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American courts have guarded with jealousy their jurisdiction of antitrust cases. However, the Supreme Court's recent decision in *Mitsubishi Motors Corporation v. Soler Chrysler Plymouth, Inc.*[1] signals a change in federal jurisdiction over international antitrust claims. If antitrust claims are at issue in an international agreement and the parties have agreed in advance to submit all disputes to foreign arbitration, those antitrust issues may now go abroad to the arbiter's forum with the blessing of the United States Supreme Court. Previous decisions have taken tentative steps toward this end,[2] but *Mitsubishi* creates a new precedent, effectively setting up a double standard for domestic and foreign antitrust arbitration.

I. Facts of the Case

Mitsubishi Motors Corporation ("Mitsubishi") is the product of a joint venture between Chrysler International, S.A. ("CISA"), a Swiss corporation, and Mitsubishi Heavy Industries of Tokyo. Mitsubishi entered a purchase and sales agreement with Soler Chrysler Plymouth ("Soler") of Pueblo Viejo, Puerto Rico, which contained a clause stipulating that all disputes would be arbitrated in Japan by the Japan Commercial Arbitration Association.

At first Soler's business was brisk, but it soon fell off sharply. Soler was forced to request delay or cancellation of planned shipments, and as a result, over 900 cars due for shipment to Soler remained in Japan. A dispute arose, and Mitsubishi and CISA sued Soler to compel arbitration under the Federal Arbitration Act. In a counterclaim, Soler alleged violations of the Sherman Act.[3]

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1. 105 S. Ct. 3346 (1985).
2. *See infra* text accompanying notes 19-31.
3. The Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982), is the flagship of American

The district court ordered arbitration of all claims outlined in the agreement, including those alleging antitrust violations. The court relied on *Scherk v. Alberto-Culver Co.*,[4] which focused on concerns for international cooperation and smoothness of trade and upheld an arbitration agreement in an international dispute similar to *Mitsubishi*.

The First Circuit reversed the district court's order to arbitrate the antitrust claims, holding that the strong policy favoring arbitration was overridden by the judicial rule excepting antitrust issues, and that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards did not require arbitration of American antitrust claims.[5]

The Supreme Court granted certiorari "primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction,"[6] and reversed. Echoing the district court's reasoning, the Court held that concerns for international commercial cooperation and competition warranted a new, narrow exception to the general rule.

The Court's break with antitrust orthodoxy partially clarifies a previously ambiguous area of the law dealing with international commercial transactions. American businessmen can now rely on arbitration clauses like the one in the *Mitsubishi* contract with confidence that it will be enforced, even if antitrust violations are subsequently alleged. American courts have long

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antitrust legislation.

4. 417 U.S. 506 (1974). *See infra* text accompanying notes 28-31. *Scherk* pointed out the "almost indispensable" status in international commercial agreements of advance contractual provisions selecting the forum in which possible disputes would be litigated. The *Scherk* Court felt that any action on its part to disqualify such a provision would "surely damage the fabric of international commerce and trade." *Id.* at 517.

5. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 165-66 (1st Cir. 1983), *rev'd* 105 S. Ct. 3346 (1985). The Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6697, 330 U.N.T. 38, *reprinted in* 9 U.S.C.A. § 201, app. at 192-200 (Supp. 1985)[hereinafter cited as Convention], is a product of the United Nations' efforts to facilitate international commerce and resolve ancillary disputes. Signatory nations agree to give full faith and credit to an arbitral decision rendered in another signatory nation's jurisdiction as long as the issue at arbitration is one capable of arbitration in the enforcing nation and does not violate the enforcing country's public policy. For a brief description of the Convention and United States involvement, see Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw. U.L. Rev. 1 (1971). The United States has provided for enforcement of the Convention in 9 U.S.C. §§ 201-08 (1982).

6. 105 S. Ct. at 3353.

permitted arbitration proposed after antitrust claims are raised,[7] but now, under certain circumstances, an agreement to arbitrate made before an antitrust allegation will be upheld as well.

II. PRE-*Mitsubishi* BENCHMARKS—THE BIRTH OF A NOTION

Traditionally, federal courts have adjudicated antitrust claims, rather than referring them to arbitration.[8] Although arbitration saves time, money, and reduces already staggering caseloads, antitrust is considered too complicated for arbiters to always handle successfully.[9] More importantly, perhaps, federal courts have considered public rights under the Sherman Act[10] too important to the public to be adjudicated outside the courts.[11] The general attitude is typified by the Second Circuit's opinion in *Wilko v. Swan*,[12] which held in 1953 that "the remedy a statute provides for violation of the statutory right it creates may be sought not only in any 'court of competent jurisdiction' but also in any other competent tribunal, such as arbitration, *unless* the right itself is of a character inappropriate for enforcement by arbitration."[13]

Because of public interest in a free market, antitrust issues have traditionally been considered a right "inappropriate for enforcement by arbitration." Public policy dictates that the state, as representative of the public and protector of its interests,

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7. *See, e.g.*, Cobb v. Lewis, 488 F.2d 41, 47-49 (5th Cir. 1974).

8. *See, e.g.*, Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978); Sam Reisfald & Son Import Co. v. S.A. Eteco, 530 F.2d 679 (5th Cir. 1976); Hunt v. Mobil Oil Corp., 444 F. Supp. 68 (S.D.N.Y. 1977).

9. "Antitrust disputes are far removed from the ordinary grist of commercial arbitration. Questions of law in antitrust cases can hardly be characterized as simple. . . . And a glance at some of the legal questions which may arise in antitrust disputes between franchisors and franchisees or licensors and licensees should satisfy the doubters." Farber, *The Antitrust Claimant and Compulsory Arbitration Clauses*, 28 FED. B.J. 90, 94 (1968)(footnotes omitted).

10. 15 U.S.C. §§ 1-7 (1982).

11. *See, e.g.*, American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

12. 201 F.2d 439 (2nd Cir. 1953), *rev'd* 346 U.S. 427 (1953). *Wilko* was an action against a securities brokerage firm for alleged misrepresentation in a securities sale. It is analogous to antitrust cases because a similar public interest in securities law enforcement is thought to preclude arbitration of securities claims. The Supreme Court held that, considering the importance to the public of the issues involved, any agreement to arbitrate disputes arising under the Securities Act of 1933 was void, notwithstanding the Federal Arbitration Act. 346 U.S. at 428-438. But in *Mitsubishi*, the Court reasoned that *Wilko* was a purely domestic suit, and therefore had no direct bearing on the case before it.

13. 201 F.2d at 444.

should be involved in any action involving general public interests, such as antitrust enforcement.[14] And when the state is not a party, antitrust claims are routinely adjudicated in court, while other elements of the same dispute await previously stipulated private arbitration.[15] It is common practice for a court to stay the arbitrable issues in a case and direct the nonarbitrable ones—i.e. antitrust claims—to judicial resolution first.[16]

However, in several pre-*Mitsubishi* cases, the Supreme Court quietly laid the foundation for an international exception to the anti-arbitration rule. Three cases are particularly important. The first states the general rule against arbitration, still applicable in domestic antitrust cases; the second shows the Court's willingness to allow adjudication before a foreign tribunal; the third is the Court's analogous departure from a previous rule against arbitration of securities violation claims. The latter pair, viewed together, illustrate the Court's drift toward flexibility, and make the new holding in *Mitsubishi* almost predictable.

American Safety Equipment Corp. v. J.P. Maguire & Co.,[17] provided the major support for the First Circuit's decision in *Mitsubishi* to bar antitrust arbitration. *American Safety* was an action seeking a declaratory judgment that a licensing agreement was illegal because parts of the agreement violated the Sherman Act. The agreement provided for arbitration of all disputes. But arbitration was denied for the following reasons, as summarized by the *Mitsubishi* Court: 1) the activity of ag-

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14. *See* Associated Milk Dealers, Inc. v. Milk Drivers' Union Local 753, 422 F.2d 546, 552 (7th Cir. 1970); Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 627, 237 N.E.2d 223, 226 (1968). Generally, parties are free to agree that commercial disputes will be arbitrated. "But agreement to arbitrate matters of public policy is another question. The reason is that arbitration is peculiarly suited to its fundamental purpose: the prompt and economical solution of *private* business disputes. . . .Where, on the other hand, the power of the parties to create, limit or define their rights and legal relations is restricted by law in the public interest, the parties cannot by stipulation or agreement remove or loosen the restriction.'" Comment, *Private Arbitration and Antitrust Enforcement: A Conflict of Policies*, 10 B.C. INDUS. & COM. L. REV. 406, 411 (1969)(quoting Manhattan Storage & Warehouse Co. v. Mover's & Warehousemen's Ass'n, 289 N.Y. 82, 89-90, 43 N.E.2d 820, 824 (1942)).

15. *See, e.g.*, Austin Mun. Sec., Inc. v. National Ass'n of Sec. Dealers, Inc., 757 F.2d 676, 696 (5th Cir. 1985); Lake Communications Inc. v. ICC Corp. 738 F.2d 1473 (9th Cir. 1984); University Life Ins. v. Unimare Ltd., 699 F.2d 846, 850 (7th Cir. 1983); John M. Lee, Inc. v. Ply*gem Indus., 593 F.2d 1266, 1274 (D.C. Cir. 1979), *cert. denied*, 441 U.S. 967 (1979); Drayer v. Krasner, 572 F.2d 348 (2d Cir. 1978), *cert. denied*, 436 U.S. 948 (1978).

16. *See* N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp., 532 F.2d 874, 876-77 (2d Cir. 1976).

17. 391 F.2d 821 (2d Cir. 1968).

grieved citizens as "private attorneys general," enforcing treble damages, would be impaired; 2) allowing suits on contracts of adhesion to be forced into arbitration by the very parties who wrote the contracts would be unfair; 3) complex antitrust issues are "ill-adapted to strengths of the arbitral process" such as brevity, equity and minimal writing requirements; and 4) antitrust issues are too important to be entrusted to business people for adjudication, particularly foreigners unfamiliar with American law.[18]

In addressing the first element, the court pointed to private citizens' roles in enforcing the antitrust laws, a prime efficiency feature, since the government is unable to detect all violations alone. On the second element, the court relied on supposed—but undocumented—congressional intent that such strong arm tactics be prohibited. The third and fourth items were lightly treated and then passed by. This decision is the leading case on antitrust arbitration, and though it remains the rule in domestic antitrust suits, *Mitsubishi* announced an end to its blanket application to international disputes.

The second building block in the *Mitsubishi* structure, that of choice of forum clauses and foreign jurisdiction over cases involving Americans, was *The Bremen v. Zapata Off-Shore Co.*,[19] a 1971 admiralty suit against a German corporation for damage to an oil rig which it towed across the Gulf of Mexico. The parties' agreement stipulated that all disputes would be handled by London's High Court of Justice, but Zapata sought its remedy in federal district court. After procedural wrangling between the two courts and an appeal to the Fifth Circuit, the Supreme Court found that no one had given proper weight to the selection of forum clause in the original contract and ordered dismissal. In holding that the parties' choice of forum must be respected, Chief Justice Burger wrote:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist

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18. 105 S. Ct. at 3357. Scores of subsequent cases have relied on *American Safety*. *See, e.g.*, Zimmerman v. Continental Airlines, Inc., 712 F.2d 55, 59 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984); N.V. Maatschappij Voor Industriele Warden v. A.O. Smith Corp., 532 F.2d 874, 876 (2d Cir. 1976); Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1215 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972); Cowden Mfg. Co. v. Koratron Co., 422 F.2d 371, 372 (6th Cir. 1970), *cert. denied*, 398 U.S. 959 (1970).

19. 407 U.S. 1 (1972).

> on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[20]

The Court found sufficient reason to respect the parties' choice of forum, though that forum was outside the United States.[21] Yet *The Bremen* recognized that choice of forum clauses should not be upheld where "enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or judicial decision."[22] This language could be construed to include the American public policy concerning antitrust violations, but the foundation for change had been laid. The Court was on record as being willing to send an American party abroad for judgment if the party had so agreed.

Finally, *Scherk v. Alberto-Culver Co.*[23] addressed the impact of international concerns on arbitration clauses. It involved alleged violations of the 1934 Securities Act rather than antitrust issues, but its ruling is analogous to *Mitsubishi* because of the strong public policy behind judicial enforcement of rights under the 1934 Act—an attitude prevalent in adjudication of Sherman Act claims.

In *Scherk,* an American manufacturer closed a deal in Europe to purchase three businesses and accompanying trademarks from a West German national. The agreement provided for arbitration based on Illinois law, by the International Chamber of Commerce in Paris. But the district court found that under *Wilko v. Swan,* Securities Act claims were inappropriate for arbitration, and the Seventh Circuit affirmed.[24] The Supreme Court reversed, ruling that a contractual provision identifying in advance the forum for resolution of any dispute was "an indispensable element in international trade, commerce, and contracting."[25] Evidently these international concerns were strong

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20. *Id.* at 9.

21. "The choice of . . . forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.* at 12.

22. *Id.* at 15.

23. 417 U.S. 506 (1974).

24. *Id.* at 510 (construing Wilko v. Swan, 346 U.S. 427 (1953)).

25. *Id.* at 518 (quoting *The Bremen,* 407 U.S. at 13-14).

enough to overcome domestic policy constraints against arbitration. Seeking to avoid "unseemly and mutually destructive jockeying" for advantage by each party, the Court decided that upholding the parties' previous selection of a forum in an international dispute was vital to continued commercial freedom and should be set aside only in unusual cases.[26]

These three cases, then, provided the conceptual groundwork, each in its own area, for the result in *Mitsubishi.*

III. Analysis of *Mitsubishi*—An Inscrutable Result?

Mitsubishi brought a substantive antitrust issue into the precedential framework established by *The Bremen* and *Scherk.* The *Mitsubishi* majority first treated arbitration of statutory rights in general and then, more specifically, rights under the Sherman Act. Though both parts of the decision were the subject of strong dissent, the opinion shows the Court's willingness to affirm international arbitral adjudication.

A. Arbitration of Statutory Rights and Claims

In determining the arbitrability of statutory antitrust rights, the Court examined the provisions of the Federal Arbitration Act,[27] which embodies a strong preference for arbitration, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[28] which governs enforcement of an arbiter's award given in a foreign jurisdiction.

The Federal Arbitration Act makes arbitration of claims under "a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[29] The *Mitsubishi* Court found that this section of the Act governed the dispute between the parties, and that federal policy favoring arbitration should be followed, even though the rights at issue were statutory.[30] The Court saw no inherent prohibition against taking statutory rights to alternate dispute resolution. "[B]y agreeing to arbitrate a statutory claim, a party does not

26. 417 U.S. at 517, 519.

27. 9 U.S.C. §§ 1-4 (1982).

28. Convention, supra note 5; *see also infra* notes 43, 45.

29. 9 U.S.C. § 2 (1982).

30. 105 S. Ct. at 3353 (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

forego the substantive rights afforded it by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[31] The argument is persuasive if, in fact, the arbiter abides by all statutory elements and remedies.

The dissenters argued strenuously that Congressional creation of statutory remedies precludes a private arbitration agreement.[32] In the absence of any indication that Congress intends to allow arbitration of statutory rights, the dissent would confine its application primarily to contract claims, since the arbiter is not bound by the rules of civil procedure, the rules of evidence, and so forth.

But though the dissenters have precedent for their theory, no clear policy emerges from the cases they rely upon. In the absence of any such specific guide, the existence or feasibility of a line between arbitration of common law and statutory claims remains unclear, and the majority's willingness to entrust statutory rights to an arbiter seems essentially reasonable.

While the dissent raises valid concerns, it fails to address the Sherman Act statutory claims in light of the transaction's international nature. It makes a good case for distinguishing between statutory and contract claims in adjudication, but ignores the narrow circumstances in which *Mitsubishi* is to be applied and the international ramifications of the distinction in such cases. This last point was the linchpin of the majority's decision.

B. Arbitration of Antitrust Claims

While purely domestic antitrust claims continue to be non-arbitrable, *Mitsubishi* holds that an international commercial transaction including an agreement with a valid arbitration clause is subject to arbitration—even by foreign arbiters—under the Federal Arbitration Act.[33] To reach its conclusion the court addressed *American Safety*'s arguments against antitrust arbitration, but recognized the interests of international comity as paramount in this fact situation.

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31. *Id.* at 3355.

32. *Id.* at 3366-67 (Stevens, J., dissenting).

33. The Supreme Court's decision in *Mitsubishi* directed that arbitration of Sherman Act issues proceed as stipulated by the parties, under the auspices of the Japan Commercial Arbitration Association.

1. Breaching the American Safety *Barrier*

In an international context, the Court was unpersuaded by the *American Safety* doctrine's arguments against antitrust arbitration. It quickly disposed of three concerns. First, there is no basis for assuming that appearance of an antitrust claim means the arbitration clause is "tainted," or part of a contract of adhesion, therefore disqualifying the mutually selected forum. Absent a showing of real compulsion through lopsided bargaining power, or fraud perhaps, the Court found no reason to assume that an agreement to arbitrate was made under duress. Second, the possibility of complexity does not preclude arbitration of an antitrust issue. The flexibility of the process allows persons with sufficient expertise to participate. Third, there is no reason to assume *a priori* that an arbiter will be hostile, ignorant, or incompetent. Arbiters are becoming increasingly sophisticated, and should not be precluded from adjudication solely on a presumption of inability. The only remaining concern was for preservation of the effects of antitrust laws on "American democratic capitalism."[34]

American Safety's recognition of the deterrent role of "private attorneys general" seeking treble damages gave the Court more trouble. According to the dissent, any removal of this powerful disincentive to pay antitrust damages could have "devastating consequences for important businesses in our national economy" and undermine their "ability to compete in world markets."[35] This is a valid concern, though perhaps somewhat inflated, since *Mitsubishi* only affects businesses in their dealings with foreign entities.

The majority, however, saw no potential attenuation of the deterrent effect of antitrust statutes; when the parties have agreed that an arbiter is to decide claims "arising from the application of American antitrust law," the arbiter will be obligated to dispose of the suit in accordance with "the national law giving rise to the claim."[36] Since the Court felt that the governing law would remain constant no matter who the deciding authority might be, all of the antitrust laws' desired effects should continue.

The dissent's concern with this approach is that an arbiter's

34. *Id.* at 3357-58.
35. *Id.* at 3370 (Stevens, J., dissenting.)
36. *Id.* at 3359.

findings and awards are not subject to review or official enforcement.[37] But this is precisely where the Convention comes in, allowing American judges to examine the foreign award and permit its enforcement. And if the arbitration falls through, an aggrieved party ought still to be free to bring his case into court.

In addition, while recognizing its deterrent effect, the majority viewed antitrust treble damages as an individual *remedy*, not as a primarily punitive measure.[38] No one is compelled to bring an antitrust suit, or to claim a particular remedy. Parties should be allowed to establish beforehand the forum to which they will submit themselves for the settlement of disputes, just as they set the other terms of their agreement—especially in an international deal. Indeed, choice of forum is commonly considered an essential part of an international commercial transaction. That the Court recognized and deferred to this concern illustrates its awareness of business sense and practice as affecting the practicality of legal rules. The law is often a reflection of prevailing practices, and *Mitsubishi* is no exception.

The Court might have insisted on bringing the antitrust claim to court, but the long-term consequences of such an attitude could have been detrimental to American international commerce. It would have signaled to foreign trading partners that dispute resolution clauses in contracts with Americans would not always be binding and would have made potential foreign trading partners much more cautious in signing agreements with American businesses.

2. *International Comity*

The concern for international commercial cooperation was a factor in *The Bremen* and *Scherk* decisions, and continued in *Mitsubishi*. The Court displayed a growing judicial awareness that the world economy is becoming more and more integrated, requiring a fresh look at long-established rules.

The *Mitsubishi* Court relied heavily on *Scherk*'s diplomatic reasoning:

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties'

37. *Id.* at 3370 (Stevens, J., dissenting).
38. *Id.* at 3359.

> agreement, *even assuming that a contrary result would be forthcoming in a domestic context.*[39]

As with arbitration of statutory rights in general, the dissent objected to the majority's "vague concerns for the international implications of [the] decision and a misguided application of *Scherk*."[40] Unpersuaded, the majority opted to make international commerce as free as possible. If American law were to control the agreement, said Justice Blackmun, the arbiter must abide by the parties' agreement that such law would govern.[41]

The Court seemed implicitly aware of the American role in the international commercial community, and that foreign reaction to our antitrust laws has not always been pleasant. The Court would probably agree with a Washington Post editorial which stated well *Mitsubishi*'s essential philosophy:

> Americans have worked out their rules of competition at home and are now trying to extend them into international commerce as a sort of afterthought. . .[but] the Sherman Antitrust Act is not a suitable instrument for the regulation of world trade. Maintaining international competition is the proper business of diplomats and of negotiation, not federal judges and litigation.[42]

IV. Ramifications

Mitsubishi marks an important change in antitrust law. Arbitration of major legal issues previously thought nonarbitrable now bears the Supreme Court's imprimatur. But the first essay in any form is always imperfect, and *Mitsubishi* raises some questions. It was a battle between policies carried out to detailed extremes, involving clashes of statutory and contract claims, private and public enforcement, domestic and international concerns, and general and individual rights and remedies. But when the dust settled, the heart of the decision, and the element which produced the new exception, was the international character of the transaction, and the majority's implicit acknowledgment that attempting extraterritorial enforcement of our antitrust laws could produce adverse reaction. Therefore affirmative steps should be taken to abide by the spirit of the Convention and allow arbitration.

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39. *Id.* at 3355 (emphasis added).
40. *Id.* at 3370 (Stevens, J., dissenting).
41. *Id.* at 3359-60.
42. Washington Post, Nov. 4, 1979, at C6, col. 1.

A. Implementation—Why and How?

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards recognized that if an arbitration award is "contrary to [that nation's] public policy," or passes on something "not capable of settlement by arbitration under the law of that country," it need not be enforced.[43] As the dissent in *Mitsubishi* rightly points out, other nations party to the Convention have denied arbitral awards under this very provision, considering their domestic public policy more important than "international comity."[44] It would have been entirely reasonable and within recognized rights for the United States to do the same. Why, then, in light of the otherwise solidly established policy against antitrust arbitration in domestic disputes, does the Court seem to make an international exception when it might not have been necessary? The answer lies in a combination of factors.

On its face, the language of the treaty allows refusal of *enforcement* of a foreign arbitral award, and does not authorize a signatory nation's flat refusal even to submit the issue to the arbitral process.[45] The majority pointed out that any problems that might arise in arbitrating antitrust claims could be examined and resolved when the time came for enforcement in the United States. At that point, the Convention's clause permitting

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43. Convention, *supra* note 5, art. V(2)(a) & (b). The dissent argued that this clause allowed the United States to refuse arbitration of antitrust claims as contrary to domestic public policy, but the majority clung to concerns of international comity, finding them strong enough to override any such objections. And though the Supreme Court has not specifically addressed the issue, other courts have taken a very narrow view of opting-out for public policy concerns, in one case holding that only the "most basic notions of morality and justice" were sufficient public policies to warrant opting out of international arbitral enforcement under the Convention. Whether antitrust allegations rise to this level of importance is open to question. Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co., 484 F. Supp. 1063, 1068 (D.C. Ga. 1980); *see also, e.g.*, Fotochrome v. Copal Co., 517 F.2d 512 (2d Cir. 1975); Parsons & Whitmore Overseas Co. v. Societe Generale De L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974); Gulf States Tel. Co. v. Local 1692, Int'l Bhd. of Elec. Workers, 416 F.2d 198 (5th Cir. 1969).

44. 105 S. Ct. at 3371-72 (Stevens, J., dissenting).

45. However, the dissent reads the article V provisions (allowing refusal of enforcement) in conjunction with Article II, which restricts applicability of the Convention to those matters "capable of settlement by arbitration," and argues that since antitrust matters are incapable of arbitration, the Convention does not apply. Evidently, the Convention leaves it to the signatory states to decide whether a matter is "capable of settlement by arbitration." One commentator calls this phrase "one of the most troublesome provisions of the entire Convention." Aksen, *supra* note 5, at 8.

refusal of enforcement could come into play—not before.[46] If a foreign arbiter's decision were based on erroneous application of antitrust law, or flawed for some other reason, the United States could properly refuse enforcement. The only alternative to a party willing to press the issue would be to seek its remedy in an American courtroom.

In addition, the Court's decision was clearly motivated to some extent by economics and the concern that American international commercial involvement be as free, fluid, and adaptable as possible. Zealous assertion of antitrust jurisdiction over all foreign trading partners could very well increase their reluctance to deal with American business, making them wary of possible lawsuits in a forum they did not agree to. And since the Court felt that in an international context public policy goals of antitrust law can be adequately served by arbiters,[47] there is little danger in preferring free trade over this jurisdictional jealousy. The Court believed that American international commercial credibility could be fostered, through allowing arbitration, without damaging domestic public policy on antitrust enforcement.

Finally, the *Mitsubishi* holding is a narrow one. The vast amount of domestic antitrust law should remain untouched by this case. Considering the factual elements that were important to the Court, the new rule seems to apply only if there is (1) an international commercial transaction, (2) an agreement up front that all disputes be arbitrated, (3) a particular forum chosen by mutual consent, and (4) antitrust claims by one or both parties in a subsequent dispute.

Curiously, the principle at the heart of the decision—the international character of the deal as dispositive—is not treated by the Court in great detail. And the dissent is correct in characterizing the decision as resting on "vague concerns for comity among nations."[48] The majority does not explain what exactly this international comity is. The reader may postulate concerns for American competitiveness in world markets, or a "you scratch my back, I'll scratch yours" attitude. But the Court does not say what international concerns it bases the decision on, or what results it hopes the decision will bring. Perhaps it does not know for certain; the opinion does seem in a sense an elaborate

46. 105 S. Ct. at 3359-60.
47. *Id.* at 3360.
48. *Id.* at 3372.

justification for a gut reaction. But considering the economic interests, the practicalities of application, and the precedent for support, the reaction was generally correct.

The dissent's parting shot was an expression of doubt that American citizens would want one of their own to seek redress for violation of an American public right in a foreign tribunal.[49] But *Mitsubishi* applies only to those cases where the parties have mutually agreed on a forum for arbitration beforehand. Perhaps more repugnant to American citizens would be a court's decision to disregard what the parties properly and in good faith agreed to, in the sole interest of preserving its own jurisdiction.[50]

V. Conclusion

Mitsubishi's effects are unclear, but its signal is obvious: the Supreme Court is willing to allow antitrust issues to go before a foreign arbiter by contract. Although its concerns are not clearly defined, the Court prefers individual freedom of contract and commerce over preserving traditional jurisdiction. Overall United States competitiveness in the international marketplace constitutes the dispositive factor in the case. And absent a strong showing that American antitrust public policy would be seriously harmed by foreign arbitration, the Supreme Court has preferred to leave parties to an international agreement to their own devices and settlements.

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49. *Id.* at 3374 (Stevens, J., dissenting).
50. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 12-13.