners were] well-established in Japan" at the same time that they "were new entrants in the U.S. market, with unknown brand names and with no goodwill or business reputations in the United States," they "could be expected *unilaterally* to adopt similar [low] pricing strategies to attract customers and gain consumer acceptance in this country." (Pet. App. 479a).

Nor can any support for respondents' conspiracy claims be derived from the expert study cited by the court of appeals as showing that petitioners' export sales "generally were at prices which produced losses." (Pet. App. 179a). That study only purports to show that, during the 1967 to 1970 period, four of the petitioners exported certain of their television receivers to the United States at prices below an undefined measure of their costs. (Pet. App. 114a; Rec. 1883a-1903a, vol. 5).[19] Such alleged "losses" by foreign companies seeking to break into and become

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[19] Two of the six Japanese manufacturer petitioners (Toshiba and Sharp) were not subjects of the study at all; as to a third (Sanyo), there was no data for color television sales; while as to a fourth (Hitachi), the only color television data related to a single screen size in a single year. (Rec. 1901a, vol. 5).

established in the U.S. television market would not "indicate anything other than legitimate independent competitive activity." (Pet. App. 483a). As the district court explained:

> "[T]he mere fact that some of the [petitioners] lost money in the initial years of their entry into the U.S. market, or that they lost money on particular transactions, does not meet [the *Cities Service*] test. A company's long-range independent economic interests may require it to operate at a loss for several years in order to become established in a new market." (Pet. App. 482a).

Moreover, as previously discussed (pp. 24-27, *supra*), sales at "losses" by petitioners could never support a rational inference of the predatory export conspiracy alleged in light of the undisputed facts which demonstrate that petitioners could not have had any hope of recouping such losses by acquiring and maintaining monopoly power.

There is also no merit to respondents' contention that the alleged granting of secret rebates to United States customers is evidence of conduct against independent economic self-interest. Secret price concessions have been recognized by this Court as an important means of price competition. *See, e.g., Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 457 (1978). As the district court explained, the granting of such hidden discounts or rebates by petitioners would have constituted "unilateral conduct which was . . . rational, independent, and pro-competitive." (Pet. App. 500a). By establishing *minimum* export prices, the Japanese Government-compelled export controls clearly hampered each petitioner's ability to compete for sales in this country. It would have been entirely consistent with each petitioner's independent economic self-interest secretly to have granted whatever rebates below those minimums were necessary to

meet the demands of its U.S. customers. (Pet. App. 501a-502a).[20]

The court of appeals' conclusion that a fact finder could determine "that at least some of the [petitioner] manufacturers knew that others were engaged in rebating" (Pet. App. 179a) cannot transform this unilateral and pro-competitive behavior into proof of conspiracy. There is no evidence that "knowledge" of alleged rebating by others "was gained through communications between or among the [petitioners]." (Pet. App. 502a). Further, as the district court pointed out:

> "It is commonplace for competitors to learn from customers or potential customers about 'deals' being offered by other manufacturers. This is precisely how customers induce price competition between one manufacturer and another. . . . [T]here is widespread evidence . . . that this was being done by the American purchasers of Japanese CEP's in an effort to 'whipsaw' or induce [petitioners], competing among themselves, to give better discounts, rebates, allowances, etc. in order to get the business." (Pet. App. 502a).

In sum, respondents' evidence shows that the alleged "low pricing" activities in the United States would have been entirely consistent with each petitioner's independent economic self-interest and with vigorous competition.

(b) *The other evidence relied upon by the court of appeals does not provide any support for the alleged "low price" export conspiracy.* The remainder of the evidence relied upon by the court of appeals related to: (i) alleged price stabilization in the Japanese domestic market (Pet.

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[20] *Cf. United States v. Citizens & Southern National Bank*, 422 U.S. 86, 118-20 (1975); *Knuth v. Erie-Crawford Dairy Cooperative Ass'n*, 463 F.2d 470, 475-76 (3d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973) (conduct designed to circumvent government-imposed restraints of trade is pro-competitive and thus cannot give rise to an antitrust violation).

App. 172a-175a); (ii) economic conditions in the Japanese television manufacturing industry (Pet. App. 170a-172a); and (iii) the Japanese Government-compelled export control arrangements (Pet. App. 177a-180a). That evidence is either irrelevant to or inconsistent with the alleged "low price" export conspiracy and thus cannot satisfy the *Cities Service* standard.

(i) *Alleged price stabilization in Japan.* It is well established that evidence of participation in one agreement cannot be utilized to infer participation in another when there is no independent evidence of any connection between the two agreements.[21] No such "connection" has been, or can be, shown between respondents' purported evidence of alleged "high" price stabilization in the Japanese domestic market and the alleged twenty-year conspiracy to fix "low," predatory export prices to the United States.[22]

As the district court found, none of the documents (whether deemed admissible or not) offered by respondents to establish such a "connection" showed that petitioners' alleged price stabilization activities related to anything other than the Japanese domestic market. (Pet. App. 421a-463a). The court of appeals did not disagree with this finding, but nonetheless held that the existence of a "connection" with the export market could be inferred. (Pet. App. 176a-177a).

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[21] *See, e.g., In re Fine Paper,* 685 F.2d 810, 822 (3d Cir. 1982), *cert. denied,* 459 U.S. 1156 (1983); *Golf City, Inc. v. Wilson Sporting Goods Co.,* 555 F.2d 426, 435 (5th Cir. 1977); *see also Dart Drug Corp. v. Parke, Davis & Co.,* 344 F.2d 173, 186 (D.C. Cir. 1965); *International Shoe Machine Corp. v. United Shoe Machinery Corp.,* 315 F.2d 449, 459 (1st Cir.), *cert. denied,* 375 U.S. 820 (1963).

[22] While the court of appeals held that a fact finder could infer that the alleged home market price stabilization continued for a longer period (Pet. App. 174a-175a), the only direct evidence in the record on the length of these activities is a specific finding by the Japanese Fair Trade Commission that they terminated no later than January, 1967. (Rec. 17841a, vol. 39; Pet. App. 397a, n.127; 407a-412a).

Such an inference makes no sense. Since the alleged price stabilization in the Japanese domestic market would have been economically beneficial to its participants without regard to export sales, it would not suggest the existence of any export conspiracy. Further, although the court of appeals held that a trier of fact could infer that "high" profits allegedly derived by petitioners in Japan would have provided them with the funds to launch a concerted predatory export raid on the United States, the court of appeals failed to explain why there would be any incentive to expend those funds in such a raid. (Pet. App. 175a; 177a). Rational business firms would not throw away money on a losing venture (*i.e.*, selling at predatory prices without any plausible hope of recoupment) merely because those firms had accumulated profits in another market (see discussion at pp. 24-26, *supra*).[23] In addition, as the district court found, respondents have conceded that there is no record evidence to show that petitioners' profits in the Japanese market were "exorbitant" (Pet. App. 413a & n.145; 420a-421a); and what evidence there is suggests that those profits actually *declined* during the relevant period. (Pet. App. 410a-412a.) There is thus no basis upon which even to *speculate* that hypothetical "high" profits earned by petitioners from alleged price stabilization in Japan could have been used to "fund" any type of predatory export scheme.

(ii) *Economic conditions in Japan.* Similarly, there is no merit to the court of appeals' suggestion that the competitive situation of the Japanese television manufacturing industry (*i.e.*, the alleged high fixed costs, excess capacity and "protected" home market) tends to support the alleged "low price" export conspiracy. (Pet. App. 169a-172a; 176a-177a). While such alleged economic conditions might have provided Japanese television manufacturers with an incentive *unilaterally* to export

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[23] *See also Northeastern Telephone*, 651 F.2d at 89; D. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1341-42 (1965).

to the United States at "low prices," there is no explanation in the court of appeals' decision as to why such economic conditions would have induced petitioners to *conspire* to achieve that same objective. Indeed, evidence of such economic circumstances would only underscore the conclusion that "low" export pricing by petitioners, even if "parallel," would have been consistent with independent action.[24]

(iii) *Japanese government export controls.* Finally, petitioners' participation in the Japanese Government-compelled export control arrangements lends no support to an inference of the alleged "low price" conspiracy. Apart from being government-compelled and hence precluded from being held a "feature" of the alleged conspiracy (see Point II, *infra*), those export controls on their face set only *minimum* export prices and *limited* the number of petitioners' direct export customers. (Pet. App. 177a-178a). As the district court found, such export controls would have naturally led to *higher* export prices and thus cannot logically be considered evidence of a "low price" conspiracy. (Pet. App. 324a-329a).

Moreover, the court of appeals' conclusion that the "five-company rule" could have served as an integral "feature" of the alleged "low price" conspiracy by protecting petitioners from competition among themselves in the United States (Pet. App. 179a-180a) is conclusively refuted by respondents' own evidence. As conceded by respondents (Pet. App. 383a-384a), found by the district court (Pet. App. 324a; 382a-385a), and acknowledged by the court of appeals (Pet. App. 180a), the "five-company

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[24] *See Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963) (Because "[l]ike businesses are generally conducted alike" in response to common economic conditions, "similarity in operations lacks probative significance unless present 'under circumstances which logically suggest joint agreement, as distinguished from individual action.'").

rule" did not prevent different petitioners from selling to the same U.S. customers. Respondents' own evidence shows that major mass merchant retailers in the United States (including Sears, J.C. Penney, W.T. Grant, Montgomery Ward and Western Auto) were all supplied by two or more of the petitioners (Pet. App. 383a), and the court of appeals recognized that petitioners Sanyo and Toshiba were both selling to Sears, and that petitioners Sharp and Toshiba were both selling to Motorola. (Pet. App. 181a-182a). In addition, it is undisputed that the "five-company rule" did not limit the number of U.S. customers to whom petitioners' products could be resold, and that most of the petitioners sold to hundreds of other customers in the United States through their American sales subsidiaries who were registered as one of their five direct export customers. (Pet. App. 384a-385a). The court of appeals' unexplained conclusion that these undisputed facts are not "sufficient to exclude as a matter of law" the inference that the "five-company rule" allocated U.S. customers as part of a "low price" conspiracy (Pet. App. 180a) is precisely the type of unsupported speculation barred by *Cities Service*.

* * * *

In sum, because none of respondents' evidence, whether viewed separately or together, demonstrated conduct against independent economic self-interest or any other facts supportive of the alleged "low price" export conspiracy, summary judgment was warranted on this ground as well.[25]

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[25] Both the district court and the court of appeals recognized that respondents' claims under sections 1 and 2 of the Sherman Act, the Wilson Tariff Act, the Robinson-Patman Act and section 7 of the Clayton Act were all premised upon the same conspiracy allegations. (Pet. App. 621a-622a; 642a; 656a-657a; 662a; 190a; 191a; 193a; 195a). Application of the *Cities Service* conspiracy inference standard would thus require dismissal of all of those claims.

II. PETITIONERS' PARTICIPATION IN EXPORT CONTROLS WHICH THE GOVERNMENT OF JAPAN HAS ATTESTED THAT IT COMPELLED CANNOT CONSTITUTE A FEATURE OF AN ANTITRUST VIOLATION

The court of appeals relied upon both the "five-company rule" and the "check price" arrangements as central "features" of the alleged "low price" export conspiracy. (Pet. App. 167a-168a; 177a-179a). The court of appeals' erroneous holding that petitioners' participation in those Japanese Government-compelled export control arrangements could constitute the basis of an antitrust violation is thus another ground for reversing the judgments below.

A. The Official Representations Of The Government Of Japan Should Have Been Given Conclusive Effect

Petitioners relied upon an official statement submitted by the Government of Japan to the district court in 1975 (the "1975 Japanese Government Statement," Pet. App. 6a-14a) to demonstrate that the participation in the export control arrangements challenged by respondents was compelled by the Japanese Government. (Pet. App. 387a-388a). This pronouncement, which was forwarded to the district court by the U.S. Department of State, explained the origin and purpose of those export control arrangements. The 1975 Japanese Government Statement established that:

> 1. The Ministry of International Trade and Industry ("MITI") is the "government organ empowered and responsible for" the formulation and execution of Japanese trade policy, a fundamental purpose of which is to ensure that Japanese exports do not cause "unnecessary disruptions in the national economies of Japan's trading partners." (Pet. App. 8a);
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> 2. In 1962, the Japanese Government recognized the need to apply this "orderly exportation" policy to television exports to the United States "to avoid the

possibility of trade conflicts." Thus, between 1963 and 1973, the Japanese Government, through MITI: "directed Japanese television manufacturers including the present Japanese [petitioners] to enter into an agreement under Article 5-3 of the Export and Import Trading Law with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States . . . . MITI supervised the preparation of such agreements and regulation so that MITI's intention was correctly reflected." (Pet. App. 11a);

3. "[The minimum price] agreements entered into among the Japanese [petitioners], as well as certain regulations of the Japan Machinery Exporters Association [which included the five-company rule] . . . have come into existence pursuant to the direction of MITI." (Pet. App. 8a); and

4. "[T]he Japanese television manufacturers and exporters had no alternative but to establish the agreement[s] and regulation[s] in compliance with the said direction." (Pet. App. 12a). The Japanese Government's direction had a "compulsory power equivalent to law." (Pet. App. 10a). Thus, "[h]ad the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers [under Japanese law] to unilaterally control television sales for export to the United States and carry out its established trade policy." (Pet. App. 11a).

As summarized in a Note Verbale delivered to the U.S. Department of State by the Japanese Government in response to the court of appeals' decision:

"[B]y entering into minimum price agreements with respect to export of television receivers and by adopting the JMEA regulations (including the so-called 'five-company rule,' which, among other things, served to control the quality of exported products), *the Japanese corporations in question were acting*

pursuant to specific mandatory directions of the Government of Japan . . . ."

(Gov. of Japan Merits Br. App. 2a) (emphasis added).[26]

In total disregard of the 1975 Japanese Government Statement, the court of appeals held that a fact finder could conclude that: (i) the export control arrangements had only been sponsored or "encouraged" by the Government of Japan, rather than compelled (Pet. App. 177a-178a); (ii) there is some doubt "that the minimum prices [contained in the manufacturers' agreements and referred to in the JMEA regulations] . . . were in fact determined by the Japanese Government" (Pet. App. 188a-189a); (iii) "the [G]overnment [of Japan] merely provided an umbrella under which [petitioners] . . . fixed their own export prices" (Pet. App. 189a); and (iv) the "five-company rule was the result of nongovernmental action." (Pet. App. 178a).

These holdings were wrong. As the Solicitor General has explained, the court of appeals should have given "dispositive" effect to the "explicit and detailed" statement of the Japanese Government. (U.S. Gov. Cert. Br. 17). The court of appeals' failure to do so is contrary to the long-established rule that an official pronouncement of a foreign sovereign attesting to its governmental activities must be accepted by United States courts as conclusive proof of the representations of governmental actions, laws and policies contained therein.

For example, in *United States v. Pink*, 315 U.S. 203, 218-21 (1942), this Court considered whether nationalization decrees of the Russian Government had extraterritorial effect over property located in the State of New York. The Soviet Commissariat for Justice had issued an official statement explaining that the nationalization decrees

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[26] Over the years, the Japanese Government has directed Japanese manufacturers and exporters to comply with similar agreements and regulations governing the export of a wide variety of products. (Gov. of Japan Merits Br. 3).

at issue were intended to have such an impact. This Court held that these official representations of the Russian Government were entitled to be given *"conclusive"* effect. *Id.* at 220 (emphasis added).[27]

The policy behind this rule of conclusivity can be found in the act of state doctrine, which prohibits U.S. courts from inquiring into the validity of acts or policies of a foreign government acting within its sovereignty.[28] The rationale of that doctrine—leaving the conduct of foreign affairs to the Executive and Legislative Branches—would be frustrated if courts were permitted to adjudicate the veracity of an official statement of a foreign government attesting to its own laws and actions. Thus, in *Banco de Espana*, 114 F.2d at 443-44, a case decided before *Pink*, the Second Circuit gave conclusive effect to a statement of the Spanish Ambassador representing that actions taken by the Spanish government in acquiring title to certain property were "governmental acts." Relying upon, among other authorities, this Court's act of state decision in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Second Circuit reasoned that "[i]t would seem to follow [from the act of state doctrine] that the statement that such [governmental] acts had taken place,

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[27] *See also Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438, 443-44 (2d Cir. 1940); *The Claveresk*, 264 F. 276, 279-80 (2d Cir. 1920); *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919); *D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280, 1283-85 (D. Del. 1976), *aff'd per curiam*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Occidental Petroleum Corp. v. Buttes Gas & Oil Company*, 331 F. Supp. 92, 103-04 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *United States v. Melekh*, 190 F. Supp. 67, 87 (S.D.N.Y. 1960); American Bar Association, Section of Antitrust Law, *Antitrust Law Developments (Second)* 562, n.272 (1984).

[28] *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 (1976); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762-63 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

made to our courts officially on behalf of [a] friendly foreign government by its accredited representative, must be accepted as proof of that fact . . . ." 114 F.2d at 443.[29]

The 1975 Japanese Government Statement, like the statement of the Commissariat for Justice in *Pink*, is an official declaration of a foreign sovereign attesting to its own governmental laws, actions and policies. Accordingly, that Statement is entitled to conclusive effect. Indeed, as a detailed declaration from a friendly foreign government attesting to export controls implemented pursuant to that nation's pre-existing laws as a vital part of its foreign trade policies, the 1975 Japanese Government Statement presents the strongest possible case for applying the conclusivity doctrine. Both the Department of Justice and the State Department agree that, in these circumstances, the representations of the Government of Japan should have been given dispositive effect. (U.S. Gov. Cert. Br. 17).

By failing to do so, the court of appeals has sanctioned the very result that *Pink* and the act of state doctrine are designed to prevent—a full-scale judicial inquiry into the veracity of a friendly foreign government's attestations of sovereign conduct, including possible depositions of and court appearances by foreign government officials. Such wide-ranging inquiry into sensitive matters of state would significantly intrude upon

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[29] *See also The Claveresk*, 264 F. at 280 (official pronouncement of a foreign government "describing a certain act and avowing it as governmental, is to be taken as verity"); *D'Angelo*, 422 F. Supp. at 1284 (relying on *Pink* in giving conclusive effect to an opinion of the Attorney General of Mexico concerning the scope and effect of a Mexican expropriation decree); *Occidental Petroleum Corp.*, 331 F. Supp. at 110 (barring an inquiry into the authenticity, validity, and motivations behind a decree of a foreign government because such an inquiry would involve "the very sources of diplomatic friction and complication that the act of state doctrine aims to avert").

foreign sovereignty, encroach upon the conduct of foreign relations by the Executive Branch, and invite foreign governments and courts to take reciprocal action against the United States. For all of these reasons, the representations in the 1975 Japanese Government Statement should be accorded conclusive effect.

B. Petitioners' Participation In Export Controls Compelled By The Government Of Japan Cannot Form A Basis For Antitrust Liability

Despite the conclusive representations of the Japanese Government that it had compelled petitioners' participation in the export control arrangements, the court of appeals held that those arrangements could be found to constitute central "features" of the alleged antitrust conspiracy in violation of U.S. law. (Pet. App. 179a-180a; 188a-189a). This ruling is contrary to both the sovereign compulsion and act of state doctrines.

1. *Petitioners' Participation in the Japanese Government's Export Controls is Protected by the Sovereign Compulsion and Act of State Doctrines*

As noted above, the act of state doctrine prevents U.S. courts from entertaining any claim that requires inquiry into the validity of the actions or policies of a foreign government acting within its sovereignty.[30] "A corollary to the act of state doctrine in the foreign trade antitrust field is the often-recognized principle that corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability, as if it were an act of the state itself." *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976).[31] The court of appeals' conclusion that petitioners' participation in the

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[30] *See* authorities cited at p. 39 n.28, *supra*.

[31] *See also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) (conspiracy involving foreign government purchasing subject to antitrust scrutiny absent a showing that such conduct was compelled by the foreign government); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1296-99 (D. Del. 1970) (concerted boycott of U.S. firm compelled by regulatory authorities in Venezuela held

Japanese Government's export control arrangements can constitute a "feature" of an unlawful conspiracy violates these two doctrines.

The Solicitor General (U.S. Gov. Cert. Br. 14) and the Third Circuit have both recognized the sovereign compulsion doctrine.[32] Indeed, in this very case, the court of appeals "assume[d], without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act." (Pet. App. 188a). It erred, however, by failing to apply the sovereign compulsion doctrine to petitioners' participation in the export control arrangements.

As previously discussed, the conclusive representations of the Government of Japan establish that such participation was both *compelled* and *supervised* by the Japanese Government. The 1975 Japanese Government Statement makes it clear that petitioners entered into the export control arrangements "under the direction of [the Japanese Government]"; that the Japanese Government's directive had a "compulsory power equivalent to law"; and that petitioners had "no alternative but to establish the agreement[s] and regulation[s] in compliance with the said direction." (Pet. App. 10a; 12a). Further, the Japanese Government continuously "supervised" the export control arrangements to be certain that its "intention was correctly reflected." (Pet. App. 11a). Under these circumstances, principles of fundamental fairness and respect for foreign sovereignty, which underlie the sovereign compulsion doctrine, require that petitioners not be penalized for complying with the directives of their government.[33]

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protected by the sovereign compulsion doctrine); J. Atwood & K. Brewster, *Antitrust and American Business Abroad* §§ 8.14, 8.17-8.22 (2d ed. 1981).

[32] *See Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979).

[33] Recently, in *Southern Motor Carriers Rate Conference, Inc. v. United States*, —— U.S. ——, 105 S. Ct. 1721, 1729-31 (1985), this

Similarly, by permitting a trier of fact to treat petitioners' government-compelled participation in the export control arrangements as a "feature" of an antitrust violation, the court of appeals has authorized precisely the type of private legal attack upon sensitive foreign governmental policies that the act of state doctrine is designed to prevent. As explained by this Court in *Sabbatino*, the act of state doctrine mandates that challenges to foreign governmental conduct or policies be addressed by our political branches of government, rather than by the judiciary. 376 U.S. at 423 (the act of state doctrine "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations"). Thus, courts must consider whether judicial action will "touch . . . sharply on the national nerves" of a foreign government and embarrass the Executive Branch in its conduct of foreign relations. 376 U.S. at 428. Antitrust actions which raise such concerns have been prohibited under the act of state doctrine even when the claims are asserted against private parties.[34]

As the 1975 Japanese Government Statement establishes, in carrying out the Government of Japan's directives, petitioners were acting as instrumentalities of the Japanese Government, whose export control arrangements were "no less than the implementation of [its] foreign trade policy." (Pet. App. 11a). If respondents are permitted to challenge petitioners' participation in such

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Court held that the analogous state action doctrine applies to private conduct undertaken pursuant to a "clearly articulated state policy" and subjected to "active state supervision"—without any need to show "compulsion." In the present case, the 1975 Japanese Government Statement establishes even more: a "clearly articulated" government policy; "active supervision" by the government involved; *and* actual "compulsion."

[34] *See, e.g., American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 76-77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Occidental Petroleum Corp.*, 331 F. Supp. at 111.

arrangements as the basis for an antitrust violation, the foreign trade policy of Japan itself will be placed on trial. The Government of Japan's Note Verbale confirms that few judicial decisions could intrude more sharply upon the Japanese Government's "national nerves." (Gov. of Japan Merits Br. App. 1a-4a).

In sum, under both the sovereign compulsion and act of state doctrines, petitioners' participation in the Japanese Government's export control arrangements cannot form the basis of an antitrust violation.

2. *United States Foreign Policy Requires Application of the Sovereign Compulsion and Act of State Doctrines*

That the sovereign compulsion and act of state doctrines should apply to petitioners' participation in the Japanese Government-compelled export controls is further demonstrated by the official representations of the Executive Branch and various foreign governments in this case. (U.S. Gov. Cert. Br. 14-20; Gov. of Japan Merits Br. 9-10). As the Solicitor General has explained: "The court's rejection of petitioners' sovereign compulsion defense has caused deep concern to the Government of Japan and to the governments of other countries that are significant trading partners of the United States and *threatens to affect adversely the foreign policy of the United States.*" (U.S. Gov. Cert. Br. 6) (emphasis added).

The United States and its major trading partners often engage in negotiations designed to balance their competing international trade interests, and this bargaining frequently results in government-imposed controls on exports by private citizens.[35] In order for these trade negotiations to be successful, foreign sovereigns must be assured that by requiring their nationals to comply

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[35] As the Solicitor General has pointed out, the United States has requested that our trading partners enter into such voluntary restraint arrangements which limit their exports to this country. (U.S. Gov. Cert. Br. 18). *See also* Presidential Memorandum for the United States Trade Representative, 49 Fed. Reg. 36,813 (1984).

with government-compelled export controls, they will not be subjecting them to private antitrust liability in the United States. (U.S. Gov. Cert. Br. 19).

The United States Government has assured the Japanese Government that when, acting within its jurisdiction, it compels its own nationals to enter into export control arrangements, such compelled conduct "[will] not give rise to violations of the United States antitrust laws."[36] Moreover, the then Assistant Attorney General in charge of the Antitrust Division took the same position with respect to the very export control arrangements at issue in this case.[37]

The Solicitor General has called this Court's attention to the serious concerns expressed by the United States' major trading partners as a result of the court of appeals' holding that petitioners' participation in the Japanese Government-compelled export control arrangements may constitute a basis for U.S. antitrust liability. (U.S. Gov. Cert. Br. 19). The Governments of Australia, Canada, France, Japan, Korea, Spain and the United Kingdom all have filed diplomatic notes with the Department of State which emphasize that the court of appeals' decision will have an adverse effect upon trade relations between the United States and its principal trading partners.[38] It is the considered opinion of the United States Government that, as a result of the court of appeals' decision:

> "these and other foreign governments understandably may be reluctant to accommodate proposals by

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[36] Letter of Attorney General William French Smith to Ambassador Yoshio Okawara, dated May 7, 1981. (Pet. App. 26a). *Accord* Letter of Assistant Attorney General J. Paul McGrath to Mr. Kenneth McDonald, Charge d'Affaires a.i., Embassy of Australia (Jan. 18, 1985) (a copy of which has been lodged with the Clerk of this Court).

[37] *See* Letter of Assistant Attorney General Donald I. Baker to Senator Edward M. Kennedy, dated February 16, 1977. (Pet. App. 15a-20a, at 18a).

[38] Copies of these diplomatic notes have been lodged by the Solicitor General with the Clerk of this Court.

> the United States to resolve trade controversies by the imposition of voluntary restraint agreements on their own manufacturers. Such a response could deprive the United States of a tool that has proved valuable in the resolution of difficult international trade disputes." (U.S. Gov. Cert. Br. 19) (footnote deleted).

For all of the foregoing reasons, this Court should reverse the court of appeals' decision and hold that petitioners' government-compelled participation in the export control arrangements cannot constitute or be a "feature" of a United States antitrust law violation.

III. THE COURT OF APPEALS' 1916 ANTIDUMPING ACT JUDGMENT SHOULD ALSO BE REVERSED BECAUSE IT IS CONTINGENT UPON THAT COURT'S ERRONEOUS ANTITRUST RULINGS

The court of appeals' erroneous antitrust rulings also necessitate a reversal of its judgment under the 1916 Antidumping Act. That statute requires proof of a specific predatory intent to destroy or injure an industry in the United States. (Pet. App. 29a; 218a). As its decision on the 1916 Act demonstrates, in order to find a genuine issue of material fact regarding such specific predatory intent, the court of appeals relied upon the same erroneous inference of a predatory export conspiracy that it found to be permissible in its antitrust decision.

With respect to respondents' *conspiracy* claims under the 1916 Act, the court of appeals relied upon the same "evidence supporting [respondents'] theory that [petitioners] entered into the alleged [predatory Sherman Act] conspiracy" as the basis for its conclusion that there exists a genuine issue of material fact as to whether "[petitioners] agreed to dump CEPs on the United States market with the specific intent to destroy or injure an industry in the United States." (Pet. App. 219a). Similarly, with respect to respondents' *individual* Antidumping Act claims, the court of appeals once again relied upon this same "evidence offered to tie each [petitioner]

to [the Sherman Act] conspiracy" as the sole basis for its holding that there exists a genuine issue of material fact as to each petitioner's *individual* predatory intent. (Pet. App. 221a). Indeed, it was precisely because its finding regarding specific predatory intent was contingent upon its conclusion that an inference of the alleged predatory export conspiracy could be drawn, that the court of appeals affirmed the dismissal of the 1916 Act claims (both individual and conspiratorial) against those defendants (*i.e.*, Sony, Sears and Motorola) whose summary judgments against respondents' antitrust conspiracy claims were affirmed. (Pet. App. 221a-223a).

The same conclusion must apply to respondents' 1916 Act claims against the petitioners. In the absence of the court of appeals' erroneous conclusion that an inference of the alleged predatory export conspiracy could be drawn, all that would be left in the record on the issue of petitioners' "intent" in the U.S. market would be the *unreversed* findings of the district court that respondents have failed to come forward with any probative evidence of an anticompetitive or predatory intent. (Pet. App. 463a-473a). Summary judgment is thus also warranted against respondents' 1916 Act claims.

IV. PRINCIPLES OF SOUND JUDICIAL ADMINISTRATION WARRANT REINSTATEMENT OF SUMMARY JUDGMENT BY THIS COURT

Petitioners respectfully submit that this Court should reinstate the summary judgments now.[39] Reinstatement in this fifteen-year old case would send a strong signal to federal trial judges that summary judgment is a meaningful tool for managing large and complicated antitrust cases. As Chief Justice Burger recently cautioned, "[i]f

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[39] This Court has previously reinstated district court judgments in appropriate cases. *See, e.g., Board of Education v. Pico*, 457 U.S. 853, 862-63 (1982); *Kleppe v. Sierra Club*, 427 U.S. 390, 415 (1976); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 65 (1975).

the courts are to retain public confidence, we cannot let disputes wait two, three or five years to be disposed of" when efficient tools of judicial administration can avoid that result.[40]

Because, as demonstrated in Points I-III above, it is clear that respondents' claims are unsupportable and that the district court's summary judgments should have been affirmed, sound judicial administration requires that this Court reinstate those judgments. Remanding this case to the court of appeals would only add another needless chapter to this seemingly endless proceeding which has already embroiled the parties and an overburdened judiciary in years of time-consuming and enormously expensive litigation. *See Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 169-70 (1967) ("effective judicial administration" requires this Court to finally dispose of issues where reasonably possible, rather than remand them to the court of appeals).

Indeed, since the court of appeals and the district court both relied upon the same factual predicates, and disagreed only as to the permissible inferences which could be drawn from those facts and the legal standards to be applied in drawing such inferences, this Court can determine from the opinions below that reinstatement is appropriate. The procedural posture of this case is thus similar to that which existed in *Kleppe v. Sierra Club*, 427 U.S. at 395-96. In *Kleppe*, the court of appeals did not upset the key findings by the district court as to what the record showed, but instead drew erroneous inferences from those uncontested findings and misconstrued the governing law. *Id.* at 401, 403. Inasmuch as there was no dispute between the two lower courts with respect to the facts distilled from the record, *id.*, this Court not only reversed the incorrect legal standard applied by the court of

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[40] Honorable Warren E. Burger, Speech at 1982 ABA Annual Meeting, 68 A.B.A.J. 276 (March 1982).

appeals, but also ordered reinstatement of summary judgment. *Id.* at 414-15.

There are particularly compelling public policy reasons for this Court to reinstate the summary judgments in this case. Reinstatement would help prevent this massive litigation—in which two domestic manufacturers, including the industry leader, have used burdensome judicial proceedings to wage "economic war" against their foreign competitors (Pet. App. 665a)—from providing encouragement to others who may try to misuse the antitrust laws to achieve protectionist objectives. Reinstatement would also assure our major trading partners that cooperating with the United States Government to establish export control arrangements will not subject their nationals to endless private litigation.

Finally, reinstatement would encourage district court judges to devote the time and resources necessary to give proper consideration to summary judgment motions in appropriate antitrust conspiracy cases. As previously discussed (pp. 21-23, *supra*), without summary judgment, antitrust conspiracy claims grounded in speculation would penalize and deter the very pro-competitive behavior which the antitrust laws are intended to encourage. The district court in this case did precisely what trial courts should do when confronted with a massive record in support of an antitrust conspiracy claim. It "spent months and months in the tedious process of reading in chambers the significant . . . portions of [respondents'] [final pretrial statement], reviewing the sources cited for the various allegations contained therein, . . . and studying the voluminous memoranda addressing the evidence and arguing about its significance." (Pet. App. 255a). It then meticulously examined respondents' evidence and contentions under this Court's *Cities Service* inference standard and, properly applying that standard, concluded that respondents did not show any "significant probative evidence" of the conspiracy alleged. (Pet. App. 621a).

This Court should reaffirm the proper use of summary judgment in antitrust conspiracy cases by reinstating the district court's judgments and bringing this fifteen-year-old proceeding to an end.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court reverse the judgments of the court of appeals and order reinstatement of the judgments of the district court.

June 14, 1985

Respectfully submitted,

IRA M. MILLSTEIN
A. PAUL VICTOR
JOEL B. HARRIS
KEVIN P. HUGHES
JEFFREY L. KESSLER
MARTIN S. HYMAN
MINDY J. SPECTOR
ELIZABETH A. JAFFE
JEFFREY P. BIALOS

WEIL GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
Tel.: (212) 310-8000

RAYMOND T. CULLEN

MORGAN LEWIS & BOCKIUS
120 South Broad Street
Philadelphia, Pa. 19109
Tel.: (215) 481-9500

Attorneys for Matsushita Electric Industrial Co., Ltd.; Matsushita Electric Corporation of America; Matsushita Electric Trading Co.; and Matsushita Electronics Corporation

DONALD J. ZOELLER
Counsel of Record

JOHN L. ALTIERI, JR.
HAROLD G. LEVISON
ROBERT A. JAFFE
ADRIAN H. VON HASSELL

MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
Tel.: (212) 510-7000

PATRICK T. RYAN

DRINKER BIDDLE & REATH
1100 Phila. Nat. Bank Bldg.
Philadelphia, Pa. 19107
Tel.: (215) 988-2700

Attorneys for Toshiba Corporation and Toshiba America, Inc.

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
STEPHEN P. MURPHY
PAUL J. PANTANO, JR.

METZGER SHADYAC & SCHWARZ
1275 K Street, N.W.
Washington, D.C. 20005
Tel.: (202) 289-4520

H. WILLIAM TANAKA
LAWRENCE R. WALDERS
B. JENKINS MIDDLETON

TANAKA WALDERS & RITGER
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Tel.: (202) 223-1670

CHARLES J. BLOOM

KLEINBARD, BELL & BRECKER
1550 United Engineers Bldg.
30 South 17th Street
Philadelphia, PA 19103
Tel.: (215) 568-2000

Attorneys for Hitachi, Ltd.; Hitachi Kaden Hanbai Kabushiki Kaisha; and Hitachi Sales Corporation of America

JIRO MURASE
PETER J. GARTLAND
GENE Y. MATSUO
PETER A. DANKIN
LANCE GOTTHOFFER

WENDER MURASE & WHITE
400 Park Avenue
New York, New York 10022
Tel.: (212) 832-3333

MATTHEW J. BRODERICK

DECHERT PRICE & RHOADS
1500 Market Street
Philadelphia, Pa. 19102
Tel.: (215) 972-3400

Attorneys for Sharp Corporation and Sharp Electronics Corporation

HOKEN S. SEKI
DAVID A. DOPSOVIC

SEKI & JARVIS
520 Madison Avenue
New York, N.Y. 10022
Tel.: (212) 759-2303

HENRY T. REATH
FRANK A. LUCHAK
JUDITH N. RENZULLI

DUANE MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, Pa. 19102
Tel.: (215) 854-6300

JOHN T. DOLAN
ARNOLD B. CALMANN

CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
Gateway One
Newark, N.J. 07102
Tel.: (201) 622-2235

DONALD F. TURNER

WILMER CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Tel.: (202) 872-6000

Attorneys for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

CHARLES F. SCHIRMEISTER
PETER C. WILLIAMS

REID & PRIEST
40 West 57th Street
New York, N.Y. 10019
Tel.: (212) 603-2000

STEPHEN W. ARMSTRONG

MONTGOMERY MCCRACKEN
WALKER & RHOADS
Three Parkway
Philadelphia, Pa. 19102
Tel.: (215) 563-0650

Attorneys for Mitsubishi Corporation and Mitsubishi International Corporation

JAMES S. MORRIS
KEVIN R. KEATING
MICHAEL S. PRESS

WHITMAN & RANSOM
522 Fifth Avenue
New York, N.Y. 10036
Tel.: (212) 575-5800

CHARLES J. BLOOM

KLEINBARD, BELL & BRECKER
1550 United Engineers Bldg.
30 South 17th Street
Philadelphia, PA 19103
Tel.: (215) 568-2000

Attorneys for Sanyo Electric Co., Ltd.; Sanyo Electric Trading Co., Ltd.; Sanyo Electric, Inc.; and Sanyo Manufacturing Corporation

AMENDMENTS TO RULE 28.1 STATEMENTS

Amendents To Rule 28.1 Statement Of Petitioners Toshiba Corporation And Toshiba America Inc.

Petitioners Toshiba Corporation and Toshiba America Inc. submit the following amendments to their Rule 28.1 statement contained in the Appendix to the Petition: Delete Pars Tousheh Holding Co., Ltd. (Iran); change Toshiba (Malaysia) Bhd. (Malaysia) to Toshbar Corporation Bhd. (Malaysia).

Amendments To Rule 28.1 Statement Of Petitioners Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, And Hitachi Sales Corporation Of America

Petitioners Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and Hitachi Sales Corporation of America submit the following amendment to their Rule 28.1 statement contained in the Appendix to the Petition: Delete Hatsuco, Ltd.

Amendments To Rule 28.1 Statement Of Petitioners Mitsubishi Electric Corporation (MELCO) And Mitsubishi Electric Sales America, Inc.

Petitioners Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc. submit the following amendments to their Rule 28.1 statement contained in the Appendix to the Petition: Delete Kansai Mitsubishi Electric Products Sales (Inc.); Mecom Okitac Systems (Inc.); Toyo Machinery Industry Works (Inc.); and Daito Industry (Inc.). Change Tyoden Industrial Machinery; Service Engineering (Inc.) to Ryoden Industrial Machinery Engineering (Inc.). Change Mitsubishi Industrial Software (Inc.) to Mitsubishi Electric Industrial Software (Inc.). Add Ryoden Kasei (Inc.) and Melcom Service (Inc.).

Amendments To Rule 28.1 Statement Of Petitioners Mitsubishi Corporation And Mitsubishi International Corporation

Petitioners Mitsubishi Corporation and Mitsubishi International Corporation submit the following amendments to their Rule 28.1 statement contained in the Appendix to the Petition: Delete El Vic Farm Corporation; Sunstar Rubber Industries Corporation; MCF Footwear Corporation; and MC Minerals Corporation. Add Coilplus, Inc.; Hi-Tech Stamping, Inc.; Mitsubishi Foods (MC), Inc.; Hishi Plastics U.S.A., Inc.; and Evergreen Investment Corporation.