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Recent Development


RONALD A. BRAND*

I. INTRODUCTION

With support from the executive branch, Congress, and the courts, arbitration has become an increasingly popular method of international dispute resolution. While agreements to arbitrate traditionally were frowned upon, particularly when the dispute involved certain "public law" or "statutory" matters, the situation has changed dramatically in the past few decades. United States courts now routinely order arbitration of disputes implicating important policy issues in securities, antitrust, Racketeer Influenced and Corrupt Organizations ("RICO"), and employment law matters.1 By the end of the 1980's, the presence of a public or "statutory" issue seemed no longer to be a distinguishing factor; arbitration, when selected by the parties in a binding agreement, would be the method of dispute settlement.

Just as most legal trends meet with limitations, this liberal enforcement of arbitration agreements was rejected by the United States Court of Appeals for the Federal Circuit in *Farrel Corp. v. United States International Trade Commission*.2 The *Farrel* opinion is founded upon an administrative law distinction drawn from a single sentence dictum of the Supreme Court in *Gilmer v. Interstate/Johnson...*

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1. See infra notes 28-52 and accompanying text.
The Federal Circuit used this distinction to justify its refusal to compel arbitration in *Farrel*, reversing an administrative body’s decision to terminate adjudication in the face of an arbitration agreement between private parties.4 The court rejected the argument that a contract clause calling for the arbitration of “all disputes arising in connection with the present Agreement,” required that the International Trade Commission terminate an investigation conducted under section 337 of the Tariff Act of 1930 (“Section 337”).5

The *Farrel* decision is troubling for those who believe contracting parties should have unlimited autonomy to select arbitration as a forum for dispute settlement in international transactions. Disputes arising from commercial and investment transactions are increasingly likely to include the intellectual property rights issues dealt with under Section 337. Thus, the limitations of the *Farrel* decision could have a significant impact on international trade.

While the Federal Circuit in *Farrel* focuses on the dispute settlement process, the result also raises substantive international trade law concerns. The court failed to consider either United States commitments to the General Agreement on Tariffs and Trade (“GATT”),6 or the rule of construction presuming statutory consistency with such international obligations.7 These failures exacerbate the existing problem of bringing Section 337 into compliance with article

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3. 111 S. Ct. 1647 (1991); see infra notes 44-52 and accompanying text.
4. 949 F.2d at 1156.
7. “Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1986) [hereinafter RESTATEMENT]; see infra notes 105-08 and accompanying text; see also Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”). But cf. RESTATEMENT, supra, § 114 cmt. a (“The principle of interpretation in this section is influenced by the fact that the courts are obliged to give effect to a federal statute even if it is inconsistent with a pre-existing rule of international law or with a provision of an international agreement of the United States.”).
III:4 of the GATT, as is required by the panel report adopted by the GATT Contracting Parties in November 1989.

Farrel compels further consideration of the relationship among private dispute settlement arrangements, national laws governing international trade, and sovereign international trade obligations. This commentary begins by reviewing the background of U.S. law regarding enforcement of arbitration agreements, against which the Farrel decision must be considered. It then addresses Farrel's effect on substantive trade law issues. Finally, it concludes that Farrel raises serious concerns about U.S. compliance with GATT obligations and U.S. courts’ future practice in dealing with those obligations.

II. THE DEVELOPMENT OF UNITED STATES POLICY FAVORING ENFORCEMENT OF ARBITRATION AGREEMENTS

Congress originally enacted the Federal Arbitration Act in 1925 to “revers[e] centuries of judicial hostility to arbitration agreements . . . [and] to allow parties to a dispute to avoid ‘the costliness and delays of litigation,’ and to place arbitration agreements ‘upon the same footing as other contracts . . . ’” The Act was

8. Article III:4, the basic national treatment (non-discrimination) provision of the GATT, states in part:
   The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.
   GATT, supra note 6, art. III:4.


10. Portions of this section are developed from the author’s earlier discussion in Ronald A. Brand, Nonconvention Issues in the Preparation of Transnational Sales Contracts, 8 J.L. & COM. 145, 158-64 (1988).


12. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974) (quoting H.R. REP. No. 96, 68th Cong., 1st Sess. 1, 2 (1924)). Section 2 of the Act provides that a written agreement to arbitrate a commercial dispute, “shall be valid, irrevocable, and enforceable.” 9 U.S.C. § 2 (1988). To accomplish this goal, the Act provides for a stay of proceedings in a case where the issue before a court is arbitrable under the agreement, and directs the federal courts to order parties to arbitrate if there has been a “failure, neglect or refusal” of a party to honor an agreement to arbitrate. 9 U.S.C. §§ 3-4 (1988). The Act further provides for the enforcement of arbitral awards once rendered by allowing judgment to be
reenacted and codified in 1947 as Title 9 of the United States Code.\textsuperscript{13}

The goals of the Arbitration Act were furthered in the international setting by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which entered into force in the United States on December 29, 1970.\textsuperscript{14} Article II of the Convention obligates the courts in each contracting state to "recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."\textsuperscript{15} The Convention further requires that each contracting state recognize any award rendered in another contracting state as binding and enforce the award just as if it had been rendered domestically.\textsuperscript{16}

The concept of arbitrability under article II(1) of the New York Convention "relates to public policy limitations upon arbitration as a method of settling disputes."\textsuperscript{17} Each state tends to apply its own public policy considerations to determine the scope of arbitrable matters.\textsuperscript{18}

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In the United States, respect for party autonomy in the selection of a forum for dispute settlement underlies the law on arbitration. In the seminal case of The Bremen v. Zapata Off-Shore Co., the Supreme Court enforced a choice-of-forum clause in a contract between U.S. and German parties calling for litigation in London. The Bremen generated subsequent decisions enforcing choice-of-forum provisions generally, but at the same time including dicta suggesting exceptions to enforcement. These exceptions can be categorized as those cases (1) where enforcement of the provision would result in substantial inconvenience, or denial of an effective remedy; (2) where there has been fraud, overreaching, or unconscionable conduct in contract relations; and (3) where enforcement would result in a violation of public policy or the transaction is


20. The Court noted that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." Id. at 9.

21. The Bremen, 407 U.S. at 17-18. But cf. id. at 16 ("[W]here it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable.").

This is basically the doctrine of forum non conveniens. However, it is important to note that courts have found that the existence of a valid forum-selection clause does not prevent a transfer under 28 U.S.C. § 1404(a):

Congress set down in § 1404(a) the factors it thought should be decisive on a motion for transfer. Only one of these—the convenience of the parties—is properly within the power of the parties themselves to affect by a forum-selection clause. The other factors—the convenience of witnesses and the interest of justice—are third party or public interests that must be weighed by the district court; they cannot be automatically outweighed by the existence of a purely private agreement between the parties. Such an agreement does not obviate the need for analysis of the factors set forth in § 1404(a) and does not necessarily preclude the granting of the motion to transfer.


22. The Bremen, 407 U.S. at 15. The Supreme Court further developed the fraud exception in Scherk v. Alberto-Culver Co., when it stated:

This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the clause is unenforceable. Rather, it means that [a] . . . forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion.

otherwise unfair, unjust or unreasonable. Despite their repetition as dicta, these exceptions rarely are applied.

U.S. courts have said they would recognize analogous exceptions to enforcement of arbitration clauses, although neither the Federal Arbitration Act nor the New York Convention subjects the obligation to enforce to such defenses. But like the exceptions to choice-of-forum enforcement, such exceptions appear only in dicta and seldom, if ever, produce judicial refusal to enforce an arbitration agreement. The Act has been construed to permit a defense of fraud or illegality in the inducement of the arbitration clause itself as a defense to enforcement of arbitration, but any question as to fraud or illegality in the inducement of the contract as a whole is an issue for the arbitrator and cannot be raised as a defense to enforcement of the arbitration clause.

23. The Bremen, 407 U.S. at 15. The Court rejected Zapata's argument that the exculpatory clause contained in the agreement violated U.S. public policy. Id. at 15-16.


25. The New York Convention does provide that recognition and enforcement of an arbitral award may be refused if the party against whom it is invoked can prove that (1) the parties were either under a legal incapacity when the agreement was made or the agreement itself was invalid, (2) proper notice was not given in the arbitration proceedings, (3) the award deals with matters not within the terms of the submission to arbitration or beyond its scope, (4) the composition of the arbitral tribunal was not in accordance with the agreement to arbitrate, or (5) the award is not yet binding on the parties in the country in which it was rendered. New York Convention, supra note 14, art. V(1). These are defenses to the recognition and enforcement of arbitral awards. Nothing in the Convention provides for defenses to an action to compel arbitration pursuant to an agreement between the parties.

26. See, e.g., Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 627 (1985) (sustaining an arbitration clause, but opining that "[i]f course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' 9 U.S.C. § 2.").

U.S. courts long held that certain matters of important public policy, such as antitrust claims, securities law claims, employment law claims, and claims under RICO, could not be decided by arbitration and must be submitted to the courts. More recent decisions, however, particularly in the international setting, have consistently held that even such "public" or "statutory" law concerns may be entrusted to arbitration.

In Scherk v. Alberto-Culver Co., the Supreme Court, relying heavily on the language of The Bremen, encountered a contract clause providing that "any controversy or claim [that] shall arise out of this agreement or breach thereof" be submitted to arbitration before the International Chamber of Commerce in Paris. In its earlier decision in Wilko v. Swan, the Court had declined to order arbitration of issues arising under section 12(2) of the Securities Act of 1933. Despite this precedent, in Scherk the Court ordered arbitration of the dispute between the parties, including a claim of securities fraud under section 10(b) of the Securities Exchange Act of 1934. The Court acknowledged that it could have based its decision on the difference in policies between the 1933 and 1934 Acts, but instead relied on the distinction that the contract in Scherk was "a truly international agreement." The Court recognized that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost

30. See, e.g., Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1305-07 (8th Cir. 1988) (Title VII claim not subject to arbitration).
32. Public regulation of prices and shipping arrangements by administrative agencies, however, cannot be avoided by an arbitration clause. A/S Ivarans Resideri v. United States, 938 F.2d 1365 (D.C. Cir. 1991) (Federal Maritime Commission jurisdiction over administration of international rate and transport allocation agreement displaced arbitration clause in contract between private carriers); Duke Power Co. v. Fed. Energy Regulatory Comm'n, 864 F.2d 823, 829-31 (D.C. Cir. 1989) (arbitration provision in interconnection agreement between power companies that was filed with FERC did not prevent FERC from exercising jurisdiction to enforce violation of a filed rate schedule); see Gulf Oil Corp. v. Fed. Power Comm'n, 563 F.2d 588, 596-97 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1977).
34. Id. at 508.
indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.\(^{37}\)

*Mitsubishi Motors v. Soler Chrysler-Plymouth*\(^ {38}\) further eviscerated any remaining uncertainty regarding the arbitrability of "public law" matters.\(^ {39}\) The Supreme Court disallowed antitrust defenses asserted by a Puerto Rican auto dealer whom a Swiss joint venture between U.S. and Japanese parties had sued in federal district court to compel arbitration in Japan.\(^ {40}\)

The *Mitsubishi* decision recognized that U.S. courts of appeals, following *American Safety Equipment Corp. v. J.P. Maguire & Co.*,\(^ {41}\) "uniformly had held that the rights conferred by the antitrust laws were 'of a character inappropriate for enforcement by arbitration."\(^ {42}\) It concluded, however, that "concerns 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' agreement, even assuming that a contrary result would be forthcoming in a domestic context."\(^ {43}\)

With its 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*,\(^ {44}\) the Supreme Court once again reaffirmed its consistent and pervasive position favoring arbitration, even in areas of the law

\(^{37}\) Id. at 516.


\(^{39}\) For examples of past cases denying arbitration of public law matters, see *supra* notes 28-31 and accompanying text.

\(^{40}\) 473 U.S. at 628-40.

\(^{41}\) 391 F.2d 821 (2d Cir. 1968).

\(^{42}\) 473 U.S. at 621 (quoting *Wilko v. Swan*, 201 F. 439, 444 (2d Cir. 1953), rev'd, 346 U.S. 427 (1953)).

\(^{43}\) Id. at 629. This focus on the facilitation of international commerce brought with it the reiteration of the Court's recognition in *Scherk* that refusal to enforce an international arbitration agreement would "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 631 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974)). Although the *Mitsubishi* Court acknowledged the risks of submitting statutory U.S. antitrust issues to Japanese arbitrators in Japan, it expressed confidence in the ability of the parties and of the arbitral body they had agreed upon to select arbitrators to apply U.S. antitrust law ably. 473 U.S. at 634. It found the ultimate safeguard in the New York Convention's reservation to each contracting state of the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." *Id.* at 638 (quoting the New York Convention, *supra* note 14, art. V(2)(b)).

traditionally considered to involve important issues of public policy. Gilmer held that a claim under the Age Discrimination in Employment Act of 1967 ("ADEA") can be subject to compulsory arbitration when the parties have signed a valid agreement to arbitrate. The Court made clear that a statutory claim distinction would not be a foundation for denying arbitration. Noting that "the burden is on [the party objecting to arbitration] to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims," Justice White reiterated the Court's earlier language that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."

While acknowledging that "the ADEA is designed not only to address individual grievances, but also to further important social policies," the Gilmer court used the language of Mitsubishi to note that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Finally, Justice White rejected the argument that arbitration of ADEA claims would undermine the role of the Equal Employment Opportunity Commission ("EEOC") in enforcing the ADEA: "An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." This single sentence became the foundation for the Federal Circuit's refusal to enforce arbitration of a claim under Section 337 in Farrel.

45. In the time between the Mitsubishi and Gilmer decisions, the Supreme Court had continued its trend favoring arbitration of "public law" or "statutory" matters. See Rodríguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).


47. Gilmer, 111 S. Ct. at 1652.

48. Id.

49. Id. (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1982)).

50. Id. at 1653.

51. Id. (quoting Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985)).

52. Id. The logic of Gilmer has been extended to Title VII claims under the Civil Rights Act of 1964 in at least four circuits. See Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991).
III. *Farrel Corp. v. International Trade Commission: Its Implications for a Broad Policy Favoring Arbitration*

*Farrel Corporation, a U.S. rubber and plastics manufacturer, licensed a competing Italian corporation, Pomini Farrel S.p.A., to use Farrel’s technology in the manufacture of machines to mix rubber and plastics. Pomini was authorized to sell the machines worldwide, except in the United States, the United Kingdom, and Japan. Successive license contracts contained the following arbitration clause:*

> All disputes arising in connection with the present Agreement shall be finally settled by arbitration. Arbitration shall be conducted in Geneva, Switzerland, in accordance with the rules of Arbitration of the International Chamber of Commerce.

> Judgment upon the award rendered may be entered in any Court having jurisdiction, or application may be made to such Court for a judicial acceptance of the award and an order of enforcement, as the case may be.\(^5^3\)

On January 1, 1986, Farrel terminated the license agreement. Approximately seven months later, Pomini announced plans to market the mixing machines in the U.S. Farrel filed actions in Italy, Scotland, and the United States District Court for the Northern District of Ohio, claiming violation of intellectual property rights.\(^5^4\) The district court granted Pomini’s motion to dismiss, holding that the claims must be submitted to an International Chamber of Commerce arbitration panel.\(^5^5\)

Meanwhile, Farrel filed a Section 337 complaint against Pomini with the International Trade Commission ("ITC" or "Commission"), alleging trade secret misappropriation, trademark infringement, and misrepresentation of source of manufacture. Farrel sought an exclusion order forbidding entry into the U.S. of Pomini’s mixing devices. In October of 1990, an administrative law judge determined that the investigation should be terminated in light of (1) the existence of the arbitration clauses in the technology licensing agreements; (2) the Commission’s previous decision in *In re Certain* 


\(^5^4\) *Id.* at 1149.

Fluidized Bed Combustion Systems,'56 which terminated an investigation because an arbitration agreement existed between the parties; and (3) the preclusive effect of the Ohio district court dismissal.57

Upon review, the ITC affirmed the administrative law judge's decision to terminate the investigation.58 The Commission based its decision on Mitsubishi and the federal policy favoring enforcement of arbitration agreements.59 It deemed compelling arbitration appropriate since the "claim of trade secret misappropriation [was] 'inextricably connected to the license agreement,'" and there existed no "legal constraints external to the parties' agreement which foreclose[d] arbitration."60

Section 337 authorizes the ITC to deal with the importation and sale of articles that infringe valid U.S. intellectual property rights,61 and unfair methods of competition or unfair acts in the importation of any articles into the U.S., or in their sale, if they tend to destroy or substantially injure a U.S. industry, prevent the establishment of such an industry, or restrain or monopolize trade and commerce in the U.S.62 Section 337 provides that "[t]he Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative."63 The Farrel court considered this language imperative, stating that "where 'the directions of a statute are mandatory, then strict compliance with the statutory terms is essential to the validity of the administrative action.'"64

The court agreed with Farrel Corporation that "the language of section 337 is clear: Once the Commission begins a section 337 investigation, section 337(c) authorizes termination of the investigation only in limited and specific circumstances—after its entry of a consent order or approval of a settlement agreement between the parties," or when the matter is based solely on alleged acts within the

57. Farrel, 949 F.2d at 1150.
59. Id. at 6 (citing Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).
60. Mixing Devices, supra note 58, at 8 (quoting Fluidized Bed, supra note 56, at 5).
62. § 1337(a)(1)(A).
63. § 1337(b)(1).
64. Farrel, 949 F.2d at 1153 (quoting 1 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 4.18 (4th ed. 1985)).
purview of the countervailing duty and antidumping laws. Finding these to be the only congressionally authorized exceptions to reaching a conclusion as to whether a violation exists, the court determined that termination in deference to arbitration would constitute the inappropriate creation of "an additional and inconsistent statutory exception."

In an intellectual property infringement case before a U.S. district court, it is the court's role to determine whether infringement occurred. However, the court may dismiss or suspend proceedings upon the equitable defense that an agreement to arbitrate exists between the parties. The Commission argued in Farrel that the situation was no different under its authority. Thus, because Section 337(c) provides that "all legal and equitable defenses may be presented in all cases," the Commission, like the district court in its decision in the Farrel/Pomini dispute, could dismiss based upon a prior agreement between the parties to arbitrate. The Farrel court, however, interpreted the statute otherwise, finding that "[w]hile the statute does require the Commission to consider defenses, nowhere in the text does language appear permitting termination of an investigation without concluding, as section 337(c) commands, whether a violation exists."

Ultimately, the court decided that to allow termination because of an arbitration agreement, "before the public
interest can be considered, turns the purpose of section 337 on its head.\textsuperscript{70}

A. Section 337 Settlement Agreements and Agreements to Arbitrate

Several aspects of the Farrel analysis are notable in light of the broad, existing policy favoring arbitration. First, as noted above, a Section 337 proceeding may be terminated upon a settlement agreement among the parties.\textsuperscript{71} The court at no point discussed the similarity between such a settlement agreement and a pre-existing agreement to arbitrate, which is merely another sort of private agreement on the method by which a settlement will be reached.

While the ITC is required to publish notice of the initial decision to terminate based upon a settlement agreement, the final decision to terminate belongs to the Commission.\textsuperscript{72} If the Commission determines that the agreement between the parties is appropriate, a termination order is appropriate, and “need not constitute a determination as to violation of section 337.”\textsuperscript{73} An agreement to settle the dispute by submission to arbitration is no less a “settlement agreement” than is a final agreement; it simply requires that the final terms be determined by a mutually acceptable third party.\textsuperscript{74} While the Commission may not have a final opportunity to review the precise substance of the ensuing decision, this alone is insufficient reason to

\textsuperscript{70} Id.
\textsuperscript{71} The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section, except that the Commission may, by issuing a consent order or on the basis of a settlement agreement, terminate any such investigation, in whole or in part, without making such a determination. . . . 19 U.S.C. § 1337(c) (1988).
\textsuperscript{72} 19 C.F.R. § 210.51(b)(2) (1993).
\textsuperscript{73} Id.
\textsuperscript{74} It could perhaps be argued that a decision terminating because of a settlement agreement in final resolution of a dispute differs from a termination based on an agreement to submit the dispute to arbitration. This argument, however, would ignore the Federal Arbitration Act and New York Convention, which treat agreements to arbitrate and final awards as equally enforceable. See infra notes 76-78 and accompanying text. Either way, the Commission has the final decision on termination. The important point is that in either case the ITC acts consistently with the decision of the parties concerning the method for achieving the resolution of the dispute.
forego all the advantages that accompany a consistent policy of enforcing arbitration clauses.75

The Farrel court itself does not justify distinguishing agreements to arbitrate from other settlement agreements, and for giving the former less weight under Section 337. Under either type of arrangement, the private parties have found a mutually satisfactory method of ending the dispute. The court in Farrel gives no explanation for respecting one type of agreement and not the other.

B. Enforcement of Agreements to Arbitrate and Arbitral Awards

In an earlier case, Young Engineers, Inc. v. United States International Trade Commission,76 the Federal Circuit held that the ITC in a Section 337 proceeding could consider the res judicata effect of a judicial ruling regarding patent infringement. Just as a second judicial proceeding would be precluded, the court found "no reason that the Commission must devote time and attention to that matter."77 Thus, the Federal Circuit acknowledged that the ITC could terminate a Section 337 proceeding when presented with a court's decision on the same matter. In Farrel, however, the Federal Circuit rejected the argument from Young Engineers and other prior decisions of its own and of the Supreme Court that Section 337 compelled the Commission to terminate the action because the parties had agreed to submit the dispute to arbitration. It ruled instead that the statute forbade termination.

The result in Farrel is inconsistent with the Farrel court's own discussion of Young Engineers. The court distinguished Young Engineers, where another forum had already rendered a decision, from the case at bar, where there was as yet merely an agreement to submit to another forum. According to the court, "[w]hat the Commission fails to recognize, however, is that no arbitral award had yet been made in this case against which res judicata could have applied."78 Thus the court clearly implied that a final arbitration award would be treated the same as a judicial decision, requiring termination of a Section 337 action on a res judicata rationale.

75. The Supreme Court has noted these advantages, and expressed confidence that the arbitral process can be relied on to apply U.S. statutes capably. Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 631, 634 (1985). For an outline of the Supreme Court's own pro-arbitration policy, see supra notes 33-52 and accompanying text.
76. 721 F.2d 1305 (Fed. Cir. 1983).
77. Id. at 1315.
78. Farrel, 949 F.2d at 1154.
If *Young Engineers* is correct in finding that a Section 337 action should be terminated when a court has already decided the issue between the parties, and *Farrel* is correct in implying that ITC termination would also result from the res judicata effect of a prior arbitral award, then the structure of U.S. arbitration law compels that termination should result when the parties have agreed to submit the matter to binding arbitration.

Both the Federal Arbitration Act and the New York Convention embody a clear policy to respect and enforce both agreements to arbitrate and the resulting arbitral awards. There is no policy distinction made in either the Act or the Convention that would justify the different treatment established by the *Farrel* court. To the contrary, the Act and the Convention aim to make both agreements to arbitrate and prior arbitral decisions enforceable. Therefore, if, as the *Farrel* court implied, a prior arbitration award would provide grounds for termination of ITC action under Section 337, then it follows that an agreement between the parties to submit the issue to arbitration should be treated no differently.

It makes little sense to respect the result of the parties' choice of dispute resolution forum and not grant the same level of respect to the parties' choice of the forum at the outset. The Federal Arbitration Act and the New York Convention form a pattern of parallel respect for, and recognition of, both the choice to arbitrate and the results of arbitration. Any divergence from this pattern of respect at least merits explanation beyond that provided by the court in *Farrel*.

C. Gilmer and the Farrel Court's Administrative Agency/Court Distinction

The *Farrel* court also addressed the line of Supreme Court cases culminating in *Mitsubishi*[^79], which favors enforcement of arbitration agreements even when the dispute involves the application of antitrust and other "public law."[^80] It found the Federal Arbitration Act to be directed mainly at judicial recognition of arbitration agreements, noting that "[t]he Commission, of course, is not a court."[^81] By this reasoning, Section 337, which is administered exclusively by the ITC, should not be interpreted to conform to the Arbitration Act's pro-arbitration policy. The *Farrel* court deemed this distinction between

[^79]: See supra notes 38-43 and accompanying text.
[^80]: See supra notes 32-52 and accompanying text.
[^81]: 949 F.2d at 1155.
courts and administrative agencies to be particularly important in considering how arbitration agreements could fit into Section 337. Moreover, the court thought the language and legislative history of Section 337 evinced a purpose to supplement otherwise inadequate legal remedies. Therefore, "the Commission's role in investigating possible violations [is] unique and beyond the scope of purely private enforcement." 82

Section 337 allows the Commission to toll the one-year or eighteen-month deadline for completion of an investigation when there are pending "proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation." 83 The Farrel court interpreted this language as allowing merely suspension, but not termination, when the case is under consideration by another tribunal. The court felt that termination in deference to arbitration would lead to the absurd result of the Commission giving "greater deference to an arbitral tribunal than [to] a U.S. District Court." 84

The Farrel court used the language of Gilmer v. Interstate/Johnson Lane Corp. 85 to support its interpretation of Section 337. It viewed Gilmer as holding that an arbitration agreement affects an administrative tribunal and a judicial tribunal differently. The Supreme Court's dictum that "[a]n individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC," 86 was taken as meaning that an "arbitration agreement operate[s] as a waiver of the right of access only to the judicial and not the administrative forum." 87

While in other respects the Farrel court used Gilmer to support its analysis, it did not explain how its administrative-agency-versus-court distinction would fit with the Supreme Court's holding in Gilmer compelling arbitration of a matter before the EEOC. A logical extension of the reasoning in Gilmer would seem to implicate similar results when other "statutory" claims are before an administrative body, unless Congress specifically and clearly states otherwise. The Farrel court's inferences from Section 337's text and legislative history seem something less than what should be required.

82. Id. at 1155-56.
84. 949 F.2d at 1156 (quoting dissent from Mixing Devices, supra note 58, at 2).
85. 111 S. Ct. 1647 (1991); see supra notes 44-52 and accompanying text.
86. Gilmer, 111 S. Ct. at 1653.
87. Farrel, 949 F.2d at 1156 (emphasis in original).
In an earlier Section 337 case, the ITC had relied heavily on Mitsubishi when it terminated an investigation because of an agreement to arbitrate. The administrative law judge and the Commission cited that case in their decisions to terminate the investigation in the Farrel/Pomini dispute. The Farrel court rejected this approach as a baseless extension of the Federal Arbitration Act policy favoring arbitration. To support this result, the Federal Circuit inferred much from the language and history of Section 337, and extracted a rule that trumps the broad judicial and legislative policy favoring arbitration. Given that a major statute, a significant treaty, and numerous Supreme Court decisions lie behind this general policy, the Farrel court's interpretation seems questionable at best. When one looks beyond Farrel to other concerns regarding Section 337, however, the case is even more problematic.

IV. SECTION 337 AND THE GATT: THE OTHER IMPLICATIONS OF FARREL

In its decision in the Farrel/Pomini dispute, the U.S. District Court for the Northern District of Ohio had ruled in a manner consistent with Mitsubishi when it granted Pomini’s motion to dismiss and compel arbitration of the dispute with Farrel. Thus, as the Federal Circuit saw it, the arbitration clause that required a U.S. district court to dismiss in deference to arbitration, could not compel the same deference on the part of an administrative body (the ITC). Not only is the foundation for this distinction weak, the distinction itself ignores U.S. international obligations under the GATT.

Later, the Farrel court made no reference to this earlier litigation involving the interplay of Section 337 and district court action on intellectual property rights. If it had done so, it would have had to address important concerns regarding differing treatment of procedural issues before a district court and the ITC. Those concerns implicate important international obligations arising out of the GATT.

In the 1980’s, Akzo N.V., a Netherlands corporation, and E.I. du Pont de Nemours & Co., a U.S. corporation, faced off in litigation over patent rights to processes for the manufacture of aramid fibers and products created with those fibers. In the United States, Du Pont

89. See supra notes 56, 58-60 and accompanying text.
sought exclusion of Akzo products through Section 337 proceed-
91. The ITC found that the process used in the manufacture of
Akzo’s aramid fibers abroad, if used in the U.S., would infringe Du
Pont’s patent, and that the unauthorized importation of fibers
manufactured under that process had the tendency substantially to
injure the U.S. aramid fiber industry. The ITC issued an exclusion
order prohibiting the unlicensed importation of aramid fiber products
manufactured abroad by Akzo or its subsidiaries or affiliated
companies.92 While the matter was before the ITC, the U.S. district
court in Delaware declined to exercise jurisdiction over the product
patent issues raised by the parties, finding that the ITC proceedings
“could very well resolve the issues presented in this case.”93

The Federal Circuit affirmed the ITC decision, rejecting
arguments that ITC procedures discriminated against foreign products
or parties on the basis of nationality, in violation of U.S. treaty
obligations.94 Akzo responded by petitioning the European Commu-
nity under the Community’s “commercial policy instrument.”95 The
European Commission decided to initiate panel proceedings under
article XXIII of the GATT.96 Although Akzo and DuPont settled
their dispute,97 the Community continued its challenge to Section
337 procedures generally, pursuing the argument that Section 337

91. See Akzo N.V. v. United States Int’l Trade Comm’n, 808 F.2d 1471, 1475 (Fed.


1984).

94. Akzo, 808 F.2d at 1485.

95. Council Regulation 2641/84, 1984 O.L. (L 252) 1. This is the European equivalent
§ 2411 (1988)). It allows the Community, upon a petition by an industry or member state,
to initiate Commission consideration of “illicit commercial practices” by trading partners,
and ultimately to challenge those practices before the GATT on behalf of the complainant.

96. Commission Decision 87/251, 1987 O.J. (L 117) 18, 21. Article XXIII is the primary
dispute settlement provision of the GATT. It requires that parties begin with
bilateral consultations in which the alleged offending party must give “sympathetic
consideration” to the representations of the complaining party. GATT, supra note 6, art.
XXIII:1. If the dispute cannot be settled through these consultations, article XXIII:2 provides
for consideration of the dispute by the “CONTRACTING PARTIES” (i.e., all parties to the
agreement acting through the GATT Council). Id. art. XXIII:2. This consideration, in
practice, leads to the appointment of a panel which issues a report which then goes to the
Council for adoption on behalf of the “CONTRACTING PARTIES.” Ultimately, while most
disputes end with a recommendation that the offending measure be withdrawn, other
available remedies are the authorization of compensation or retaliation. See William J.

97. Panel Report, supra note 9, paras. 2.9 & 5.1.
procedures violate the non-discrimination provisions of article III:4 of the GATT (the position rejected by the Federal Circuit in Akzo). 98

The Community argued that Section 337 procedure resulted in less favorable treatment for imported goods than for U.S. goods. The substance of the complaint was that a U.S. plaintiff, in patent infringement proceedings under Section 337 (available only against imported goods) was met with more favorable procedures than under normal patent infringement litigation in a federal district court (available against either a domestic or a foreign defendant). Thus, a foreign defendant in patent litigation is placed at a procedural disadvantage relative to a U.S. defendant. The GATT panel agreed, finding Section 337 to be inconsistent with article III:4 of the GATT, and issued its report on November 3, 1988. 99 The U.S. originally blocked adoption of the report in the GATT Council, but reversed this position, allowing adoption in November 1989. 100

The GATT panel found six aspects of Section 337 procedures that disfavor alleged patent infringers when the accused products are imported. 101 The panel found two of these inconsistencies to be

98. Id. para. 3.1.
99. Panel Report, supra note 9, para. 6.3.
101. (i) the availability to complainants of a choice of forum in which to challenge imported products, whereas no corresponding choice is available to challenge products of United States origin;
(ii) the potential disadvantage to producers or importers of challenged products of foreign origin resulting from the tight and fixed time-limits in proceedings under Section 337, when no comparable time-limits apply to producers of challenged products of United States origin;
(iii) the non-availability of opportunities in Section 337 proceedings to raise counterclaims, as is possible in proceedings in federal district court;
(iv) the possibility that general exclusion orders may result from proceedings brought before the USITC under Section 337, given that no comparable remedy is available against infringing products of United States origin;
allowable under article XX(d) as “necessary to secure compliance” with U.S. patent law.\textsuperscript{102} The report requested, as to the four remaining inconsistencies, that the “United States ... bring its procedures applied in patent infringement cases bearing on imported products into conformity with its obligations under the General Agreement.”\textsuperscript{103} Two of these inconsistencies are directly implicated by the \textit{Farrel} decision. They are:

1) the choice of forum (\textit{i.e.}, U.S. district court or the ITC) available in cases brought against imported products, whereas no such choice is available in cases against domestic products, and

2) the possibility that foreign respondents may be subject to concurrent proceedings in both of these forums.\textsuperscript{104}

In \textit{Farrel}, had Pomini been a producer of domestic goods, Farrel would have had only one forum in which to challenge Pomini’s allegedly wrongful conduct. Normally that forum would be the district court. When a valid arbitration agreement exists, the Federal Arbitration Act dictates that the forum be the arbitral tribunal selected by the parties. The decision of the U.S. District Court for the Northern District of Ohio in the \textit{Farrel}/Pomini dispute exemplified this accepted judicial deference to arbitration.\textsuperscript{105}

\textsuperscript{(v)} the automatic enforcement of exclusion orders by the United States Customs Service, when injunctive relief obtainable in federal court in respect of infringing products of United States origin requires for its enforcement individual proceedings brought by the successful plaintiff;

\textsuperscript{(vi)} the possibility that producers or importers of challenged products of foreign origin may have to defend their products both before the USITC and in federal district court, whereas no corresponding exposure exists with respect to products of United States origin.

Panel Report, \textit{supra} note 9, para. 5.20.

\textsuperscript{102} \textit{Id.} paras. 5.30-33.

\textsuperscript{103} \textit{Id.} para. 6.4.

\textsuperscript{104} \textit{Id.} para. 5.20(i), (vi). U.S. antidumping procedures would at first appear to be subject to similar objections. Foreign products may be the subject of either antidumping actions before the ITC and the Commerce Department or antitrust (predatory-pricing) actions in federal district court. Similar conduct involving domestic goods may be challenged only in court under the antitrust laws. However, the procedures applied in antidumping cases are specifically authorized in the GATT system through article VI of the GATT and the Tokyo Round Antidumping Code. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, \textit{in} GATT, \textsc{Basic Instruments and Selected Documents} 171-84 (26th Supp. 1980); see \textit{GATT, supra} note 6, art. VI. Thus, national antidumping procedures can be justified under article XX(d) of the GATT as measures “necessary to secure compliance with laws or regulations which are not inconsistent with the Provisions of’ the GATT. \textit{GATT, supra} note 6, art. XX(d).

When a producer or importer of a foreign product is involved, however, the U.S. complainant may file either in the district court or with the ITC under Section 337. When an arbitration clause exists, the court will defer to arbitration, as did the district court in *Farrel*. Unless the ITC similarly defers, however, the maker or importer of the foreign goods may have to defend in two forums (*i.e.* the agency and arbitration). The GATT Council condemned these procedural features as defective in the Section 337 panel report. The *Farrel* court’s decision that proceedings must properly continue in both arbitration and before the ITC clearly contradicts the GATT Council’s finding.

The GATT panel report is wholly consistent with the U.S. Supreme Court’s decisions from *The Bremen* through *Mitsubishi*, which recognized the need for predictability in determining the dispute resolution mechanism in international commercial relations. The judicial versus administrative tribunal distinction developed in *Farrel* exacerbates already existing problems of U.S. compliance with GATT obligations. When an arbitration agreement exists, a U.S. complainant thus has a choice of forums (ITC or arbitration) in which to assert intellectual property claims against a foreign defendant, and may, in fact, elect to proceed in both forums. Substantively identical claims involving domestic goods are strictly directed toward arbitration. These are the very types of discrimination the panel report concluded violated the GATT.

*Farrel* also raises concern about the court’s failure to consider rules of statutory construction that conflict with its result. The court latched onto the word “shall” in Section 337(b)(1), proclaiming that it is “the language of command,”' and that where “the directions of a statute are mandatory, then strict compliance with the statutory terms is essential to the validity of the administrative action.”' The court failed even to consider the coexisting rule of statutory construction that, “[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.” This latter rule is supported by language of the Supreme Court saying that “an Act of

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106. 949 F.2d at 1153 (quoting Ass’n of Am. R.R. v. Costle, 562 F.2d 1310, 1312 (D.C. Cir. 1977)).
107. 949 F.2d at 1153 (quoting SINGER, supra note 64, § 4.18).
108. RESTATEMENT, supra note 7, § 114.
Congress ought never to be construed to violate the law of nations if any other possible construction remains.”\(^{109}\)

V. CONCLUSION

While the General Agreement on Tariffs and Trade has the status of an executive agreement in U.S. law, and never received the formal advice and consent of the Senate,\(^ {110}\) it is generally agreed that it constitutes a treaty obligation binding upon the United States.\(^ {111}\) It is true that a later statute will supersede a prior treaty obligation when the two conflict.\(^ {112}\) However, “[w]hen the [treaty and statute] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either.”\(^ {113}\)

The rule of statutory construction requiring respect for international obligations has the support of numerous Supreme Court decisions, and should not be lightly disregarded. The \textit{Farrel} court’s failure even to mention it in the adoption of a contrary rule of construction is a serious oversight and raises questions about the resulting holding. While Congress certainly could choose to exclude consideration of U.S. commitments to GATT in the application of Section 337, it is unlikely that such a choice has been made silently. Section 337 is a part of U.S. international trade law, all of which is significantly interrelated with the GATT multilateral trading system.

Congress could also choose to override its policy favoring arbitration by barring the ITC from terminating a Section 337 proceeding in the face of an arbitration agreement. However, without more explicit statutory text or legislative history on this issue than

\(^{109}\) Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
\(^{110}\) See U.S. CONST. art. II, § 2, cl. 2.
\(^{112}\) The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.

\(^{113}\) Whitney v. Robertson, 124 U.S. 190, 194 (1888).
was cited by the Federal Circuit in *Farrel*, assuming such a choice in the face of the doctrine favoring statute-treaty consistency was taking a rather substantial leap.

The *Farrel* court chose the very result least consistent with U.S. international obligations contained in both the New York Convention and in the GATT. In doing so it should have explicitly held that the rule of statutory construction favoring compatibility with an international agreement either did not apply, or was overridden by a countervailing authority. The court made no such explicit determination. Instead, the decision demonstrates an insouciance toward international obligations all too often present in U.S. jurisprudence.