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RECORDS
AND
BRIEFS

No. 83-2004

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

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

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 RESPONDENTS

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Petitioners,

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Respondents.

On Writ of Certiorari to The United States Court of
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BRIEF FOR RESPONDENTS

JURISDICTION.

The Court of Appeals for the Third Circuit entered two separate judgments in this litigation on December 5, 1983, one relating to the antitrust segment of the litigation (Nos. 81-2331/2332/2333 in the Court below), and one relating to the antidumping segment of the litigation (No. 80-2080 in the Court below). Since Question Nos. 1 and 2 presented in the petition and accepted for review are limited to the judgment in the antitrust segment of the case, respondents submit that the Court does not have before it for review the separate judgment in the antidumping segment of the case. *Infra*, Part III.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions invoked in the complaints are reproduced in the Appendix to the Petition at 27A-32A;¹ however, the Questions Presented in the Petition involve only Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. Certain pertinent Japanese statutes and Japanese Government statements concerning Japanese export cartel pricing and a provision of the General Agreement on Tariffs and Trade ("GATT") are also reproduced in the Addendum to this brief.

COUNTER-STATEMENT OF THE CASE.

In the antitrust segment of these two consolidated cases, two American television manufacturers, respondents Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE"), challenge an unlawful combination and conspiracy among twenty named defendants comprising the principal Japanese consumer electronic products manufacturers

1. Because of the volume of the evidentiary materials, the Court has directed that this matter be heard on nine copies of the Appendices in the Court of Appeals, dispensing with the requirement of a separate printed appendix in this Court. The opinions of the lower courts are contained in the two-volume Appendix to the Petition for Writ of Certiorari filed June 7, 1984. A separate appendix was prepared in the Court of Appeals for each of the two separate appeals before the Court of Appeals, No. 80-2080 (Antidumping Act of 1916) and Nos. 81-2331/2332/2333 (Antitrust).

References herein to the Appendix to the Petition for Writ of Certiorari are denoted by the page number followed by 'A'. References herein to the appendix in the Court of Appeals in Nos. 81-2331/2332/2333 are denoted by the page number followed by 'a'. References to the volume number of the volume of the Appendix in Nos. 81-2331/2332/2333 in which the referenced pages are found are abbreviated "App. Vol.". References to respondents' complaints and other documents contained in the appendix in the Court of Appeals at No. 80-2080 are denoted by the page number followed by 'b'. References to the Addendum to this brief are abbreviated as 'ad'.

References to the Brief of Petitioners are abbreviated as 'P.Br.'; to the Brief of the United States as *amicus curiae* as 'G.Br.'; to the Brief of Japan as *amicus curiae* as 'J.Br.'. Respondents' Rule 28.1 designation of corporate relationships appears in their Brief in Opposition to Petition for Writ of Certiorari.

doing business in the United States, their Japanese trading companies and their United States marketing subsidiaries, and others,² to restrain and monopolize trade and commerce in television receivers and other consumer electronic products in the United States.³ In the antidumping segment, which is not before the Court, respondents charged that the Japanese companies violated the Antidumping Act of 1916 by individually importing or assisting in importing consumer electronic products, in violation of the Act, as well as by conspiring to do so.

A. *Procedural History.*

NUE filed its complaint in the District of New Jersey in Newark, on December 21, 1970, six months after it was forced to close its Jersey City, New Jersey, television plant and related facilities and discontinue its television manufacturing business, and several weeks after the U.S. Treasury Department had ruled that Japanese television receivers were being dumped in the United States. Three Japanese manufacturers, Hitachi, Sanyo, Mitsubishi, and their three controlled or affiliated trading companies, disputed *in personam* jurisdiction and venue, and refused to provide discovery on the merits until their jurisdictional motions were decided, forcing NUE to take discovery, in Japan and in the United States, to establish jurisdiction and venue before proceeding with discovery on the merits from these companies.⁴ On February 8, 1971, seven defendants filed statute of limitations motions and motions to strike paragraphs of NUE's complaint. On July 23, 1971, nine defendants filed preliminary

2. Certain other Japanese manufacturers, including among others Nippon Electric Co. Ltd. ("NEC") and The General Corporation ("General") are identified co-conspirators, but were not named as defendants. In addition, certain of the facts herein specifically relate to Victor Company of Japan ("Japan Victor"), a subsidiary of the Matsushita interests.

3. Zenith and NUE seek treble damages and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, for petitioners' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, Section 7 of the Clayton Act, 15 U.S.C. §18, Section 2(a) of the Clayton Act, 15 U.S.C. §13(a), and Section 73 of the Wilson Tariff Act, 15 U.S.C. §8.

4. After NUE had completed discovery on this issue, Mitsubishi Corporation and Hitachi Ltd. abandoned their jurisdictional defenses.

motions contending that the Antidumping Act of 1916, 15 U.S.C. §72, was "unconstitutionally vague." Petitioners blocked discovery of their pricing data in convenient format by objecting to producing their previous submissions in the Treasury Department's proceedings under the Antidumping Act of 1921, which contained such television pricing information for both the Japanese and United States markets.⁵

Most of defendants' preliminary motions were briefed and argued in 1971 and 1972 before Judge Robert Shaw, who died in July 1972, before deciding them. In October 1972, the *NUE* case was reassigned to Judge John J. Kitchen in Camden, New Jersey, and in June 1973, *NUE* moved for determination of the jurisdictional defenses. Hitachi, Sanyo and Mitsubishi objected to the admissibility of *NUE*'s evidence and declined to brief the jurisdiction and venue issues until the Court ruled on their evidentiary objections. In September 1973, before reargument of the other pending motions or rulings on petitioners' evidentiary objections, Judge Kitchen died. The *NUE* case was assigned in January 1974, to Judge Herbert J. Stern, who on petitioners' request recused himself. In February 1974, the *NUE* case was reassigned to the Honorable Vincent P. Biunno.

By September 20, 1974, when Zenith filed its complaint in the Eastern District of Pennsylvania, petitioners were still blocking discovery on the merits and continuing to withhold their Treasury Department submissions on the ground that none of petitioners' motions in the *NUE* case had yet been decided. When the *Zenith* case was assigned to District Judge A. Leon Higginbotham, Jr., petitioners immediately moved the Judicial Panel on Multidistrict Litigation, under 28 U.S.C. §1407, to transfer the *Zenith* case to Judge Biunno in New Jersey. Because of the protracted delays in the *NUE* case, Zenith opposed transfer. The Judicial Panel not only denied petitioners' motion to transfer the *Zenith* case but, *sua sponte*, ordered that the *NUE*

5. The Treasury Department's antidumping proceedings, which had begun in 1968, resulted in a finding in early 1971 that Japanese television receivers were being dumped in the United States, *i.e.*, sold at prices in the United States that were substantially below Japanese market prices for the same goods and that the United States television manufacturing industry was being injured by this conduct. App. Vol. 11 (4200a).

case be "transferred to the Eastern District of Pennsylvania and, with the consent of that court, assigned to the Honorable A. Leon Higginbotham, Jr." *In re Japanese Electronic Products Antitrust Litigation*, 388 F.Supp. 565, 567 (J.P.M.L. 1975).⁶

Petitioners filed a new round of motions in January 1975, disputing jurisdiction and venue in Pennsylvania, attacking the constitutionality of 28 U.S.C. §1391(d) (the alien venue provision) as violative of the Fifth Amendment Equal Protection component, attacking the constitutionality of the 1916 Antidumping Act on the grounds of alleged "vagueness," seeking to strike certain allegations in and challenging other counts of Zenith's complaint. Matsushita and Sharp, which had not challenged jurisdiction and venue in the *NUE* case, now joined the other defendants in raising these grounds.

Judge Higginbotham promptly established a briefing schedule on every outstanding motion in the *NUE* and *Zenith* cases, conducted expedited discovery on the jurisdiction and venue fact issues in the *Zenith* case, issuing his own interrogatories from the bench, ruled on petitioners' objections to *NUE*'s jurisdiction and venue evidence (Sanyo and Hitachi withdrew their objections), and, in a series of evidentiary hearings and written decisions filed between January and May 1975, disposed of all of petitioners' preliminary motions in both cases. The District Court (a) upheld the constitutionality of the Antidumping Act of 1916, 402 F.Supp. 251 (E.D. Pa. 1975), (b) denied all of the jurisdiction and venue motions, 402 F.Supp. 262 (E.D. Pa. 1975), (c) directed defendants to produce their submissions to the Treasury Department, (Pretrial Order No. 9, February 19, 1975), and (d) denied petitioners' motions seeking an interlocutory appeal under 28 U.S.C. §1292(b) of the jurisdiction and venue rulings. The court dismissed international Robinson-Patman Act counts relating to dumping, and limited Zenith's Robinson-Patman claims to interstate commerce, 402 F.Supp. 244 (E.D. Pa. 1975). The Third Circuit denied a petition for writ of mandamus filed by

6. The panel noted that "[t]he fact that several motions remain undecided in the *NUE* action is understandable in light of the unfortunate series of occurrences that have affected it," but predicted that "transfer will result in the expeditious and efficient resolution of common factual and legal questions under the firm guidance of the transferee judge." 388 F.Supp. at 567.

Mitsubishi Electric Corporation relating to the jurisdiction and venue issue. 521 F.2d 1399 (3d Cir. 1975).

After NUE and Zenith were permitted to begin coordinated merits discovery in mid-1975, NUE moved to transfer its case to Philadelphia for all purposes pursuant to 28 U.S.C. §1404(a). Sanyo opposed transfer, on the asserted ground that, although the court had upheld jurisdiction in Pennsylvania in 1974, the Pennsylvania court lacked *in personam* jurisdiction over Sanyo in 1970 when NUE had filed suit. On August 18, 1976, after discovery and hearing on this new objection, Judge Higginbotham dismissed Sanyo's opposition to transfer as baseless.⁷

In late 1976, nearly two years after they filed answers to the complaint, petitioners filed belated, multi-million dollar counterclaims against Zenith, which are still pending. In 1977, when Judge Higginbotham was appointed to the Court of Appeals, the cases were reassigned to District Judge Edward R. Becker. To further delay discovery in the main actions, petitioners thereafter launched an harassing nationwide deposition program directed at Zenith's wholesale customers, assigning to the task nine teams of attorneys from their battery of twenty law firms. In the next three years, petitioners deposed 49 persons from 32 companies, including Zenith's major independent wholesale customers, and generated 10,093 pages of transcripts, 2,851 pages of exhibits, and hundreds of thousands of other documents that petitioners subpoenaed from Zenith's independent distributors and others.

In an effort to bring the cases to trial, respondents abridged their discovery efforts, which had been thwarted by petitioners' procedural maneuvers, and filed their Final Pretrial Statement ("FPS") in 1979, pursuant to District Judge Becker's extraordinary "Case Management Order," Pretrial Order No. 154, App.

7. Overruling Sanyo's objection, Judge Higginbotham commented: "It is astonishing to the Court that, at this advanced stage of these proceedings, it should be required to review contentions by the Sanyo defendants which, upon examination, prove to be patently frivolous. Counsel for the Sanyo defendants should be aware that at a subsequent point in this litigation the Court will be prepared to entertain an application by NUE to recover the costs of prosecuting the instant motion." (Pretrial Order No. 66 dated August 18, 1976.)

Vol. 2 (661a), 478 F.Supp. at 946-960, which required respondents to set forth with preclusive effect, as that Order required, "each fact" and "all subsidiary and supporting facts" (668a) on which they might rely at trial, the mode of proof at trial of each fact and subsidiary fact, their technical and economic experts' reports and other materials required by Judge Becker's order.

The Case Management Order also required petitioners to file a Final Pretrial Statement, their experts' reports, if any, and other materials. Rather than comply, petitioners filed a further group of dilatory summary judgment motions, a new round of *in limine* motions raising a plethora of evidentiary issues, and other motions, including: (1) a motion disputing subject matter jurisdiction of the court, *denied* at 494 F.Supp. 1161 (E.D.Pa. 1980); (2) motions disputing Zenith's standing to sue, (relying on *Illinois Brick Co. v. Illinois*, 432 U.S. 720 (1977)), *denied* at 494 F.Supp. 1246 (E.D.Pa. 1980); (3) motions disputing NUE's standing to sue (relying on *Bangor Punta Operations, Inc. v. Bangor Aroostook R.R.*, 417 U.S. 703 (1974)), *denied* at 498 F.Supp. 991 (E.D.Pa. 1980); (4) a motion attacking the Antidumping Act of 1916 on grounds of alleged repugnance to the United States-Japan Treaty of Friendship, Commerce and Navigation, *denied* at 494 F.Supp. 1263 (E.D.Pa. 1980), *aff'd*, 723 F.2d 319 (3d Cir. 1983) (208A-11A); (5) motions for partial summary judgment on the 1916 Antidumping Act claims based on certain insignificant technical differences between television receivers adjusted for sale in the Japanese market and those adjusted for sale in the United States market, *granted in part* at 494 F.Supp. 1190 (E.D.Pa. 1980), *rev'd*, 723 F.2d 319 (3d Cir. 1983) (198A-223A); (6) multiple summary judgment motions under §1 of the Sherman Act, §2 of the Sherman Act, §2(a) of the Clayton Act, as amended, §7 of the Clayton Act, and §73 of the Wilson Tariff Act, App.Vol. 3 (753a-1104a); and (7) a further group of *in limine* motions raising a series of evidentiary objections under Rules 104, 403, 702-704, 801-805, and 901-902 of the Federal Rules of Evidence relating to scores of documents identified in respondents' Final Pretrial Statement for possible trial use. The Court of Appeals later held nearly every one of such objections to be meritless, and remanded the remaining objections for reconsideration by the district court. (64A-162A).

Although the Case Management Order imposed on petitioners a reciprocal obligation to file responsive Final Pretrial Statements, the district court relieved petitioners of their obligation to do so. Briefing, protracted hearings before the court and the court's decision on petitioners' numerous evidentiary objections and summary judgment motions consumed much of 1980. (Between January 1, 1980, and October 1, 1980, the parties filed 114 briefs, which totalled some 7500 pages). The district court granted partial summary judgment in favor of petitioners on respondents' antidumping claims and certified the order for interlocutory appeal. The district court then ruled much of respondents' evidence inadmissible, and granted summary judgment on the antitrust claims. Petitioners requested the Court of Appeals to defer argument in the interlocutory appeal until argument in the antitrust segment of the cases.

The Court of Appeals heard two days of oral argument relating to both the antitrust appeal and the antidumping appeal on October 21-22, 1982. On December 5, 1983, in the antitrust segment at Nos. 81-2331/2332/2333, the panel (Chief Judge Collins J. Seitz and Circuit Judge John J. Gibbons, of the Third Circuit, and Circuit Judge Thomas J. Meskill, of the Second Circuit, sitting by designation) unanimously vacated the summary judgments against Zenith and NUE, in an opinion authored by Circuit Judge Gibbons, and remanded the cases for trial. The Court reversed most of the district court's rulings which excluded evidence from the pretrial record, and remanded the remaining evidentiary issues for further consideration. (34A-197A). The Court of Appeals redefined the record of admissible evidence for summary judgment purposes, and held that plaintiffs' admissible direct and circumstantial evidence of conspiracy was sufficient to create a genuine issue of fact as to conspiracy, precluding summary judgment under F.R.Civ.P. 56, and also to withstand a potential directed verdict motion under the F.R.Civ.P. 50(a) standard (60A-64A), and remanded the cases for trial. The summary judgment record which the Third Circuit examined to determine the sufficiency of plaintiffs' evidence differed significantly from the limited record which the district

court considered.⁸ (Because of the evidentiary issues remanded for further consideration by the district court, the complete record of admissible evidence still has not been finally defined). The Court of Appeals held that the portions of respondents' conspiracy evidence which it had held admissible were sufficient to create a genuine issue of fact as to conspiracy and to preclude summary judgment, regardless of the outcome on the remaining evidentiary issues remanded to the district court.

In a second opinion, which Chief Judge Seitz authored, relating to the interlocutory antidumping appeal at No. 80-2080, the same panel unanimously reversed the district court's construction of the Antidumping Act of 1916, 15 U.S.C. §72, rejected petitioners' Due Process Clause challenge to the Act on the ground of alleged "vagueness," dismissed the contention that application of the Act would infringe the United States-Japanese Treaty of Friendship, Commerce and Navigation, and upheld the sufficiency of respondents' evidence in the antidumping segment of the litigation. (198A-223A). In the "Questions Presented" in their petition for writ of certiorari filed June 7, 1984, petitioners raised no issue relating to the Court of Appeals' separate judgment in the antidumping segment of the litigation.

8. Petitioners' assertion (P.Br. at 6 n.4) that the district court assumed the admissibility of all the evidence it excluded for purposes of considering petitioners' summary judgment motions is incorrect. The district court refused to consider a number of executives' diaries and other evidence (which it had incorrectly held were inadmissible) for the broader purposes for which they were offered and ruled inadmissible key portions of respondents' economic expert witnesses' opinion evidence as set forth in their verified reports. The Third Circuit vacated those rulings and held the economic expert opinion evidence admissible, and this evidence constituted an important part of the foundation of the Third Circuit's decision upholding the sufficiency of respondents' conspiracy evidence.

Although the petition challenged the admissibility of respondents' expert economic opinion evidence, the Court limited the grant of certiorari to Questions 1 and 2 and did not grant certiorari with respect to the evidentiary question relating to the admissibility of the expert opinion evidence. The Court of Appeals' determination that the experts' opinions are admissible is therefore final for purposes of these proceedings.

B. *The Petitioners.*

Petitioners, defendants below, Matsushita, Hitachi, Toshiba (formerly Tokyo Shibaura), Sanyo, Sharp (formerly Hayakawa) and Mitsubishi, are six of the largest Japanese manufacturers of television receivers and other consumer electronic products. Their combined annual sales exceed \$67 billion and their assets \$65 billion, and they employ more than 500,000 persons.⁹ Toshiba, Hitachi and Mitsubishi manufacture heavy electrical equipment, computers, semiconductors, electronic components, as well as consumer electronic products. Matsushita, whose Osaka-based industrial complex produces all of the electronic components it uses in the manufacture of its "Panasonic" products, is the largest television manufacturer in the world, accounting for more than 20% of all television sales in the non-Communist world. Matsushita Electronics Corporation, a related electronic components manufacturer based in Japan, is jointly owned and operated by Matsushita and its partner, the Dutch electronics firm N.V. Philips Gloeilampenfabrieken. App. Vol. 25 (10575a-618a). Its sales exceed \$2.4 billion and it employs some 15,000 employees.

The petitioners also include the closely affiliated or controlled Japanese "trading companies," responsible for sales in Japan, in foreign markets or both, and the United States sales subsidiaries of these Japanese manufacturers and trading companies. One of them, Mitsubishi Corporation (a Japanese trading company affiliated with the Japanese industrial complex known as the "Mitsubishi Group" — formerly the Mitsubishi *zaibatsu*), by itself has annual sales of \$66.9 billion. All of the Japanese manufacturers have United States subsidiaries and extensive distribution systems here, as well as patent-licensing tie-ups and other United States operations. Two of their subsidiaries, Matsushita Electric Corporation of America and Sanyo Manufacturing Corporation, now own major United States assembly and distribution facilities formerly owned by Motorola, Inc., and Warwick Electronics Inc., American manufacturers that were

9. *Fortune*, August 15, 1985 at 183-201. Less current data is found in the record at App. Vol. 11 (4121a-2a).

forced out of the consumer electronics business.¹⁰ All the Japanese manufacturers are doing business in the United States by reason of their own extensive commercial activities here and the activities of their United States subsidiaries. 402 F.Supp. 262 (E.D. Pa. 1975).

C. *The Respondents.*

Founded in 1923, Zenith is a mid-West manufacturer of consumer electronic products, computers, and other electronic equipment and had been a leading American manufacturer of radios.¹¹ Regarding Zenith's television products, one petitioner said: "*Nobody* else has such a combination of quality engineering . . . features." App. Vol. 19 (8232a) (emphasis in original). NUE, whose Emerson Division formerly manufactured and sold television receivers and other consumer electronic products under the Emerson and Dumont tradenames, was forced to shut down its Jersey City, New Jersey, television plant and abandon the manufacture of television receivers in June 1970.

D. *The Japanese Electronic Products Cartel.*

Petitioners have scrupulously avoided coming to grips with the evidence, preferring instead to debate general legal issues

10. Sears, Roebuck & Co. ("Sears"), the largest private-label importer in the United States of Japanese television receivers, and Motorola, Inc. ("Motorola"), which, prior to selling its television manufacturing and distribution business to the Matsushita interests, had been a major domestic television manufacturer, were also named defendants in the *Zenith* case. Summary judgments in their favor were affirmed below. (180A-83A). The Court of Appeals, however, reversed summary judgment in favor of Matsushita on Zenith's Clayton Act §7 claims challenging Matsushita's acquisition of the former Motorola television plants and distribution system as well as Sanyo's acquisition of Warwick. Sony and Sony Corporation of America settled with Zenith, and the Court of Appeals later affirmed summary judgment in their favor on NUE's claims against them. (183A-85A).

11. Zenith's name has recently been changed to Zenith Electronics Corporation. Zenith, like many other domestic radio manufacturers, was driven out of the radio business by the same cartel pricing practices employed in the television business, and no longer manufactures radios. No radios for consumer use are made in the United States.

not presented.¹² Petitioners' three-page summary of the case (P.Br. at 2-4) is so incomplete and so mischaracterizes both the conspiracy allegations and the evidence of conspiracy, that respondents believe it necessary to summarize the facts at somewhat greater length than is customary.¹³

Summary. The antitrust segments of respondents' complaints (13b-63b) allege a conspiracy among the petitioners to restrain and monopolize United States trade and commerce in television receivers, radios, and related products. In furtherance of this conspiracy, petitioners conspired to drive down price levels for television receivers and other products in the United States market, and as part of the same conspiratorial scheme, simultaneously established and stabilized artificially high prices for consumer electronic products in the Japanese market, a market that remained closed to competition from non-Japanese manufacturers of these products. Petitioners' conspiracy was designed to affect petitioners' prices in both the closed Japanese market and the United States market, and had the purpose of establishing sharp differentials between them. Petitioners used the financial advantages resulting from their price collusion in the closed Japanese home market to help subsidize and sustain their concerted depressed pricing in the United States market. Principal features of the conspiracy and its economic import, as reflected in the evidence, are described and analyzed in respondents' economic expert witnesses' verified reports (reproduced in Appendix Volumes 5-7).

Petitioners' conspiracy involved collusive "dumping",¹⁴ a

12. Petitioners sought leave, over respondents' objection, to dispense with printing the record, on the asserted ground that only legal issues are presented. The Court directed that nine copies of the entire appendix in the Court of Appeals be filed.

13. The Court granted respondents leave to exceed the normal page limits of Rule 33.3 by Order dated August 7, 1985.

14. The subject of dumping was examined at an early date in Viner, *Dumping: A Problem in International Trade* 12-20 (1927). The Antidumping Act of 1916, 15 U.S.C. §72, which imposes criminal sanctions and confers a private treble-damage remedy, was the first American antidumping measure. During the entire period of the Japanese consumer electronic products conspiracy, dumping, if it resulted in injury to a United States industry, was also proscribed by United States law and subjected importers to potential assessment of a dumping duty under the Antidumping Act of 1921, 19 U.S.C. §160

form of international, unfair competition which is analogous to classic geographic price discrimination, involving the sale of goods in one country at prices that are lower than the prices at which they are sold in the country of production. Dumping has long been illegal in most industrially developed nations including Japan. Article VI of the General Agreement on Tariffs and Trade ("GATT") (62 Stat. 3682), to which Japan is a signatory, states that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." (19ad).

Petitioners' conspiracy began in the late 1950s with radios, and then continued successively with black-and-white television receivers and with color television receivers. *See*, App. Vol. 6 (2330a-2400a; 2414a-2458a). The conspiracy has been remarkably successful. App. Vol. 11 (4201a-4530a). Radios for consumer use and black-and-white television receivers are no longer manufactured in the United States. American manufacturers, such as Admiral, Motorola, Philco, Westinghouse, and respondent Emerson (NUE) itself, have been driven out of the business, and during 1963-1977, petitioners and their co-conspirators succeeded in capturing no less than 50 percent of the largest portion of the United States television business — the table model and portable segment. App. Vol. 11 (4134a).

Japan's antitrust laws prohibit horizontal price-fixing. But in 1963, when Japanese television receiver imports accounted for less than five percent of United States sales, petitioners organized a formal export cartel under a Japanese antitrust exemption permitting Japanese companies to coordinate their pricing and divide their customers, ostensibly for certain benign purposes. App. Vol. 14 (5764a-6237a). Similar arrangements were established in the radio field. App. Vol. 14 (6259a-77a). The Japanese Export and Import Trading Act (Act No. 299, 5 August 1952) carves out a conditional exemption from Japanese antitrust law for two types of export cartels, provided that the Japanese

et seq. (1970) (4ad-9ad), now codified and amended at 19 U.S.C. §1673 *et seq.*, a provision then administered by the Department of Treasury and now administered by the Commerce Department.

Ministry of International Trade and Industry ("MITI") first approves the formation and organizational details of such cartels, and provided further that cartel members do not engage in "unfair business practices". (30ad). Under Part III, Section 5-bis of the Export and Import Trading Act (25ad-26ad), MITI has the power to approve such export cartels only if, *inter alia*, (a) "[t]here is no fear of violating treaties and other arrangements concluded with foreign governments or the international agencies," such as GATT, (b) "[t]he interests of importers or enterprises concerned at the destination is not injured and there is no fear of gravely injuring international confidence in Japanese exporters," and (c) "participation in or the withdrawal from the agreement is not unjustly restricted."

The ostensible purpose of petitioners' formal cartel arrangements, as the "Rationales" accompanying the written cartel agreements recited, was to prevent Japanese consumer electronic product imports from disrupting the United States market and injuring United States manufacturers.¹⁵ Petitioners filed with MITI a series of "Applications for Authorization For Concluding the Agreement of Manufacturers" under this Japanese statute, seeking MITI's approval for the cartel. *See e.g.*, App. Vol. 14 (5775a, 5872a). Petitioners' application falsely represented that the cartel would observe the statutory requirements. Although they received MITI approval, on the basis of these misleading applications, acting secretly and with mutual knowledge and understanding of their undisclosed common purposes, petitioners jointly and systematically transformed the character of the cartel. Petitioners commonly used the United States prices they jointly set under the cartel agreements — the so-called "check prices" — as reference price levels, simultaneously setting their actual prices at levels below those "check prices" and using the same pricing system to circumvent United States customs and antidumping laws by declaring those "check prices" as their "actual" prices at United States Customs, and later by

15. App. Vol. 14 (6089a-93a); *see also*, (5785a-87a; 5814a-16a; 5823a-24a; 5841a-42a; 5850a-51a; 5860a-61a; 6062a-3a; 6112a-30a; 6132a-3a; 6146a-7a; 6160a-1a).

lying to the Treasury Department in its antidumping investigation, thus concealing their true, lower import prices from United States customs authorities. App. Vols. 23 and 24; App. Vol. 10 (3817a-66a); App. Vol. 15 (6289a; 6293a; 6295a-6a; 6301a-3a).

Both the United States and Japanese Governments challenged aspects of petitioners' overall scheme. On December 4, 1970, the United States Treasury Department issued a "Determination of Sales at Less Than Fair Value," finding that "television receiving sets . . . from Japan [were] being . . . sold at less than fair value," within the meaning of the Antidumping Act of 1921. App. Vol. 11 (4190a).¹⁶ In March 1971, the United States Tariff Commission unanimously concluded that "an industry in the United States is being injured by reason of" dumping of imported Japanese television receivers. (4198a). The Treasury Department issued a formal dumping finding (4200a), and petitioners and other importers ultimately settled the Government's dumping case in 1978 by agreeing to pay approximately \$77 million in duties and fraud penalties, an amount far less than the duties and penalties actually due to the United States. (55ad-6ad).

Between 1956-1970, the Japanese Fair Trade Commission ("JFTC") twice charged petitioners with horizontal price-fixing in the Japanese market. The first case, "*Case No. 5, 1957 Against Home Electric Appliance Market Stabilization Council*," resulted in petitioners' admission of price-fixing activities. App. Vol. 11 (4685a-4720a). In the second case, *Case No. 6, 1966 Against Sanyo Electric Co., Ltd. and Five Other Companies*, the JFTC again charged petitioners with horizontal price-fixing involving television receivers. In the Court of Appeals below, and here (P.Br. at 3 n.2), petitioners have conceded the price-fixing activities involved in the second case, and their activities are otherwise extensively documented. App. Vols. 12-13 (4913a-5574a). Within the closed Japanese market, petitioners eliminated competition among themselves by agreeing to stabilize and maintain high prices. App. Vol. 5 (1678a-1917a); App.

16. This finding was made on the basis of the higher "check prices" which the Japanese manufacturers falsely reported in that proceeding and not detected as false by the Government. See *infra* at 29 and 44-45 n.57.

Vol. 6 (2255a-2474a); App. Vols. 12-13 (4913a-5752a). These activities enhanced petitioners' conspiratorial control over their United States-Japan dumping margin, *i.e.*, the difference between their Japanese market prices and their much lower United States prices. These concerted activities furthered the objects of the conspiracy by (a) giving them joint control over their prices in the closed Japanese market, (b) aggravating the dumping margin on sales in the United States, (c) stabilizing the Japanese price component of the margin at artificially high prices, and (d) enhancing petitioners' ability to achieve their common objectives by improving return on sales in the Japanese market, and permitting them to maintain a satisfactory return overall, thus enabling them to deepen the dumping margin on the United States side and continue the conspiracy over a longer period of time. App. Vols. 5 and 6.

In furtherance of their conspiracy, petitioners artificially depressed their prices on massive quantities of products sold to United States customers, and drove down and held down prevailing United States television price levels. App. Vol. 5 (1762a-1816a); App. Vol. 6 (2417a-59a); App. Vol. 7 (2749a-2824a); App. Vol. 11 (4269a-4530a). The resulting depressed price levels in the United States reduced or eliminated United States manufacturers' profits, brought many United States manufacturers to the brink of financial collapse, and inflicted serious injury on the few United States manufacturers that have survived petitioners' concerted assault. App. Vol. 11 (4201a-4530a).

1. *Petitioners' Conspiratorial Activities to Set the Japanese Price Component of Their United States-Japan Dumping Margin.*

During the relevant time period, members of the cartel completely controlled the highly concentrated Japanese market, App. Vol. 5 (1721a-23a) (172A) — a market that was closed to foreign competition by Japanese Government-imposed tariff and non-tariff barriers, as well as by petitioners' concerted efforts to exclude foreign competitors such as Zenith from access to the major Japanese channels of distribution and by petitioners'

keiretsu (or Japanese company group) control over those distribution channels.¹⁷ In this closed, concentrated market, petitioners simultaneously built production capacity far in excess of Japanese market demand and targeted the United States conspiratorially as the market for their constantly increasing excess production. App. Vol. 5 (1679a-1720a). Petitioners also concede that they fixed Japanese market prices of these products, a concession noted by the Court of Appeals, which pointed to evidence that this continued longer than the two-year period to which petitioners admitted. (174A-175A).¹⁸ These price-fixing activities in furtherance of the conspiracy were carried out through a number of secret conspiratorial groups. The activities of some of the principal groups are highlighted below.

a. *The Market Stabilization Council.*

In 1956, petitioners established the "Market Stabilization Council" to fix and stabilize price levels for television receivers,

17. App. Vols. 5, 6 and 7 (1904a-15a; 2297a-2323a; 2707a-17a; 2742a-8a; 2800a-01a; 2924a-37a); (170A; 371A-73A); App. Vol. 11 (4533a-42a). For example, as early as 1962, Zenith was advised by C. Itoh & Co. Ltd., a leading Japanese trading company, that "it seems to be difficult to deal with Zenith's products in the present condition," and that "MITI would not allocate the foreign currency, because Zenith products are exceedingly popular in the market here." App. Vol. 11 (4537a). In 1963, Nichimen Co., Inc. (a Japanese trading company) advised Zenith that its inability to market Zenith products in Japan was due to "[t]he Japanese Electronic Industries Association's pressure to the Government," the Japanese manufacturers' "pressure to the leading chain and department stores," and "[a]n attempt to pressure our company and persuade us by various means not to indulge too aggressively in the distribution of those products." (4539a-40a).

18. "Liaison counsel for the defendants candidly conceded at oral argument that there was a two-year period between 1964 and 1966 during which some discussions about bottom prices in Japan took place among some of the defendant companies. Transcript of argument, October 22, 1982, at 71. * * * We conclude . . . that the direct evidence of horizontal price-fixing in the periods referred to in the Japanese Fair Trade Commission proceedings, when coupled with the circumstantial evidence to which we have referred, would permit an inference that the conspiracy operated over a longer period." (174A-175A).

radios and certain other electric appliances in the Japanese market. App. Vols. 11, 12, 5, 6 and 7 (4685a-4720; 4805a-13a; 4881a-3a; 1727a-32a; 2345a-51a; 2751a). Through the Market Stabilization Council, petitioners aggressively policed their horizontal price agreements through a program of boycotts and repurchase of discounted merchandise. App. Vol. 5 (1727a-32a; 1741a); App. Vol. 6 (2264a-89a; 2334a-7a; 2345a-51a; 2417a-19a). The manufacturers also jointly fixed profit margins on sales of television receivers at 22% for retailers and 8% for wholesalers, App. Vol. 11 (4701a), and petitioners' Presidents met to discuss and agree upon production levels. App. Vol. 11 (4715a; 4699a); App. Vol. 12 (5041a; 5048a). The Japanese Fair Trade Commission ("JFTC") prosecuted petitioners and made findings regarding petitioners' conduct and attached some of the documentary evidence to its decision. App. Vol. 11 (4687a-4720a). Petitioners admitted the validity of the JFTC's findings. (95A).

b. *The Okura Group, The Palace Group, The Tenth Day Group, and Other Conspiratorial Groups.*

Notwithstanding the JFTC proceedings, the Japanese manufacturers secretly continued to fix television prices and agree on production volume, and organized as early as 1964 (a) regular meetings of their Chairmen and Presidents called the "Okura Group," which met monthly in Tokyo's Okura Hotel, (b) regular meetings of the next highest level of their managers called the "Palace Group," which met monthly at Tokyo's Palace Hotel, and (c) more frequent meetings of head officials of petitioners' television divisions, called the "Tenth Day Group" (because it first met on the tenth day of the month), which met at the petitioners' offices. App. Vols. 5-7 (1762a-1816a; 2417a-25a; 2749a-2802a).

The diaries of petitioners' high-ranking executives, their written statements, and their testimony in the JFTC's "Case No. 6, 1966 against Sanyo Electric Co. Ltd. and Five Other Companies," contain details of these secret, conspiratorial activities. App. Vols. 12-13 (4915a-5574a). Petitioners have admitted their membership in, and attendance at, the secret meetings of

these price-fixing groups. App. Vol. 12 (4815a-55a). These regular monthly meetings continued through at least 1977. App. Vol. 12 (4870a-1a; 4872a).

(i) *The Okura Group.*

The Presidents and Senior Managing Directors of Matsushita, Toshiba, Hitachi, Mitsubishi Electric, Sanyo and Sharp — the Okura Group — met on a monthly basis beginning as early as 1964 and continuing through at least February 1977. App. Vol. 12 (4870a-1a). Attendees at these meetings included: Messrs. K. Matsushita and M. Matsushita (Matsushita); K. Iue (Sanyo); K. Nishi (Hitachi); K. Okubo (Mitsubishi Electric); J. Hiraga (Toshiba); and A. Saeki (Sharp). Konosuke Matsushita, founder of the Matsushita complex, organized the Okura Group, App. Vol. 12 (5037a-39a; 4870a-1a; 4909a-12a), as the forum for petitioners' discussions at the highest levels of coordination of future demand and of their production, App. Vol. 12 (5038a-43a; 4946a-51a) and of price levels, App. Vol. 12 (5055a; 5058a; 5148a) for television receivers. *See also* App. Vol. 7 (2753a-4a); App. Vol. 5 (1742a-4a).

(ii) *The Palace Group.*

During 1964-1977, managing directors (the equivalent of senior vice presidents) of these six companies also attended the monthly Palace Hotel meetings, App. Vol. 12 (4872a-3a); App. Vol. 7 (2753a); App. Vol. 5 (1738a-42a), where they discussed "industry-wide production, sales, and inventory data," and agreed on "bottom prices for television receivers," or the minimum prices at which petitioners would sell television receivers in the Japanese market. App. Vol. 12 (4946a-51a; 4955a-6a; 4962a-3a; 5040a). As revealed in the Statements ("Protocols") which these executives later provided to the JFTC, in agendas, and in these executives' pocket diaries, the Palace Group agreed secretly to fix "bottom prices," wholesale and retail profit margins, and other terms of sale for television receivers sold in Japan. App. Vol. 12 (4978a-80a; 5040a-41a; 5063a-69a, 4974a-6a; 5011a-17a; 4948a-51a; 4955a; 4916a-43a). At Tenth Day meetings the Japanese manufacturers' television executives also discussed

television "bottom prices" and profit margins. App. Vol. 12 (4876a). Petitioners admit that "[c]ertain of these matters arose at the 'Palace Group' as a result of prior discussions at the 'Tenth Day Group.'" App. Vol. 12 (4873a; 5003a-7a; 5011a; 5015a). The lower-echelon Tenth Day Group executives reported to Palace Group members. When the Tenth Day Group could not agree, the same issue was referred to the Palace Group for agreement. App. Vol. 12 (4917a-21a; 4928-9a; 4955a-6a; 5002a-7a; 5015a). A "secretary company" was selected to coordinate discussion of these issues, and this function rotated. App. Vol. 12 (4983a-4a; 5022a; 5025a; 5049a).

(iii) *The Tenth Day Group.*

The Tenth Day Group was a regular, secret gathering of Matsushita, Toshiba, Hitachi, Sharp, Mitsubishi and Sanyo television department executives. App. Vol. 12 (4875a-76a); App. Vol. 5 (1733a-5a); App. Vol. 7 (2752a). Meetings lasting two to three hours were held as frequently as twice a month, normally in a conference room of the Group's "secretary company." App. Vols. 12-13 (4984a; 5449a-50a). The staff of the Tenth Day "secretary company" often attended meetings of the Palace Group. App. Vol. 12 (4966a). The Protocols of their executives, agenda, and pocket diaries confirm that the Tenth Day Group discussed and agreed on current and future television prices, price structures and profit margins at these meetings.¹⁹

The petitioners also exchanged information, and "voted", on such commercially sensitive topics as current and future production, shipment and inventories of television receivers, relating both to the Japanese domestic market and to television

19. See App. Vol. 12 (4916a-21a; 4926a-30a; 4931a-35a; 4941a-2a; 4947a-51a; 4957a-67a; 4954a-5a; 4970a-72a; 4974a-76a; 4983a-86a; 4989a-90a; 4995a-98a; 5014a-17a; 5021a-25a; 5031a-35a; 5051a-2a; 5064a; 5071a-85a; 5092a-5100a; 5106a-14a; 5117a-23a; 5133a-52a; 5159a-63a; 5192a-5206a; 5211a-18a; 5220a-5a; 5232a-4a; 5258a-80a); App. Vol. 13 (5282a-6a; 5295a-5300a; 5327a-8a; 5333a-6a; 5339a-42a; 5361a-4a; 5367a-8a; 5373a-4a; 5405a-10a; 5417a-24a); see also, App. Vol. 7 (2749a-2801a); App. Vol. 5 (1780a-92a); App. Vol. 6 (2417-25a).

exports from Japan,²⁰ the bulk of which went to the United States.²¹ App. Vols. 12-13 (5097a; 5112a; 5197a; 5365a; 5366a; 5368a). Tenth Day Group attendees reported orally and in writing to colleagues and superiors (including Palace Group members) concerning matters they had discussed and agreed upon²² and implemented their agreements. App. Vol. 12 (4926a; 4962a; 4994a-98a; 5013a; 5028a-36a).

When they first learned that the JFTC suspected them of price-fixing, petitioners immediately devised "countermeasures for the Fair Trade Commission" to conceal their activities, but resolved to continue the meetings. App. Vol. 12 (5114a).²³ They constructed a joint "explanation" of the nature of these groups to be provided to the JFTC, agreeing to misrepresent to the JFTC that these price-fixing meetings were merely "social groups" or "clubs." App. Vol. 12 (5087a; 5173a-4a; 5179a).

The relationship between home market prices and export prices, and United States import prices, expressed in dollars in the notes, were also considered at the Tenth Day Group as early as 1966. App. Vol. 12 (5148a; 5216a-17a). Concerned then that the large differentials between the prices of their televisions sold in Japan and their much lower United States television prices

20. See App. Vol. 12 (4921a-22a; 4983a; 5021a; 5097a-8a; 5104a; 5112a; 5127a; 5137a; 5178a; 5223a; 5229a; 5236a-37a; 5259a-60a; 5267a; 5268a-9a; 5274a); App. Vol. 13 (5296a-7a; 5339a; 5365a-6a; 5367a-8a; 5430a-41a; 5504a-12a).

21. In 1966, exports to the United States of Japanese color television receivers comprised 95.3% of Japan's total exports of color television receivers. App. Vol. 5 (2079a). Exports of black-and-white receivers to the United States constituted 71.8% of Japan's total exports of those sets. App. Vol. 5 (2078a).

22. See App. Vol. 12 (4918a; 4920a; 4926a; 4933a; 4948a; 4950a; 4962a; 4966a; 4972a; 4989a-90a; 5002a; 5013a; 5016a; 5032a; 5081a-84a).

23. Under the heading "countermeasures," Toshiba's Tenth Day Group representative, S. Yajima, made the following entry in the notebook in which he recorded what transpired at these price-fixing meetings, App. Vol. 12 (5114a):

To burn old documents.

Will not take minutes. Burn all documents. Change the name of Palace Group. Also change the place of meetings. Report at the next meeting.

Name get together meeting concerning TV

(The Tenth Day Group)

might be noticed, petitioners secretly agreed in December 1966 to report false statistics to the Japanese Government to conceal the price differentials. App. Vol. 13 (5609a-10a).

(iv) *The "MD Group"*.

As early as 1969, petitioners also secretly organized the so-called "MD Group" to facilitate their exchange of detailed, current company data on their production for domestic and export purposes, their shipments and their inventories, both for domestic and export, of television receivers and other consumer electronic products. App. Vols. 12-13 (4846a-53a; 5747a-52a); App. Vols. 5 and 7 (1737a-38a; 2752a). Written minutes of the MD Group meetings and statistics exchanged were marked "secret". App. Vol. 13 (5685a; 5710a; 5731a; 5732a). The companies exchanged their individual current production, shipment and inventory data, and utilized a "voting" procedure to coordinate and harmonize their future production, shipment and inventories.²⁴ App. Vol. 5 (1763a-85a). The export statistics the Japanese manufacturers exchanged and "voted" on at the MD Group were primarily statistics on their exports to the United States, petitioners' principal export market by far. MD Group meetings continued to at least 1977. App. Vol. 12 (4846a-52a); App. Vol. 13 (5719a).

2. *The Japanese Manufacturers' Conspiracy As It Related to the United States Price Component.*

While petitioners' executives were meeting in the Okura, Palace, Tenth Day and MD Groups to stabilize Japanese market television prices at inflated levels in that closed market, petitioners' executives were also meeting to devise and implement a method for coordinating and concealing their United States pricing at levels much lower than their Japanese market prices. This machinery involved two main components: (a) a set of formal export cartel arrangements under the Japanese anti-trust exemption described above, and (b) an informal, secret

24. See App. Vol. 13 (5654a; 5659a; 5663a; 5664a-5a; 5667a; 5670a; 5671a; 5675a; 5676a; 5678a; 5681a; 5684a; 5686a; 5692a; 5693a; 5696a; 5697a; 5700a; 5701a; 5703a; 5704a; 5706a; 5711a; 5712a; 5716a; 5719a; 5721a; 5727a; 5728a).

course of conduct in which petitioners engaged under the nominal facade of their formal cartel arrangements. App. Vol. 5-7 (1747a-61a; 1778a-9a; 1793a-1816a; 2425a-45a; 2802a-17a).

On their face, petitioners' formal export cartel agreements consisted of two integrated sets of provisions: (i) written cartel agreements (the "Manufacturers Agreements") App. Vol. 14 (5765a-6027a) in effect during the period 1963-1973, signed and administered by a group of petitioners' high-ranking executives — the "Television Export Council" — including among its members and founders executives who, as members of the Okura, Palace and Tenth Day Groups, were simultaneously involved in petitioners' price-fixing activities within the closed Japanese market, App. Vol. 5 (1741a-42a); and (ii) a set of "Rules" (the "JMEA Rules") that petitioners adopted by vote at their Japan Machinery Exporters Association ("JMEA"), which were administered by another group of petitioners' executives — the "Television Export Examination Committee," App. Vol. 14 (6049a-6236a).

a. *The Television Manufacturers' Agreements and the JMEA Rules.*

The Manufacturers' Agreements and the JMEA Rules contained explicit provisions relating to United States prices, known in their industry as "check prices." Similar arrangements had existed for radios. App. Vol. 14 (6257a-77a). Petitioners' informal, secret course of concerted conduct under the facade of their formal agreements, however, involved their common use of these ostensibly "minimum" prices known as "check prices," established by petitioners' TV Export Council and TV Export Examination Committee, merely as reference prices from which petitioners departed to arrive at their even lower actual United States import prices. To conceal this aspect of their conspiracy, petitioners agreed to lie by reporting to United States Customs the higher "check prices" instead of their true import prices. In this way, petitioners coordinated and concealed their actual United States prices at levels below their fixed prices in the closed Japanese market, thereby enabling them to evade United States antidumping laws and, acting as one body, to capture most

of the United States market by dumping and by continuing to coordinate their actual United States prices at these artificial, dumping price levels.

Petitioners' Television Export Council maintained its office at the Electronics Industries Association of Japan ("EIAJ") in Tokyo. App. Vol. 14 (5777a; 5809a; 5829a; 6008a). At meetings of the Television Export Council, petitioners' executives fixed "check prices" for television receivers to be imported into the United States. These prices were listed in schedules attached to the Manufacturers' Agreements.²⁵ The price provisions of the JMEA Rules interlocked with the price provisions in the Manufacturers' Agreements.²⁶

These two sets of agreements were directed specifically and exclusively at United States trade and commerce, dealt specifically with United States import prices, and with customers located in the United States, and they expressly stated that they were intended to have effects in the United States.²⁷

1. *Shipment Validation.* Petitioners agreed to submit to the Television Export Council and to the Television Export Examination Committee, prior to shipping television receivers to the United States, an "Application for Validation of Shipment," which would set forth the name of the manufacturer, the trading company (or Japanese exporter — in many instances the manufacturers' controlled trading companies), the United States importer or purchaser, trademark, quantity, type and model of television receiver, "customer registration number," and United States unit price.²⁸ Members agreed to obtain prior written approvals from the Council and the Committee which would certify that their shipments were consistent with the Agreements and

25. See App. Vol. 14 (5840a; 5849a; 5859a; 5889a; 5951a; 5961a; 5969a; 5977a; 5985a; 5993a; 6001a; 6014a; 6019a-27a).

26. See App. Vol. 14 (6055a-56a; 6062a; 6077a; 6092a; 6099a-6100a; 6137a-39a; 6152a-53a; 6165a-6a; 6168a; 6180a; 6182a; 6194a; 6196a; 6208a-09a; 6220a-21a; 6235a).

27. See App. Vol. 14 (5777a; 5847a; 5874a; 5957a; 5999a; 6007a; 6052a; 6073a; 6095a; 6115a-16a; 6135a-36a; 6149a-50a; 6163a-64a; 6177a-78a; 6191a-92a; 6205a-06a; 6219a-20a).

28. See App. Vol. 14 (5813a; 5887a-88a; 6059a-60a; 6087a-88a; 6110a-11a; 6130a-31a; 6144a-45a; 6171a-72a; 6187a-88a; 6201a-02a; 6214a-15a; 6233a-34a).

the Rules.²⁹ The Council and the Committee endorsed their approval on these Applications. Since the Council and Committee were comprised of petitioners' own executives, the Japanese manufacturers necessarily were each aware of certain price information on every shipment of covered Japanese television receivers sold in the United States during the crucial ten-year period 1963-1973.³⁰ Moreover, they had access to the other particulars of each other's business with United States customers, including the actual prices, when they differed from the "check price." See, Article 13, App. Vol. 14 (5780a-81a; 5877a-78a; 5959a; 6011a).

2. *Customer Registration.* The Agreements and Rules provided for the registration of United States customers, prohibited petitioners from changing customers during their effective period and prohibited transactions with unregistered customers without prior cartel permission.³¹

3. *Enforcement.* The Television Export Council and the Television Export Examination Committee, i.e. petitioners themselves, had the power to investigate each others' suspected violations of the Agreements. App. Vol. 14 (5780a-81a; 5877a-8a; 5959a; 6011a). Sales at United States prices below the "check prices" carried a penalty.³² The Japanese government has taken the position in United States courts that sales below "check prices" constitute a violation of Japanese law. See Responses of the Japanese Government in the *Continental Forwarding* litigation (43ad-44ad; 50ad-51ad).

4. *The Five-Company Rule.* Certain of the Rules provided for an allocation of United States customers among the

29. See App. Vol. 14 (5780a; 5877a; 5958a-59a; 6011a; 6056a-57a; 6078a-79a; 6100a-01a; 6120a-21a; 6140a-41a; 6154a-55a; 6169a-70a; 6183a-84a; 6197a-98a; 6210a-11a; 6224a-25a).

30. See App. Vol. 14 (5813a; 5887-88a; 6059a-60a; 6087a-88a; 6110a-11a; 6130a-31a; 6144a-45a; 6171a-72a; 6187a-88a; 6201a-02a; 6214a-15a; 6233a-34a).

31. See App. Vol. 14 (5779a; 5876a-7a; 5957a-58a; 6010a; 6052a-53a; 6074a; 6096a; 6116a; 6136a-38a; 6150a-53a; 6164a-67a; 6178a-81a; 6192a-95a; 6206a-09a; 6221a-23a).

32. See App. Vol. 14 (5780a-81a; 5877a-78a; 5959a; 6011a; 6057a; 6079a; 6101a; 6121a; 6141a; 6155a; 6170a; 6184a-85a; 6198a-99a; 6211a-12a; 6226a-27a).

cartel members by prohibiting any Japanese exporter of television receivers from registering more than five United States customers (the "Five-Company Rule") without cartel permission. App. Vol. 14 (6136a-37a; 6150a-51a; 6164a-65a; 6178a-79a; 6192a-93a; 6206a-07a; 6222a). The character and effect of this provision would depend upon the relationship which the Japanese manufacturers established between their Japanese market prices and their *actual* United States prices. Whatever effects this provision might have had on United States commerce had petitioners set their United States prices at levels equal to or above their Japanese market prices, in reality their actual United States prices were aggravated *dumping prices*, and the Five-Company Rule, which divided major United States customers among the Japanese manufacturers, aimed the combined impact of the two aspects of petitioners' conspiracy — the dumping margin — exclusively at United States manufacturers competing for the same accounts, with pernicious anticompetitive results. App. Vol. 8 (3075a-83a) (179A). A "guideline" — not set forth in the formal cartel documents, but separately used by the Television Export Examination Committee — strengthened the Five-Company Rule by prohibiting more than one supplier from selling to the *same* United States importer or customer unless petitioners jointly approved such an overlap in registration. App. Vol. 14 (6230a).

5. *Right To Withdraw.* Under explicit withdrawal provisions, any petitioner could withdraw at any time from the Agreements simply by notifying the Television Export Council thirty days in advance of its intention to withdraw. App. Vol. 14 (5778a; 5875a; 6008a); App. Vol. 41 (18391a-456a). As noted above, MITI was powerless under Section 5-bis of the Export and Import Trading Law (25ad-26ad) to approve any export cartel that unduly restricted the right to withdraw. No petitioner was required to belong to the JMEA, and its "Rules" did not apply to non-members. App. Vol. 14 (6163a; 6177a; 6191a; 6205a).

6. *Price Provisions.* The "check prices" (sometimes abbreviated "C.P." or "C/P") which the Television Export Council established related to transactions between Japanese manufacturers and exporters of television receivers to be imported in the United States, and were claimed by petitioners to be "minimum

prices.” (P.Br. at 3). The “check price” of the JMEA Rules was a similar price based in turn upon the prices which the Television Export Council established and related to the price level at which Japanese suppliers sold to registered United States customers. Petitioners set the “check prices” by reference not to their own costs but to United States manufacturers’ prices, App. Vol. 14 (6256a), and set them at levels far below the prices of United States manufacturers. (Affidavit of Dr. Horace J. DePodwin, App. Vol. 8 [3061a, 3073a-74a]; App. Vol. 5 (1866a-68a); App. Vol. 11 [4198a]).

In theory, the “check prices” were described as “minimum” prices. Petitioners were free under the Agreements and Rules to sell at any United States import prices which were *above* the “check prices,” and were under no obligation to sell *at* the “check price.” The “check price” provisions did not govern the price levels for goods petitioners sold in the Japanese market or the relationship between petitioners’ Japanese market prices and their United States market prices. Absent collusion in the Japanese market, petitioners could have sold in Japan (a) at prices which were *above*, *below* or *equal* to the “check prices,” and (b) at prices which were equal to or lower than their United States prices. The Agreements and Rules did not require petitioners to dump television receivers in the United States.

7. *Meetings of the Television Export Council.* Between 1963 and 1973, petitioners’ representatives, as members, attended at least 120 monthly meetings of the Television Export Council, App. Vol. 12 (4857a-63a). At these meetings they discussed their United States prices, and agreed upon their United States pricing strategy. App. Vol. 12 and 14 (4886a; 6029a-30a; 6031a-32a; 6239a-45a; 6253a-56a); (449A).

8. *MITI Approval.* The Japanese manufacturers petitioned MITI for approval of the formal television export cartel under the Japanese statute which confers an exemption from Japanese antitrust laws, invoking these provisions in joint written applications and attaching their proposed Agreements and JMEA Rules. In these applications, petitioners misrepresented their true purposes. App. Vol. 14 (5771a-75a; 5868a-72a).

9. *The Rationales.* Each Agreement and set of Rules contained³³ a "Rationale" which purported to set forth petitioners' reasons for seeking the MITI approval and which recited their alleged intention of avoiding injury to United States manufacturers, as required by the statute. Petitioners represented to MITI that in the absence of such a cartel their United States prices might drop below the proposed "check price" levels, and that such prices would disrupt the United States market, injure United States producers, and trigger enforcement of the United States antidumping statutes. The Japanese manufacturers stated that their intent was to "prevent disturbance to the United States market caused by unfair prices" App. Vol. 14 (6091a), acknowledging therein that the massive shipments they contemplated could seriously disrupt the United States market and injure United States manufacturers. In ostensible compliance with the Japanese antitrust exemption law, petitioners also represented to MITI that their purpose was to ensure that no party sold at prices below the "check prices." Thereafter, however, they conspired to do precisely that, and jointly used the formal arrangements as a facade to conceal this course of conduct. Petitioners were determined to garner an ever-larger combined share of the United States market, as their 1963 JMEA Rationale states: "[T]he businessmen involved have decided that, *acting as one body*, they will strive to maintain export order and, furthermore, *to aim for steady expansion of exportation.*" App. Vol. 14 (6063a).³⁴

b. *The Character of the Japanese Manufacturers' "Check Prices."*

For each six-month (or shorter) period between 1963 and 1973, the Japanese manufacturers' Television Export Council adopted a set of "check prices" applicable to the principal types and sizes of television receivers to be imported and sold in the

33. See App. Vol. 14 (5785a-87a; 5814a-16a; 5823a-24a; 5832a-33a; 5841a-42a; 5850a-51a; 5860a-61a; 5890a; 5952a; 5962a; 5978a; 6002a-03a; 6015a; 6061a-63a; 6089a-93a; 6112a-13a; 6132a-33a; 6146a-47a; 6160a-61a; 6174a-75a; 6189a-90a; 6203a-04a; 6216a-7a; 6235a-36a).

34. Emphasis added to all quotations unless otherwise noted.

United States.³⁵ Although these television receivers included hundreds of distinct models with different features, the manufacturers adopted during each period a maximum of only ten common prices, substituting an artificial, basic price structure for that which would have been forged by natural market forces in the United States.³⁶ Petitioners' executives set these "check prices" far below the prices they jointly and simultaneously fixed for the comparable products petitioners sold in the Japanese market. App. Vol. 5 (1817a-1882a; 2195a-2237a); App. Vol. 8 (3015a; 3056a-7a; 3073a-4a); App. Vol. 9 (3285a-3468a); App. Vol. 11 (4175a-4208a).

Although petitioners claim (P.Br. at 3) that the "check prices" were "minimum prices," in actuality, petitioners used the "check prices" only as the reference, as shown below, for arriving at the actual prices they agreed on with United States buyers, and, starting from the "check prices" petitioners set their *actual* import prices at still lower prices in order to divert business from United States manufacturers.³⁷ In furtherance of their conspiracy, simultaneously petitioners made joint use of the "check prices" to conceal their actual lower prices.

When compared with the Japanese manufacturers' fixed prices in the Japanese market, the "check prices" were themselves dumping prices, as the Court of Appeals held. (179A). This is established by the fact that, although petitioners lied and reported "check prices" as their actual prices to the Treasury Department in its Japanese television Antidumping Act of 1921 proceeding, App. Vol. 10 (3817a-66a); App. Vols. 23-24 (9519a-10574a), the Treasury Department still found the existence of dumping based on petitioners' "check prices." App. Vol. 11 (4188a-4200a). Further proof is provided by respondents' two

35. See App. Vol. 14 (6019a-27a; 5849a; 5859a; 5889a; 5951a; 5961a; 5969a; 5977a; 5985a; 5993a; 6001a; 6014a).

36. See App. Vol. 14 (5778a; 5784a; 5811a-12a; 5831a; 5840a; 5849a; 5859a; 5875a; 5889a; 5951a; 5961a; 5969a; 5977a; 5985a; 5993a; 6001a; 6009a; 6014a; 6019a-27a; 6030a; 6032a; 6035a; 6036a; 6047a-48a; 6055a-56a; 6077a; 6099a-6100a; 6119a; 6165a-66a; 6180a; 6182a; 6194a-95a; 6196a; 6208a-09a; 6220a-21a; 6253a-56a; 6262a-64a [radios]); App. Vol. 8 (3015a, at 3046a-3083a).

37. See App. Vol. 16 (6598a-6601a; 6670a-72a; 6679a-81a); App. Vol. 18 (7675a-76a; 7777a-7796a); App. Vol. 20 (8296a-8306a; 8458a-59a).

computer-generated, defendant-by-defendant, model-by-model price comparisons of technically comparable models, based on (a) price information the Japanese manufacturers themselves provided in interrogatory answers, and (b) the petitioners' Japanese market prices as established by their admissions against interest on their Japanese commodity tax returns (they would have no legitimate business reason to *overstate* their Japanese market prices in those tax returns and pay more tax than the law required), App. Vol. 9 (3285a-3468a) and App. Vol. 5 (1836a-1861a), and by respondents' accountants' analysis of petitioners' periodic average prices per screen-size data (by defendant) for both markets, App. Vol. 5 (1817a-1835a; 2205a-37a); App. Vol. 7 (2949a-62a); App. Vol. 8 (3107a; 3121a; 3123a; 3125a), all of which fully corroborate the Treasury Department's dumping finding.

*c. The Persistent Differentials Between
Petitioners' Japanese Market Prices and their
United States Import Price Levels.*

Petitioners' conspiracy to affect price levels in both Japan and the United States resulted in large, persistent and anticompetitive dumping margins between their high price levels in the Japanese market and their low United States import price levels for comparable television receivers imported and sold in the United States. The creation and maintenance of these international, geographic price differentials was a principal object of their conspiracy. App. Vol. 9 (3287a-3468a). Even calculating these dumping margins on the basis of the higher import prices which petitioners themselves falsely reported, respondents' model-by-model price comparisons disclose large mean percentage dumping margins between the Japanese market factory sales prices and the factory sales prices of their imported television receivers in the United States, averaging some 59% for color sets and more than 58% for black-and-white sets, as follows, App. Vol. 9 (3351a):

**MEAN % MARGIN BETWEEN JAPANESE HOME
MARKET FACTORY SALES PRICE AND EXPORT
FACTORY SALES PRICE TO THE UNITED STATES**

<u>Defendant</u>	<u>Color (%)</u>	<u>BW (%)</u>
Hitachi.	58.42	43.36
Matsushita.	74.02	55.16
		58.71
Mitsubishi.	52.73	81.72
Sanyo.	76.03	64.90
Sharp.	61.80	66.72
Toshiba.	32.34	38.78
<i>Average</i>	59.22	58.48

See also, App. Vol. 9 (3321a; 3430a; 3440a-3441a); App. Vol. 5 (1858a-59a). Since the Japanese manufacturers concealed their *actual* import prices, the true dumping margins are even substantially greater.³⁸

d. The Japanese Manufacturers' System For Co-ordinating and Concealing Their Actual United States Dumping Prices.

To enable them all to continue to dump, it was essential that petitioners conspire successfully to conceal their actual United States import prices, and they did so by lying in their United States Customs declarations,³⁹ and by causing their United

38. Petitioners' price differentials between the Japanese market and the United States market are not explained by differences in the costs of distribution in the two markets. Significantly, products such as video cassette recorders (VCR), which only the Japanese manufacturers make, are sold through the same distribution channels in Japan as are television receivers. Petitioners' prices in Japan and in the United States were at the same levels for these products. App. Vol. 6 (2336a-37a; 2614a-2621a).

39. All imports of goods are subject to certain procedures to enter the United States Customs territory. Upon entry, a Special Customs Invoice, Form 5515, prepared by the exporter, must be presented by the importer for clearance of each shipment. 19 U.S.C. §§1481 and 1485. (10ad-15ad). The invoice provides the information as to the kind, quantity, composition, price and value upon which the applicable duty is determined. The invoice must show the purchase price of each item, in the currency of the purchase, and must disclose *all rebates, drawbacks, and bounties, separately itemized*. The obligation to

States customers to execute purchase orders at higher fictitious "prices", to pay for the goods initially by letters of credit at the falsely reported "prices", and to pay additional United States customs duty on the goods at the falsely reported "prices." By using their formal cartel arrangements, in furtherance of their conspiracy, as a facade for conduct having radically different purposes and effects, and by combining this price coordination with their simultaneous price-fixing in the closed Japanese market, petitioners made the Agreements and Rules merely a component of their conspiracy to produce large concealed dumping margins which they knew would injure their United States competitors and disrupt the market in the United States, but would escape detection under the United States antidumping laws. App. Vol. 17 (7444a-45a).⁴⁰

NOTES (Continued)

furnish true and relevant information is formalized by the declaration that the consignee must execute when making entry. 19 U.S.C. §1485; 19 C.F.R. §141.19. False declarations on entry invoices are punishable by a penalty, or forfeiture, *in an amount up to the value of the merchandise*. 19 U.S.C. §1592. (16ad-17ad). The customs laws also require that the invoice prepared by the exporter be *certified before the consular officer of the United States for the consular district in which the merchandise was manufactured or purchased or from which it was to be delivered pursuant to the contract*. 19 U.S.C. §1482(a). The certification must include a verified declaration stating "*that there is no other invoice differing from the invoice so produced,*" as well as a declaration that all statements contained in the invoice are true and correct. 19 U.S.C. §1482(b).

Petitioners' flagrant practice of "double invoicing," *i.e.*, presenting to United States Customs an invoice different from the invoice utilized by the parties to the transactions, is an abuse of the customs laws specifically prohibited by 19 U.S.C. §1482(b).

40. GATT and various national antidumping laws reflect a world-wide condemnation of dumping as a vicious trade practice. The Antidumping Act of 1921, 19 U.S.C. §160, *et seq.*, (4ad-9ad), was intended to prevent the anticompetitive and destructive effect on domestic industries of importation into this country of foreign goods and merchandise at prices lower than the prices at which such goods are sold for consumption in the country of production. During the period involved in this case, dumping duties under the Antidumping Act of 1921, 19 U.S.C. §161 (1970), were calculated to equal the difference between the price of the product sold in the country of production (the "foreign market value") and the import price of the product as it is imported into the United States. (Section 161 was enacted as §736 of the Trade

Unrebutted evidence of the main features of this aspect of petitioners' conspiracy is described in detail in Plaintiffs' Final Pretrial Statement.⁴¹ In summary, petitioners and the buyers for large United States mass merchandising chains and original equipment manufacturer ("OEM") customers, using the "check prices" as their "keystone", App. Vol. 20 (8296a-97a), systematically agreed on prices for imported television receivers that were below the "check prices."⁴² Japanese suppliers prepared and falsely certified the standard Special Customs Invoice No. 5515 and shipping documents setting forth the "check price" (or occasionally a higher price) as a camouflage, instead of the true price, and falsely denying the existence of any rebates or drawback agreements, for presentation by the customer to United States Customs upon entry of the goods through Customs.⁴³ This conduct violated United States customs laws and criminal laws, as the participants were well aware. App. Vol. 16 (6684a); App. Vol. 21 (8737a-75a). *See*, 18 U.S.C. §§542 and 1001 (1ad; 3ad); 19

Agreements Act of 1979, 93 Stat. 172). Falsification of the true import price by reporting a higher price conceals the fact of dumping, and reduces the amount of the additional dumping duty that would be assessed and collected after a finding of dumping. The Act is enforced by imposition of an additional duty (the "antidumping duty") when, after an investigation, the Treasury Department has determined that imports of a product are at less than fair value and the United States Tariff Commission has determined that an industry in the United States has been injured by reason of dumped imports.

41. *See* App. Vol. 16 (6455a-6559a; 6871a-6904a); App. Vol. 17 (7007a-12a; 7063a-81a; 7257a-62a; 7339a-61a; 7529a-30a; 7541-48); App. Vol. 18 (7562a-7662a); App. Vol. 19 (7983a-97a); App. Vol. 23 (9517a-10109a); App. Vol. 24 (10111a-574a).

42. *See* App. Vol. 16 (6456a-6559a; 6599a-6600a; 6871a-6904a); App. Vol. 17 (7043a-44a; 7063a-81a; 7257a-62a; 7337a-61a; 7529a-30a; 7541a-48a); App. Vol. 18 (7861a); App. Vol. 19 (8084a-91a; 8155a-57a); App. Vol. 20 (8296a-97a; 8344a; 8440a-41a); App. Vol. 22 (9201a-06a; 9211a-14a; 9233a-38a; 9463a-64a); App. Vol. 23-24 (9517a-10574a).

43. *See* App. Vol. 23 (9531a; 9534a-35a; 9538a; 9540a-41a; 9544a; 9546a; 9551a; 9555a; 9557a; 9559a; 9561a; 9563a; 9565a; 9567a; 9577a; 9581a; 9590a-91a; 9603a-04a; 9612a-13a; 9619a-20a; 9622a-23a; 9634a-5a; 9637a; 9641a; 9645a-46a; 9655a-56a; 9658a-59a; 9662a-63a; 9672a-73a; 9685a-91a; 9711a; 9722a-25a; 9841a-42a; 9867a-71a; 9873a-74a; 9877a-78a; 9886a-87a; 9912a-13a; 9916a-17a; 9920a-21a; 9977a-78a; 9981a-82a; 9984a-85a; 10005a-06a; 10008a-09a; 10056a-57a; 10060a-61a; 10071a-72a); and other 5515 forms at App. Vol. 23-24 (10076a-574a).

U.S.C. §1592 (16ad-17ad). Petitioners and their co-conspirators made a systematic effort, as they said, “to keep all agreed [actual] prices off [the] documents as a method of escaping the United States laws.” App. Vol. 19 (8149a). Apart from the wholesale violations of United States customs laws involved in this aspect of the conspiracy, such shipments from Japan at prices below the “check prices” constituted a violation of Japanese law (according to the position of the Japanese government in the *Continental Forwarding* litigation. See 43ad-46ad; 50ad-51ad).⁴⁴

The seller’s invoice also stated the “check price” (or a higher price), and the United States buyer cooperated by paying extra *ad valorem* import duty calculated at the “check price” — rather than a lower duty on the actual lower price — in order to conceal the actual price.⁴⁵ Petitioners supplied their Television Export Council and the Television Export Examination Committee with Shipment Validation forms showing the “check price” (or a higher price), although petitioners’ executives, who comprised

44. The *Continental Forwarding* litigation involved the question whether United States Customs duties on goods imported from Japan should be calculated at the Japanese “check prices,” if there is one, or at the lower price, if the importer paid less than the check price. The case history of the two *Continental Forwarding v. United States* cases may be found at 46 Customs Ct. Rep. 579 (1961); *rev’d*, 52 Customs Ct. Rep. 629 (1964); *aff’d*, 53 C.C.P.A. 105 (1966); 64 Cust. Ct. 838, A.R.D. 270, 311 F.Supp. 956 (2d Div. 1970), *aff’d*, 463 F.2d 1129 (C.C.P.A. 1972). The pertinent answers of the Japanese Ministry of International Trade and Industry to interrogatories of the United States government, as set forth in the Government’s appendix to the Court of Customs and Patent Appeals in that case, are reproduced in the addendum to this brief. (33ad-51ad).

45. See App. Vol. 16 (6671a-2a; 6679a; 6683a); App. Vol. 17 (7044a; 7048a-7049a; 7083a-93a; 7098a-7100a; 7103a-33a; 7142a; 7162a; 7171a; 7174a; 7176a-77a; 7184a-85a; 7260a; 7472a-77a; 7507a; 7542a-52a); App. Vol. 20 (8348a-51a); App. Vol. 22 (9263a-66a; 9299a); App. Vol. 23 (9532a-33a; 9536a-37a; 9539a; 9542a-43a; 9545a; 9552a; 9554a; 9556a; 9558a; 9560a; 9562a; 9564a; 9566a; 9568a; 9575a; 9582a-83a; 9585a; 9593a; 9605a; 9614a; 9621a; 9624a-25a; 9633a; 9636a; 9639a-40a; 9643a-44a; 9657a; 9661a; 9674a; 9712a-13a; 9726a-29a; 9787a-92a; 9813a; 9843a; 9866a; 9869a; 9872a; 9875a-76a; 9888a; 9914a-15a; 9918a-19a; 9922a; 9980a; 9983; 9986a-93a); and other invoices at App. Vols. 23-24 (10007a-572a).

these groups and approved the completed forms and certified compliance with the “check price” provision, well knew that the true prices were lower than the “check prices.”⁴⁶

The United States buyer paid by letter of credit calculated at the “check price”; thus, an overpayment — equal to the difference between the “check price” and the “actual price” — resulted. App. Vol. 17 (7029a; 7044a); App. Vol. 22 (9203a; 9211a; 9417a-27a; 9441a-43a); App. Vol. 23 (9520a). Petitioners and their customers kept track of this “difference money,” as it was known, in special accounts, and exchanged copies of these accounts for mutual verification.⁴⁷ In doing so, both petitioners and their United States customers all acted in the strictest secrecy. See App. Vol. 17 (7075a-76a; 7104a; 7109a; 7113a; 7123a; 7124a; 7129a; 7139a; 7141a; 7145a; 7146a-49a; 7151a; 7168a; 7418a-19a); App. Vol. 22 (9329a).⁴⁸ The true price — often many dollars below the fictitious “invoice price” or “check price” — resulted in a total of “difference money” which was very substantial.⁴⁹ The ongoing “difference money” balance — equal to the difference

46. See App. Vol. 23 ([Translation: 9522a] 9629a-32a; 9653a-54a; 9669a-71a; 9679a-84a; 9697a; 9741a; 9759a; 9812a; 9827a; 9833a-40a; 9855a-65a; 9885a; 9895a-99a; 9908a; 9910a; 9935a-42a; 9961a-62a; 9972a; 9974a; 9976a; 10000a-04a; 10022a-27a; 10042a-43a; 10049a-50a); App. Vol. 24 (10218a; 10319a; 10339a; 10343a; 10347a; 10353a-69a; 10378a-85a; 10480a-87a; 10514a-15a). (See, Translations: App. Vol. 14 [5813a; 5887a; 6059a; 6087a; 6110a; 6130a; 6145a; 6159a; 6172a; 6188a; 6202a; 6215a; 6234a]).

47. See App. Vol. 16 (6723a-6801a; 6921a-7001a); App. Vol. 17 (7049a-51a; 7072a-81a; 7083a-93a; 7098a-99a; 7103a; 7109a-16a; 7121a-22a; 7123a-42a; 7145a-53a; 7161a-90a; 7194a-7232a; 7237a-44a; 7283a-7307a; 7311a-20a; 7326a-35a; 7418a-19a; 7471a-90a); App. Vol. 18 (7899a-7901a; 7910a-57a); App. Vol. 21 (9095a-9147a); App. Vol. 22 (9257a; 9293a-99a; 9307a-21a; 9327a-35a; 9341a-51a; 9354a-79a).

48. As Sharp cautioned Midland, a United States buyer, App. Vol. 17 (7139a): “We can not allow you to reveal such a confidential document to outside of your company such as CPA, tax office as well as customs house, as you know well the reason for it. We strongly request you use it within your office. Upon receipt of your written confirmation we would like to cooperate with you in this matter.” Midland responded: “Please be assured that Mr. Ryan and myself will continue to keep this document confidential per your request.” App. Vol. 17 (7140a). See also, App. Vol. 18 (7887a; 7893a).

49. See App. Vol. 16 (6751a-55a; 6758a-59a; 6761a-63a; 6765a; 6768a; 6771a; 6774a-75a; 6777a-79a; 6781a-82a; 6784a-85a; 6787a-89a; 6791a-92a; 6794a-95a); App. Vol. 17 (7044a; 7435a-36a).

between the fictitious "invoice price" or "voluntary camouflaged price," App. Vol. 17 (7444a) and the "actual (FOB) price" or "contract price" — was also known as the "check price balance" or "c.p. balance."

For this aspect of the conspiracy to work, Japanese manufacturers had to secretly refund "difference money" to United States buyers, and they used identical means to do so. Several companies used the same Basle, Switzerland, branch of the same Swiss bank (Swiss Bank Corp.) to make these secret transfers. *See*, Sanyo's secret transfers to Sears, App. Vol. 16 (6779a; 6782a; 6785a; 6792a; 6795a; 6798a), and General's secret transfers to Midland, App. Vol. 17 (7374a; 7404a-10a; 7424a). The principal means of refunding "difference money" included: (a) checks that petitioners secretly drew on their Hong Kong, Japanese, and Swiss bank accounts and hand-delivered or mailed to United States buyers located at buying offices in Japan or in the United States;⁵⁰ (b) secret telegraphic fund transfers ("T/T") to the United States through petitioners' foreign bank accounts in Switzerland, Germany and other countries, App. Vol. 17 (7045a; 7050a; 7056a; 7404a-10a; 7415a; 7421a; 7466a; 7104a-05a; 7241a; 7247a; 7275a-76a); (c) "credits" disguised as offset credits on tooling costs the buyer ordinarily would have paid, App. Vol. 18 (7946a-57a); App. Vol. 19 (8203a); App. Vol. 20 (8372a-76a); App. Vol. 21 (9015a-35a), or credits for free spare parts or credits toward the purchase price of other products not subject to current dumping examination, including the "over-under" or "over-and-under-billing" technique, whereby the difference between the higher "invoice" price and the "actual" price is credited toward and deducted from the actual agreed purchase price of another product which the same buyer desired to purchase, thus reducing the agreed prices on other products to lower levels (and requiring further false declarations for those products and customs fraud on shipments of such other products, as well as on the

50. *See* App. Vol. 16 (6611a-13a; 6645a-47a; 6763a; 6779a; 6782a; 6785a; 6789a; 6792a; 6795a; 6798a; 6905a-07a); App. Vol. 17 (7030a; 7034a; 7045a; 7278a-79a; 7281a; 7322a; 7325a; 7421a; 7431a-32a; 7439a-42a; 7463a-64a; 7491a; 7493a-94a; 7496a-97a); App. Vol. 19 (8131a-47a); App. Vol. 22 (9417a-27a).

television product);⁵¹ (d) “usance” or “usance interest” (a recognized form of “concealed dumping;” See Viner, *Dumping: A Problem in International Trade* 17, 266, 281), whereby petitioners allowed extended payment terms, permitted the buyer to retain accumulated interest on the letter of credit, and credited this sum against the “difference money” owed the buyer. App. Vol. 17 (7029a-30a; 7032a-33a; 7046a; 7052a-53a; 7059a); App. Vol. 18 (7898a; 7903a; 7905a-57a; 7979a); (e) deposits in the United States customers’ yen bank accounts in Japan. App. Vol. 16 (6906a); App. Vol. 18 (7875a-76a; 7883a-86a; 7977a-78a); and (f) travelers’ checks which petitioners’ employees while visiting the United States secretly hand-delivered to United States buyers. App. Vol. 17 (7377a; 7400a; 7414a). Whatever the method, the purpose and effect were the same, and Japanese manufacturers often copied the same technique.⁵²

Petitioners also adopted identical accounting nomenclature to disguise the illicit payments in their books as legitimate payments, including, for example, (i) “loyalty discounts,” App. Vol. 16 (6603a-08a; 6683a-85a; 6693a-95a; 6703a-51a; 6622a-23a); App. Vol. 19 (8151a-89a); (ii) charges by the buyer against the account of the Japanese supplier for “excessive inspection,” “100% inspection,” “inspection,” or “rework” which was never performed, App. Vol. 10 (4107a-17a); App. Vol. 17 (7029a-30a; 7096a-97a; 7191a-93a; 7371a-73a; 7397a; 7399a); App. Vol. 20 (8373a-74a); App. Vol. 21 (8743a-44a; 8855a-73a); (iii) fictitious “commissions”. App. Vol. 10 (4107a-17a); App. Vol. 17 (7029a-30a; 7094a-97a; 7143a-44a; 7155a-60a; 7264a; 7274a-76a; 7308a;

51. See App. Vol. 16 (6611a-12a; 6751a; 6755a; 6758a; 6761a; 6765a; 6768a; 6774a; 6905a-07a; 6921a-7001a); App. Vol. 17 (7029a-30a); App. Vol. 20 (8298a-8307a; 8373a-76a; 8537a-38a); App. Vol. 21 (9015a-29a).

52. Sharp employed the “usance” method with Midland, App. Vol. 17 (7052a); General Corporation with Midland, App. Vol. 17 (7030a; 7046a); Nippon Electric Co., Ltd. (“NEC”) with Midland App. Vol. 17 (7059a), and Matsushita with J. C. Penney, App. Vol. 18 (7895a-7957a; 7979a). Sharp and Montgomery Ward, App. Vol. 21 (9015a-35a; 9145a), Matsushita and J. C. Penney, App. Vol. 18 (7945a-58a), and Magnavox and its Japanese suppliers, App. Vol. 20 (8372a-76a) all used offsets on tooling charges. Mitsubishi used deposits in buyers’ Japanese bank accounts with Gambles Import Corporation, App. Vol. 21 (8937a-8941a); as did Toshiba with J. C. Penney, App. Vol. 18 (7977a-78a); and Matsushita with J. C. Penney, App. Vol. 18 (7883a-86a).

7377a; 7382a-83a; 7393a; 7399a); App. Vol. 22 (9435a-51a); (iv) "compensation" for "market research" furnished by the buyer that both knew to be of no value to the Japanese supplier. App. Vol. 19 (7985a-8068a).

Fictitious "commissions" or "sales commissions" for services not rendered were credited by General to Midland, App. Vol. 17 (7373a), by Sharp to Midland, App. Vol. 17 (7094a-97a; 7143a-44a; 7155a-56a); by NEC to Arvin App. Vol. 22 (9435a-49a); and by NEC to Midland App. Vol. 17 (7264a; 7308a). Entries for "excessive inspection," "excess inspection" or "rework" were used to disguise payments of this nature by Sharp to Midland, App. Vol. 17 (7094a-97a), by General to Midland App. Vol. 17 (7399a); and by Matsushita to Magnavox. App. Vol. 21 (8855a-73a). Sanyo used the so-called "loyalty discount" arrangement with Sears, App. Vol. 16 (6680a-87a; 6699a-6750a; 6781a-6801a); Magnavox, App. Vol. 21 (8813a), and General Electric Co., App. Vol. 19 (8098a-8101a; 8108a; 8151a-89a).

For merely several hundred instances revealed in discovery in this case alone, Japanese manufacturers retransferred \$19,331,045 to their customers. App. Vol. 23 (9519a-20a). The average percentage difference between the reported "price" and the actual price was 11.73% for monochrome television receiver models, and 9.5% for color television receivers (9519a), on sampled transactions having a (falsely reported) dollar value of \$271,733,706.⁵³

In a letter to Sharp, Midland informed Sharp of the "commission" arrangements it had had with other Japanese manufacturers, App. Vol. 17 (7094a-95a):

We have talked to you and other manufacturers about how we can receive the money that is owed to Midland because of the pricing of television sets. The manufacturers that we

53. This compilation was merely a sampling of such transactions. Large amounts of so-called "difference money" refunded to United States customers were also camouflaged by other means such as falsely "underpricing" other products purchased at the same time. This "over-and-under billing" technique allowed purchasers not only to recover "difference money," but also defrauded the United States of a portion of the *ad valorem* duty that importers should have paid on the higher agreed prices for those other products. App. Vol. 20 (8296a-8302a; 8306a-07a; 8371a; 8376a).

have talked to have proposed to us to rebate this money to us in the United States if we would sign the enclosed agreement. *We have signed this agreement with different manufacturers, and they have already started rebating money to us in the United States.*⁵⁴

A good example of how petitioners' "difference money" scheme worked is provided in a July 1, 1968 "confidential" letter to Sanyo from the Japanese trading company, C. Itoh & Co., the fourth largest corporation in the world outside the United States and a prominent participant in United States importation of Japanese consumer electronic products. App. Vol. 22 (9413a-15a). Over two years before the Treasury Department's dumping finding, Itoh (a member of the Japan Machinery Exporters Association, App. Vol. 12 [4888a]) warned Sanyo "to be extremely cautious" in issuing a purchase order for television sets destined for the United States "in view of recent rumors on the dumping question." Itoh also advised Sanyo how to falsify shipment validation forms, invoices, and purchase orders, and how to handle internal accounting for transactions involving "double invoicing." Itoh's recommended procedure involved misrepresenting prices to MITI by maintaining a secret account — the "book of adjustment of balance" — that would be shown only to the Japanese Ministry of Finance in the event of a tax audit, but never shown to MITI:

. . . [T]hough the Ex-godown net, your delivery price, of [the television receiver] is actually \$158.33 (¥57,000), you must list FOB Japan higher than \$175 when filing the TV shipments and export validation form

54. Since these acts in furtherance of the conspiracy exposed the United States buyers to criminal and civil sanctions for customs fraud, in addition to dumping duties, some United States purchasers who were aware that the transactions were illegal would buy only "domesticated" sets, i.e., television sets imported by the petitioners' United States sales subsidiaries and delivered to the United States purchaser after customs clearance. App. Vol. 19 (8155a-56a). However, in many cases United States buyers advanced money to those subsidiaries for *ad valorem* duties based on the "check price" stated on the invoice, and thus knowingly facilitated entry of the television receivers on false customs invoices, since they were aware that their actual prices were below the "check price." App. Vol. 17 (7551a-52a); App. Vol. 19 (8100a-01a).

with the TV Export Council and the Japan Machinery Export Association due to the existence of "Export control price."

Therefore, even if FOB Japan is set, let's say at as low as \$175, the discrepancy between FOB Japan and actual Ex-go would be too large when you submit actual Ex-go price as corresponding to domestic shipment price. Moreover, we think that the maker's price itself will become an issue because it is too low.

Generally, it is understood that FOB Japan is 3% above FOR. If we follow this method of calculation, we consider it appropriate to price Ex-godown net at \$170 and FOB Japan at \$175.

In the event we set the official price as above, the accounting transactions with your company will be dealt with in the following manner.

1. Issue the purchase order setting Exgodown net at \$170.00 (¥61,200).
2. The difference of ¥4,200 between actual Ex-go and the above figure will then be offset by separate accounts of your company and ours other than by the sales/purchase accounts.

That is:

A. Transactions at CI (Purchase)

Purchase at \$170 and at the same time \$11.67 (¥4,200) will be entered as DR. into the miscellaneous deposit accounts under the pretext of sales promotional subsidy. The payment of accounts payable is done simultaneously with the receipt of money as a sales promotional subsidy.

* * *

B. Transactions at your company (Sales).

Enter sales at \$170. At the same time using a separate account (such as sales promotional subsidy A/C), \$11.67 will

be entered as CR. The payment of a sales promotional subsidy is made simultaneously with the receipt of money into the accounts receivable.

* * *

By manipulating in the above fashion, externally the following will appear (1) *In dealing with MITI we can certify that a fair price is observed by us submitting only a purchase order and books of accounts receivables and payables. We will not show a separate book containing the adjustment of balance.* (2) In case of an investigation (audit) by the Tax Office, we will submit the books of accounts payables and receivables as well as the book of adjustment of balance, so as to prove that we are not manipulating profits. *(There will be no problem arising from this discrepancy because MITI and the Finance Ministry are under different jurisdictions).*

In 1966, two years before the Treasury Department had even commenced its Japanese television dumping investigation, the petitioners realized that the large differentials between their Japanese market prices and their United States prices were reflected even in the aggregate trade statistics compiled and published periodically by the Japanese government and agreed immediately to take steps to prevent detection of their dumping. At a December 27, 1966, meeting of the EIAJ "Statistics Committee" (to which all of them belonged, App. Vol. 12 [4747a-4756a; 4884a]), the manufacturers noted that "the domestic unit price is higher than the export unit price by a factor of 2.3 or more." They observed that this "might engender a suspicion overseas that Japan is engaged in dumping." App. Vol. 13 (5609a-10a). A contemporaneous "confidential" memorandum of that meeting addressed to the Chief of the Plant Accountants' Section of Japan Victor Co., Matsushita's subsidiary, discloses that petitioners agreed to alter the statistics they each reported to MITI to prevent discovery of their dumping (5609a):

Although no datum is presently available which shows the domestic shipment in value of color television sets, it can be obtained by subtracting the Customs Statistics of the

Ministry of Finance from the Current Production Statistics of the Ministry of International Trade and Industry. According to this, the unit price will approximately amount to 150,000 yen, and the export unit price in the Customs Statistics is 64,000 yen or thereabouts, so results will show that the domestic unit price is higher than the export unit price by a factor of 2.3 or more. This, in turn, may give rise to a misunderstanding that the domestic price is too high or may engender a suspicion overseas that Japan is engaged in dumping. Therefore, it was agreed that when the report is to be filed with the MITI the amount obtained by subtracting the advertising expenses, the service expenses and the rebates from the domestic shipment in value be reported, thereby narrowing the price gap between the Current Production Statistics and the Customs Statistics.

Because a sudden change in the aggregate statistics might have aroused suspicion, petitioners agreed to make the change gradually, over a three-month period, and even agreed on a joint "explanation" to be provided to the authorities in the event they were detected by MITI and questioned.

e. Detailed Coordination of Petitioners' Pricing Conspiracy.

Petitioners successfully concealed their pricing conspiracy from United States Customs and the Treasury Department, but there is abundant evidence of petitioners' mutual knowledge of each others' adherence to the common plan. See App. Vols. 15-16 (6337a-51a; 6361a; 6373a-75a; 6668a; 6670a-72a; 6673a-76a; 6677a; 6679a; 6841a-42a); App. Vol. 17 (7094a-95a; 7443a-45a; 7450a-52a); App. Vol. 18 (7979a); App. Vol. 19 (8155a-60a); App. Vol. 20 (8646a-47a; 8659a-61a); App. Vol. 21 (8771a-75a; 8813a; 9041a-50a; 9056a; 9073a-79a; 9083a-93a); App. Vol. 22 (9381a-82a; 9463a-65a; 9469a; 9507a-10a). Each petitioner knew of the others' identical acts and implemented the plan secure in the knowledge that the others were doing the same things, namely adhering to the secret pricing system with their registered United States customers, and for the same common purpose — one designed to achieve a mutually beneficial result that could

not be achieved and perpetuated without the continuous cooperation of them all.⁵⁵ Each knew that without substantially unanimous action in compliance with this plan, it would not work, that without full participation those who participated in the plan would be exposed to a serious risk of forfeiture of shipments and of criminal prosecution, but that general adherence to the conspiracy would make possible a continuing dumping campaign that would simultaneously displace and injure United States competitors and cause petitioners' joint share of the United States market continually to expand and afford a continuous opportunity to dispose of their excess production capacity at a satisfactory overall yield in both the United States and Japanese markets. Thus, there was the strongest of motives for participating in the conspiracy.

At crucial points, any failure to maintain close coordination would have exposed petitioners' United States pricing system and would have made it impossible for the conspiracy to continue. The risk of exposure was particularly acute during the Treasury Department's Antidumping Act of 1921 investigation and its aftermath, in the period 1968-1974, and then after the facade was dropped and petitioners' formal cartel arrangements were not officially renewed in 1973.

(i) *Petitioners' Conspiratorial Actions to Deflect Suspicion by the Treasury Department During the 1921 Antidumping Act Investigation.*

The Treasury Department's Antidumping Act of 1921 investigation began in 1968 and focused attention on petitioners' United States import prices by requiring them to set forth those prices. This presented petitioners with a serious dilemma. If they reported their true prices, a dumping finding and a large

55. As the Court of Appeals found, "[t]he evidence would permit a finding that efforts were made to conceal this activity both from MITI and from the United States Customs Service, and a finding that at least some of the manufacturers knew that others were engaged in rebating." (179A). The Court of Appeals held that of the Japanese manufacturers only Sony, which also did not belong to the Okura, Palacc, or Tenth Day Groups, was not involved in this activity.

dumping-duty assessment were inevitable, and it would be impossible thereafter for petitioners (and unprofitable for their importers) to continue to dump. In addition, disclosure of actual prices which differed from the falsely reported "prices" reflected on their United States customers' Form 5515 customs entry declarations would have exposed their false customs declarations and subjected those prior shipments to forfeiture. App. Vol. 15 (6361a). If some manufacturers reported actual prices and others did not, petitioners feared that Customs would investigate the accuracy of all their submissions. App. Vol. 17 (7443a-45a). Since findings of dumping under the Antidumping Act of 1921 are country-wide findings, the one or two Japanese manufacturers who did not lie about their actual prices at this stage could have exposed the entire Japanese television industry to a dumping finding. For the conspiracy to survive the dumping case, therefore, all the petitioners had to answer the Treasury Department's questionnaire untruthfully, and since petitioners were obliged to file their responses to the Treasury Department's inquiries at approximately the same time, the lies had to be carefully coordinated. It was essential that each (a) lie about its prices, (b) continue to police compliance with the system by all, (c) prepare for Treasury Department questioning about the system that might be provoked by dangerous industry rumors of their "double invoicing" practices, and (d) attempt to divert Treasury from questioning the accuracy of their submissions.

The petitioners communicated with each other to assess what Treasury and Customs already knew or suspected, to balance the risks, App. Vol. 16 (6677a); App. Vol. 21 (9073a-93a), and systematically lied in their responses, in violation of 18 U.S.C. §1001.⁵⁶ Having lied in their responses, petitioners later attempted to block respondents' access to those submissions in discovery in these cases, and, after Judge Higginbotham directed petitioners to produce their submissions, lied about their true prices in their answers to respondents' interrogatories. App.

56. See App. Vol. 23 (9627a; 9647a-48a; 9651a; 9664a; 9677a; 9692a-93a; 9695a; 9698a; 9701a; 9714a; 9717a; 9730a; 9735a; 9742a; 9745a; 9760a-62a; 9797a; 9805a; 9814a-9815a; 9817a; 9828a; 9831a; 9845a; 9849a; 9851a; 9853a; 9879a-81a; 9883a; 9889a-90a; 9893a; 9900a-01a; 9905a; 9924a; 9927a; 9943a-45a); App. Vol. 24 (10171a; 10178a; 10183a; 10208a-09a).

Vol. 10 (3901-8a).⁵⁷ An internal Sears memorandum dating from this period shows Toshiba and Sanyo devising a strategy through their joint customer, Sears, for dealing with Customs in furtherance of petitioners' conspiracy, App. Vol. 16 (6677a):

Phone call Tokyo [Handwritten]

Iijima, Tokyo — Toshiba Munao says he heard *customs* was questioning *Sanyo* on double invoicing? *Sanyo top level* says *no* — not at present time.

Sanyo feels we should wait on divulging system.

Trigger off new investigation last for years. Very dangerous — would re-open whole new case. Sanyo feels customs already knows of double invoicing and Sears would gain nothing — tell truth when asked.

RE: Toshiba — will we have to divulge how we over and under bill with them — would we have to reveal system if asked by customs?

Repetition of these dangerous rumors to the Treasury Department about petitioners' "double-invoicing" practices also prompted anxious discussion among all the Japanese television producers at petitioners' Electronic Industries Association of Japan ("EIAJ"); some of the large United States customers were kept informed of these discussions. A contemporaneous document produced by one customer states, App. Vol. 21 (8771a):

The Japanese exporters are extremely concerned about the conversations that are taking place within the E.I.A.

57. App. Vol. 23 *Compare*, (9627a with 9649a; 9651a with 9665a; 9677a with 9716a; 9717a with 9732a; 9735a with 9743a; 9745a with 9763a; 9765a with 9795a; 9797a with 9804a; 9805a with 9816a; 9817a with 9830a; 9831a with 9848a; 9849a with 9852a; 9853 with 9882a; 9883a with 9891a; 9893a with 9903a; 9905a with 9925a; 9927a with 9946a; 9947a with 9966a; 9967a with 9996a; 9997a with 10016a; 10017a with 10037a; 10039a with 10046a; 10047a with 10052a; 10053a with 10068a; 10069a with 10092a; 10093a with 10109a); App. Vol. 24 (10171a with 10181a; 10277a with 10295a; 10317a with 10322a; 10337a with 10340a; 10341a with 10344a; 10345a with 10348a; 10349a with 10374a; 10375a with 10389a; 10391a with 10406a; 10407a with 10414a; 10415a with 10424a; 10425a with 10456a; 10459a with 10475a; 10477a with 10504a; 10505a with 10543a; 10549a with 10574a).

[U.S.A.] committees in the United States. While dumping charges against Japan are being appraised, *there are also other conversations among American E.I.A. representatives implying illegal practices of pricing and kick backs between the Japanese exporter and the U. S. importer.* * * * The feeling of the lawyers representing Japan was that E.I.A. Japan should take a strong position to seek a truce, because if the charges were factual, *it could be most damaging.* * * * *The suggestion was made that E.I.A. Japan should prepare their case assuming that there had not been nor are there any secrets between the Japanese supplier and the U. S. importer of the television sets.*

Some Japanese manufacturers and United States purchasers considered destroying or changing incriminating records. App. Vol. 18 (7891a); App. Vol. 19 (8156a); App. Vol. 21 (8771a; 8844a). An internal memorandum of one United States purchaser states (8771a):

N. E. C. was to give us dates of purchase orders from Magnavox which should be checked for pricing information. There may be inconsistency between F.O.B. Japan prices versus F.O.B. San Francisco. *Whether our files of correspondence and old purchase orders should be purged will have to be discussed with our legal people.*

Other companies instructed their personnel "not to keep any records in [their] office on the difference between actual price and check price." App. Vol. 18 (7887a). In an October 1970 letter, Tanaka, the Japanese companies' American customs lawyer, App. Vol. 15 (6429a-37a; 6417a-18a; 6447a-48a), alerted the director of the EIAJ's New York branch, the Japan Light Machinery Information Center, about these dangerous allegations and warned petitioners to "be prepared" for questions from Treasury, App. Vol. 21 (8773a-75a):

More recently I have heard that Zenith has been giving currency to the story that *Magnavox has been a party to alleged double invoicing and other illegal practices* involving the importation of certain television receivers from Japan. * * * Let me say again that this is all hearsay and

that I have no direct basis to evaluate such hearsay information. I am only passing this information on so that EIA-J members will be fully aware and *be prepared to meet any of these allegations should any of them be made during the forthcoming meeting before the Treasury Department or to the press.*

Tanaka also warned other conspirators. App. Vol. 15 (6345a-46a; 6373a); App. Vol. 16 (6673a-76a). C. Itoh (the trading company that advised Sanyo on accounting tricks to conceal double-invoicing) also reported the concerns which petitioners had voiced at a joint EIAJ-JMEA meeting, and in a September 1970 memorandum recorded petitioners' mutual awareness of each other's dilemma, App. Vol. 15 (6361a):

In this case, although it is said that *invoice price* between head and branch offices will not be consulted, *customs invoice price is believed to be consulted to some extent in the process of calculation.* We believe it becomes a material for checking whether or not actual contract prices are reported. *If c/p [check price] is reported but actual [price] is not reported, in some cases one may be at loss to explain. (Some manufacturers in Japan are not reporting actual prices and are worried that they might be exposed to false reporting).*

Representatives of petitioners and their large United States customers held meetings in the United States during 1970 to formulate plans to deflect the antidumping investigation away from the dangerous question of petitioners' true import prices. App. Vol. 15 (6315a-36a); App. Vol. 21 (9041a-50a; 9056). At a meeting among them held on October 26, 1970 in New York, Ira M. Millstein, Esquire (one of Matsushita's lawyers) proposed filing a suit against the Treasury Department to challenge its price determinations on procedural due process grounds. He defended this idea on the ground that "*a litigation might provide protection against 'double pricing' exposure*", i.e., the United States import-price component of the dumping margin (App. Vol. 21 [9073a]). He reasoned that "the government would be in a poor position to press double pricing charges because this would amount, to some extent, to a second attack on the same

prices after the first attack failed, opening possibilities of abuse of process or malicious prosecution were the government to fail the second time (or at least 'harrassment')."⁵⁸ The matter was the subject of discussion at high levels within the importers' organizations, App. Vol. 15 (6377a-95a); App. Vol. 21 (9077a-93a), and petitioners also considered the impact of their "double invoicing" on the dumping investigation at an EIAJ "Top Meeting," App. Vol. 15 (6351a). Petitioners were otherwise in regular communication concerning the problems posed by the dumping investigation. App. Vol. 14-15 (6239a-40a; 6241a-2a; 6246a-8a; 6351a; 6409a-15a).

(ii) *The Continuation of Petitioners' Conspiracy After Non-renewal of the Formal Check Price Arrangements.*

In 1973, the Agreements and Rules were not formally renewed and the nominal facade for petitioners' conspiratorial conduct was removed. Petitioners found themselves in another serious predicament which called for careful collaboration. After the Treasury Department's March 9, 1971 dumping finding, App. Vol. 11 (4200a), the next step in the administrative proceeding was assessment of dumping duties on current shipments. Although petitioners were unable to prevent a dumping finding, they had succeeded in concealing their true import prices, thereby minimizing the anticipated dumping duty assessments. Treasury's dumping duty assessment would be based only on the prices which petitioners reported in their questionnaire responses and would to that extent be understated.

When the Agreements and Rules were not formally renewed the absence of "check prices" posed a serious problem. Petitioners faced the dilemma of what fictitious prices should be set forth on Special Invoice Form 5515, and of how they could

58. The Matsushita interests and one of their United States customers did file such lawsuits. See, *J.C. Penney Co., Inc. v. U.S. Treasury Department*, 319 F.Supp. 1023 (S.D.N.Y. 1970), *aff'd*, 439 F.2d 63 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Matsushita Electric Industrial Co., Ltd. v. U.S. Treasury Department*, 67 Cust. Ct. 328, C.D. 4292, *aff'd*, 60 C.C.P.A. 85, C.A.D. 1086, *cert. denied*, 414 U.S. 821 (1973).

continue to make their fictitious prices appear to be uniform, and, therefore, plausible to Customs. Had petitioners suddenly begun to report actual prices — prices that were far below the “check prices” — Treasury and Customs (which had never seen petitioners’ actual prices) might have interpreted this as a simultaneous, across-the-board *reduction* in Japanese television prices, warranting a renewed dumping investigation; it also might have aroused suspicion concerning the accuracy of the pricing information petitioners and importers had previously submitted. Similarly, if only some Japanese manufacturers and importers began to report true prices and others did not, petitioners feared that Treasury might notice the inexplicable gap between new actual prices and the old “check prices,” and might suspect that companies reporting the higher prices had been engaged in “double-invoicing.” Discovery of such “double-invoicing” might have led to reexamination of the prices on all petitioners’ entries during the entire 1963-1973 period and to possible discovery of petitioners’ pricing system, as later happened to some degree. See App. Vol. 15 (6295a). Treasury might then have reopened the dumping investigation to correct the import prices on which its dumping finding was based, and recalculated the dumping duties based on the true dumping margins. In addition, discovery of the conspiracy would expose petitioners to criminal liability and forfeiture of television shipments from the early 1960s through 1973.

Faced with these serious risks, petitioners could not afford to leave to chance how these new dangerous events might unfold. A “confidential” letter, dated February 19, 1973, from the General Corporation, a Japanese manufacturer, to the major United States buyer, Midland International Corp., provides a cinematographic view of the situation after petitioners did not formally renew the formal cartel arrangements, when Japanese suppliers continued to police the system and deemed it “better to keep voluntary camouflaged prices . . . making them at 10% higher than actual prices” to avoid suspicion of dumping. App. Vol. 17 (7443a-45a):

It is understood to be as a [sic] very confidential news that check price will not be continued further on and after the

end of February this year, when the present agreement will terminate.

This should be a good news on your part being free from heavy overpayment and also from extended settlement minimizing your burden of interest to be involved.

This, we hope and trust, will solve the matter of exchange loss on your part, which please check.

However it might be better to keep voluntary camouflaged prices between us making them at 10% higher than actual prices, because this 10% can be easily refunded at the same time as shipment as you know. The U.S. authorities concerned were very much concerned to [sic] unit prices after evaluation of yen last time, which according to them, should reflect at once new dollar value to outcome from the revolution of yen. Such being the case, if actual [sic] prices will appear on invoices, it might be subject to dumping suspicion [sic].

When Midland ignored this advice, and submitted purchase orders and letters of credit for television sets setting forth the "Real Price", it was harshly admonished for endangering the conspiracy, risking enormous additional dumping duties, and exposing prior entries to antidumping scrutiny. Its Japanese supplier invited Midland "*to coolly look straight at the dangerous surroundings*" created by a comparison with other Japanese suppliers' continued submission of false customs invoices, and demanded an explanation for this refusal to cooperate, App. Vol. 17 (7450a-52a):

Re: L/C [letter of credit] PRICE On Outstanding Orders
 What is the exact reason why you stick to opening L/C
 [Letter of Credit] at the Real Price?
 Because of overpaying?
 Because of saving the interest?
 Or other reason?

We have to coolly look straight at the dangerous surroundings, such as,

1. Due to 10% Dollar devaluation/Yen upvaluation. Other makers are going to increase the price. (For example, SONY announced \$20.00 increase on retail price in the States. Mitsubishi announced at least 10% increase on FOB Japan price.)
2. *Reducing the price of the same model will make the customs have the suspicion of the dumping.*
3. Once MID/GNRL are suspected and are black-listed, *dumping duty will be imposed to you* and we cannot make the shipment-shipment hold.
4. Further, U.S. customs' authority can have the right further to *investigate the price details not only on present/future models but also on the past models* if they are/have [sic] been safe from dumping.
5. *If the FOB Japan price of ours is compared with others', great suspicion would be inevitable.*

General insisted that Midland continue to set forth the "voluntary camouflaged prices" — in effect a *phantom* "check price" — on its letters of credit until its Japanese manufacturer could "grasp more clearly the movement of the other makers," and coordinate its conduct with theirs, App. Vol. 17 (7452a):

. . . we will suggest you to open L/C at the old check price until June shipment, at least. We think by someday around June/July *we can grasp more clearly the movement of the other makers'* and A/D [antidumping] matter.

The local Japanese buying office of Teledyne, Inc., another United States purchaser, also reported this pressure to continue to set forth the old prices on purchase orders and Customs Form 5515's until petitioners could coordinate their activities at the "end of July." App. Vol. 22 (9463a-64a). A Teledyne communication later in 1973 stated, App. Vol. 22 (9465a):

"Re General z they recommend we do not change PO prices until may be end July because although check prices abolished, U. S. Antidumping rule still exists and they want to *wait for a while and see what competitors will be doing* z

they are asking same thing to other customers such as Midland z."

An "Interoffice Memo" dated May 29, 1973, describes the coordination of these moves with respect to the prices to be set forth on purchase orders, App. Vol. 22 (9469a):

"General therefore wants us to *wait until end of July*. They feel they will be in a position to agree to revise PO prices then. They are asking the same things to Midland and others."

Thus, the Japanese manufacturers continued this aspect of the conspiracy *even after* the non-renewal of the formal Agreements and Rules. Toshiba continued its "over-and-under" billing scheme with Sears. *See e.g.*, App. Vol. 16 (6962a-80a; 6995a-7001a); App. Vol. 23 (9717a-33a); App. Vol. 17 (7262a; 7492a-7508a; 7526a; 7555a). App. Vol. 10 (4107a-17a).

Ultimately in 1977, aspects of the conspiracy began to unravel. While respondents were subpoenaing documents and taking depositions of large buyers, two large United States buyers found it expedient to acknowledge the practice in filings with the Securities and Exchange Commission and in a very limited "voluntary disclosure" to the United States Customs Service. App. Vol. 10 (4107a-17a); App. Vol. 15 (6289a-6312a); App. Vol. 16 (6809a-29a); App. Vol. 17 (7555a); App. Vol. 21 (8937a-48a; 8971a-96a). Another importer was indicted and pleaded guilty to customs fraud charges on March 29, 1979. App. Vol. 10 (4107a-4117a). Petitioners, however, escaped indictment.⁵⁹

(iii) *Pettitioners' Joint and Knowing Acquiescence in and Approval of Each Other's Falsified Shipment Validation Forms to Further the Conspiracy.*

The Japanese manufacturers, whose Television Export Council and Television Export Examination Committee were assigned the function of "checking" each others' shipment valida-

59. An indictment of Sears Roebuck & Co. is currently pending before the Court of Appeals for the Ninth Circuit.

tion forms for compliance with the "check price" provisions of the Agreement and Rules, were aware that the "check prices" which they set forth on "Applications for Validation of Shipment" were not the true prices. Although the Agreements and Rules empowered the Council and the Committee to investigate and prevent sales at prices below the "check prices," and required petitioners to "comply with requests for reports and with demands for investigation," (*See, e.g.*, App. Vol. 14 (5878a)), petitioners continued to validate each other's applications notwithstanding their knowledge that each other's shipment validation forms did not reflect the true prices and that the true prices were below the reported "check prices." There was no showing that petitioners ever caused the Council or the Committee to investigate or to invoke the Agreements and Rules to prevent their putative "competitors" from continuing to sell below the "check prices." There was no showing that any petitioner — in order to prevent another Japanese "competitor" from obtaining a pricing edge in an illegal manner in sales to a United States customer — ever reported another petitioner's flagrant customs violations to United States Customs. On the contrary, petitioners and their major United States purchasers met together to discuss ways to continue their joint pricing system, and to continue to conceal their actual prices from United States Customs, and to continue to dump television receivers in the United States. App. Vol. 21 (9073a-75a).⁶⁰

60. The Japanese manufacturers' United States sales subsidiaries, operated at a loss over many years, acted as United States conduits by drawing funds on their own accounts and delivering checks for secret transfers to United States customers, and by "domesticating" imported goods to accommodate their private label and OEM purchasers that refused to be importer of record. App. Vol. 19 (8156a); App. Vol. 16 (6742a-79a); App. Vol. 19 (8004a-06a; 8016a-17a; 8037a-39a; 8041a); App. Vol. 24 (10111a-27a); App. Vol. 21 (8855a-73a; 8935a-68a); App. Vol. 22 (9495a-97a; 9417a-27a); App. Vol. 16 (6909a-20a; 6872a-75a); App. Vol. 19 (8217a-23a); App. Vol. 21 (8782a-3a; 8785a-7a; 8779a); App. Vol. 11 (4169a-73a); App. Vol. 22 (9430a); App. Vol. 21 (8769a); App. Vol. 11 (4171a-73a).

f. *The Destructive Effects of Petitioners' Conspiracy.*

Petitioners' "check prices" were substantially below not only petitioners' Japanese market prices but also television price levels in the targeted United States market. App. Vol. 8 (3056a-57a; 3073a-74a); App. Vol. 11 (4191a, 4197a-98a). Petitioners' steadily increasing shipments at actual prices concealed under the facade of the Agreements and Rules shattered prevailing "price points" in the United States market, drove United States prices down to levels that eventually made profitable operations impossible for United States manufacturers, and finally decimated the United States consumer electronic products industry. App. Vol. 11 (4269a-98a; 4304a-4530a); App. Vol. 5 (1957a; 1965a-6a).

United States manufacturers' profits dwindled and, in many cases, they incurred losses that ultimately forced them to abandon the manufacture and distribution of these products. App. Vol. 5 (1958a-71a); App. Vol. 6 (2475a-2507a); App. Vol. 11 (4201a-8a; 4211a; 4216a-21a; 4223a-8a; 4229a-31a). The volume of imports and the combined share of United States sales represented by the Japanese manufacturers' consumer electronic products increased many times. App. Vol. 5 (2157a-9a); App. Vol. 6 (2551a-98a); App. Vol. 11 (4123a-68a). By 1976, Japanese imports accounted for more than 50% of all portable and table model color television sales in the United States market, by far the largest portion of the business. App. Vol. 11 (4134a). United States production and United States producers' aggregate share of domestic sales plummeted. App. Vol. 6 (2486a-88a). The number of United States companies producing television receivers declined, with under-utilization and idling of United States television receiver assembly plants. App. Vol. 5 (1960a); App. Vol. 6 (2489a-93a). United States producers' operating profits declined drastically. App. Vol. 5 (1968a-69a). The number of persons employed in United States establishments in the industry and man-hours worked on television receivers also drastically declined. App. Vol. 5 (1960a-64a).

Elaborate studies of the television industry by Federal agencies with special expertise in analyzing the effects of imports

on domestic commerce describe the serious injury which United States manufacturers sustained. App. Vol. 11 (4191a-4208a). Plaintiffs' expert economic witnesses' studies (verified by affidavit) corroborate these findings. App. Vols. 5 and 6; App. Vol. 8 (3107a-13a). The operating results of the few domestic manufacturers which survived and of their distributors provide dramatic evidence of the destructive effects of petitioners' actions and the success of their conspiracy. App. Vol. 11 (4211a-31a; 4237a-4268a); App. Vol. 5 (1918a-1980a); App. Vol. 6 (2475a-2517a); App. Vol. 11 (4119a-4530a).

On the filing of NUE's action, General Electric recorded its view in an internal memorandum that "of all U.S. TV manufacturers, [General Electric] probably suffered the greatest damage from Japanese competition." (App. Vol. 11, 4229a). Although General Electric also considered filing suit, one executive stated the reason why it could not do so: "[o]ne of the defendants [Toshiba-4233a] is a corporation in which we own 10% of the stock and other defendants are both customers and licensees." (4231a). RCA's profits in the television manufacturing segment of its business were substantially reduced during the period, App. Vol. 11 (4211a-21a), but RCA received large sums in license royalties from the Japanese manufacturers, who had been able to develop little meaningful technology of their own in this field. App. Vol. 5 (1657a-63a). Many established television manufacturers with profitable operations in other fields of business (including NUE) did not survive. See also App. Vol. 11 (4211a-4530a).

As a further consequence of petitioners' conspiracy, United States competitors became ripe for acquisition. On May 28, 1974, recognizing the direction of these events, Motorola sold the assets of its Consumer Products Division to the Matsushita interests for cash and contemplated reciprocal arrangements between Motorola and Matsushita in related fields of the electronics business. App. Vol. 25 (10647a-914a). In the short span of seven months following the Matsushita-Motorola acquisition, four U.S. television manufacturers — Admiral, Magnavox, Philco and Packard Bell — were all either acquired or went out of business. The American affiliate of N.V. Philips Gloeilampenfabrieken (Europe's largest television manufacturer

and joint-venture partner of the Matsushita interests under a comprehensive "Industrial Cooperation Agreement," App. Vol. 25 (10577a-618a)), acquired Magnavox by tender offer, App. Vol. 11 (4245a-68a), after exploring the feasibility of acquiring Zenith. App. Vol. 11 (4251a; 4257a). In 1976, Sanyo bought Warwick Electronics, Inc. ("Warwick"), a United States television manufacturer which for many years had supplied Sears Roebuck & Co. and which ultimately attributed its financial decline to pricing practices of Sanyo and Toshiba, which were designated by the cartel to sell to Sears. App. Vol. 11 (4237a-44a); App. Vol. 16 (6865a-66a); App. Vol. 41 (18493a-508a). A Sanyo executive boasted that the Warwick acquisition provided an opportunity "to seize the majority share in the U.S. market." App. Vol. 16 (6862a; 6864a). Admiral was forced out of the television business thereafter.

Petitioners admitted this evidence of injury for purposes of summary judgment.

SUMMARY OF THE ARGUMENT

1. The admissible direct, as well as circumstantial, evidence of the charged conspiracy in the pretrial record as defined by the Court of Appeals is sufficient to create a genuine issue of fact regarding the existence of petitioners' conspiracy, and a trial is required. The unrebutted conspiracy evidence "tends to exclude the possibility of independent action"; thus, the evidence meets the standard of *Monsanto Co. v. Spray-Rite Service Corp.*, ___ U.S. ___, 104 S.Ct. 1464, 1470-73 (1984), and includes sufficient unrebutted evidence of petitioners' motive to conspire in the manner in which the evidence shows they did. Evidence of conspiracy is sufficient to create an issue if it gives rise to a reasonable inference of "a conscious commitment to a common scheme designed to achieve an unlawful objective," *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, 104 S.Ct. at 1471, and such evidence is sufficient "even though contrary inferences might reasonably be drawn." *Aspen Skiing Company v. Aspen Highland Skiing Corporation*, ___ U.S. ___, 53 U.S.L.W. 4818, 4823 (1985); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

2. Although the record contains such evidence, there is no mandatory requirement here of proof of conduct contrary to economic self-interest. Proof of such conduct may be relevant and, with evidence of parallel acts, sufficient in other contexts (as in refusal-to-deal cases) to warrant an inference of conspiracy from circumstantial evidence, but there is no universal and inflexible requirement that such evidence be presented in all Sherman Act conspiracy cases, particularly where, as here, there is direct evidence.

3. The "foreign sovereign compulsion" issue, which petitioners deliberately waived and abandoned below, is a false issue. The Japanese manufacturers *did not do* what they claim to have been "directed" to do. Instead, petitioners' actual conduct violated both Japanese law (according to the Japanese Government 32ad-51ad) and United States law, and petitioners lied to both governments to conceal their violations. They continued such conduct long after the existence of any alleged "direction." Moreover, petitioners' conduct was part and parcel of their conspiracy, which clearly violated United States law, and under *Loewe v. Lawlor*, 208 U.S. 274, 299 (1908), and many other decisions of this Court, such conduct is entitled to no immunity and such conduct may, in part, "evidence" the violation of law. *Ohrlik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). The Court of Appeals correctly determined that unresolved factual issues relevant to these questions precluded summary judgment based on petitioners' "compulsion" defense.

4. Petitioners have been found to be doing extensive business in the United States. The courts below have *in personam* jurisdiction over petitioners and subject-matter jurisdiction over petitioners' entire conspiratorial course of conduct, and petitioners have not challenged either ruling. Thus, no foreign governmental "direction" can suffice to relieve petitioners in their commercial activities here of the duty to obey United States law. Moreover, no foreign governmental "compulsion" is entitled to judicial deference when it relates to conduct that is inconsistent with United States law, and where (as here) such conduct (a) amounts merely to *commercial* activity, and (b) has direct, exclusive and intended effects on United States commerce, and

was effectuated by and carried on by acts committed within the territorial boundaries of the United States.

5. Petitioners' reliance on an alleged MITI "direction" (evidenced by no contemporaneous written decree) is undermined by the explicit withdrawal provisions (required by Japanese statute) in the very Agreements and Rules in question. There is no *bona fide* invocation of the "foreign sovereign compulsion" doctrine here, because petitioners (a) could have withdrawn from the Agreements and the JMEA at any time, (b) had a right of judicial review of any such "direction," and, as Judge Higginbotham observed (Pretrial Order No. 5, Third Day at 240-241), (c) were not required to export.

6. To the extent that any diplomatic communication regarding factual or legal contentions in issue in a United States court may be entitled to any legal effect, they must, at a minimum, (a) possess sufficient specificity to permit a United States court, in the context of litigation of specific facts and issues, to determine whether the "direction" may be given effect within the legal limitations of any "compulsion defense" that may be recognized, and (b) must be presented in sufficiently timely fashion so as not to intrude upon the sovereignty of the United States and of its courts by disrupting orderly judicial procedures. As the United States Government concedes in this case (G.Br. at 26 n.26), the Japanese Government "failed to spell out its role . . . with sufficient clarity." Moreover, the belated presentation of a second Note Verbale 14 years after the filing of the NUE complaint, after the Court of Appeals' decision, and while the cases are pending in this Court, exceeds proper deference to the sovereignty of the United States. Recognition of such an irregular procedure would be an undesirable precedent that would encourage similar untimely efforts by foreign nations attempting to protect commercial interests of their nationals and would be unduly disruptive of orderly judicial procedures. The Japanese government communications in this case fail to satisfy any of these basic requirements and are entitled to no deference.

7. Since the Questions Presented in the petition involve only the antitrust segment of the cases, under Rule 21.1(a) no issue relating to the antidumping segment of these cases is before the Court. Moreover, a ruling on the conspiracy issue could not

adversely affect respondents' antidumping claims, because the counts of respondents' complaints that charge violations of the Antidumping Act of 1916, charge both that petitioners combined and conspired in violation of that Act, and also that petitioners violated the Act by "importing" and by "assisting in importing." Apart from conspiracy evidence, there is evidence of petitioners' intent that suffices independently to satisfy the statutory intent requirement of the Antidumping Act of 1916, 15 U.S.C. §72. Respondents' antidumping counts therefore state offenses supported by sufficient evidence without the need for evidence of conspiracy. Since the Court of Appeals redefined the summary judgment record in reversing the district court's evidentiary rulings, "reinstatement" of the district court's summary judgments would also be inappropriate.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENTS' ADMISSIBLE DIRECT AND CIRCUMSTANTIAL EVIDENCE OF PETITIONERS' CONSPIRACY IS SUFFICIENT TO CREATE A GENUINE ISSUE OF FACT, AND PROPERLY REVERSED SUMMARY JUDGMENT

On the basis of the additional evidence it ruled was admissible, but which the district court had failed to consider, the Court of Appeals unanimously determined that respondents' conspiracy evidence is sufficient. Its determination was correct.

A. *The Japanese Manufacturers Mischaracterize the Conspiracy Alleged and Proven.*

The Japanese manufacturers mischaracterize the conspiracy and evidence to obscure its basic character as a conspiracy to dump designed to achieve their monopolistic purpose. Consistent with this strategy, they therefore ignore the direct evidence of their collusion regarding the Japanese market price component of this scheme and its economic effect when combined with their United States pricing system, and suggest that this direct evidence is merely evidence of "another conspiracy." Having

dismembered the conspiracy, petitioners argue abstractly and without record support that a conspiracy among Japanese manufacturers to depress prices in the United States market in order to drive United States manufacturers out of the business would be "economically illogical," regardless of its success to date. This question-begging strategem fails to address either the record evidence or the Court of Appeals' holdings.

The evidence shows an integrated course of conspiratorial conduct to restrain and monopolize trade and commerce in television receivers and other consumer electronic products through collusive dumping and other anticompetitive activities. It involved a scheme for simultaneously coordinating petitioners' Japanese market pricing with their United States import pricing for the purpose, and with the effect, of establishing sharp price differentials between the two markets. Thus, petitioners' reliance (P.Br. at 24-25) on commentators who are of the view that single-firm, single-geographic-market predatory pricing is "rare," is misplaced. Petitioners' factually unsupported attack on the "economic logic" of their scheme misses the mark by overlooking the subsidization of petitioners' coordinated dumping in the United States made possible by their price-fixing in the Japanese market.

The evidence of petitioners' conspiracy, detailed above, consists of

(a) undisputed evidence that for more than 10 years the Japanese manufacturers regularly and frequently discussed their Japanese market pricing, and direct evidence of petitioners' actual price collusion in the Japanese market, *supra* at 16-22;

(b) undisputed evidence, in the form of the signed Agreements and Rules, of their United States price arrangements, which a variety of other evidence shows that petitioners jointly used as a facade for coordinated United States pricing having different purposes and effects, and evidence that petitioners combined this secret system of price coordination with their simultaneous, admitted collusion on price in the closed Japanese market to make the Agreements and Rules a component of a larger unlawful scheme designed to produce large concealed

dumping margins which they knew would injure their United States competitors but would escape detection under the United States antidumping laws, *supra* at 22-53;

(c) undisputed evidence of large differentials between petitioners' Japanese market prices and their drastically lower United States market prices, persisting over many years, thus confirming the Treasury Department's dumping finding, *supra* at 28-31;

(d) undisputed evidence that petitioners discussed among them the differentials between their Japanese market price levels and their lower United States price levels, and discussed ways of jointly concealing (1) their dumping, (2) the fact that their actual import prices were below the "check prices," (3) that they were submitting false customs declarations at the time of entry, (4) that they were secretly refunding "difference money" to United States importers, and (5) how they had uniformly lied to the Treasury Department to conceal their dumping from it during its Antidumping Act of 1921 proceeding, *supra* at 21; 31-53;

(e) undisputed evidence of regular secret meetings among petitioners' Chairmen, Presidents and Television Department heads, where they discussed current and future prices, production, inventories and shipments and exchanged confidential company data and forecasts so that they might be harmonized *supra* at 16-22;

(f) undisputed evidence that the Japanese manufacturers met for at least ten years at the Television Export Council, where they discussed their United States pricing strategies, *supra* at 22-28;

(g) undisputed evidence that Japanese manufacturers' export sales were generally at a loss and that they also operated their United States subsidiaries at a loss over many years, *infra* at 81;

(h) undisputed direct evidence that petitioners agreed on methods to conceal their large differentials between their Japanese market prices and their United States prices from both the Japanese government and the United States government, and that in concealing their true prices they engaged in wholesale violations of both Japanese and United States laws; *supra* at 31-53;

(i) undisputed evidence that Japanese manufacturers and trading companies connived to devise ways to deceive MITI about their actual United States prices, *supra* at 39-42;

(j) undisputed evidence that they discussed and agreed upon the profit margins of their respective wholesale and retail distributors in the Japanese market, *supra* at 16-22;

(k) undisputed evidence that petitioners regularly exchanged, discussed and harmonized their production levels and agreed on joint adjustment of their production levels, *supra* at 16-22;

(l) undisputed evidence that petitioners regularly discussed and exchanged information on their respective inventory levels, *supra* at 16-22;

(m) undisputed evidence that petitioners regularly discussed and exchanged information on their respective shipments, *supra* at 16-22, 24-25;

(n) undisputed evidence that petitioners discussed, exchanged and "voted" on forecasts and projections of future demand, supply, production, shipment and inventories, both for the Japanese market and for exports, the majority of which were destined for the United States, *supra* at 16-22;

(o) unrebutted expert opinion evidence regarding the Japanese manufacturers' strong economic motives to conspire to dump and to eliminate their United States rivals, *infra* at 76-81;

(p) unrebutted expert opinion evidence analyzing the evidence that shows why petitioners' conduct was totally inconsistent with mere unilateral acts of "competing" companies, and evidence of acts against legitimate individual interests, *supra* at 31-53, 42-43, 52-53, and *infra* at 70-72, 78-81;

(q) undisputed evidence that petitioners systematically and uniformly lied to conceal their actual United States prices, and thereby to conceal and continue their dumping and to minimize the dumping duties, *supra* at 31-53;

(r) undisputed evidence that petitioners continued their United States pricing scheme long after their formal Agreements and Rules were not formally renewed, *supra* at 48-53;

(s) evidence that petitioners submitted to their own executives at the Television Export Council and Television Export

Examination Committee every invoice for covered television receivers, and certain other consumer electronic products imported into the United States, disclosing to one another on current information model numbers, features, quantity shipped, pricing, date of shipment, tradename, and purchaser for every shipment to the major United States purchasers, *supra* at 22-28, 52-53; and

(t) undisputed evidence that petitioners were mutually aware of each other's Japanese market pricing, current production shipment and inventory, forecasts of demand both domestic and export, introduction, timing and pricing of new models, pricing and identities of their United States customs, methods of pricing to customers in the United States, and the existence of concealment and means and methods whereby they concealed their actual prices from United States Customs upon entry, and from the Treasury Department during proceedings to enforce United States antidumping laws, and their common purposes for so doing, *supra* at 16-53;

(u) evidence that petitioners knew that each was engaged in the conspiracy, each used identical terminology to disguise its participation and used identical means for implementing the scheme, for the same ultimate common purpose, which all understood, gave their adherence to it and continued to act in a fashion necessary to keep it up, and protected and ratified it by refraining from enforcing the price provisions of their Agreements and Rules or reporting each other's illegal conduct; *supra* at 42-43, 43-48, 52-53.

Considered together, without tightly compartmentalizing the various components of this conspiratorial plan, and without disregarding after scrutiny of each aspect their cumulative significance, this body of direct and circumstantial evidence "reasonably tends to prove that [the Japanese manufacturers] had a conscious commitment to a common scheme designed to achieve an unlawful objective," *Monsanto Co. v. Spray-Rite Service Corp.*, ___ U.S. ___, 104 S.Ct. at 1473, and, as the Court below held, raises a genuine issue of fact whether petitioners were engaged in a conspiracy under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2.

This body of evidence includes direct evidence of major aspects of petitioners' conspiracy. Petitioners' assertion that the direct evidence of their collusion in the Japanese market is direct evidence, but "not of the conspiracy alleged" (P.Br. at 20) is based on nothing more than petitioners' mischaracterization of the conspiracy alleged and is incorrect. As a result, petitioners' statement of the question presented is highly misleading. Inference of conspiracy only from "parallel acts and other circumstantial evidence" alone is not the issue. As the Court of Appeals observed, the pretrial record contains both circumstantial evidence and direct evidence of the conspiracy charged. Similarly, petitioners' assertion (P.Br. at 6, 19) that their conspiracy to create the dumping differentials involved their concerted conduct to affect the Japanese market price component and that such conduct is "non-actionable," is incorrect and is not properly before the Court. The Court of Appeals (168A) and the district court specifically upheld subject-matter jurisdiction over petitioners' entire course of conduct — a holding that petitioners have not challenged. Petitioners have not challenged the district court's *in personam* jurisdiction findings based on the Japanese manufacturers' own direct commercial activities in the United States, as well as that of their subsidiaries. 494 F.Supp. 1161 (E.D. Pa. 1980); 402 F.Supp. 262. The fact that some of the activities that comprised petitioners' scheme occurred in Japan is therefore irrelevant. "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Continental Ore Co. v. Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962). Petitioners' entire course of conduct is appropriately to be considered in assessing the sufficiency of the conspiracy evidence, as the Court of Appeals correctly held. (166A).

B. Zenith and NUE Are Entitled To Be Given the Full Benefit of Their Proofs Without Fragmenting and Compartmentalizing the Factual Components.

Conspiracy has been defined as "a combination of two or more persons, by concerted action, to accomplish a criminal or

unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means." *Pettibone v. United States*, 148 U.S. 197, 203 (1893). The agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Copperweld Corporation v. Independence Tube Corporation*, ____ U.S. ____, 104 S.Ct. 2731, at 2742 (1984). The essential combination in a Sherman Act conspiracy case "may be found in a course of dealings or other circumstances, as well as in any exchange of words." *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *United States v. A. Schrader's Son*, 252 U.S. 85 (1920). It may also be inferred from "things actually done." *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600, 612 (1914). Therefore, business behavior is admissible to show conspiracy.

In these cases, petitioners are charged with conspiring to restrain and monopolize trade and commerce by means of concerted pricing arrangements and other anticompetitive activities. Although respondents submitted direct evidence in this case, proof of conspiracy may be, and often is, entirely circumstantial. It is well-established that "[n]o formal agreement is necessary to constitute an unlawful conspiracy." *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). As the Court has said, "[i]t is not the form of the combination or the particular means used but the result to be achieved that the statute condemns." *Id.* at 809. Consequently, an unlawful conspiracy "may be and often is formed without simultaneous action or agreement on the part of the conspirators." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

Although most of their petitioners' acts in furtherance of their conspiracy violated either Japanese law or United States law, petitioners lay great stress on their contention that not all of their acts — specifically, their formal cartel arrangement — were unlawful. (P.Br. at 36A-47A). But it is not necessary that all the means that conspirators adopt to achieve the unlawful purpose of their conspiracy be themselves unlawful: "[a]cts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 707; *Poller*

v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 468-69; *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952); *Swift & Co. v. United States*, 196 U.S. 375, 397 (1905). It is "not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts." *American Tobacco Co. v. United States*, *supra*, 328 U.S. at 809; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465-466 (1921); *Truax v. Corrigan*, 257 U.S. 312, 327 (1921). Therefore, as shown below (Part II), even the fact that certain of petitioners' acts are claimed to have been "directed" by a Japanese government agency, and that petitioners complied therewith, would not immunize petitioners' unlawful conspiracy.

Petitioners' seek to separate dumping from the conspiracy and to fragment the conspiracy into two "separate conspiracies," violating a basic rule applicable to cases such as these. Because the character and effect of acts which may in themselves be legal can be accurately appraised only by examining the context in which they were committed, and because pieces of evidence may cumulate logically to reinforce each other in supporting an inference, by deductively combining to exclude some possibilities, or by inductively making other possibilities more likely, or both, it is fundamental that "*the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.*" *United States v. Patten*, 226 U.S. 525, 544 (1913); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). As the Court has said, a court or jury must "look at the whole picture and not merely at the individual figures in it." 370 U.S. at 699. Respondents are to "be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 699. Moreover, in so viewing the evidence, courts are "bound to view the evidence in the light most favorable to [respondents] and to give [them] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Id.* at 696.

The Court of Appeals correctly applied these fundamental precepts in appraising the evidence.

C. On Summary Judgment, Proof of Sherman Act Conspiracy Is Not Deficient Merely Because a Contrary Inference Might Reasonably Be Drawn.

Notwithstanding their admission of conspiracy with respect to major aspects of the overall plan, petitioners argue that a fact-finder could reasonably infer that they were simply "competing" with one another in other aspects. Putting to one side the un rebutted evidence, and the experts economic analysis of it, that such an inference would be impossible on this record, the circumstance that a fact-finder might reasonably draw a different inference from the evidence is never dispositive. Contrary inferences can often be drawn, and it is the task of the fact-finder to assess such competing inferences in a trial. As the Court said in *Aspen Skiing Company v. Aspen Highland Skiing Corporation*, No. 84-510, 53 U.S.L.W. 4818 (Opinion filed June 19, 1985), citing *Continental Ore Co.*, the applicable standard requires the Court to "interpret the entire record in the light most favorable to [respondents] and give to [them] the benefit of all inferences which the evidence fairly supports, *even though contrary inferences might reasonably be drawn.*" ____ U.S. ____, 53 U.S.L.W. at 4823.

Nor is it part of the function of the trial judge on summary judgment to attempt to decide which reasonable inferences are "more probable" than others. Weighing the probabilities of competing inferences is for the jury. As the Court has said, "it is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944), cited with approval in the antitrust context in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. at 700-701. Even under the more stringent "beyond a reasonable doubt" standard applicable in criminal cases, the Government is not required to negate all competing reasonable

inferences. *Holland v. United States*, 348 U.S. 121, 139-140 (1954).

D. Petitioners' Concerted Pricing Arrangements Are Unlawful Per Se.

The Japanese manufacturers suggest that they must be shown to have fixed specific prices or price levels (P.Br. at 3), but respondents produced evidence that petitioners did coordinate their United States prices at specific levels, namely, price levels consistently below their Japanese market price levels. The *per se* rule applies, however, even where no specific prices or price levels are set, as long as prices or price levels are affected by concerted action for that purpose or with that effect.⁶¹ Price-fixing—long illegal *per se* under the Sherman Act — “includes more than the mere establishment of uniform prices.” *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-223 (1940). In *Socony-Vacuum*, where the Court condemned a pattern of concerted conduct by certain oil companies of purchasing oil on the spot market for the purpose and with the effect of stabilizing prices, the Court said (310 U.S. at 222-223):

Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the Trenton Potteries Company Case has no such limited meaning.
* * * Hence, prices are fixed within the meaning of the Trenton Potteries Company Case if the range within which purchases or sales will be made is agreed upon, if the prices

61. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (elimination of short term credit); *United States v. Container Corp. of America*, 393 U.S. 333 (1969) (exchange of price information as stabilizing although lowering prices); *United States v. General Motors Corp.*, 384 U.S. 127, 147 (1966) (indirect effect on prices); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) (minimum prices); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951) (maximum prices); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (buying surplus gasoline to stabilize prices); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Plymouth Dealers Ass'n. of Northern Cal. v. United States*, 279 F.2d 128 (9th Cir. 1960) (establishing price list from which negotiations began).

paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon.

* * *

. . . [T]he machinery employed by a combination for price-fixing is immaterial. Under the Sherman Act a combination formed for the purpose and with the effect of raising, *depressing*, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.

The Court has consistently reaffirmed this basic formulation of the *per se* rule for price-fixing. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 345 (1982); *Catalano v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (agreements *per se* unlawful "even though there [is] no direct agreement on the actual prices to be maintained.")⁶² The evidence supports the inference that the Japanese manufacturers combined for such purpose and with such effect.

Evidence of some variations in petitioners' pricing is also immaterial. The issue is not whether petitioners were charging *uniform* low prices, but whether they conspired to dump and thereby to depress United States price levels to levels that would eliminate competitors in the targeted United States market. The objective of petitioners' conspiracy did not require uniform pricing in order to succeed. There was no need for *identical* dumping prices. The "Five Company Rule" limited the number of major United States customers each petitioner could supply to five and a separate "guideline" they adopted limited overlapping supply arrangements except for those that their own Television Export

62. *United States v. General Motors*, 384 U.S. 127, 147 (1966); *United States v. Socony-Vacuum Oil Co.*, *supra* (agreement to buy surplus oil to stabilize prices); *Sugar Institute v. United States*, 297 U.S. 553, 601-602 (1936) (agreement to adhere to previously announced prices, although particular prices not fixed); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-693 (1978) (agreement not to discuss prices until after initial selection of engineer); *FTC v. Cement Institute*, 333 U.S. 683, 690-693 (1948) (agreement to use a specific method of quoting prices); *Plymouth Dealers' Ass'n. of Calif. v. United States*, *supra* (use of fixed uniform list price as starting point for negotiations).

Examination Committee approved. Under this arrangement petitioners needed to beat only the prices of their United States competitors. A similar argument was rejected in *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700, 703 (1969), where the Court pointed out that a lack of uniformity was immaterial because "petitioners' complaint . . . was not that the respondent companies were charging uniform fees but that they were charging deliberately 'excessive and unreasonable' fees for the purpose of injuring the petitioner."

E. The Evidence Excludes the Possibility That Petitioners Were "Competing" Among Themselves.

Petitioners attempt to portray themselves as "competing" manufacturers, engaged in "normal competitive activities" and "aggressive competition" (P.Br. at 21-22), and, in an effort to explain away the furtive behavior with which the record is replete, petitioners liken the secret payments they made to conceal their actual import prices from United States Customs to secret "competitive rebates." (P.Br. at 30). Petitioners' explanation of the secretiveness of their conduct, however, does not square with the evidence. The "difference money" which defendants secretly transferred to United States importers was simply ancillary to their conspiracy to dump and to conceal their true dumping prices from the authorities. Petitioners' scheme was kept "secret" only from United States Customs and the United States Treasury Department. It was no secret among them: App. Vol. 15 (6337a-51a; 6361a; 6373a-75a); App. Vol. 16 (6668a; 6670a-72a; 6673a-76a; 6677a; 6679a; 6641a-42a); App. Vol. 17 (7094a-95a; 7443a-45a; 7450a-52a); App. Vol. 18 (7979a); App. Vol. 19 (8155a-66a); App. Vol. 20 (8646a-47a; 8659a-61a); App. Vol. 21 (8771a-75a; 8813a; 9041a-50a; 9056a; 9073a-79a; 9083a-93a); App. Vol. 22 (9381a-82a; 9463a-65a; 9469a; 9507a-10a). Secrecy was essential to prevent detection of dumping and was preserved at the cost of petitioners' United States customers' paying higher *ad valorem* duties on shipments, at the cost of petitioners' and their customers' lies on customs entry documents, and at the cost of petitioners' lies to the Treasury Department in proceedings under the Antidumping Act of 1921.

Japanese manufacturers divided major United States customers among themselves. In this fashion, by collusively selling at artificially high prices in the Japanese markets and by coordinating their pricing below their "check prices," the full brunt of petitioners' organized "competition" at predatory, dumping prices was brought down on rival independent manufacturers in the United States competing for those sales. That several of the largest American customers were permitted by the cartel to have two Japanese suppliers does not detract from the significance of the "Five Company Rule." That Rule still operated in even those few instances drastically to limit the number of potential suppliers. Exceptions were permitted only when the cartel approved.⁶³ The Court of Appeals properly rejected petitioners' contrary argument. (180A).

To establish that petitioners' price-fixing machinery in this case involved their conscious commitment to a common scheme designed to achieve their unlawful objective, respondents need only have shown

that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. The circumstances . . . leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking.* * *Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *United States v. Masonite Corp.*, 316 U.S. 265, 274-276 (1942); *Interstate Circuit Inc. v. United States*, 306 U.S. 208, 226 (1939).

63. Nor is it material, as petitioners claim (P. Br. at 35), that their scheme left some room for them to compete with each other for small accounts and local dealers that were not specifically allocated. The principal United States chain stores, mass merchandisers and OEM accounts, who accounted for the bulk of the business, were registered by the cartel members, allocated among them, and remained customers over many years. As the Court of Appeals held (180A), the fact that petitioners may have permitted some residual competition would not be fatal. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

The evidence was more than adequate to create a genuine issue of fact that petitioners all had an awareness of the general scope and purpose of the scheme and participated in it.

F. *Proof of Action Contrary to Economic Self-Interest, Although Probative and Often Sufficient Proof of Conspiracy, Is Not a Sine Qua Non of Conspiracy Evidence In All Cases.*

Petitioners argue that unless there is direct evidence of all aspects of a conspiracy, conspiracy proof is always insufficient unless it includes evidence of conduct "against the independent economic self-interest" of the alleged co-conspirators. (P.Br. at 18). However, *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), which petitioners cite, contains no such holding.

Nonetheless, petitioners contend that the Court of Appeals created an "exception" to *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968), and that its decision is inconsistent with that case. The Court of Appeals did not even cite *Cities Service*, and did not create an "exception" to its holding.

1. *Cities Service Is Inapposite.*

Cities Service did not announce any broad new standard for sufficiency of Sherman Act conspiracy evidence. In the seventeen years since it decided *Cities Service*, the Court has had occasion to cite that case only once, namely in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 n.22 (1970), reversing summary judgment in a Civil Rights Act conspiracy case. The Court did not even cite *Cities Service* in *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464 (1984), the most recent decision on sufficiency of proof of Sherman Act conspiracy.⁶⁴ *Cities Service* is limited to its particular and unusual facts, and does not apply here.

64. As in this case, the petitioner in *Monsanto* also relied on *Cities Service* for an argument similar to that advanced by petitioners. Brief of Petitioner, Monsanto Company, at 32. Nonetheless, the Court did not adopt the restrictive approach.

Cities Service was not a horizontal price-fixing case. Nor were the plaintiff and Cities Service competitors. Cities had no natural motivation to join a conspiracy to injure the plaintiff's business. Iran had nationalized the Iranian assets and oil concession rights of British Petroleum ("BP") and transferred them to National Iranian Oil Co. ("NIOC"). Thereafter, BP threatened to sue any purchaser of NIOC oil. 391 U.S. at 278. Waldron, a broker who had negotiated an exclusive contract to purchase NIOC oil, brought suit alleging a conspiracy among BP and six integrated American oil producers to boycott NIOC's oil in world markets. Cities, an independent refiner and distributor that held no significant oil reserves, was named a defendant later when, after initially expressing an interest in buying the NIOC oil from Waldron, it decided against doing so. The Court's decision dealt only with the merits of Cities' motion for summary judgment.

Waldron had initially contended that Cities had joined the boycott (1) when it was "bought off" or "paid off" by offers of Kuwait oil from Gulf, a defendant, and (2) when a consortium created later made other oil available to Cities. However, the actual timing of these occurrences defeated the inference. Cities had negotiated a final agreement with Gulf for Kuwait oil long before Iran nationalized BP's assets and some two years *before* plaintiff had approached Cities with the NIOC oil. Moreover, Gulf's price was less than Waldron's. The Consortium's offer to Cities came some two years *after* the date plaintiff alleged Cities had joined the conspiracy. Not having argued that Cities' acquiescence and participation in the conspiracy was obtained by threat of retaliation, plaintiff was foreclosed from advancing that position on appeal. 391 U.S. at 280 n.16. Waldron could rely *only* on evidence that Cities, two years *before* plaintiff's approach, had decided to buy cheaper oil from Gulf instead of buying Waldron's oil, and being sued by BP and boycotted by the other defendants.

Plaintiff admitted it did not know what Cities' motive might be, and contended that "Cities' motive for entering the alleged conspiracy was basically irrelevant," (391 U.S. at 265-66), and that it was "unnecessary to demonstrate why Cities conspired." (391 U.S. at 279). Plaintiff also conceded that "Cities' interests . . . were directly opposed to those of the other

defendants" (391 U.S. at 279), because unlike the others it did not have large supplies of foreign oil, was not a member of the international cartel to control foreign oil, and had no wish to re-establish the *status quo* prior to nationalization. 391 U.S. at 279. They coincided with plaintiff's. 391 U.S. at 285.

Against this background, the Court said, "to suggest, as petitioner does, that Cities' participation in the conspiracy is shown by its failure to deal with him is itself to rely on motive." *Id.* at 279. But the record "contain[ed] an overwhelming amount of . . . contrary evidence of Cities' motives." 391 U.S. at 277. The Court summarized the precise issue by saying that "[p]etitioner is . . . forced to take the position that *the one fact that he has produced, Cities' failure to make a deal with him for Iranian oil, is sufficiently probative of conspiracy to entitle him to resist summary judgment.*" 391 U.S. at 286. The Court said that "due to the absence of probative force of Cities' failure to deal with Waldron as being in itself evidence of conspiracy, petitioner's position is, in effect, that he is entitled to rest on the allegations of conspiracy contained in his pleadings." 391 U.S. at 289. Answering this contention, the Court stated its narrow holding as follows:

"Essentially all that the lower courts held in this case was that Rule 56(e) placed on Waldron the burden of producing evidence of the conspiracy he alleged *only after* respondent Cities Service *conclusively showed* that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them. That holding was correct." 391 U.S. at 289.

The differences between the direct and circumstantial evidence of conspiracy and the motive evidence in this case and the single, inadequate item of circumstantial evidence in *Cities Service* are striking and decisive.⁶⁵ In *Cities Service*, the only evi-

65. The lower courts have accordingly read *Cities Service* narrowly. In *Tunis Brothers Co. v. Ford Motor Co.*, 763 F.2d 1482, 1498 (3d Cir. 1985) (Higginbotham, C. J.), the Court read *Cities Service* as standing for the proposition that "[i]f there is substantial factual evidence supporting *both* an inference of conspiracy *and* an inference of lawful conduct, and the crucial question involves motive, summary judgment is inappropriate." *see also, Barnes v.*

dence plaintiff cited was Cities' refusal to buy. Here, however, although evidence of petitioners' consciously parallel conduct is extensive, the record is replete with many of the classic hallmarks of collusion, including direct evidence and admissions of collusion, meetings, communications, information exchanges, and carefully coordinated and concealed activities that leave no doubt of petitioners' conscious commitment to a common plan.⁶⁶ Here, unlike Cities Service, petitioners have made no "conclusive" factual showing. They have made *no* showing at all.

Again, unlike *Cities Service*, here there is extensive evidence relating to petitioners' motive that contradicts their bald claim in their brief that "[t]here could be no rational motive" for their conspiracy. As in *Poller* — and unlike *Cities Service* — the Japanese manufacturers are in a "competitive relationship" with Zenith and were, until it was forced to abandon the business, with NUE. Japanese manufacturers benefited from the elimination of their United States competitors. The Court of Appeals

Arden Mayfair, Inc., 759 F.2d 676, 681 (9th Cir. 1985) ("[i]n determining whether an inference may be reasonable, the district court should not weigh competing inferences."); *Southway Theatres, Inc. v. Georgia Theatres Co.*, 672 F.2d 485, 494, 95 (5th Cir. 1982), (*Cities Service* applicable to conspiracy claims but "ultimate inference that a conspiracy existed need not be more probable than the inference that the refusal to deal resulted from independent business judgment"); *Ambook Enterprises v. Time Inc.*, 612 F.2d 604, 616 (2d Cir. 1979) (*Cities Service* indicating only that "one factor" to consider in determining if agreement should be inferred from parallel conduct was whether agreement benefited the alleged conspirators)

66. Although petitioners were the summary judgment movants and thus had the Rule 56(c) burden to make a "conclusive" factual showing that they were entitled to judgment, both the Court of Appeals and the district court addressed exclusively the sufficiency of *respondent's* factual opposition to petitioners' largely unsupported summary judgment motions, App. Vol. 3 (753a-928a; 1021a-98a). Compare *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 161 (1970) ("No defense to an insufficient showing is required.") Although the Court of Appeals (a) held that a preclusive Case Management Order could shift the normal Rule 56 burden of the movant to the opponent of the motion, (b) measured the sufficiency of respondents' conspiracy evidence under a more stringent procedural standard, and (c) found it sufficient without reference to the inconclusive nature or non-existence of petitioners' factual submissions in support of their motions (60A-64A), the Court of Appeals' judgment in Nos. 81-2331/2332/2333 may also be affirmed on the independent ground that petitioners' factual showing in support of their motions was wholly insufficient.

analyzed this evidence of motive. (169A-180A). *See* reports of Dr. Horace J. DePodwin, Dr. Gary Saxonhouse, Dr. Kozo Yamamura, Professor John O. Haley, Mr. Stanley Nehmer, and Morris J. Cohen & Co. at App. Vols. 5, 6 and 7; App. Vol. 8 (3099a-3125a); App. Vol. 8 (2965a-3097a); App. Vol. 8 (3161a-92a) (experts' qualifications).

Petitioners account for more than 75% of Japanese production in the highly concentrated Japanese television industry. App. Vol. 5 (1721a-23a); (172A). Founded in the 1950s on the basis of licensed American technology, App. Vol. 5 (1657a-68a), the Japanese industry adopted as its television broadcast signal encoding system the United States standard. Appendix in No. 80-2080 (1325b). Although compatible technology made competition in Japan from United States manufacturers feasible, governmentally-imposed and private trade barriers prevented competition by American and other non-Japanese manufacturers in the Japanese market. App. Vols. 5, 6 and 7 (1904a-14a; 2297a-2323a; 2924a-37a) (170A; 370A-373A); App. Vol. 7 (2742a-8a; 2924a); (170A; 370A-373A). Thus, a stable horizontal price-fixing agreement among the few dominant Japanese manufacturers in the concentrated, closed Japanese market was feasible: the manufacturers were protected from price competition in Japan from non-parties. (170A); App. Vol. 5-6 (1904a-17a; 2297a-2323a).

During the 1960s and 1970s, petitioners created plant capacity that far exceeded what the Japanese market could absorb at a desirable price. App. Vol. 5 (1678a-1724a); (171A). Japanese manufacturers had relatively higher fixed costs than American manufacturers, because of Japanese employment and financing practices, as well as higher debt-equity ratios. They therefore had larger fixed obligations. App. Vol. 7 (2889a-2917a). Their higher fixed costs provided a strong motive for Japanese manufacturers to utilize the excessive capacity at the highest possible rate. App. Vol. 7 (2900a-01a) (170A-171A). The Japanese manufacturers therefore had a strong motive to use all capacity, to produce in quantities that far exceeded Japanese market demand, and to dispose of this excess capacity in a market outside Japan. App. Vols. 5-7 (1708a-12a); (2889a-2901a). Since, however, unlimited price competition in all markets in an industry

characterized by excess capacity would be likely to produce losses, if it were feasible to avoid price competition, petitioners would be more likely to have made efforts to do so. (171A). Because the Japanese market was concentrated and sheltered from outside competition, making complete collusion easy and stable, there was a motive to collude and effective collusion was possible, as the Court of Appeals held. (171A).

In addition, Japanese manufacturers belonged to industry trade associations which met at regular intervals and exchanged information about plant capacity, inventories and pricing, App. Vol. 5 (1725a-46a); App. Vol. 6 (2254a-89a); App. Vol. 7 (2749a-2800a). They had extensive opportunities to conspire. Such concert of action would make possible export sales at prices sufficiently low to absorb excess capacity, as the Court of Appeals noted (172A). Each defendant, in fact, consistently sold comparable models in the Japanese market at prices higher than they were being sold in the United States. App. Vol. 5 (1817a-82a; 2205a-37a); App. Vol. 9 (3285a-3468a) (172A). Such conduct over a long period tends to show that each manufacturer was confident that it would be able to support low price sales in the export market by higher-price sales at home, as the Court of Appeals recognized. (172A). Uncontradicted direct evidence of agreed-upon price stabilization in Japan shows that petitioners did conspire, and petitioners have admitted it. (P.Br. at 3 n.2). The Court of Appeals held that, "on this record a fact-finder could reasonably infer the existence, among some Japanese manufacturers, of an agreement to stabilize prices in the Japanese home market, thereby deriving profits which would support sales at low prices in the United States." (175A). The direct and circumstantial evidence of a price stabilization conspiracy in Japan here is reinforced by the conclusions of several of respondents' economic experts, who, after studying the industry and examining the evidence, opined that there was a price-fixing cartel in operation. See, App. Vol. 5 (1611a-1633a; 1725a-45a; 1981a-82a); Vol. 6 (2334a-51a; 2414a-25a); Vol. 7 (2749a-94a).

Given the near-identity of Japanese and United States technical conventions, the United States had the greatest potential as the foreign market for petitioners to exploit, and petitioners had a motive to find a market for their excess production and to sell

at prices low enough to eliminate competition in the United States by American firms. (177A). Acting in concert, petitioners also had the ability to make exports to the American market at predatory dumping prices and to subsidize such pricing in part by profits from sales in the Japanese market at their collusively-established prices in that closed market. Petitioners accurately predicted in their "Rationales" that sales at such prices would disrupt the United States market and injure United States businesses, and they proceeded systematically to engage in such sales. App. Vol. 14 (6091a).

Conspiracy conferred vital benefits. Each Japanese company had targeted customers which it could service with assurance that other cartel members would not become involved, except to the limited extent that the cartel itself approved. App. Vol. 5 (1629a). Each Japanese firm was assured that what was a low, dumping price for their product would not be further affected by the actions of its Japanese associates. App. Vol. 5 (1629a). The cartel's concerted action generated a larger volume of investment in the Japanese industry than would have otherwise been the case, App. Vol. 5 (1629a); App. Vol. 6 (2258a), and this added capacity both enabled and encouraged the Japanese to penetrate the United States market far more deeply than they would have had they competed lawfully and simultaneously discouraged additions to capacity by United States manufacturers, who could no longer even realize adequate returns on their existing capital investments. App. Vol. 5 (1629a-30a). The Japanese companies were able to invest with impunity, secure in the knowledge that any output in excess of what the Japanese market could absorb at the established monopoly prices could be dumped in the United States, thus facilitating their broader anti-competitive strategy. App. Vol. 6 (2258a); App. Vol. 5 (1629a-30a).

By regularly exchanging detailed information as to production, shipments, inventories, pricing, export and domestic, and domestic and export forecasts, petitioners were able to reduce uncertainty in their planning, minimize the financial risks such uncertainty brings, and were able better to plan additions to production capacity, to police violations of their agreements, to coordinate a joint approach to the United States market and

measure their performance against an agreed-upon industry standard, and to facilitate joint action on domestic prices and distribution margins, and agreements on United States customers — all significant advantages to each petitioner which United States manufacturers did not enjoy. App. Vol. 5 (1627a; 1633a). Such information put petitioners in an advantaged position as compared to United States competitors who may have been equally or even more efficient, but who did not possess such valuable information. App. Vol. 5 (1627a). By limiting competition among themselves for individual United States customers, petitioners segmented the United States market, permitting each to capitalize on its own strengths and to economize on marketing and distribution costs. Designated Japanese suppliers could be assigned to confront specific United States firms, and competition among Japanese firms for United States sales could be eliminated, permitting each maximum flexibility to set artificial prices above or below competitive levels depending on United States market conditions, with little regard for the disciplines of cost and capital formation which governed United States competitors. App. Vol. 5 (1633a); App. Vol. 6 (2257a).

Conspiracy enabled petitioners to entrench their position in the United States market to a degree that *individual* action by each of them could never have achieved, App. Vol. 5 (1619a; 1628a), enabling the Japanese companies to charge higher prices and earn greater profits in the closed Japanese market they jointly controlled, and allowing petitioners to lower their prices in the United States market to a level sufficient to eliminate competition from United States competitors, while still maintaining an acceptable rate of return overall. App. Vol. 6 (2257a). Petitioners themselves articulated the benefit of a *cooperative* effort to expand their joint United States market share, resolving in their "Rationales" that "*acting as one body, they will strive . . . to aim for steady expansion of exportation.*" (6063a). App. Vol. 14 (5823a-24a; 5890a; 5970a; 5986a; 6015a; 6063a; 6093a); See also, App. Vol. 8 (3015a-92a at 3075a-83a).

Although petitioners had a strong motive to dump, without the conspiracy it would have been impossible to coordinate the necessary joint approach for concealing their true prices and evading the United States antidumping laws, which was essential

to the long-term objectives of the conspiracy. Uncoordinated dumping by each in the early 1960s would simply have resulted in a prompt country-wide dumping finding and assessment of dumping duties that would have frustrated petitioners' common purpose. Conspiracy offered the simultaneous benefits of coordinated dumping and deceptive plausibility in concealment of their true prices achieved by uniform reporting of "check prices." Thereafter, as part of the conspiracy, they were able jointly to defend their secret pricing system by orchestrating their uniform lies to the Treasury Department, by continuing to report phantom "check prices" in the dangerous period after the facade was removed, thus jointly preventing detection of their prior dumping, reducing the amount of dumping duties ultimately assessed, and blunting enforcement of the United States antidumping laws with respect to future United States imports of their products, and thereby permitting them to continue to dump.⁶⁷ App. Vol. 15 (6338a-40a); App. Vol. 17 (7443a-45a; 7450a-52a); App. Vol. 22 (9463a-65a; 9469a).

The Court of Appeals also discussed the evidence (a) suggesting that NUE and Zenith were injured by an export cartel (179A), App. Vol. 5 (1611a-1917a; 2195a-2237a); and (b) that petitioners set "check prices" that were dumping prices, evidence of collective intent to harm American competitors; (c) that the

67. A further telling indication of petitioners' motive is their uniform conduct in exporting to the United States, rather than marketing in Japan, the output of their large, low-cost Taiwan and Korean television plants. By 1970-1971, Japanese manufacturers had already established, or begun to establish, manufacturing facilities in Taiwan and Korea. Given their relative proximity to the Japanese market, lower transportation costs to ship the product to market, and high prevailing prices for television receivers in Japan, App. Vol. 9 (3291a-3468a), exports of at least part of the output of these Taiwan and Korean plants to Japan could be expected of independent competitors desirous of capitalizing on low production costs to garner a larger Japanese market share. On the other hand, such importation could be expected seriously to affect price levels and threaten the stability of the cartel's financial base in Japan. App. Vol. 5 (1713a-20a); App. Vol. 6 (2446a-51a). Although Japanese firms located in Taiwan produced 1,140,000 television sets in 1972, only 42 sets were shipped to Japan. Petitioners shipped their low-cost output across the Pacific Ocean to large importers in the United States. App. Vol. 5 (2153a-59a); App. Vol. 6 (2449a-50a; 2532a-36a).

Japanese manufacturers and their subsidiaries jointly transformed the character and effect of the formal cartel arrangement (179A); and (d) that petitioners tried to conceal this activity both from MITI and from the United States Customs Service and knew that others were engaged in this system but did not report it to either government. (179A).⁶⁸

There is also admissible expert opinion evidence, as the Court of Appeals noted (179A), that petitioners' export sales for long periods were at prices which produced losses, often as high as twenty-five percent on sales, App. Vol. 5 (1884a-1903a; 1716a-20a)—further circumstantial evidence pointing to intentional predatory pricing, as the Court of Appeals noted. (179A); *see also* App. Vol. 11 (4171a-3a); App. Vol. 19 (8063a); App. Vol. 21 (9131a); App. Vol. 22 (9430a). Petitioners' Five-Company Rule operated simultaneously with their horizontal price-fixing in Japan, permitting an inference (179A) that the allocation of United States customers, combined with price-fixing in Japan, and aggravated dumping in the United States, was intended to concentrate the effects of petitioners' dumping upon American competitors, while eliminating competition among the Japanese manufacturers in both markets. (179A). As the Court of Appeals held (180A), there is sufficient admissible record evidence not only to support "a finding of a conspiracy to sell at artificially high prices in Japan while at the same time selling at artificially low prices in the United States," but also to support a finding of strong *motive* on petitioners' part to conspire in this fashion. (177A).

The Court of Appeals' unanimous decision is not inconsistent with *Cities Service*.

68. The Government observes that "[i]t was not inconsistent with petitioners' independent self-interest for them to fail to report the secret rebates" of others "since detection of the rebates could have exposed each petitioner to liability for violations of antidumping laws." (G.Br. at 12-13). This simply underscores the highly interdependent nature of such conduct and reinforces the inference of conspiracy. Moreover, public policy should dictate that violation of United States laws never be recognized as consistent with *legitimate* business interests. No court has ever held that action contrary to individual business interests includes anything but *legitimate* business interests.

2. *Monsanto Does Not Support Petitioners' Argument.*

Monsanto Co. v. Spray-Rite Service Corp., ___ U.S. ___, 104 S.Ct. 1464, does not require a different result in this case. In *Monsanto* the Court dealt only with an alleged vertical conspiracy among a manufacturer and its distributors to terminate a distributor for failure to adhere to resale prices announced by the manufacturer. The opinion in *Monsanto* addresses the sufficiency of the normal categories of evidence in such distributor-termination cases. What the Court held was that a terminated distributor must adduce evidence "that the manufacturer, and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" 104 S.Ct. at 1471. Summarizing the standard to be applied in such distributor-termination cases, the Court said that "[t]he correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." 104 S.Ct. at 1473. To the extent that *Monsanto* has any bearing here, the Third Circuit's decision is fully consistent with it. Indeed, the Court in *Monsanto* relied on Third Circuit precedent in framing the general rule. 104 S.Ct. at 1471, 1473.

3. *The Court Has Never Adopted a Sweeping Requirement of Proof of Action Contrary to Individual Self-Interest In Every Sherman Act Conspiracy Case.*

Petitioners argue that proof of conduct contrary to individual self-interest is necessary in every case. To be sure, evidence of conduct contrary to individual self-interest is a relevant factor. In many cases, such evidence would be sufficient together with parallel business behavior to warrant an inference of conspiracy. However, neither this Court nor any court of appeals has held that it is a *sine qua non* in every Sherman Act conspiracy case.

Petitioners' argument ultimately rests on two inapposite Third Circuit decisions. Both *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984), and *Zoslaw v.*

MCA Distributing Corp., 693 F.2d 870 (9th Cir. 1982), cited by petitioners, rely on *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975), and *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), Third Circuit decisions authored by Chief Judge Seitz, who was a member of the Third Circuit panel that unanimously upheld respondents' conspiracy evidence in this case. There is no inconsistency, and moreover, petitioners misconstrue the holdings in those cases. *Zoslaw* is expressly limited to cases involving "no direct evidence of conspiracy." 693 F.2d at 884.⁶⁹ *Kreuzer* is, similarly, limited to cases in which the *only* probative evidence presented is parallel behavior.⁷⁰ Nor is such a requirement of acts contrary to self-interest to be found as a *sine qua non* in the influential Third Circuit precedents. The Third Circuit employs the factor as one among several used to define the set of *sufficient conditions* for inference of conspiracy in cases involving refusals to deal. In *Bogosian*, the Court made it clear that it applies that factor only to cases when a plaintiff presents proof of consciously parallel behavior — "*without more*." 561 F.2d at 446. The Third Circuit has been careful to point out that its decisions mentioning that factor only define "*one means*" of proving conspiracy, *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 114 (3d Cir. 1980), and that "[w]e can envision *other* factors which might, when coupled with consciously parallel behavior, support such an inference." *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 209 (3d Cir. 1980). Petitioners' argument is without precedent.

69. Thus, the court said, "[i]n this case. . . since appellants presented no direct evidence of conspiracy, appellants' only chance depended on their presentation of circumstantial evidence sufficient to support the inference of a "conscious parallelism" conspiracy theory and on such further inferences as appellants might be able to draw from trade association and credit managers' meetings among the various distributors." 693 F.2d at 884.

70. Thus, after discussing the role of evidence of conduct contrary to the independent interest of the conspirators, the court stated by way of clarification: "[t]hus, *parallel behavior alone* is insufficient evidence from which to infer a conspiracy." 735 F.2d at 1488.

Circumstantial evidence of conspiracy traditionally recognized in antitrust cases has included evidence of (1) "*things actually done*," such as parallel business behavior, other business behavior, or a course of dealing; (2) "*an exchange of words*," such as communications at meetings, telephone discussions or correspondence among competitors. Direct evidence of conspiracy — written agreements or documents or in testimony that agreements were reached — is rare. The acts contrary to self-interest factor assumes special importance in cases where practically the *only* conspiracy evidence is evidence of otherwise ambiguous parallel business behavior. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). The narrow question presented in such cases is whether such consciously parallel business behavior *alone* may sometimes support an inference of conspiracy. They do not involve the sufficiency of evidence when business behavior beyond consciously parallel behavior is relied upon; they do not involve the sufficiency of conspiracy evidence where there is evidence of an exchange of words, *e.g.*, meetings, correspondence, telephone conversations; they do not involve the sufficiency of evidence when circumstantial evidence, of both types, is combined with *direct* evidence. Those cases support the precept that, even in the absence of *any* other "plus factor" evidence (such as evidence of opportunity to conspire or "an exchange of words" — meetings, telephone discussions, correspondence, or direct evidence, such as agreements or testimony) consciously parallel business behavior may sometimes be sufficient by itself, where — by reason of the very nature of such parallel conduct in its context — it satisfies an additional criterion which tends reasonably to indicate a conscious commitment to a common scheme. Those cases constitute an exception to the precept that consciously parallel business behavior *alone* is insufficient to support an inference of conspiracy, by defining a further circumstance that, in the absence of direct evidence or "plus factor" evidence, permits an inference of conspiracy to be drawn. They define *sufficient* conditions for the inference of conspiracy, not *necessary* conditions to be satisfied in *every* antitrust conspiracy case.

Neither this Court nor any other has ever held that proof of acts contrary to economic self-interest is necessary for the inference of conspiracy to be drawn in *every* Sherman Act case in which circumstantial evidence is presented.⁷¹ In cases where other "plus factor" evidence or *direct* evidence is presented, the standard is not applied.⁷²

Nor should a more stringent rule be fashioned for sufficiency of evidence of conspiracies to depress prices. "The *per se*

71. In *Interstate Circuit*, the Court's narrow holding was only that "[i]t was enough that" there was certain parallel conduct of a particular type. *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), cited by the Government, did not deal with the sufficiency of a plaintiff's proof to establish a *prima facie* case at all. The jury returned a verdict for the defendants, and the issue before the Court was whether plaintiff's circumstantial evidence was *so strong that it was entitled to judgment n.o.v.*

72. *Norfolk Monument Co. v. Woodlawn Mem. Gardens*, 394 U.S. 700 (1969) (parallel business practices plus circulation of pamphlet and meetings held sufficient); *Park v. El Paso Board of Realtors*, 764 F.2d 1053 (5th Cir. 1985) (rejecting requirement of conduct contrary to individual self-interest test where plaintiff presented other evidence of collusion, including direct evidence, in addition to parallel acts); *Ambook Enterprises v. Time, Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. denied*, 448 U.S. 914 (1980); *Gainesville Utilities v. Florida Power & Light Co.*, 573 F.2d 292, 301 (5th Cir. 1978) (parallel business behavior plus correspondence held sufficient); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 245 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) (similar pricing plus meetings, telephone calls, and correspondence held sufficient evidence of conspiracy to depress prices); *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965) (similar pricing plus meetings at which price information was exchanged held sufficient to warrant criminal conviction); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (similar pricing plus evidence of several meetings of industry leaders held sufficient evidence of conspiracy to depress price levels); *Pittsburgh Plate Glass Co. v. United States*, 260 F.2d 397 (4th Cir. 1958), *aff'd*, 360 U.S. 395 (1959) (simultaneous announcement of identical price increases subsequent to meeting held sufficient to sustain criminal conspiracy conviction); *Standard Oil Co. v. Moore*, 251 F.2d 188, 204-12 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958) (exchange of information and parallel practices held sufficient); *C-O Two Fire Equipment Co. v. United States*, 197 F.2d 489, 497 (9th Cir. 1952), *cert. denied*, 344 U.S. 892 (1952) (similar pricing plus meetings of executives and product standardization held sufficient for criminal convictions); *Strobl v. New York Mercantile Exchange*, 582 F.Supp. 770 (S.D.N.Y. 1984) (upholding sufficiency of evidence of meetings, telephone conversations, some evidence of agreement and parallel conduct):

rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.'" *Arizona v. Maricopa County Medical Society*, *supra*, 457 U.S. at 348. The Court has said "[t]he anticompetitive potential inherent in all price-fixing arrangements justifies their facial invalidation even if procompetitive justifications are offered for some," *Id.* at 351, and has long rejected "[the] position that fixed prices are reasonable if they are lower than free competition would yield." *Id.* at 352 n.25. A combination "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951). "It makes no difference. . . whether the effect of the agreement is to raise or to decrease prices," because the alleged "reasonableness" of prices is no excuse for price fixing. *United States v. McKesson & Robbins*, 351 U.S. 305, 310 (1956); *Catalano, Inc. v. Target Sales, Inc.*, *supra*, 446 U.S. at 647; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-397 (1927).

Moreover, there is unrebutted record evidence that petitioners' "check prices" were *dumping prices*; that their lower, *actual* prices were even *lower dumping prices*, and (179A); as the Court of Appeals noted that their United States prices were often *below cost*. App. Vol. 5 DePodwin Report (1716a-20a; 1884a-1904a); App. Vol. 11 (4169a-74a). A conspiracy to depress prices, particularly one that creates such geographic price differentials, is the traditional weapon of monopolists, such as the trusts the Sherman Act was enacted to check — combinations of formerly independent producers that destroyed competition by destroying competitors. Courts have repeatedly condemned this type of conspiracy.⁷³ This case presents similar

73. The Standard Oil Trust, dissolved by the Court in *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911), employed a strategy of "local price cutting at the points where necessary to suppress competition." 221 U.S. at 42-43, forcing competitors "either to become members of the combination or [to be] driven out of business." 221 U.S. at 32-33. See also, *United States v. American Tobacco Co.*, 221 U.S. 106, 182 (1911) (concerted price warfare by

monopolistic conduct by a foreign cartel of large Japanese corporations doing business here and operating internationally in classic predatory fashion.

Notwithstanding evidence of petitioners' conspiracy and of their flagrant customs law violations, petitioners seek to cast themselves as acting in the public interest in depressing United States prices of consumer electronic products. (P.Br. at 21-22) The courts have repeatedly rejected this pretext. *See, Arizona v. Maricopa County Medical Society*, *supra*, 457 U.S. at 352 n.25; *United States v. Corn Products Refining Co.*, 234 F. 964, 1011-13 (S.D.N.Y. 1916) (L. Hand, J.). "The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended. . . ." Spelling, *A Treatise on Trusts and Monopolies*, 217 (1893).⁷⁴

The United States Government has expressed concern that the Court of Appeals' reversal of summary judgment might lead to actions under the antitrust laws "to deter lawful price competition." (G.Br. at 15). There was nothing "lawful" about petitioners' fraudulently concealed dumping prices. Foreign competitors who, unlike petitioners, compete lawfully and do not belong to predatory foreign price-fixing cartels that conspire to fix prices in closed foreign markets abroad, and to dump in the

Tobacco Trust); *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932) (Beef Trust: "fixing prices. . . over temporary periods of time as to eliminate competition by rivals less favorably situated"); *Nash v. United States*, 229 U.S. 373 (1913); *Thomsen v. Cayser*, 243 U.S. 66 (1917); *Paterson Parchment Paper Co. v. Story Parchment Co.*, 37 F.2d 537 (1st Cir. 1930), *rev'd on other grounds*, 282 U.S. 555 (1931); *Porto Rican American Tobacco Co. of Porto Rico v. American Tobacco Co.*, 30 F.2d 234 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929); *Cockling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *United States v. International Harvester Co.*, 214 F. 987 (D. Minn. 1914) (Farm Machinery Trust: concerted depressed pricing to destroy rivals); *United States v. E. I. DuPont de Nemours & Co.*, 188 F. 127, 138-145 (C.C. Del. 1911) (Gunpowder Trust: "Fundamental Agreement" controlling prices and markets to destroy competitors by selectively lowering prices).

74. *See* 21 Cong. Rec. at 2458, remarks of Sen. Sherman citing *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102 (1899) (Match Trust) ("[i]t is no answer to say that this monopoly has in fact reduced the price of friction-matches. That policy may have been necessary to crush competition")

United States, and to devise fraudulent schemes to shield their dumping from detection have no reason to fear United States laws. There is no danger that application of normal antitrust rules in this case will deter legitimate competition.

II. THE COURT OF APPEALS CORRECTLY HELD THAT UNRESOLVED FACTUAL ISSUES PRECLUDE SUMMARY JUDGMENT WITH RESPECT TO PETITIONERS' "SOVEREIGN COMPULSION" DEFENSE.

The belated reappearance of a "sovereign compulsion defense" in these cases introduces another false issue. The district court did not decide any of the many legal and factual questions surrounding their alleged "compulsion defense" in this case. (393A-394A). The Court of Appeals also found it unnecessary to reach the question. (188A-189A).

Petitioners deliberately elected not to defend the summary judgments on this alleged ground in the Court of Appeals. Petitioners' liaison counsel informed the Court of Appeals that the Japanese manufacturers "[did] not press it."⁷⁵ Although such a defense would be, as the Government concedes, an "affirmative defense" (G.Br. at 22), that is waived if not pleaded, with the exception of Mitsubishi Electric Corporation petitioners never asserted "compulsion" as an affirmative defense in their answers to the complaints or moved pursuant to F.R.Civ.P. 12(b). They did not raise this issue below in the questions presented in their briefs in the Court of Appeals. Moreover, when the State Department transmitted to the clerk of the district court the original 1975 MITI Note, the State Department's Legal Adviser, Mr. Philip Trimble, expressly stated that "*neither the State Department nor the United States Government takes any position on the content of the statement or on any other aspect of the litigation in question.*" (6A).

75. "[Plaintiffs' counsel] points to these check price agreements about which I think your Honors know very well, we like to refer to them as government mandated export agreements because of the record that has been developed down below about MITI having required it *but whether they did or not is obviously of no importance on this appeal and we do not press it on this appeal.* . . ." Transcript of Oral Argument Before the Court of Appeals for the Third Circuit on October 22, 1982, at 88-89.

This Court does not decide in the first instance an issue not pressed and not decided by the lower courts. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

The Court of Appeals accepted the MITI Note at face value, and assumed, without deciding, "that a government-mandated export cartel arrangement fixing minimum prices would be outside the ambit of Section 1 of the Sherman Act," holding "summary judgment on that ground is not possible," because the evidence clearly showed that *petitioners did not comply with the purported "direction"* (188A-189A).

Its treatment of the issue was in complete accord with this Court's settled precedents.

A. *Petitioners' Involvement Was Simply A Constituent Element In A Broader Unlawful Arrangement.*

Undisputed evidence shows that petitioners selectively ignored provisions of the Arguments and Rules and, instead, used their formal cartel arrangements as a facade for concerted conduct having different purposes and effects, and combined this price coordination with simultaneous price collusion in the closed Japanese market, thereby making the Agreements and Rules a component of a larger conspiratorial scheme designed to produce large concealed dumping margins which they knew would injure United States competitors and disrupt the United States market but would escape detection. The Japanese manufacturers even continued this front *long after* the Agreements and Rules were not formally renewed when there was no claimed "direction". See, *supra*, at 48-52. Their participation in the formal cartel arrangements which they claim were "directed" by MITI was only one constituent element in a broader course of illegal conduct. This aspect of the case is governed by the fundamental rule established as long ago as *Loewe v. Lawlor*, 208 U.S. 274, 299 (1908), where (quoting from *Aikens v. Wisconsin*, 195 U.S. 194, 206 [1904]), the Court held that "[n]o conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts may be made a step in a criminal plot, and, if

it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

This fundamental rule derives, in part, from the definition of conspiracy itself: a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose *by means that are lawful or unlawful*, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465-466 (1921); *Truax v. Corrigan*, 257 U.S. 312, 327 (1921). Consequently, if the end is unlawful, the conspiracy is also unlawful even though some of the means, or even all of the means adopted to achieve it, may be lawful. Mr. Justice Holmes stated the underlying reason for the rule as long ago as *Aikens v. Wisconsin*, 195 U.S. 194, 205 (1904): an act "derives all its character from the consequences which will follow it under the circumstances in which it was done." Therefore, "acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 707.

This Court has applied the rule uniformly for more than eighty years and has rejected the same kind of defense which petitioners offer here in many leading antitrust cases.⁷⁶ The Court has applied the fundamental rule not only where the means used involved acts not in themselves illegal, but even where an unlawful course of conduct is "in part initiated, evidenced, or carried out" by conduct that is *constitutionally protected*. *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

Even if petitioners had *complied* with the alleged "direction", their argument would be wholly without merit.

76. See, e.g., *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Maryland & Virginia Milk Producers Ass'n. v. United States*, 362 U.S. 458, 472 (1960); *Georgia v. Pennsylvania Ry. Co.*, 324 U.S. 439, 457-463 (1945); *Swift & Co. v. United States*, 196 U.S. 375, 397 (1905).

B. *Petitioners Did Not Comply With the Alleged MITI "Direction"*.

No "compulsion" claim can be recognized as *bona fide* where a defendant has failed to comply with the "direction". Petitioners, who claim that MITI "directed" them to form a cartel to fix "minimum" United States prices for certain benign purposes, set those prices far below their Japanese market prices and then sold their products at prices far *below* those "minimum" prices, jointly using those "check prices" to coordinate and conceal their dumping. Petitioners' course of conduct went far beyond the scope of any MITI "direction". Neither the petitioners, nor the Government of Japan nor the Government of the United States contends that what petitioners actually did was "directed" by MITI.

The Japanese manufacturers fixed prices in Japan at artificially high levels. MITI did not "direct" petitioners to do so. The Japanese Fair Trade Commission brought repeated proceedings against them for violation of the Japanese anti-monopoly laws. MITI did not "direct" petitioners to sell their products in the United States at prices far below the prices they fixed in the closed Japanese market *i.e.*, to *dump*, in violation of United States statutes, or to lie about their actual import prices on United States customs entry documents, or to lie to the United States Treasury Department about their prices and submit false responses in the 1921 Antidumping Act proceeding, or "direct" them to engage in acts in furtherance of the conspiracy in devising methods to conceal their actual prices or to make clandestine payments, which, although necessary to continue their dumping campaign in the United States, Japan has stated involves wholesale violation of Japan's Foreign Exchange and Foreign Trade Control Law and Customs Law (43ad-51ad), and which the United States Government concedes "sovereign compulsion does not shield." (G.Br. at 26). It never "directed" petitioners to lie to MITI about their actual prices on consumer electronic products sold in the United States. It never "directed" them to conspire to supply false statistical data concerning the value of domestic and export shipments of these products to

MITI and other Japanese agencies to conceal their dumping, as the minutes of the EIAJ Statistics Committee show they did. (App. Vol. 13 (5609a-10a).

Moreover, the "check prices," which petitioners describe as "minimum" prices, did not require petitioners to dump. The Japanese manufacturers were free to sell at any United States import prices above the "check prices." Petitioners could have sold at prices in Japan that were above, below or equal to the "check prices," as they chose. They could have sold in the United States at the same higher price levels that they maintained in the Japanese market and been in full compliance with the "minimum" check price Agreements. Had they done that, there would have been no predation here. They could also have lowered the Japanese prices to their United States levels and avoided violation. Had they done that, however, they could not have sustained the revenue losses entailed and could not have achieved the objectives of their conspiracy.

C. Merely Commercial Acts That Are Implemented By Acts Within The Territorial Boundaries Of The United States And Have Intended Effects On United States Trade And Commerce Are Not Immune From United States Law Even If "Compelled" By A Foreign Government.

Petitioners have been found to be transacting business in the United States on a very extensive basis. The Court of Appeals noted that petitioners' conduct "*impinged severely on primary-line competition in consumer electronic products in the American market.*" (168A-169A). Both the Court of Appeals (168A-169A) and the district court held that the United States courts have subject matter jurisdiction over petitioners' entire course of conduct in this case.

Mere *commercial* acts "compelled" by a foreign sovereign are not immune from the United States antitrust laws. The notion of "sovereign compulsion," said to be a corollary of the act of state doctrine, is subject to the well-established exception for conduct that is "*commercial*," as opposed to "public" or

"governmental."⁷⁷ No immunity could arise from compliance with "directions" of Japanese agency employees concerning the marketing of consumer electronic products in the United States, activity that is unquestionably commercial.

Moreover, there is no antitrust immunity for governmentally "compelled" acts that occur outside the territorial boundaries of a foreign state and in the course of the foreign and interstate trade and commerce of the United States, such as petitioners' conduct.⁷⁸ This limitation derives from the established contours of the act of state doctrine, which counsels deference only to acts of a foreign government "*done within its own territory*." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964).

Petitioners voluntarily chose to engage in business in the United States. No foreign governmental "direction" can suffice to relieve them of their basic duty to comply with our laws. *Airline Pilots Association International v. TACA International Airlines*, 748 F.2d 965, 969-972 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 2324 (1985).

77. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697-698 (1976) (opinion expressing views of four Justices); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976); *Hunt v. Mobil Oil Co.*, 550 F.2d 68, 79 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); *Sage Inf'l. Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D.Mich. 1981); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 394-95 (D. Del. 1978); Letter of Jack Tate, Acting Legal Advisor, Department of State, to Philip Perlman, Acting Attorney General (May 19, 1952), 26 Dept. State Bull. 984 (1952) ("Tate Letter," repr. 425 U.S. at 711); Letter of Monroe Leigh, Legal Advisor, Department of State, to Robert H. Bork, Solicitor General (Nov. 26, 1975), repr. 425 U.S. at 706; 1 Atwood & Brewster, *Antitrust and American Business Abroad* (2d ed. 1981) §§ 5.18, 8.09 and 8.21, at 135-137, 250-251, and 269-270. This distinction has been codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*; see also Antitrust Guide for International Operations, United States Department of Justice, Antitrust Division, dated January 26, 1977, at 8 n.21 ("Antitrust Guide").

78. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Antitrust Guide*, at 54. 1 Atwood & Brewster, *Antitrust and American Business Abroad* § 8.22, at 270 (2d. ed. 1981).

D. *The Vague and Belated Japanese Diplomatic Communications Are Insufficiently Specific and Too Untimely To Be Given Any Effect.*

If legal effect is to be given to diplomatic communications regarding factual, or legal, contentions relating to "foreign sovereign compulsion" claims in United States courts, at a minimum they must (a) be sufficiently specific to permit adjudication of the facts pertinent to the validity of a particular claim of "compulsion", and (b) be presented in sufficiently timely fashion so as not to disrupt orderly judicial procedures and thereby intrude upon the sovereignty of the United States and its courts. The Japanese government communications in this case satisfy neither of these basic requirements, and they are entitled to no legal effect.

Whether to recognize foreign governmental acts in the context of litigation is ultimately a judicial question, and judicial action may be guided, but not controlled, by the petition of interested governments relating to a particular set of acts.⁷⁹ A conclusory foreign government statement lacking sufficient specificity to enable the courts to adjudicate the facts relating to the doctrinal limitations to any "compulsion defense" cannot be dispositive. See G.Br. at 23.

The 1975 MITI Note does not specifically state where, or how (whether in writing or orally), or when, or by whom, or to whom the alleged MITI "direction" was given. The nature of the alleged "direction" is not specified, nor does the MITI Note contain any statement by a Japanese legal officer stating the legal effect, if any, under Japanese law of the type of alleged "direction" that purportedly was given.⁸⁰ The Notes fail to spell out with clarity MITI's role in the creation of these cartels. The United States Government in its brief expressly "[does] not at

79. *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 715 (1976) (concurring opinion of Mr. Justice Powell); *First National City Bank v. Banco Nacional De Cuba*, 406 U.S. 759, 790 (1972) (dissenting opinion of Mr. Justice Brennan).

80. Diplomatic communications on legal subjects from foreign officials other than the highest authority empowered under law of the foreign state to issue official legal opinions are not entitled to conclusive weight. Cf. *United States v. Pink*, 315 U.S. 203 (1942).

this point dispute the court's conclusion that the Government of Japan failed to spell out its role. . . with sufficient clarity." (G.Br. at 26 n.26). The MITI Note and the Note Verbale of May 1984 provide at best ambiguous support for some kind of fuzzy involvement by a Japanese governmental agency. Neither communication (1) addresses the separate "Guidelines" for implementing the Five-Company Rule, which prohibited petitioners from registering the same customer App. Vol. 14 (6230a-31a); (2) the continuation of petitioners' conduct *after the* formal Agreements and Rules were not renewed; (3) the sanctions, if any, that could be imposed for petitioners' failure to comply with the alleged MITI "direction"; (4) whether the "direction" was merely legally insignificant "precatory compulsion" such as Japanese "administrative guidance"; or (5) the explicit statutorily required "Withdrawal" provisions in the Agreements.

E. The Japanese Diplomatic Communications Are Untimely and Disruptive of Orderly Judicial Proceeding of United States Courts.

After nearly 14 years of litigation, and after the decision of the Court of Appeals, the Government of Japan has seen fit to present a further Note Verbale, dated May 1984, designed to touch up MITI's 1975 Note, and to demand in its brief that this Court give instant conclusive legal effect at this late stage to its vague assertions in defense of these Japanese manufacturers. The United States has a strong interest in orderly judicial proceedings in its courts, and recognition of such eleventh-hour diplomatic communications would set a bad precedent for such undesirable disruptive efforts in commercial litigation.

F. The Diplomatic Communications Do Not Adequately Define the Nature of the Alleged "Direction".

The diplomatic communications in this case state only that the government agency *would have* invoked certain governmental powers to enter a formal decree had petitioners not followed some unspecified "direction." In effect, they state that no formal decree or order of compulsion was ever entered requiring peti-

tioners to do anything.⁸¹ Petitioners do not advance a *bona fide* claim of true "compulsion".

Mere official encouragement, approval or precatory compulsion gives rise to no immunity under the United States antitrust laws. *Continental Ore Co. v. Union Carbon Carbide & Carbon Corp.*, *supra*, 370 U.S. 690, 707; *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979) ("It is necessary that foreign law must have coerced the defendant into violating American antitrust law"); *United States v. Watchmakers of Switzerland Information Center*, 1963 Trade Cas. ¶70,600, at 77,456-57 (S.D.N.Y. 1962). However, because the Japanese diplomatic communications fail to specify the nature of the alleged "direction", a United States court would be unable to apply American law to test the validity of this attempted invocation of a "compulsion" defense.

Moreover, petitioners' absolute right of withdrawal from the cartel negates any assertion of "compulsion." Each of the Manufacturers' Agreements during the entire period (1963-1973) contains an explicit provision permitting withdrawal at any time without condition. App. Vol. 14 (5875a; 6008a); App. Vol. 41 (18391a-456a). This is consistent with Japanese law, which explicitly *prohibits* undue restriction on the right to withdraw from

81. The Japanese legislation relied upon as requiring the conduct in question is merely *permissive*, allowing the formation of export cartels if the *approval* of the MITI is obtained. (25ad, 27ad). No penal or other sanction has been shown to apply upon the failure or refusal of any party to comply with this kind of encouragement, *see* Y. Kanazawa, "The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power," in A. von Mehren (ed.), *Law in Japan* 480, 501 (1973) ("MITI recommends to each of the firms in an industry that it observe certain restrictions on its production or private practices. The official has no authority in law to enforce his recommendation."); App. Vol. 8 (3139a-3144a). The fact that petitioners had an unexercised right of legal review of any such direction also undermines the *bona fides* of petitioners' reliance upon the alleged "direction." *See Antitrust Guide, supra*, at 52. *See also* Competitive Impact Statement for Proposed Consent Judgment in *United States v. C. Itoh & Co.*, 47 Fed. Reg. 30,311, 30,313, 30,315 (July 13, 1982) ("Administrative guidance as that term is generally used and understood is not legally binding and as such does not have the force of law.").

such arrangements. (26ad-27ad). The Japanese diplomatic communications fail to explain this inconsistency. Participation in the related JMEA Rules was likewise entirely voluntary. The Rules only applied to JMEA members, and no manufacturer or exporter was required to become or remain a member of the JMEA. Japan's notes also fail to explain this further inconsistency.

III. NEITHER THE 1916 ANTIDUMPING ACT ISSUE NOR "REINSTATEMENT" OF THE DISTRICT COURT'S SUMMARY JUDGMENT IS PROPERLY BEFORE THIS COURT.

Petitioners attempt to smuggle into this appeal an issue concerning the sufficiency of respondents' evidence of the *intent* required under the Antidumping Act of 1916, by suggesting that the alleged insufficiency of *antitrust* conspiracy evidence requires dismissal of these separate *antidumping* claims. (P. Br. at 46-47). The Questions Presented involve no issue relating to the Court of Appeals' separate Opinion and Judgment in the antidumping segment of this litigation, and petitioners' argument is in cavalier disregard of Rule 21.1(a).

The Antidumping Act of 1916, 15 U.S.C. §72, makes individual dumping unlawful, as well combinations and conspiracies to dump: persons "*importing*" or "*assisting in importing*" may violate the Act, independent of any proof of overall conspiracy. In the separate counts under the Antidumping Act of 1916, respondents' complaints⁸² charge not only that petitioners combined and conspired, but also that they individually "*imported*" and "*assisted in importing*" in violation of the Act. Respondents' evidence of petitioners' intent (other than the conspiracy evidence) includes (i) evidence of the size and persistence of each petitioner's dumping margin, (ii) efforts of each petitioner to evade the United States antidumping laws and the necessary cooperation in each others' dumping scheme and concealment, (iii)

⁸². Appendix to the Briefs in No. 80-2080, Vol. I at 616b-626b, and 196b-216b.

evidence that petitioners' prices were below their costs, (iv) evidence relating to losses of petitioners' United States subsidiaries, and (v) evidence of specific statements evincing an intention to restrain and monopolize the United States market or injure the United States industry. Since the antidumping claims are not before the Court, such evidence, which includes evidence that the district court ruled inadmissible and failed to consider, but which the Court of Appeals reviewed, suffices by itself to satisfy the intent requirement of the Act and to require a trial on the antidumping segment of the litigation. If it is reconsidered, it should properly be examined on remand and not addressed for the first time in this Court. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981).

Petitioners' suggestion that remand would not be required should they prevail on the conspiracy issue in this Court overlooks the fact that, with reversal of most of the district court's evidentiary rulings and with other issues of admissibility concerning items of respondents' evidence still open on remand, the summary judgment record has been substantially redefined by the Court of Appeals' evidentiary rulings and has not yet even been finally determined in this case. The record, therefore, is not in a posture that would permit the Court to consider "reinstatement" of the summary judgments which the district court entered based upon the factual record which the district court misdefined by its erroneous evidentiary rulings.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the unanimous Judgment of the Court of Appeals for the Third Circuit in the antitrust segment of these cases.

Respectfully submitted,

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