The US as global attorney

by Gregory J Wallance

Since the end of the Cold War era, the US has assumed the often conflicting roles of global sheriff and global attorney – with increasing tension between their competing interests.

The US Senate's recent rejection of the Comprehensive Test Ban Treaty (CTBT) was condemned by the President and many commentators as 'isolationist.' In fact, the defeat of the CTBT does not signal a re-emergence of American isolationism but rather marks only the latest in a series of clashes between two competing role models for American assertiveness in the post-post-Cold War world – the US as global sheriff and the US as global attorney, that is, as advocate for international law and morality. The problem is not isolationism but the increasing tension between the two different means – sheer military power, on the one hand, and forceful projection of American legal and moral values on the other – by which the US influences the behaviour of other countries.

As global lawyer the US has altered the legal cultures, business morality, working conditions and human rights practices in scores of nations. A factory worker in Thailand, a marketing vice president of a Japanese pharmaceutical company, a Zurich bank manager, and a French businessman in Moscow live working and professional lives that express American legal values. Far more than fast food and Hollywood movies, American legal exports have affected daily life around the globe.

The US exports its legal values in three principal ways:

- unilateral enforcement of American laws against foreign companies and their executives (e.g. the Department of Justice's attack on international price fixing cartels);
- multilateral agreement after lengthy diplomacy (e.g. the recent OECD convention prohibiting foreign bribery); and
- non-governmental organisation lobbying and pressure (such as that which resulted in highly-publicised changes in workplace conditions in Nike and Reebok factories in third world countries and an emerging set of international factory labour standards).

America's ability to project its legal values to faraway places is on a par with its ability to project military force globally. The exported American legal values express the best American impulses, including commitment to the rule of law, a sense of fairness and equal opportunity, and a dislike of business corruption and dishonesty. In short, American legal values are quintessentially moral ones.

However, the projection of American legal values has already created contradictions for American foreign and domestic policy because so far the US has been selectively moral, particularly in the area of military morality. While the US seeks an international consensus on prosecution of foreign businessmen for antitrust violations, it refuses to sign the International Criminal Court Treaty, principally over concern about prosecution of American soldiers for war crimes; while it has insisted on an international pact to stop bribery, it refuses to sign international pacts to outlaw land mines and underground nuclear testing; and while its private organisations, with strong government support, lobby for international accords outlawing child labour, its military, with strong government support, opposes international agreement to outlaw child soldiers. As demonstrated by the harsh criticism from allies of the US on each occasion that the global sheriff beat back an initiative from the global lawyer, a posture of selective morality is difficult to defend. In important respects the global lawyer and the global sheriff do not get along with each other, and how they resolve the near schizophrenic tensions between moral impulse and military necessity will affect the ability of the US to shape international affairs in the post-post-Cold War world.

UNILATERAL APPLICATION OF AMERICAN LEGAL POWER

One of the more impressive feats of the Kosovo War was the ability of the B-2 bomber to fly round-trip bombing runs to Yugoslavia from a base in Missouri. The American legal equivalent of the B-2 bomber is the Department of Justice's Antitrust Division, which has projected American antitrust standards to the industrialised world. In recent years, the Antitrust Division has poured resources into investigating and prosecuting international cartels, over whom it has jurisdiction to prosecute so long as any one cartel member sells collusively-priced products in the US – a virtual certainty for most cartels.

The results of the Division's cartel bombing have been breathtaking. In 1991, 1 per cent of the corporate defendants in criminal antitrust prosecutions brought by the Department of Justice were foreign-based. No criminal antitrust charges were brought that year against a foreign individual. In 1997, nearly *two-thirds* of the corporate defendants were foreign-based and more than one-fifth of the individual defendants were foreigners. The list of convicted foreign companies includes Fujisawa (Japan), Roquette Frères (France), Heeren NV (The Netherlands), and Hoechst AG (Germany). Last year, two European companies, Hoffman-Roche and BASF, pleaded guilty to price-fixing of vitamins and paid fines totalling a staggering $725 million.

Even foreigners living in countries whose extradition treaties do not cover antitrust offences have been forced to answer antitrust charges in American courts. These defendants realise

that as indicted fugitives from American law they cannot function effectively as international businessmen. After negotiating assurances with the Immigration and Naturalisation Service (INS) that will allow them to resume travelling into the US if they are convicted or plead guilty, many have appeared in American courts to answer, usually by a guilty plea, American criminal price-fixing charges even though their own countries' laws do not make price fixing a crime.

The Antitrust Division's vigorous antitrust enforcement has stimulated other countries to develop and enforce their own antitrust laws, often under American tutelage. For example, the Antitrust Division staff have provided technical assistance to antitrust agencies in 30 countries on four continents, from Albania to Zimbabwe. The Division has negotiated co-operation agreements and mutual legal assistance treaties (MLATs) that allow the Division to take statements from witnesses in foreign countries, obtain documents and other physical evidence, and even execute searches and seizures through the Division's foreign counterpart. Recently, the US proposed an initiative in the Organisation for Economic Cooperation and Development (OECD) to develop an agreed policy that member countries enact and enforce laws prohibiting hard-core cartel activity.

Even without an international consensus that price fixing is a crime, the Antitrust Division's attack on cartels has forced foreign companies to adopt American-style compliance programs to deter employees from fixing prices of goods sold in the US. The days of the international market cartels are numbered as more and more companies realise that the risk of paying fines approaching a billion dollars is not compensated by the benefits of cartel activity.

THE MULTILATERAL APPROACH

America's Foreign Corrupt Practices Act was enacted in 1977 in the wake of the Watergate break-in and Lockheed bribery scandals. Essentially, the Act prohibited the payment of bribes by American companies to foreign government or political party officials for the purpose of obtaining or retaining business and required publicly-traded companies to maintain accurate books and records. Over the next 20 years American companies lost billions of dollars in contracts to foreign competitors whose business morality was unconstrained by such a bribery prohibition in their own countries. Foreign government officials and businessmen privately snickered at the self-imposed American business ethics, in the same fashion that their merchant ancestors laughed at 17th-century missionaries for believing that the heathens in Africa or the Americas should be objects of conversion and not exploitation.

In the end, American morality – and business reality – triumphed. At the end of 1997 the 29 member nations of the OECD and five non-member nations (Argentina, Brazil, Bulgaria, Chile and the Slovak Republic) adopted a 'Convention on Combating Bribery of Foreign Public Officials in International Business Transactions'. Its preamble is the purest expression imaginable of American legal values:

'Bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions ...'

The Convention requires each signatory to adopt 'effective measures' to deter and prevent their citizens from bribing foreign public officials for business advantage, including the use of 'dissuasive criminal penalties'. It commits the signatories to setting up a mechanism to monitor each other's compliance and implementation, which means that each signatory nation will be actively encouraging – if not pressuring – the other countries to fully live up to their obligations under the Convention.

How did this extraordinary transformation in international government and business morality come about? Factors include the increasing perception that, in the long run, business bribery harms the global economy and therefore everyone; a new generation in Europe of aggressive magistrates who exposed and vigorously prosecuted business and sports scandals (the expulsion last year of riders in the Tour de France for drug use is only one notable example of the changed atmosphere); and the media coverage of such scandals which influenced public opinion sufficiently to create a political consensus in favour of the Convention. But the overall animating force was American diplomacy spurred by pressure from major American companies who, through such lobbying organisations as Transparency International, demanded a level international-business playing field.

on the internet

http://www.usdoj.gov.atr/public/pressrelease/1997/1326.htm

Access this website for the US Department of Justice's press release concerning the Roquette Frères case.

One example of the Convention's potential impact arose recently when revelations emerged about the bribes and gratuities paid to members of the International Olympic Committee by cities seeking selection as Olympic venues. In the face of the IOC's intransigence and unrepentance, some American public officials proposed amending the Convention to prohibit bribes to members of the IOC and changing the Olympic charter to require that no country can host the games unless it has signed the Convention. Recently the IOC indicated its receptiveness to being included within the Convention. This linkage of the Convention and the Olympic controversy demonstrates how other countries may be forced to adopt the Convention's standards as the price of entry to the capital markets, access to private and public financing, and participation in international business and trade organisations, not to mention the Olympic movement.

THE NON-GOVERNMENTAL APPROACH

The television personality Kathie Lee Gifford never imagined that she would become a symbol for the export of American legal values. But in 1996 she was in the news because a line of women's clothing bearing her name had been made by under-age workers in Central America. Disney experienced embarrassing publicity from reports that Chinese factories producing Disney-labelled goods paid women working 16 hours a day $70 a month. Mattel plants in third world countries were called 'sweatshop Barbie' assembly lines. Nike and Reebok, among other companies who spend tens of millions of advertising dollars to identify their products with clean, youthful fun, were similarly embarrassed by news reports that they

exploited third-world child labour. As Nike CEO Phillip Knight sadly acknowledged:

'The Nike product has become synonymous with slave wages, forced overtime and arbitrary abuse.'

During the Cold War, a controversy over third-world factory labour standards would never have made it to prime time, but a combination of sophisticated American human rights professionals, college students and a symbol-driven media forced multinational corporations to impose American-style workplace standards in factories from Haiti to Pakistan. The historic roots of the workplace reform movement can be traced to the labour union struggles of the 1930s, the civil rights movement of the 1950s and 60s and the contemporary international human rights movement. In each of these movements a small group of tactically-savvy activists used public perception to force the government to enact and enforce laws that furthered the movement's goals. Underlying the success of each movement was an image that provoked public sympathy: a company goon clubbing a striker, southern sheriffs unleashing dogs on civil rights demonstrators, or a prisoner without a name in a cell without a number.

SCHIZOPHRENIC TENSIONS

In important respects the global lawyer and the global sheriff do not get along with each other, and how they resolve the near schizophrenic tensions between moral impulse and military necessity will affect the ability of the US to shape international affairs in the post-post-Cold War world.

The international workplace movement succeeded because it focused on companies whose products derive value from corporate or brand images. Reebok simply could not afford to have its soccer balls identified with the exploitation of 12-year-old Pakistani workers. In response to the adverse publicity Reebok created a new central production facility in Pakistan, put in place a system of independent monitors and – in a classic example of turning necessity into a virtue – affixed 'Made Without Child Labour' to its soccer balls. Nike has raised the minimum age for employment at its footwear plants to 18 (other than Vietnam, where 14 year olds can work with parental permission), installed new ventilation systems, and reduced workers' exposure to lead paint and hazardous chemicals. Starbucks Coffee, after picketing by activists over working conditions on the Guatemala plantations from which it buys some of its coffee beans, issued a revised code of conduct and specific action plans for all its supplier countries.

The international workplace movement spawned a variety of non-binding legal codes. After prodding by such groups as the Lawyers Committee for International Human Rights, an association of the Clinton Administration, human rights organisations, apparel companies and American colleges established the Fair Labour Association, which then developed a workplace code of conduct reflecting decent working conditions and a uniform system of monitoring. If a company meets the FLA standards it will be allowed to attach an FLA label to its products, including soccer balls and T-shirts. As New York Times columnist Thomas Friedman recently wrote:

'The hope is that every college bookstore and major retailer that sells sneakers, T-shirts and sweatshirts will insist on selling only FLA-labelled products.'

The international workplace movement lacks the sheer firepower of the Department of Justice's crusade against cartels and the international commitment of the Foreign Bribery Convention. Its tactics are inherently self-limiting since companies that do not depend on brand or corporate name – such as producers of raw materials and components purchased by the end-user manufacturers – are virtually immune from pressure. Voluntary codes, critics have charged, will not protect the majority of workers in developing nations because much of their country's economic output has no connection with US markets.

All true, but premature. Voluntary codes are a beginning and it remains to be seen whether the labour standards movement will spread beyond the factories run by the multinationals, which currently represent about 8 per cent of third-world workplaces. But it is difficult to imagine that an electronics factory worker in Bien Hoa, Vietnam, will quietly endure working in 100-degree heat, exposure to toxic fumes and chemicals, and physical beatings by the foreman while across the street Nguyen Thi Dong earns three or four times as much money in her Nike factory job, works in a clean, modern, well-ventilated room and can report abuse to an independent monitor.

THEORY V PRACTICE

The world is still a long way from adopting an American style legal system. Few countries would want a civil tort system in which multi-billion-dollar verdicts are handed up by juries with no more predictability than the roulette tables at the MGM Grand in Las Vegas, and equally few countries have the legal infrastructure, culture and heritage necessary to support the meticulous procedural due process given most criminal defendants in American court rooms. But American success in emphasising the rule of law in international relations has created a situation in which the converted have begun to embarrass the preacher.

One example might be called American legal exceptionalism or 'our laws are good enough for you, but yours aren't good enough for us'. In some ways, the worst offender is the US Supreme Court. In a recent speech on affirmative action to the Association of the Bar of the City of New York, Supreme Court Justice Ruth Bader Ginsburg pointed out that India's Supreme Court has cited US court decisions when judging the constitutionality of affirmative action measures and that German attorneys defending affirmative action measures before the European Court of Justice have cited international covenants. Yet, she observed, the US Supreme Court has mentioned the Universal Declaration of Human Rights just five times and only twice in a majority decision, the last such citation by either the majority or minority being 25 years ago in a dissenting opinion by the late Justice Thurgood Marshall. She pointed out that when Justice Breyer, in a 1997 dissent, referred to federal systems in Europe, the majority responded, '*We think such comparative analysis inappropriate to the task of interpreting a constitution*'. (Justice Ruth Bader Ginsberg, Benjamin Cardozo Lecture, 11 February 1999, reprinted in the *Record of the*

Association of the Bar of the City of New York, vol. 54, no. 3,275 May/June 1999, at 308–09.)

While legal exceptionalism has ruffled relatively few feathers outside of the legal community, selective morality has created something of a backlash. Three times in the last three years the global attorney and the global sheriff have fought over an international human rights pact and, each time, the global sheriff has defeated American participation, to the consternation of countries that had borne the brunt of American legal power in the international business arena. The American claim to legal superiority, implied in the above examples of the projection of American legal power, is necessarily a claim to the moral high ground. But, as lawyers often tell corporate clients implementing legal compliance programs, 'do not set standards for your company unless all the divisions are willing to meet them'.

In opposing the three human rights pacts, the US inevitably created the impression that it chooses only legal and moral values – principally business related ones – which suit its convenience. The first two pacts were the 1997 Ottawa Convention to ban anti-personnel land mines and a protocol proposed this year to the 1989 United Nations Convention on the Rights of the Child, which would have raised the acceptable minimum age for military service to 18. The Department of Defense opposed the first because land mines were needed to adequately defend American soldiers in South Korea from an invasion by North Korea and the second because the Pentagon recruits 17 year olds (with parental consent). Nonetheless, the land mine convention was ratified by nearly every country, including every significant military ally of the US for the last 50 years. The US (joined only by Somalia) still refuses to adopt the Convention on the Rights of the Child, which makes less than persuasive its opposition to the protocol.

The worst such gap between the American theoretical commitment to the rule of international law and its practice emerged when the US found itself allied with Iraq, Libya, Yemen and Qatar in voting against the International Criminal Court (ICC). During the Rome conference that approved the ICC, the US was both diplomatically and legally outmanoeuvred by countries supporting it. The so-called 'like minded' states of both developed and developing countries that dominated the Rome conference, in the manner of high-powered American lawyers, countered American objections with subtle changes in language which appeared to accommodate American concerns that American soldiers on peacekeeping or enforcing missions would be the targets of politically-motivated prosecutions (such as recognising a 'superior orders' defence when the command at issue is not clearly illegal and limiting the court's jurisdiction to prosecute soldiers where the soldier's country is 'unable or unwilling' to bring charges itself).

Nonetheless, the US was not satisfied and, despite President Clinton and Secretary of State Albright's previous support for an international war crimes tribunal, the US not only voted against the treaty but since then has lobbied against the 60 state ratifications required to put it into effect. The US military was so opposed to the ICC that, during the Rome Treaty, the Secretary of Defense apparently was prepared to call for withdrawal of American soldiers from Europe if certain proposals were adopted by the Rome Conference (they were not). To American human rights activists it appeared that, as Human Rights Watch executive director Kenneth Roth pointed out:

> ' [while 50 years ago] *the US took the lead in building modern international human rights law lately Washington has been in the public eye for the obstacles it has raised to its further development'.*

Another example of the global attorney-sheriff tension came in the Kosovo War, where the US put on an impressive display of military power but was unable to dictate the timing of the indictment of Serb leader Slobodan Milosevic and his close associates by the Bosnia War Crimes Tribunal, to which (unlike the ICC) the US had given whole-hearted support. At the time, American officials expressed concern, happily unfounded, that the indictment would prolong the war by making Milosevic even more intractable. But for a time the American military momentum seemed to be overtaken by an international legal initiative. In effect, the aspirations of the global lawyer had got in the way of the global sheriff. Just as with the question of international war crimes, land mines and whether 17 year olds could serve in the US Army, the roles of global sheriff and global attorney could not be reconciled.

The most recent clash of role model was the Comprehensive Test Ban Treaty. While domestic politics unquestionably played an important role in the Senate vote, many of the treaty's opponents – including certified non-isolationists Henry Kissinger and Senator Richard Lugar – sincerely believed that underground testing is necessary to maintain the nation's nuclear stockpile and thereby to assure both American security and that of the allies who shelter under the American nuclear umbrella. In effect, even a small risk that the US could lose its nuclear edge was enough to bring about the Senate's first explicit repudiation of a major international agreement in 80 years. Military supremacy, once again, trumped moral supremacy.

ABSOLUTISM

Having built belief systems that depend on absolutism, both the global sheriff and the global attorney sincerely believe that they cannot afford exceptions. ... until both find a way to make some exceptions, in other words, to accommodate legitimate competing interests, the global sheriff and global attorney will continue to feud.

IS RECONCILIATION POSSIBLE?

Can the global sheriff and the global attorney ever find reconciliation? The problem is fundamentally a clash of deeply-held value systems which sustain themselves by refusing to acknowledge that competing interests might have at least some merit. Steven Spielberg's remarkable movie about the Battle of Normandy, *Saving Private Ryan,* showed on at least three different occasions American soldiers shooting German soldiers who had either surrendered or were unmistakably attempting to surrender. The global attorney, typically a lawyer committed to human rights who perhaps had unearthed mass graves in El Salvador, sees a violation of the Geneva Convention and, despite the horrific circumstances that motivated the American soldiers, concludes that the need for consistency in application of international human rights covenants requires a response. The

global sheriff, perhaps a senior officer who had endured similar carnage in Vietnam, sees courageous soldiers who acted with justification given their horrific circumstances and, although acknowledging that both discipline and military advantage favour taking prisoners of war and not shooting them, concludes that not only is no response required but that any punishment would be devastating to morale. Having built belief systems that depend on absolutism, both the global sheriff and the global attorney sincerely believe that they cannot afford exceptions.

However, until both find a way to make some exceptions, in other words, to accommodate legitimate competing interests, the global sheriff and global attorney will continue to feud. Thus, in the final analysis, the point is not the merits of the international human rights pacts or the wisdom of the timing of the Milosevic indictment but rather that the global lawyer has, in some respects, been too successful. By vigorously promoting and enforcing the rule of law in both the business and human rights arenas, the US has created an international movement that it can no longer control and which conflicts with the American role as global sheriff. Whether and how this conflict can be resolved will become increasingly important to America's willingness to intervene in future conflicts, arms control and the promotion of the international rule of law – all of which, it is safe to say, will have a great deal to do with shaping the international landscape in this new century.

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