

Why All US Attorneys Should Read Justice Breyer's New Book

Law360, New York (December 18, 2015, 11:06 PM ET) -- Recently at an event hosted by the World Bank and the Washington Foreign Law Society, U.S. Supreme Court Justice Stephen Breyer discussed his latest book, *The Court and the World: American Law and The New Global Realities*.



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U.S. Law and Globalization

The interplay of the laws of nations is not a new dilemma. Contract formalities, customary business practices, and notions of justice and human rights have been clashing and harmonizing for centuries with peaks and valleys in forward progress. Justice Breyer's insight from the Supreme Court of the United States demonstrates that international commercial attorneys and international legal scholars are now closer than ever on both a vocational and practical level. The application of international law and the law of other countries is increasingly being mentioned in U.S. cases.

In my career, I have straddled the academic and corporate camps, and I felt a cathartic sense of centeredness as the application of foreign law in the U.S. courts was discussed at the World Bank event. Although I was born and raised in the United States, I completed a law degree in England before I studied law in Washington, D.C. I perceived that as a student in London my law school experience would be more inherently "international." I had been enthralled by the interplay of the law of nations since studying the economics of the transatlantic slave trade as an undergraduate student in California. Justice Breyer devotes a chapter of his new book to the Alien Tort Statute and Human Rights, the 1789 law that captured my attention through the lens of African-American history. To the audience at the World Bank, he poignantly asked, "Who are today's pirates?"



U.S. Supreme Court Justice Stephen Breyer discussing his new book at the World Bank Main Complex in Washington, D.C., on Dec. 10. (Credit: Laurel Lichty)

Today's complex interdependent world operates daily beyond the theory, history and academic arguments of whether international law is in fact law. To those caught between the laws of nations — whether a refugee seeking asylum, a parent fighting for child custody across borders, or a same-sex couple separated by visa status — this outdated academic argument does not provide immediate relief. However, the Supreme Court's role in tackling these problems is more apparent than ever before.

It is no longer only international law firms dealing with cross-border litigation that are interacting with the laws of other nations in their legal practice. We are entering a new era where even family law attorneys need to stay abreast of developing international law and the application of foreign law in U.S. courts in order to stay relevant.

Justice Breyer explains in his introduction that he "emphasizes and re-emphasizes two general themes" throughout his book.[1] The first is that the Supreme Court's work in determining the application and limits of its authority can be a force for good.[2] The Supreme Court can strengthen the rule of law in our world. [3] As he stated at the book launch event, "There are those that believe in the rule of law, and those that don't." The second theme is the need for harmonization or "comity." [4] In his discussion at the World Bank, Justice Breyer aroused laughter by saying, "Comity is a wonderful word because no one knows what it means."

What Does this Mean for the Future of Litigation in U.S. Courts?

In the realm of cross-border corporate law, understanding the implications of and being prepared for the potential application of foreign law in U.S. courts is increasingly a necessity.

I spoke to Kwaku Akowuah, counsel with Sidley Austin LLP, who will become partner effective Jan. 1.

"Justice Breyer's central theme particularly resonates for those of us who are in global law firms, frequently representing companies that have operations in many countries," Akowuah said. "For example, we are currently involved in an antitrust case in New York, in which the key legal question turns on the meaning of Chinese economic regulations, and the degree of deference that a U.S. court owes to China's official interpretation of those regulations. That case squarely raises questions about the meaning of foreign law and how U.S. courts should interact with foreign legal institutions."

In his book, through case examples accompanied by U.S. legal history, Justice Breyer discusses investment treaties and international arbitration and how they have entered the Supreme Court. He does not take a position on the increase in arbitration in the United States generally. Justice Breyer predictably judiciously presents what the proponents and critics say, the pros and cons, noting its increase in the U.S. as a source of dispute settlement.[5] He also differentiates international commercial arbitration, disputes wherein one party may be a nation-state. Justice Breyer asks; "Is it desirable to vest so much decision-making authority in tribunals, which unlike courts, are not even indirectly accountable to any electorate?"[6]

International arbitration does pose a conundrum in the realm of legal theory. Mutually agreed upon rules of dispute resolution supplant the law of the nations with nexus to the dispute. International arbitration, however, is also incredibly practical. The International Chamber of Commerce (ICC), the United Nation Commission on International Trade Law (UNCITRAL), JAMS (historically Judicial Arbitration and Mediation Services Inc.) and the World Bank's International Center of the Settlement of Investment Disputes (ICSID), among others, are providers of a neutral forum and a service that is in growing demand. These organizations offer sets of rules that make commercial and investment agreements possible that otherwise would not happen. They offer an alternative to the possibility of cross-border litigation that is often, but not always,

successful at keeping legal disputes outside of individual court systems that could be partial to one or another party. The increase in investment treaties and international arbitration can be seen as an example of the need for rule standardization.

Can Legal Harmonization Bring Global Harmony?

Susan Karamanian, Associate Dean for International and Comparative Law and Policy at George Washington University Law School, was an invited discussant at the World Bank event. I asked her thoughts after the event.

"The book dispels the notion that the Supreme Court of the United States is not focused on international law or foreign law," Karamanian said. "As Justice Breyer documents, the increased flow of goods, services, people, and information across borders by necessity has the court working on a wide range of international matters. The key cases are analyzed and their international implications are addressed. The critical issue going forward is not whether the engagement will continue but how the court will use international law or foreign law in a disciplined and structured way."

Justice Breyer, both through the discussion of his book in person and articulated in the epilogue, invoked in me a strong sense of pride in my American citizenship. Both in his emphasis of harmonization of law and the advancement of the rule of law, I was struck by how Justice Breyer appealed to what I heard as a very patriotic notion. I understood him to say that, as Americans, we have a responsibility to listen and interact with the law of other nations in order to contribute to and work with other nations to find solutions to the world's most pressing problems. [7] In a world wrought with ills that transcend country borders, harmonization may contribute to harmony. [8]

—By Laurel Lichty

Laurel Lichty specializes in corporate law and international regulatory compliance management. She has managed legal services for Fortune 500 companies in industries including financial services, pharmaceutical, insurance, technology and telecommunication. She has consulted with the International Law Institute and the World Bank's International Center for the Settlement of Investment Disputes. She is an adjunct professor at the Thomas R. Kline School of Law at Drexel University. She is a member of the ABA International Anti-Corruption and Anti-Money Laundering Committees and a member of the New York State Bar.

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[1] Breyer, Stephen G. *The Court and the World: American Law and the New Global Realities*. New York: Alfred A. Knopf, 2015 Introduction, pg. 6.

[2] *Ibid*, pg. 6.

[3] *Ibid*, pg. 6.

[4] *Ibid*, pg. 7.

[5] *Ibid*, pg. 180.

[6] *Ibid*, pg. 181.

[7] *Ibid*, pg. 282.

[8] *Ibid*, pg. 282.

