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The Court and the World Review

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Due to the interconnected nature of today's world, the Court must consider both foreign and domestic law in concert to meet an ever changing world. This sentiment is at the crux of Justice Stephen Breyer's work, The Court and the World: American Law and the New Global Realities. One of the central themes in Breyer's work is the recognition of power between foreign and domestic law[1]. Breyer highlights this concept through the doctrine of comity. As defined, comity is a practice among political entities involving mutual recognition of legislative, executive, and judicial acts.[2] Simply stated nations recognize the sovereignty of each other's laws. Applying this concept, Breyer highlights that "comity" has led to interpretations of domestic law that would allow American law to work in harmony with international law.[3] More importantly, Breyer is not necessarily calling for a revolution of the jurisprudential standard; however, he simply posits that we may learn something from examining the practices of other nations, rather than considering our own practices in a vacuum. [4]

Overall, Breyer's work reads like a miniature casebook with one important aspect: in-depth analysis by one of the Court's longstanding Justice's. Breyer gives the reader a look into the various legal issues presented to Supreme Court justices on a case by case basis prior to rendering a decision and how they are resolved. In this book, Breyer examines the evolution of the Court's consideration of international law in legal opinion on various subjects including: business, human rights, public policy, treaties, by using case law and the Court's past decisions. To provide a holistic view in this work, Breyer also gives the social and political background of each case to paint a full picture for the reader of the circumstances facing each Supreme Court decision. In some instances, the political and social landscape played a significant role in the court's decision.

Breyer divides the work into three main substantive parts. Part One focuses on the constitution, national security, and individual rights. Part Two focuses on the foreign reach of American statutory law. Additionally, Part Two focuses on cases discussing the application and regulation of international commerce. Particularly, this section addresses the following four areas of law: (1)Antitrust, (2) Evidence, (3) Securities Regulation, and (4) Copyright. While Part Three focuses on International Agreements, specifically Investment treaties and International arbitration. For the purpose of the review, I will focus on Part Two that specifically addresses the nexus between international law and business.

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[1] Stephen Breyer, *The Court and the World: American Law and New Global Realities*, 91 (Alfred A. Knopf 2015).

[2] *Comity*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive and judicial acts.").

[3] Breyer, *supra* note 1, at 92.

[4] *Id.* at 83 (" I do not argue for or against either the British, Israeli, or Spanish system in particular. I simply point out that other democracies with the same commitment to basic human rights have led the way in developing solutions.").

I. REGULATING INTERNATIONAL COMMERCE

Section A: The evolution of Anti-Trust Law

Justice Breyer focuses on the Supreme Court's 2004 decision in *F. Hoffman- La Roche Ltd. v. Empagran S.A*, to discuss the evolution of Antitrust law. .[5] In *Empagran*, the issue was whether the Sherman Anti-Trust Act[6] was applicable to a foreign price-fixing scheme, if no domestic harm resulted from those schemes."[7] The Court held the antitrust laws did not cover entities that sought damages for injuries caused in foreign commerce by applying the comity doctrine and a "rule of reasonableness". As Breyer states, the "rule of reasonableness" is a determination of whether "it would be reasonable for an American court to exercise jurisdiction over foreign parties and their conduct, or would it not?"[8].

In *Empagran*, the Court determined that while "the nations involved agreed against the price-fixing" at issue, they disagreed about appropriate remedies.[9] Considering the long-term effects of their decision, the Court refused to apply American law and its remedies in this instance. As the Court explained, "applying American law...could permit the citizens of foreign nations 'to bypass their own less generous remedial schemes, thereby upsetting a balance of competing consideration that their own domestic antitrust laws embody." Furthermore, the Court explained that applying American Law would be inconsistent with the comity doctrine the highlights the sovereignty of each nations laws. As Breyer states, applying American legal remedies could jeopardize the cooperative arrangements the United States made with other nations and erode any goodwill developed between the nations. As Breyer posits, there are three aspects of this decision that are particularly important: (1) the enforcement of similar rules in other countries, (2) the need to promote smooth operation, [10] and (3) the Court reached its conclusion with the help of briefs filed by those who understood international practice.

Section B- The Evolution of Evidence and Discovery in Foreign Tribunals

To discuss the evolution of Evidence law and Discovery practices, in international business, Breyer highlights the Supreme Court's 2004 decision in *Intel Corp v. Advanced*

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[5] F. Hoffman- La Roche Ltd. v. Empagran S.A., 542 U.S 155 (2004).

[6] Sherman Antitrust Act of 1890, 26 Stat. 209 (codified and amended as 15 U.S.C §1 (2012))

[7] Breyer, *supra* note 1, at 103 ("There is a canon of interpretation that I often used in these sort of cases, and it applies a presumption against extraterritoriality" – that is, a presumption against the foreign application of an American statute. But that canon did not help, since all conceded that the Sherman Act sometimes does apply extraterritorially. The question was not whether it applies to foreign conduct but when and where it does so.").

[8] *Id.* at 103.

[9] *Id.* at 106.

[10] *Id.* at 106-107 ("First the international; nature of commerce and of efforts to regulate it led the court not only to consider the need to avoid conflict between the substantive rules of different nation but also to ponder in some detail the differing procedural methods through which different nation enforce similar rules. Second, the court sought, not simply (in a value neutral way) to avoid conflict among different national laws, but also to promote the smooth operation of an international business regulatory system. It described its use of the term comity as an effort to "take account"...Several foreign nations, and the antitrust authorities of European Union, did the same.").

Micro Devices[11]. In *Intel,*[12] the Court permitted an American company to compel discovery for use by a foreign tribunal under Title 28, Section 1782 of the United States Code.[13] Following this decision, Breyer remarks that the *Intel*[14] decision progressed the Supreme Court's understanding and interpretation of the International Judicial system.[15]

The *Intel*[16] decision adds to Breyer's position that new applications of American law require a better understanding of foreign laws and activities.[17] According to Breyer, there are four primary lessons to be drawn from the *Intel*[18] decision. First, the court now needed to understand even more technical rules and systems for administering the law abroad, and to distinguish between a judicial forum, an administrative forum, and the like in foreign countries. Second, the Supreme Court was not an expert in foreign legal systems. Third, predictions about likely consequences may prove important to decisions. Additionally, due to its lack of experience in such matters, it has yet to be proven whether the case by case approach the court utilized would be effective. Finally, Breyer asserts the Court needed better ways of learning about the relevant foreign realities. These lessons serve as a reminder that as the world becomes more interconnected, various choice-of-law questions will arise. As Breyer poses, the *Intel* decision and it's lessons force the Court to develop a greater understanding of International law to answer any future multinational procedural questions.[19]

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[11] Intel Corp v. Advanced Micro Devices., 542 U.S. 241 (2004).

[12] *Id.*

[13] *See* 28 USC §1782 (a)(2012).

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege. *Id.*

[14] Intel Corp v. Advanced Micro Devices., 542 U.S. 241 (2004).

[15] Breyer, *supra* note 1, at 113 ("If the Empagram case had brought the Court into new territory- requiring it to understand not only the substantive antitrust law overseas but also the rules and practices involved in the administration of that law- Intel went one step further. Now the Court is needed to understand even more technical rules and systems for administering the law abroad, and to distinguish between a judicial forum, an administrative forum and the like in foreign countries.").

[16] Intel Corp v. Advanced Micro Devices., 542 U.S. 241 (2004).

[17] *Id.* at 93

[18] Intel Corp v. Advanced Micro Devices., 542 U.S. 241 (2004).

[19] Breyer, *supra* note 1, at 114.

Section C- The Evolution of Securities Law and International Stock Purchases

Breyer highlighted the Supreme Court's 2010 decision in *Morrison v. National Australia Bank*, to discuss the evolution of Securities Law.[20] In effect, the *Morrison*[21] decision limited the expansion of thought and understanding regarding foreign laws expressed in Breyer's previous examples.

The SEC's most notable rule, SEC Rule 10b-5[22], forbids "any person" from making any materially false statement or otherwise engaging in fraud in connection with the purchase or sale of any security. The issue in *Morrison*[23], was whether Rule 10b-5 applies when conduct contributing to securities fraud takes place within the United States, but the sales affected by the fraud takes place abroad[24] The majority ruled that the Rule did not apply when foreign sales were effected by domestic fraud. This decision reflected a shift from previous case law which applied a case by case approach to Rule 10b-5 as opposed to developing a bright line rule.[25] This decision also presented a limitation on the scope of Rule 10b-5 extraterritorial application.[26] Ultimately, *Intel* represented the Court's strict interpretation of Congressional intent. *Intel* also addresses an unwillingness to harmonize domestic and foreign law.

Breyer poses four primary reasons for the majority decision. First, the court criticized the previous multi-factor test for its vagueness. As the majority held, lower courts could not reach a clear decision based on a multi-factor test where the identified factors were relevant but not determinative.[27] Secondly, by examining the statutory language of the Rule nothing indicated that Congress intended extraterritorial application. [28] Thirdly, court emphasized that the purpose of the statute was to ensure the integrity of American financial

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[20] Morrison v. Nat'l Austl. Bank Ltd.., 561 U.S. 247 (2010).

[21] *Id.*

[22] Securities and Exchange Commission (SEC) Rule 10b-5, 17 C.F.R § 240.10b-5 (2013).

> Employment of manipulative and deceptive devices. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. *Id.*

[23] Morrison v. Nat'l Austl. Bank Ltd.., 561 U.S. 247 (2010).

[24] Breyer, *supra* note 1, at 119.

[25] *See*, IIT v. Cornfeld, 619 F. 2d 909 (2d Cir. 1980); Zoelsch v. Arthur Andersen & Co., 824 F. 2d, 35-36 (D.C Cir. 1987); Psimenos v. E.F Hutton & Co., 722 F. 2d 1041,1047 (2d Cir. 1983); Grunenthal GmbH v. Hotz, 712 F. 2d 421 (9th. Cir 1983) Continental Grain (Australia) Pty. Ltd. V. Pac. Oilseeds, Inc., 592 F. 2d 409 (8th Cir. 1979)

[26] *Id.* at 121 (" Namely, Rule 10b-5 applies "only in connection with" either (1) the 'purchase or sale of a security listed on an American stock exchange' or (2) the purchase or sale of any other security in the United States.'").

[27] *Id.*

[28] *Id.* at 122.

markets.[29] The court further stated " Rule 10b-5, in particular is designed to prevent fraudulent misrepresentations to investors engaging in securities transactions domestically.[30] Finally, in the most stark statement regarding congressional intent and Rule 10b-5's extraterritorial reach The Court states "probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'"[31]

Section D- The Evolution of Copyright Infringement and International Commerce

To highlight the evolution of Copyright law, Breyer discusses the Supreme Court's 2012 decision in *Kirtsaeng v. John Wiley & Sons Inc.*[32]. In this case, Kirtsang, a citizen of Thailand, received a scholarship to study aboard in the United States.[33] During his studies, Kirtsaeng noticed that many of his textbooks were far more expensive than the foreign export editions sold in Thailand, which were also available in English.[34] Kirtsaeng requested his family and friends in Thailand buy his textbooks abroad, and ship them to him in the United States. His actions resulted in an action by the textbooks publisher John Wiley & Sons., Inc. Consequently, the Court was posed to determine whether importing foreign textbooks with domestic equivalents available at a higher sale price, into the United States constituted copyright infringement.

The Court's answer was detrimental to both foreign and domestic commerce. The Court analyzed the Copyright Act, and the first sale doctrine[35] to resolve this issue. Under the first sale doctrine, the distribution rights of the copyright's owner are limited only throughout the point of the first sale.[36] The copyright owner cannot exploit the copyrighted work after this point. The majority decided in favor of Kirtsaeng, holding the first sale doctrine applies whether the first sale takes place in the United States or abroad[37]. Breyer highlights three

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).

[33] Breyer, *supra* note 1, at 124.

[34] *Id.*

[35] Victor F. Calaba, Quibbles 'n Bits: Making a Digital First Sale Doctrine Feasible, 9 Mich. Telecomm. Tech. L. Rev 1, 4 (2002).

> The first sale doctrine, as codified in Section 109 of the Copyright Act, limits a copyright owner's distribution right such that he can exploit the copyrighted work only through the point of the first sale. The first sale doctrine serves to balance copyright owners' rights with the public's interest in trading and alienating works and allows users, in effect, to partially participate in the distribution of copyrighted material. Under the doctrine, after the first sale has occurred, subsequent owners lawfully obtaining the work may freely alienate it. *Id.*

[36] Calaba, supra note 35, at 4.

[37] Breyer, *supra* note 1, at at 131 ("Ultimately, I fear adverse consequences (at east when coupled with what I have called traditional arguments) prevailed. By a vote of six to three, the Court held that the "first sale" doctrine applies whether that first sale takes place at home or abroad.").

lessons to draw from the *Kirtsaeng*[38] decision regarding the court's willingness to embrace foreign laws in American decisions. First, the majority took into consideration the growth foreign trade and America's dependence on it. Secondly, to make an adequate decision, the court educated themselves on the interaction of foreign and domestic markets. [39] Finally, the number of international sources used by the court was plentiful for reaching a determination. [40] These lessons serve as yet another step in the court's understanding and increased involvement of using foreign law in domestic decisions.

II. BREYER'S OBSERVATIONS

At the conclusion of each substantive section, Breyer offers his observations from each case he analyzed. First, Breyer asserts there is no uniform tendency by the Supreme Court to expand or limit the reach of American statutes abroad.[41] Secondly, the Court must be reasonably familiar with foreign legal constructs and practices in order to accurately interpret American statutes. Thirdly, there is a shift in the Court's opinion concerning the application of foreign law to American decisions. In issues concerning International Commerce, the Court sought not only to avoid conflict between interpretation of foreign and domestic law. More importantly the court intended to harmonize American and Foreign laws so that the systems so that as a whole they could work more effectively to reach common goals.[42] Finally, as he has continually asserted, Breyer observes that these cases suggest the judiciaries' need for information about foreign practices, rules and laws is only likely to grow. As illustrated by Breyer, Justice's rely on bar brief's to render a decision.[43] These briefs are comprised of "not just experience, but also upon research, articles and treatises".[44] Providing information on international practices in cases concerning international parties can only help to develop better judicial decisions.[45]

Further, Breyer asserts lawyers will increasingly supply the court with relevant information on international practices in their submissions to the court close the knowledge gap.[46] As more cases come before the court involving international parties, the Supreme Court's decision will carry international implications in the worlds of business, technology and even education. In this new legal landscape, the court will need to become more informed about the effect of laws in the international community.

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[38] Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).

[39] Breyer, *supra* note 1, at 131.

[40] *Id.*

[41] Breyer, *supra* note 1, at 132.

[42] *Id.*

[43] *Id.* at 114.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 132.

CONCLUSION

Ultimately, Breyer's work is an in-depth case analysis focused on one central theme: the Court should make more of an effort to understand international laws and practices due to the ever evolving world. Breyer does a masterful job of providing a holistic picture of the circumstances surrounding some of the Supreme Court's impactful decisions. Especially eye opening is Breyer's historical analysis of case law leading up to the Morrison decision. Although it is not the focus of this review, Breyer's analysis of the political and social climate surroundings seminal Presidential powers cases, such as *Korematsu*[47], The *Steel Seizure case*[48] and the *Guantanamo cases*[49] gives the reader sufficient background facts to fully understand the courts decisions.

This author agrees with many of Breyer's observations and assertions in this work, especially the need for harmonizing domestic and foreign laws in business and human rights issues.[50] Furthermore, the cases discussed in this work serve as evidence that Supreme Court cases involving foreign parties should be made with full consideration of both foreign and domestic implications. This can only be accomplished provided a complete understating of foreign practices and laws. The only drawback to this work is that Breyer does not supply enough analysis on the future of American Jurisprudence in concert with International Law. This work offers many apt legal arguments that should be essential to business attorneys.

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[47] Korematsu v. United States, 323 U.S. 214 (1944).

[48] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[49] *See* Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2005); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 553 U.S. 723 (2008).

[50] *See supra* Part I.