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The General Counsel's Role and Challenges Under Globalisation

Report
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The Conventions Project – General Counsels

The Conventions Project originated in a partnership between the Institute on High Judicial Studies and the Ministry of Foreign Affairs which followed the guidance contained in the 2008 white paper on reform of French diplomacy. One of the recommendations contained in the report emphasized the need for an adaptation of French diplomacy to the new challenges raised by globalisation. This required raising the role of business organisations and promoting the status of law and justice in the conduct of international policy. It recommended the leverage of intermediaries to favour exchanges between diplomats, lawyers, academics and practitioners representing the business community and civil society.

The Conventions Program was launched in early 2010 and since then, regular meetings were held at the Ministry of Foreign Affairs touching on, inter alia, international arbitration, corruption and extraterritoriality of US justice, environmental law or regulation of internet and communications technologies. The observations arising out of these meetings are also complemented by regular publications on the Conventions website (www.convention-s.fr).

As these exchanges progressed, it became more and more obvious that general counsels were privileged observers and often also actors in the edification of a global law. Their experience as well as their reflections provides a wealth of knowledge offered by neither diplomats nor academics. This is how the idea of a partnership between Conventions and the Cercle Montesquieu was born, aiming precisely at analysing the specificities of the role of general counsels in globalization.

This report delivers the synthesis of those exchanges which took place from September 2014 to June 2015 in the form of interviews with several general counsels of large transnational corporations, either French or present in France through a subsidiary, as well as participation in numerous meetings and four brainstorming sessions bringing together several general counsels which were moderated by Pierre Laporte in collaboration with the IHEJ team and various researchers in human sciences (Frédéric Gros, Michel Lussault, Bertrand Warusfel, Catherine Malecki et Jean-Philippe Robé).

INTRODUCTION

General counsels play a major, yet unnoticed, role in the life of domestic and international law. In France, they do not enjoy a level of political representation or an academic visibility matching their contribution to the construction of global law. They are central actors. Yet, their institutional visibility compared to other legal professions – attorneys, judges, law professors – does not do justice to their contribution. Therefore, we must understand the specificities of that profession - the general counsel's agency - and its role not only as an observer, but also as an important, albeit invisible, contributor in the production of global law. General counsels possess a practical knowledge, which the present report has the ambition to gather and render in a prospective and critical fashion.

The general counsel's role has considerably evolved in recent times. Some companies have engaged very early in this transformation by giving the general counsel a central role, which fits well with its new status. Trade with the United States, the architects of the current globalisation, played an important part in the transformation of the general counsel's role. Undeniably, the United States is a major influence on globalisation's legal culture, particularly through an extensive interpretation of their jurisdiction. It is therefore difficult to discuss at a certain level of generality the office of the general counsel because it implies considerations of various kinds. Some of these considerations relate to the individual, such as personal charisma. Some others are institutional in nature, including the central issue of the relations between the general counsel and the other managers in the C-Suite. Nevertheless, its status within the business rests on profound trends.

The general counsel's role in globalization enjoys favourable winds because it rests on three powerful engines in the modern world. First, law tends to challenge more and more the role traditionally devoted to politics. Second, the business enterprise presents itself as an optimal structure to warrant action. Third, with growing global interdependence, the world is becoming the most appropriate frame of reference for the market and many other things (I). But that triple booster does not suffice to warrant the development of the legal function within the business enterprise. The general counsel will succeed only if he is able to face a triple challenge. He must first defend a role within the business organisation that is not fully circumscribed – this is why he must shape that role and conquer legitimacy among other executive managers (particularly the CFO) or attorneys (II). He must then orchestrate the eminent action of business organisations within the context of globalization, which provides him with a formidable opportunity, provided he demonstrates his ability to master the legal challenges raised by interdependence (III). Last but not least, these two fronts will lead him to the most difficult challenge, that of finding the right balance in the constitutive ambivalence of his function, which depending on his behaviour, will either harvest glory or cause his downfall (IV).

I. A KEY PLAYER IN GLOBALISATION

The general counsel's status requires him to navigate between two worlds. On the one hand, the general counsel, often a former outside counsel, belongs to the legal community, which he represents within the corporation. On the other hand, he forms an integral part of the business community. His mission consists of combining the interests of the corporation with the legal requirements to provide freedom of action and support value creation. This places him in a situation, which may sometimes be uncomfortable but is nevertheless central because he will benefit from the double dynamics that characterize our societies, that is the central place that business organisations enjoy on the one hand, and the increasing influence of the law on the other hand. He must find ways to benefit from this state of affairs and organise his office accordingly. Let's start with the business aspect.

1. The General Counsel Benefits from the Centrality of the Business Enterprise's Role in Globalisation

One of the great evolutions of the twentieth century was the rise of the business enterprise, particularly the corporation, both nationally and internationally. This evolution gained considerable strength with the advent of globalisation and its intensification since the fall of the Berlin Wall and the end of the cold war in 1989. It is not that multinational corporations did not exist before then. They have been with us for a while. But they remained bound by the fundamental organisation of the world which opposed not only great powers – the United States and the Soviet Union, but also ideologies: Capitalism and Socialism. The corporation found itself on one side and could not present itself as a universal structure. The historical events that took place in 1989 were not only political. They carried a huge symbolic weight. They mark, and marked, the moment when the business enterprise triumphed over all other organising models to become the paramount structure of association among individuals. In a constructive manner, the business enterprise brings together individuals from many horizons and empowers them to prosper independently from any culture or national origin. They cannot succeed without the support of governments, but that support must be limited to provide a legal environment in exchange for fiscal revenue. The business enterprise is a practical organization assembled for a specific purpose, but it is also an optimal structure on a human, economic, symbolic and political scale.

The shift is spectacular. Not only does the business enterprise no longer derive its legitimacy from an external source, but on top of that, it now supplies its model and frame of reference to the political and social world. The business enterprise, particularly the corporation, presents itself as the new dominant organising institution of the world which instils the rationality whereby individuals themselves now manage their life the same way an entrepreneur manages his

capital with a view to create value – e.g. what else is implied in the expression "health capital"? No aspect of personal and communal life can escape this rationality. Even sentimental life is now thought of in strategic terms. Neoliberalism embodies the transformation of economics, among other human sciences, as a sole arbiter of "truth". Economics becomes the ultimate human relations science. Neoliberalism becomes "governmentality" in which the corporation becomes much more than a simple economic unit: through management, it personifies the art of managing human beings. Business enterprise is one of the three great forces in today's globalised world, along with governments and individuals.

Even more recently, the reach of business enterprise increased further thanks to the digital revolution. The digital industry is not a new sector but the key enabler of transformation of all other sectors. The internet is not a good, nor an industry like any another; it represents the merger of a symbolic form and the economy: a force of over-integration of life within life through the combined forces of technology and the economy. We use the term "sur-integration" because its effect is to rewrite everything in the form of a code and to make it available for new uses or new economic operations (it is a as if it is a language of its own, on top of being an instrument of communication, it has become essentially a commodity). The digital era brings about an immense opportunity to destroy intermediaries, but it does so by centralising power within the hands of the sole businesses who perform that task, thereby diffusing their culture, their national superego and their law. In other words, the digital era works as a force of Americanisation of business organisations, and carries new challenges for general counsels. This is why general counsels in the digital industry are the most advanced in the transformation of their role. They must, not only, fulfil their traditional role in the business organisation, they must also prefigure or signal the new challenges that underlie their activity, which heralds the advent of a new world.

2. The Business Enterprise as a Political Structure?

The business enterprise presents itself as a more and more autonomous legal and political structure. It fits certain criteria constitutive of a legal order: it is circumscribed (by the employees, the assets and the goodwill), it pursues a specific purpose (generate profits), and employs people within a very precise and often hierarchical structure of offices that administer it. All this gives it a particular continuity. It can even, like all other political structures, which by definition are ephemeral, be subject to a kind of state of emergency when its very existence is threatened. When such a thing happens, its precarious side resurfaces, which affects the general counsel.

This quasi-autonomous legal order can even represent an alternative to national governments. In the early stages of modernity, governments assumed the function of political integration through their redistributive function and their capacity to mobilize collective action and social transformation. Hence,

governments were the main actors in modernization. But the surge of the global business organisation signals that this dynamic is now in reverse. Modernization is gaining autonomy from public institutions and is actually turning against them.[1] To continue the modern adventure, business enterprises must now overtake governments, at least partially. Granted, trade has always existed but when business organisations first appeared in the eighteenth century, they were kept in check by political power. Business enterprises symbolize entrepreneurial freedom. They empower individuals to build (in the most literal sense) because the word "enterprise" first appeared in the realm of construction. It gives life to modern liberty as its close association with the enlightenment and liberalism suggests.

The fundamental novelty of the current situation is that the business enterprise is no longer solely a source of collective wealth creation (whose policies decide how to distribute), it is also a "place of elaboration of collective reality."[2] In our world, the real is built primarily by reference to the business enterprise. It contributes to shape social and economic dimensions of the real, manifesting itself through forms of sociability, collective labour, regulation, transmission and production of knowledge, all occuring within the business enterprise. In a way, the business enterprise is the paramount structure capable of autonomously creating its own reality. It symbolises the principle as a "continuous creation of unforeseeable novelties"[3]. This explains why the advent of neoliberal rationality finds its frame of reference no longer in the government, but in the business enterprise. The latter is understood, not in the sense of the corporation but in its generic sense, and the one to which Foucault referred as the "enterprise form". Foucault meant a form of power much better fit for our world and for our modern relation to time. It has a capacity of reaction infinitely greater because it is not encumbered by procedures and various external consultations dictated from the outside. Furthermore, it is no longer encumbered by all the requirements of politics: it is a post-government political structure… maybe even a post-political institution!

3. An Imperfect Political Structure

Raymond Aron distinguished the ordinary political structure from the political structures par excellence. He wrote that "[e]ach human group consists of a political aspect, i.e. a command order with a regime and actors, but throughout history, certain groups have been considered political in themselves, the city-states, the empires, the nations and their emanation the Government"[4]. In this

[1] Hartmut Rosa, *Accélération. Une critique sociale du temps*, translated from German by Didier Renault, Paris, La découverte, 2010, chap.9. p. 255.
[2] Olivier Basso, *Politique de la très grande entreprise. Leadership et démocratie planétaire*, Paris, PUF, 2015. This is a fundamental work on the issues analysed in this study, and was a strong source of inspiration.
[3] *Id*, p. 138.
[4] Raymond Aron, « À propos de la théorie politique », *Revue française de science politique*, n°1, 1962, PP 24-25, cited by Basso, op. cit. p. 180.

sense, the business enterprise is definitely a political structure because it is a legal order that distributes power and structures human association. It does so by providing the association with a purpose and a form of conscience by virtue of law's reflexivity. But the business enterprise cannot claim to be a group that is political par excellence because it does not fulfil the two criteria articulated by Raymond Aron: it does not have the monopoly of legitimate violence on the one hand, and it does not determine the political aspects of other groups on the other hand. In addition, business enterprises have no universal pretention (and that is the very reason why they must pursue a specific purpose), that is to say they have no vocation to take charge of all aspects of human life. The business enterprise's purpose is specific and, in fine, always the same: its rationale is to create wealth and to distribute it among its shareholders after taxes are levied by the government. It derives its universality from interest and not from politics.

Contemporary developments have bred attacks on Milton Friedman's classical model and pressured business enterprises in becoming more involved in the world's stability. These criticisms originate in the growing perception that the majority of governments are corrupt and that old governments are exhausted by successions of crisis and have lost their legitimacy as the neoliberal rationale gains ground. But the type of decentralised and fragmented social integration the business enterprise can propose suffers from two serious handicaps. The integration can only be partial and less tangible than the Westphalian approach of territorialised government. The Westphalian system, in effect, allowed for the construction of internal legal orders and categories based upon an identified territory.[5] However, by emancipating itself from that constraint, globalisation generated legal structures based, not upon the territory, but upon circulation of goods, services, capital and persons. It does so through the construction of an entirely formal and systemic world composed of electronic and monetary signals. The order no longer rests on the territory, but a security purpose. "Security" is the equivalent, in a globalised world, of "territory" in the Westphalian universe, that is to say it is the concrete substratum of the political community from which it becomes possible to build law and institutions. At least, that's what we believe, because of course, national governments are not dead. But it is no longer the sole ruler. Alone, national governments cannot provide security, but they can do so if they get involved in a joint venture between the public and private sector as we can see today in anti-corruption, the fight against tax evasion or against terrorism financing.

Globalisation is therefore based on a paradox which weighs heavily on the general counsel: areas of society that were once firmly embedded within the public sphere now rest on the business enterprise, but the business enterprise is not in a position to commit exclusively to them because it is not a political structure par excellence. This is the great misunderstanding on which our globalisation is based.

[5] This is the entire meaning of Carl Schmitt's thought, especially in *The Nomos of the Earth.*

4. The Lawyer is at the Heart of the Construction of a New World by Business Enterprises and Governments

The challenges we are facing cannot be met simply by singing, naively, the infinite merits of the "enterprise form". They require, instead, that we re-think the interaction between two entities, which are not homogeneous: the business enterprise on the one hand and the national government on the other. The latter needs more than the wealth produced by the business enterprise. To remain a potent force in the world construction, national governments also need business enterprises to be responsive and creative so as to enjoy some of the energy they set free. Reciprocally, business enterprises need the monopoly of legitimate violence to remain within the hands of the government. The political structures par excellence have shed some power but they remain unavoidable and the new imperfect political structures are indispensable, yet insufficient. This is the conundrum that faces the architects (governments and business enterprises).

The novelty of our situation is that the two dependent forces at play in the construction of our world are at the same time heterogeneous (because economics is heterogeneous compared to politics). That relation must therefore be thought out and the general counsel lies precisely at the juncture of these two forces. He is not the only one, but he has a double role: on the one hand, he is the government's correspondent within the enterprise, and on the other, he is the ambassador of the business enterprise's interests toward public authorities.

This new solidarity between government and business enterprise gives rise to a double phenomenon: while we are observing a "de-economisation" of the business enterprise, we are at the same time witnessing an "economisation" of governments (e.g. when they act as the salespersons of national champions). And these trends go hand-in-hand. This is because business enterprises present themselves as a political structure that must fulfil many other functions than the strict pursuit of their own economic interest, (that is to say generating profits and distributing them to its shareholders). Business enterprises find themselves tasked with a new mission, which is that of shaping a new world where proportions are larger than that of any national governments. In turn this implies a need to combine the classical objectives of business enterprises with a full series of extra-economic factors, such as human rights, security, ethics, etc.. The general counsel assumes the role of integrating agent. Corporate social responsibility symbolises the possibility that business enterprises could also be a source of stabilisation in the world and of modernisation of society. This is very new for the French superego that remains so rooted in Statism. The general counsel lies at the heart of that transformation not only within the global business enterprise, but also on the whole scale of society.

Today, business enterprises are no longer organised solely to generate profit, but they have become the central place of socialisation. They must ensure

that the employees are happy; they must engage in artistic philanthropy and make donations to non-profit entities. In other words, they must rethink themselves as if they are citizens. Therefore, the role of the general counsel has morphed into one in which the general counsel is tasked with ensuring the enterprise's socialisation in its political, social and ecological environment.

5. The Included Third

The global system in which we are entering presents two main characteristics: it is on the one hand without exteriority (i.e. without transcendence nor alternative) and it is complex.

The first characteristic bears direct legal consequences. Law is no longer an external reference to which every act must comply. Instead, it becomes like grammar for language, that which gives meaning and sense to action. Law becomes the common language, a means of socialisation for the business enterprise and of communication with its environment. Within globalisation, law is therefore, not an instituting external framework, which authorises action and bears economic benefits. Instead, it becomes an indispensable – but immanent - parameter for action. It lost its structuring status to become a parameter of economic activity. Paraphrasing Emmanuel Picavet, "Law is not so much a fixed framework in which interactions take place than a set of characteristics of those very interactions."[6]

The second characteristic, complexity, is easily explained by the combination of objectives we have just articulated but it also has other causes. Complexity also comes from the piling on of norms and multiplication of legal regimes. Global complexity is therefore attributable to the breadth, the diversity and the absence of ontological structures exploitable by the world, which requires a structured framework. There is no provost giving orders, no organising principle like the Westphalian system anymore. It is precisely the general counsel, among others, who will be tasked with this role of "structuration" of the world.

Attempting to define this new role, we could say that the general counsel is a third party, but an included one. The principle of the included third party was forged within the boundaries of the hard sciences precisely to express complexity. It means that one can be, at the same time, the same and another by escaping any "disjunctive alternative". A perfect illustration of the included third is the language situation, and the dialogic model which lies everywhere complexity is to be found. This is why, as the logicians put it, the included third develops when complexity grows[7].

[6] « L'approche économique du droit, l'éthique et le statut de la norme d'efficacité », Klésis, revue philosophique, 2011.

[7] See e.g. Stéphane Lupasco, *Logique et contradiction*, P.U.F., Paris, 1947

The principle of the included third is opposed to the principle of the excluded third, which corresponds to the classical national model in which the attorney[8] and the judge stood outside of their subject. Up to a certain point, because judges always remain tied to a government and have a more or less intense connection with power; they are, in this sense, always a little included. The third radically excluded, without any ties with the parties, not even the language, is more than a limit. It is a logical impossibility. This leads us to understand the third not like a given figure, but one which is always to construct and perfect. This can only be achieved by an interlocking of persons fulfilling, in a necessarily partial and imperfect way, a third function[9]. This is the substance problem of globalisation, which takes shape without borders nor transcendence. The Westphalian system, which favoured the articulation of structures, favoured this interlocking of third parties. The territorial limits afforded opportunities to create thirds if not outright excluded, at least external ones because it kept intact the triple articulation between the domestic and the international, law and politics and law and morals.

II. INTERNAL CHALLENGES: NOTARY OR “BUSINESS PARTNER” ?

To succeed in raising the general counsel’s status to the level of the included third within the business enterprise, the first challenge the general counsel must meet is to vanquish cultural resistance.

1. The General Counsel Must Assert his Role in the C-Suite

Initially, the general counsel was the head of the litigation department, which implied that his involvement was sought very late in the process, without much control over management decisions. But gradually, the multiplication of rules and the development of regulation in various fields of activity created a need for a“guardian of the temple”-type of general counsel, who knew the regulation, could give it the correct interpretation and whose horizons were not limited to litigation. To understand where the general counsel’s role is heading, we must understand where it comes from.

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[8] The surge of general counsels, particularly when they enjoy the status of corporate attorneys, illustrates a movement of internalisation of the law within the subject.

[9] This might be one of the most fecund ways to analyse the third party role of the lawyer and of the judge, which is always discussed from the perspective of separation but could, or should, be viewed from the perspective of his ties with the parties or authorities.

Business Enterprise's Notary, the Staging Post of Regal Powers within the Business Enterprise or Strategist?

In France, the general counsel's status varies considerably from one business enterprise to the other. Therefore, we cannot identify a one-size-fits-all profile type of general counsel, because his role varies considerably depending on the industrial sector in which the company operates, including its size, its internal culture and its degree of exposition to globalisation. However, the trend clearly indicates a growing convergence of the general counsel and other governance bodies. This evolution encounters resistance and the general counsel's position within the corporation is far from being secured: the lawyer still has a bad reputation; he is perceived as a character standing on the outside who prevents the smooth operation of business by adding extra layers of complexity.

Between the scribe and the business partner, there is a wide range of possibilities. At the minimum, the general counsel must ensure the legality of operations. In that case, the general counsel's role is to provide the right legal structure. Illustrative of that minimal content, in the past, a business manager introduced his general counsel to clients of the firm as the in-house "notary".

One step up on the scale of involvement, we find the general counsel tasked with the function of compliance and litigation, which is not considered explicitly strategic. However, litigation is managed differently now than it used to be. For example, the general counsel's office could decide to engage in a case-law strategy to obtain a case law more favourable to the company's interests. But this is nothing fundamentally new and it is more or less the "ABCs" of the profession. More novel is the management of global litigation which bears a real and direct financial impact on business enterprise. For some, litigation could become a profit-generating activity, a real business unit, which is shocking to the traditional lawyer.

In this new exchange of skills between the public and private sector, the government acts as a protector of its economic fabric (sometimes even before the traditional missions of social protection) and the company must internalise new functions, some of which used to be "regal" powers (e.g. collecting taxes, fighting corruption and participating in national defence) while others have more to do with welfare.

In an altogether other function, that of counsel, the general counsel handles international sanctions, financial and non-financial regulations, soft law and crisis management. All these domains require anticipation because the earlier the matter is handled; the more strategic options remain open.

The company thus realises that all aspects of legal practice require directly or indirectly a strategy, so the attorneys and the lawyers must have the means to implement this strategy. The conflict is already very present in the minds of the

participants at the moment of contract negotiation. The negotiation affords an opportunity to anticipate complications, bargain the terms of the dispute settlement provision, which will apply when a conflict arises. Lawyers know very well that happy businesses do not know the law, but that the best way to ensure peace is to prepare for war. As such, any legal assertion involves a dimension of anticipated conflict.

Nowadays, many general counsels consider that they should not be locked-in cold or purely organisational functions such as litigation or compliance. Instead, they must be more closely involved in hot functions, i.e strategic orientations of the company, or of the group. The "ideal" general counsel is therefore the same as a notary, an attorney and a strategist, and he must have all these qualities (though he does not always realise that they could contradict each other). That can only happen if other managers give greater space to the figure of the general counsel which they used to perceive as someone who was a "charge but not a source of profit generation". It's up to the general counsel to prove them wrong and to convince them of his many assets.

Globalisation as a Risk and as a Business Opportunity

If law is to becomes a central element of business strategy, the lawyer must be closely associated with commercial and strategic dimensions so as to leverage them effectively; and he must therefore be asked to leave his place as "guardian of the temple" which is, anyway, too reminiscent of an antiquated and rigid framework This won't work if he is not in a position to support his plea with objective arguments justifying this new role within the company. What would those arguments look like?

The exploitation of a legal value added – In order to convince the other executives that he must be considered as a legitimate business partner, the general counsel must make the case that law can indeed be a source of profit-generation. It is particularly apparent in the digital sector, which now represents the avant-garde of innovation. Paraphrasing Jean-Baptiste Soufron, "the argument that it is technological innovation which sealed the success of Arbnb or Uber is plain wrong. Their success comes from the quality of their design, the emphasis placed on the business culture, as well as the cohesion of their economic and legal models". He also adds that Wikipedia uses copyright in an original manner. "What is more useful than creating for itself the legal categories which will justify the new activity you are planning to develop?"[10]. Law is an essential ingredient of the company's development because it works hand-in-hand with innovation. Every creation results from an innovative technique and carries with it a legal status. To innovate is as much to invent new products as new concepts because both are inseparable. Legal innovation can sometimes make a big difference.

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[10] « À quand une stratégie ouverte et collaborative face aux risques de l'ubérisatoin du droit ? » Bloc-note, 26 June 2015

General counsels therefore appear to be best positioned to occupy that space which, otherwise, would be occupied by others. But they can only do so if they abandon the idealist vision of Justice as an absolute and if they move closer to the utilitarian vision of law that is dominant in the United States. This is why purely technical skills are no longer sufficient. What is needed is the posture of a legal executive capable of developing strategic thinking (which can only be learned through experience). Strategic thinking requires abandoning a quest for purity in law. There is no exclusive and pure legal rationale that would direct one toward a unique solution but, rather, a diversity of solutions, which can be achieved through a selection of categories and legal regimes.

Business globalisation requires the general counsel to undertake new tasks and to be aware of a multitude of matters. To be included in this dynamic role, he must participate as much as possible in negotiations. It goes without saying that he should not stay in his ivory tower, where many within the corporation would like to confine him. Instead he must acquire a good knowledge of the business, its products, actors and territories. He must also be constantly listening and paying particular attention to new projects.

Law plays a defensive role of conservation of order within the company and of consolidation of intellectual and human resources. However, the relationship between law and business enterprise goes well beyond that conservative role. Law must be a primordial guiding element in the decision-making process and it must be understood as a lever in the commercial strategy of the enterprise that can increase its competitiveness. Being law-abiding also contributes to building a reputation, a "brand" and it therefore reinforces the company's credibility. To this end, it must form an integral part of the business, likened to a part of its DNA. The business enterprise is wealthy because of its contracts (to the point that for someone like Jean-Philippe Robé, it is its sole legal identity). The protection of its intangible assets, of its goodwill, depends upon the protection of its intellectual property.

Vigilance Against Judicial Risk – Globalisation conferred a form of nobility on the profession of corporate lawyer because it recognizes that the company must trade with other businesses that might have a different relationship with law. They have no other choice than to take that into consideration and, as a consequence, raise the profile of their own lawyer. It matters that when the law is enforced (which is not always the case in France, at least not the same way), a risk is involved! It is particularly true of US law. These contacts with US authorities are powerful ramparts against those managers who are tempted to under-estimate his role. The forceful intervention of the US Department of Justice (DoJ) in various cases[11] has led to a rapid change of perceptions. The sense of emergency has been reinforced by the publication of

[11] On this, See Antoine Garapon, Pierre Servan-Schreiber (dir.), *Deals de justice. Le marché américain de l'obéissance mondialisée*, Paris, PUF, 2013.

the Yates memo by the DoJ in the fall 201512 which declares that, from now on, the federal authorities desire that private investigations be presented in such a fashion as to permit the seeking of personal liability of executives.. The DoJ plays an important role by making the general counsel the "prosecutor by delegation" and the general counsel could be forced to conduct investigations on behalf of US authorities. That movement caused a shift of the general counsel function toward that of the attorney while the attorney's role itself has shifted.

The revelations of US legal culture are as urgent as they are disconcerting. For many executives, to know the law is to know substantial provisions and yet they do not understand that law is above all about reasoning, about rigor, and about a culture. In the case of the United States, many do not grasp that the US legal culture implies a complex reality, which includes respect for promises, sometimes a brutal honesty and an absolute contempt for lies, as well as a good dose of pragmatism and a preference for a settlement whenever it is possible[13].

Before communicating, it is important to become even more: globalisation has forced corporate counsels to become more open to other cultures, to try to understand them, to speak several languages, to have a better knowledge of Common Law and to experiment with its solutions. The corporate counsel is above all a "problem solver": he must go beyond the flaws of civil law culture, where the lawyer is often tempted to oppose all initiatives[14], and display a certain flexibility, be positive, find solutions and be imaginative. This is illustrated in the motto of the French Association of Corporate Counsels (l'Association française des juristes d'entreprise (AFJE)), which advocates in favour of "creators of legal solutions".

Protection Against Scandals – The last element arguing in favour of raising the corporate counsel's profile, is paradoxically, scandal. Business enterprises are extremely sensitive and reactive to scandal, which has led many to institute a system of crisis communication. But reacting in the heat of the moment is not enough. Lessons must be learned so the same events do not occur twice. This is where the corporate counsel comes to the rescue to fulfil a preventive function through compliance programs as well as through other means.

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[12] See Department of Justice: Sally Quillian Yates, Memorandum Re Individual Accountability for Corporate Wrongdoing. September 9, 2015. Available at http://bit.ly/justice-dag.

[13] On this, see the interview of Justice Stephen Breyer, in Antoine Garapon, Daniel Schimmel, Stéphanie Balme, Li Bin, Jean-Louis Langlois, *Le procès civil en version originale*, *cultures judiciaires comparées,* éd. Lexis Nexis.

[14] This corresponds to the symbolic role of criminal law in roman-canon cultures as illustrated by the criminalisation of common life. This phenomenon, which has no equivalent elsewhere, is first and foremost in the United States where that role is fulfilled by civil trials and class actions.

The true role of the general counsel often starts after a scandal. This is well illustrated by the US anti-corruption legislation and its famous FCPA (a source of inspiration for the OECD Convention on Combating Bribery of Public Foreign Officials) which was passed in the wake of the Watergate scandal. Similarly, the Sarbanes-Oxley statute was passed after the Enron and Worldcom scandals. In France, the Sapin Law was a reaction to the BNP Paribas affair, which cost the bank nine billion USD in fines. Sociologists distinguish between scandals we learn from and those from which we learn nothing because the message at the heart of them was not heard (this in turn brings about other wrongdoings with more dire consequences). The example of pharmaceutical companies is characteristic in this respect: is there a correlation between the fact that they were heavily sanctioned for anti-competitive practices and the fact that many of their executives had been former corporate counsels?

The US DoJ has contributed much to this changing environment because of the weight of its decisions and the scale of the fines it has inflicted during the last few years. These fines have created a true legal risk and they have had a deterrent effect whereas, comparatively, the AMF or CNIL's sanctions have been slower to alter behaviours. The judicial pressure of a threatened trial, or a condemnation, could be a great help for the general counsel and reciprocally the acquittal of an executive could have devastating effects and delay, for several years, the necessary conscience awakening.

2. The General Counsel Must be Acknowledged as the Law's Guarantee within the Business Enterprise

The general counsel's role is not limited to business operations: he also fulfils other functions that concern life within the business. These functions do not rest solely on the status of the general counsel but require an assertion of authority. To succeed in these functions, the general counsel must inspire trust, which must be implicitly acknowledged by all.

The General Counsel Must Guarantee Equal Protection within the Company.

The business enterprise is a quasi-autonomous legal order in which the general counsel is at the same time the minister of justice, the district attorney and occasionally even the judge. Some may have moved a little too fast when they spoke of the necessary "constitutionalisation" of the business enterprise[15] : There is no constituting body and this political regime would be rather authoritarian considering how strong executive power remains within the business organisation (an executive, even a general counsel is disposable at will). The business organisation is a legal system that generates advice but knows nothing that resembles remotely a separation of powers including "checks and balances" as found in political systems. The only checks are

[15] Gunther Teubner, *Constitutionnalisme sociétal et globalisation : alternatives à la théorie constitutionnelle de l'État*, Éditions Thémis, Montréal, Canada, 2005.

devices like internal audits, technical control services, the necessary consultations between different services, or even an external audit. The role of the lawyer is therefore central because it purports to render relations more secure. Doing so, the corporate counsel furthers the company's stability. If internal checks operate smoothly thanks to the authority of the general counsel, the stock price is stable; otherwise…

An Enabler within the Business Organization

The legal and financial directorates of a company operate like a system of a living body supplying blood to the entire organism. The general counsel often synthesises several competing rationalities. He must integrate the regulatory dimension, the business law dimension and the employment law dimension. His qualities are those usually attributed to lawyers: capacity of abstraction, the ability to synthesise and clearly articulate the problems. These are his assets compared to the CFO who only reasons in numbers. The lawyer is able to identify the legal categories under which the operations fall and to liaise with the regulator. In articulating the reality of the business and of the operations in a legal manner, the general counsel can disarm litigation and federate the various interested players (the CFO, the COO, the Human Resources Director) thus generating consensus.

He is also the one who is tasked with managing the external relations of the company. In a way, he is a kind of minister of foreign affairs, who ensures the socialisation of the business organisation within its environment.

Leadership Over a Team of Domestic and International Lawyers

The general counsel must exercise leadership over his own team (which can number hundreds of lawyers in large enterprises). He must also establish a business model for the general counsel's office, a marketing strategy, and ensure the cohesion of a team to ensure that it is embedded within the business organisation. In a large enterprise, the general counsel's office can manage teams of local lawyers who operate in very different environments, both in the legal sense and the general sense. The general counsel's role is to create a set of references and common rules, which could bring together the different parts of the business organisation.

Through his exposure to globalisation, the general counsel acquires flexibility and a focus that predisposes him to manage intercultural teams. He routinely gathers lawyers from the various countries where the business organisation has subsidiaries in order to coordinate the general counsel's office, send messages and stabilize conflicts. These large meetings are concrete sites of legal globalisation at play. They are live laboratories where one can see hundreds of lawyers from very diverse cultural environments and where a true global culture, a mix of business culture and global business law, is being shaped. Few other

organisations can claim to give a comparable image (except maybe a few NGOs).

The general counsel must be the fervent advocate of a global corporate culture, which he must shape across various political regimes ranging from Indonesia, the United States or Romania. Letting different legal and ethical "standards" coexist in various parts of the organisation would be perceived as entirely hypocritical and employees would not understand that what is allowed here would be prohibited there. Thus, a large global enterprise becomes a powerful force of social unification (even though it may contribute to growing disparities between the local agents and their own society) building a certain cultural homogenisation throughout the world. All its employees become, if not citizens of the world, at least citizens of their global enterprise. Or, at least, they must pretend.

A New Responsibility Toward Society

If business enterprises are the artisans of the world's prosperity, they can also contribute to its fall by transforming it into an impenetrable jungle. These world giants, which are often more powerful than certain governments, can rig markets through corruption; they can sponsor the worse acts of violence when they get closer (and sometimes confuse themselves with) organised crime, when they contribute to terrorism financing, or when they destroy the planet through a shameless exploitation of its resources. The new power they acquire therefore translates through an internalisation of constraints.

Large businesses today have become global actors for the better and for the worse. They figure prominently on the front page of newspapers every other day, and all their acts are minutely scrutinised by NGOs. They are therefore pressured into dialogues not only with public authorities but also with indigenous communities, unions, NGOs...in other words, with civil society.

The new role assigned to the business enterprise manifests itself concretely through a multiplication of pressures that weigh on it (corporate social responsibility, environmental responsibility, memorial responsibility, etc.). These pressures result as much from regulation or "soft law" as from consumers' expectations. The business enterprise has no other choice than to adapt to this new environment and prevent the risk of these costly, and sometimes devastating, investigations and litigation. How can this be done? By developing a kind of internal police called "compliance", which ensures that all (executives and employees alike) comply with certain rules that efficiently prevent corruption and other financial crimes. This entails the establishment of both internal rules of good conduct, but also of a new internal organisation designed to reassure the executives, shareholders, administrators and even the employees. But no company can be perfectly compliant with thousands of rules and laws that apply to it simultaneously. The business enterprise must therefore be guided,

permanently advised about the existence of potential violations within the company and appraised of the best way to remedy the violation.

3. The General Counsel Must Be Acknowledged as a "Corporate Attorney"

As we mentioned earlier, fulfilling all these tasks requires a sort of personal authority on the part of the general counsel, but it is not enough: his status must also put him in a capacity to fulfil these tasks plainly. The problem is that he suffers from a structural weakness because he is an employee of the business organisation he must control. There are two alternative solutions to this conundrum: either entrust these functions to outside attorneys or give the general counsel the status of an attorney within the business organisation.

The last solution is favoured by several arguments. To fulfil all these new tasks, the lawyer must intimately know the subject he must handle (products, industry sector, environment, customs). He must also master specialised regulations. There is no way an outside counsel can absorb such a mass of regulations, sometimes very technical, coming from very diverse legislations and legal cultures. This would be prohibitively expensive for the client and would require an exceptional and minimally profitable investment on the part of the attorneys, given that they intervene only punctually in the life of a company unless they become its corporate counsel. In addition, outside counsels have a much more superficial knowledge of the organisation and the operation of the group than in-house counsels. Finally, it is not a good idea for business organisations to pass onto outside counsels, whatever their skills, its responsibility to comply with existing regulations. This type of work cannot be accomplished with law professors, attorneys, and judges. It requires people who have a global vision.

The general counsel is the lawyer of the company within the company and the company's attorney within society and, we dare say, in the world. Thus, the general counsel becomes a double agent dedicated to the interest of his company among which we find the requirement to observe fundamental rules designed to fight against certain calamities. The intellectual challenge is to think of the combination, the non-contradiction between imperatives that, not so long ago, appeared to be antithetical. A few see in that double role a hurdle to granting general counsel the new status of corporate attorney. But the argument can be reversed: Doesn't this dual function bring the corporate counsel closer to the attorney who is himself his client's agent as well as a "justice auxiliary"? The general counsel is no longer a litigation director or the mere notary for the higher management tasked with the mere formal structuring of its decisions. He has become a central actor in the development of the business organisation. Globalisation therefore brings the attorney and the general counsel in a unique role that is structurally dual.

The true resistance which caused the failure of the attempt to reform the corporate counsel's status [16] was motivated not only by a concern to see a part of "big" litigation escape the bar, but also by what Philippe D'Iribarne calls a "culture of honour"[17]. Such a status of corporate attorney would take away a little bit of nobility from the professionals who wear the robe. We should be wary of such petty intentions but the fact is that French culture suffers from a difficulty to part ways with a culture of statuses and privileges. Attorneys must understand that they have nothing to lose in becoming true partners with the general counsel and that it is in that material that we find the emerging nature of law and no longer in an abstract knowledge learned on the benches of law school. This would be a decisive step toward instituting a great community of French lawyers.

Place France on the Same Level Playing Field

This controversy also constitutes a test for the capacity of our country to accept the challenge of globalisation and to make up for the time wasted in this respect. This delay has cost us ten billion dollars this year, if one adds up the fines paid to the US Department of Treasury by BNP-Paribas and by Alstom. These two large French companies paid for their mistakes. But above all, they paid for their poor understanding of the new rules of the game in global business. Hence, whether it is though class actions or cooperation (more or less freely agreed) with US authorities, French business enterprises are facing a new administrative and judicial environment which could bring dramatic consequences to them and their employees. Instead of cursing the perceived US hegemon, it would probably be wiser to understand the new model that is being shaped and to acknowledge that the general counsel stands at a key strategic point in that new environment.

Globalisation brings challenges at an unprecedented scale which national laws and local courts cannot contain. US authorities simply cannot use traditional tools of criminal justice because they are facing a complexity and a diverse situation way beyond their capacity to comprehend. This is indeed the rationale at play in the "justice deals". This new rule of the game has many flaws but it does exist and it is not devoid of efficiency. Its targets are not solely white-collar crime. Rather, US law enforcement authorities have understood that through large corporations and banks, they can find ways to tackle other global concerns such as terrorism, global warming or human rights violations.

These new global practices are on the one hand new tools to contain the calamities associated with globalisation, but they are also tools of influence in what is often referred to as an economic war. In this "war", our country has many assets at its disposal. But it can only use them once it has clearly laid out the map of the new battlefield and the conditions under which it will stop fighting

[16] It was once contemplated in the Macron statute.
[17] Philippe D'Iribarne, *La logique de l'honneur*, Paris, Seuil, 1989.

with out-dated weapons and obsolete strategies. Alas, France, so proud of its legal tradition, has abandoned the battlefield of legal competitiveness against its competitors because it is stuck in positions from another era. War, as told by war strategists, is always a struggle to define the standards of the intercourse; viewed this way, the weapons have already been spoken for and the rules of the game are not at our disposal because global law defines them. It is not defeatism to acknowledge the truth of the matter. To the contrary: it is by integrating them that we will be able to focus on what is essential, that is to say the concern that the place of Paris and, for that matter, France is plainly established in this new context. When French businesses must face growing pressure from US authorities to comply with their vision of the world, to deprive them of the most useful tools to counteract appears difficult to understand, if not outright irresponsible.

Recognising the status of corporate attorney will give us the strength to counter the new model's most perverted or unpleasing effects. It is not by entertaining nostalgia for another time long gone and pretending to be in a retreat from national legislation that we will ameliorate our position and protect our businesses. To the contrary, we will only get ahead by seeing further and effectively tackling this policy's adverse effects. Conferring a new status on the corporate counsel would put us in battle order for future fights which will be at the right scale and for the good causes of our global times.

It is therefore urgent that French corporate counsels be empowered to fulfil their function in the best of conditions, and this can only be achieved by bringing the various professions closer. We hear a lot of noise around the merger of the corporate counsel and attorneys but the issue of bringing them closer to the judges, law professors and high civil servants is also on the agenda, even though the issue in this respect is not one of status but a cultural one. Attaining that objective is imperative both for the success of our businesses and for the defence of our law. All those who continue to oppose them are weakening both of these objectives.

Hence, both the business enterprise and the corporate counsel must be able to benefit from a corporate counsel's protected status: the business organisation in order to avoid being exposed to a transparency which sometimes could prove fatal in its relations with its lawyers, and the corporate counsels to avoid being subjected to pressures from within the company. Ironically today, French law deprives them of the requisite confidentiality that must govern exchanges between the business organisation and its in-house counsel. The interest of all – business organisations, lawyers and the government alike – is to render these new functions more secure thanks to a new status. In passing, almost all of our neighbours[18], allies and competitors in this new context, perfectly understood that the corporate counsel must be

[18] i.e. all the Anglo-Saxon countries as well as Germany, Spain, the Netherlands, Belgium, Portugal and many others.

admitted to the bar and enjoy the same confidentiality as an outside counsel in his exchanges with the business enterprise that employs him.

The General Counsel's Appeal

Such a reform would have the benefit of bringing the status of legal director closer to that of the US general counsel who fulfils the function of combining private and public interests, which has always existed in common law culture. How is it that, in the United States, the general counsel can sometimes pose as a counterweight to the CEO's power? First, because of the role assigned to procedure and law, which are a means to render collective action productive, in US culture. The general counsel's role is to communicate the most reliable information possible dealing with constraints and various legal and regulatory demands. This role sometimes requires revising the deadlines and various elements of an operation. The purpose is not to oppose the CEO's decision-making power, but instead, to provide him with all the necessary elements to appreciate the situation so as to make the right decisions.

This general counsel's strategic position is the product of several deep trends in recent times: first and foremost the development of globalised markets, but also the increasing size of business organisations and their role of "global citizen" as well. Because of these transformations, positions of corporate counsels tend to also be more attractive in the employment market and business enterprises can lay claim to recruiting the best "lawyers" on the market. In the United States, professions are very fluid, and attorneys practising in large law firms routinely decide to join business organisations as general counsels. However, the general counsel's strategic position rests on the realisation by the CEO that the general counsel is an essential partner, who paves the way for authorising recruitment at the highest level (some federal judges have been hired as general counsels in very large corporations). On the other hand, general counsels must learn how to maintain total independence while remaining positive forces in the organisation.

The general counsel's role is not merely to manage problems after they manifest themselves, but also to define a long term policy, to be daring, to form an essential part of the business team and to be able to provide advice that is indistinguishably legal and strategic. He must therefore learn to act both as a CEO's partner and as the guardian of the business organisation's integrity.

In an important case on the confidentiality (privilege) of the general counsel's utterance, a US federal Court of Appeals held that "The primary advantages of in-house (rather than outside) counsel are the breadth of their knowledge of the corporation and their ability to begin advising senior management on important transactions at the earliest possible stage, often well before anyone would think to hire a law firm." For this Court of Appeals, everybody "seems to see in-house

counsel as the "front lines" of the battle to ensure that compliance while preserving confidential communications. "[19].

This system's cohesion owes a lot to the very strong homogeneity of US legal elites. District attorneys, employees of agencies, attorneys, judges and a portion of the political elite have received the same training and routinely move from one of these positions to another. Compared to that situation, the Balkanisation of our legal field between attorneys, corporate counsels, magistrates from the judiciary and administrative judges, as well as high civil servants, is a major handicap. Minor progress has been made, in the last few years, to bring closer various legal and judiciary professions. Notably, the idea of integrating a judge within a large corporation to conduct internal investigations was contemplated but has not yet been implemented.

4. Support Competition with Foreign Corporate Counsels

This debate between corporate counsels or corporate attorneys was resolved in business practice in a pragmatic way: through the more and more frequent recruitment of non-French lawyers or lawyers who were not trained in France to hold staff general counsel positions. Hence, 13 out of 40 of the CAC40 general counsels fit that bill, whereas it is highly likely that 95% of the FTSE 100's general counsels are British. Unfortunately, the reverse is not true: we import foreign lawyers very easily but French lawyers are rather difficult to export.

A French Backwardness?

How can we explain such a dire situation? French lawyers are often praised for their skills and intellectual curiosity. That's not where the problem lies. It seems that what companies are looking for in foreign candidates, particularly among those trained in common law countries, is less competence than a certain legal culture, and more precisely a certain respect for the law, which can paradoxically translate in a greater predisposition to negotiate[20].

French lawyers are penalised for their appurtenance to a culture where law, in general and private law in particular, are not well considered. The elites don't "do" law and law does not have elites, goes the saying. France is a country built by engineers (those who graduated from the Ecole Polytechnique) and alumni from the ENA who are a sort of social engineer. It is striking to see how much the French business environment is tempted to reproduce, from within, the same hierarchies as those which characterize the State. Thus, within the French business organisation, the CFO's office is as important as Bercy (the name of the French ministry of Economy and Finance) in the French State, where the General Secretariat is always held by a member of the Conseil d'Etat which

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[19] Teleglobe Communications Corp. v. BCE Inc., 493 F.3d 345 (3rd Cir. 2007).
[20] See, Supra p. 31.

remains to this day the technical government of France. The legal directorate is chaired by a former attorney specialised in private law who stumbles on to the same kind of misunderstandings as those who venture into a legal field carrying less prestige than that found in public law. Of course, private law's existence is not denied, but what is denied is its pretension to constrain public decisions (which is the central predicament of common law). And so it is that we cannot do otherwise than apply private law, thus we are left with faulting the Americans. Fortunately, this way of thinking is changing and the fines inflicted in recent times have, at last, awakened a new consciousness.

The contrast is strong with countries where we find many attorneys among the elites. In American or British political institutions, law is held in high regard. In American culture, the general counsel tends to garner immediate respect for the law. But in France, corporate counsels continue to be encumbered by the French tradition of anti-juridicism which remains very strong among the elites.

Culturally, our legal understanding is not the same. In the United States, law is perceived as an enabler whereas in France, it personifies the taboos. Procedure is more valued in the United States, even in the education of children and in social relations, because this is perceived as the conditioner of social peace. In France, there are rules but the game is more about how to not to abide by them and to live altogether outside the law. The corporate counsel tends to inspire the image of a censor, who always seems to say "no". This may have a relationship to religion. While the Catholic religion projects an ideal that motivates its actors and makes them despair that it may ever be attainable. The Protestant mind seems more grounded in a concrete existence and every abstraction which evades reality seems a bit suspect to them.

Granted, this study's object is not to compare the respective merits of these approaches but we cannot completely overlook the fact that Protestant cultures have been potent in establishing the law's exteriority and, as a consequence, the lawyer's independence. It does not matter that this culture represents a mere minority. Even if it is a-typical, it has set the tone.

France's Difficulties in Globalisation

These questions have generated confusion in France where we attribute to "Americanisation" what in reality results from "globalisation". Granted, globalisation owes a lot to American culture but it does not owe all to it. A new global culture is currently being shaped. That culture attempts to foster unity and to provide the system with regulating ideas.

A question present in all minds is whether business enterprise retains a distinct citizenship. If so, what are the determinative criteria of a business enterprise's citizenship? Its shareholders? The place where it is listed? The number of employees in the world and where they are based? The place where the company is headquartered and where the board of directors convenes?

Looking closer, it is too simplistic to oppose domestic and global entities. It is not because a US company is worldwide that it is necessarily global: it is above all American and everyone knows that. This is less true of European large corporations, where each must be more culturally open. It is not because the English language is globalisation's lingua franca that globalisation is necessarily American. In a way, European companies may actually be more "global" than large American corporations.

Globalisation creates two categories of governments: those who can afford a normative geopolitical vision on the one hand, and on the other, those who have a protective attitude and are no longer able to set the tone. France suffers from a certain lack of geopolitical vision beyond the mere protection of its economic champions. Maybe, after all, France is not at the relevant scale and should therefore only consider itself as one place among others in Europe? If so, having European general counsels in French businesses may be a considerable asset… provided it is used as such.

So far, France has failed to find its place in globalisation. This is in contrast with the United Kingdom, where the vision is very clear: the City of London, Cambridge, English language and liberalism. These are fundamentals, which give British people a base from which to seemingly conquer the world. France has not made any such strides despite the fact that it possesses rich assets, including certain guiding normative terms. We can, therefore, only encourage France to adopt a strategy which must include the law. But it can only succeed if modernisation is on the agenda, which in turn requires that the voice of the corporate counsel be heard.

III. EXTERNAL STAKES: THE ENGINEER AND THE MEDIATOR

1. Law as commercial weapon

The expression of "included third" covers two sides of reality: on the one hand, the general counsel is the representative of the legal system within the business enterprise and, on the other hand, global law enjoys a specific status. To understand the general counsel's position, a relevant comparison can be made with the military legal counsel in war operations. Both must abide by rules in a situation of conflict without the benefice of hindsight. The incentive to enforce a legal obligation is not as strong with a foreigner[21], and this is reinforced by globalisation. In both cases, a war must be fought, battles must be won, and market shares must be conquered. But at the same time, both the corporate counsel and the military legal counsel are constrained by legal obligations and to a certain extent, they must respect the rule of law. This mandate matters, yet it is not an absolute necessity because, after all, winning through treason or conduct business by paying bribes always remain options. Thus, how can we explain that law gains ground in both sectors? Maybe it is because, without law obedience, victory would lose some of its shine or maybe even its deeper meaning (don't we say that war has a trial by ordeal dimension – the battle's issue is God's verdict – or, under the puritan vision of prosperity, that success in business is the sign of divine election?) It may also be so because law in a way purges warlike violence of some of its savagery. The same can be said about business. Nevertheless, global law remains a particular type of law which could not claim to have the same strength and accuracy as domestic law, which provides an ab initio framework for human relations and implies that conflicts are mediated by instituted thirds. The very particular context of war and competition among "foreigners" operates a transition from the agôn model to that of the polemos[22].

Originally, war tends to suspend law's application even though a few guiding principles – such as honour- provide a framework for the fight. But gradually, international law of armed conflict has developed considerably to the point that it has become both a set of rules to follow as well as a possible weapon to win on the mat or before a bench of judges that once could only be attained through physical force. A warlike victory can be had without firing a bullet through proceedings or by rallying public opinion. Can't the same be said about global law which specificity is that it fulfils more functions than within a political community (though internally, law has similar functions). Under the logic

[21] Globalisation is lived like an Ocean (thereby its pirate imaginary) on which crimes do not have the same meaning.

[22] This is an old opposition between the oral struggle structured by very precise rhetorical rules to convince a third person (the *agôn*) and the no-holds barred atmosphere of war (*polemos*).

of lawfare, law can disqualify the competitor, destabilize him or rob him of his victory[23].

The Various Functions of Law in the Global Space

Law has four distinct functions when it is deployed globally:

1) Law as a Framework within which No Exchange is Possible

First, law promotes relationship (contrary to war); an unconscionable contract formally remains a contract. It is a framework.

2) Law as a Regulating Idea

Then, law can make commercial operations fairer (e.g. a fair agreement or preoccupations like CSR) which could be compared to the ideal of the rule of law in the international context. However, what's new is that global law as a regulating force is not constraining but proceeds from a voluntary undertaking (which does not prevent it from being motivated by interest). In business matters, corruption fits well in that category.

3) Law as a Weapon

Law can also provide an opportunity to win on the mat. That's the meaning of lawfare: vanquish without firing a bullet or maintain a decisive advantage over one's opponents through legal means. One of the first manifestation of that idea is traceable to a publication of the Popular Republic of China's military which inventoried « examples of non-military warfare ». These included « established international laws that primarily benefit a certain country »[24]. The list also included « the use of domestic trade law on the international stage », which the book asserted « can have a destructive effect that is equal of a military operation ». What is striking is the analogy being made between war and business. This analogy will certainly not come as a surprise to general counsels.

4) Law as a Stake

A fourth and final function of global law is strategy. A good legal strategy can save a lot of lives and resources: law becomes a stake in the power relation and it is no longer the framework, the end-goal nor the weapon in a commercial war. Examples of that dimension are judicial strategy or lobbying to promote legal reforms more aligned with one's interests.

In the domestic context, law essentially fulfils the first function. In international business relations, law could work as a custom barrier or a protection against competition (e.g blocking statutes or laws that have the same effect as antitrust legislation, e.g. the FCPA). Thus, law is multifaceted and flexible. It provides both a framework and what's above it. It can also be a weapon, depending on the circumstances, which constitutes the whole or part of the whole, the available and the unavailable. This multifaceted aspect is

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[23] Orde F. Kittrie, *Lawfare. Law as a weapon of war*, Oxfrod University Press, 2016.

[24] Qiao Liang & Wang Xiangsui, *Unrestricted warfare* (1999) translated by the CIA's Fioreign Broadcast Information Service), cited in Orde F. Kittrie, *Lawfare..*, p. 5.

interesting, but it is also a great source of confusion for the general counsels, because these rules can contradict themselves.

A Negative and Positive Construction of a Customary Global Law

Every competitive relationship entails both differences and shared criteria, which leaves ample room for comparison. In the context of international business relations, these criteria are of course of an economic nature, but they are also legal. The corporate counsel is engaged in an economic war which weapons are words used in a very particular context. The same way language requires grammar to give words a meaning and that arguments are compared, global business relations also need a minimum legal content for competition to .

The general counsel shares a certain common culture with all the world's lawyers even if they do not apply the same law. He is therefore in a similar situation as his counterparts who speak with each other without having exactly the same grammar and a common lexicon. Their task is therefore to construct a common grammar and lexicon while they exchange with each other. Globalised law is made of translatable rules (contracts, compensated payments, etc.) but they are always under construction.

The corporate counsel is situated at the crossroads of the extreme no-holds barred situation of war, and the situation of an act of language which must be performative and eventually requires a mediation by a third person, i.e. a judge or an arbiter. Between the two, we find negotiation and settlement. Global law as an included third to interactions under formation results from that necessary balance between war, which gives it its energy and law which structures it. Thus, global law channels and mitigates aggressive competition by providing a framework. International business relations are at the junction of the negative reciprocity of war, to which it borrows certain traits, such as competition or struggle for power, and the positive reciprocity which is inherent in legal relationships (it is also mediated by goods and the economy).

Through all these semi-antagonistic, semi-cooperative exchanges, the corporate counsel participates in an effort of construction of a common law on the global scale. At first sight, this common law appears weaker than domestic law, but its manifestations are different. It is a set of uses, practices, trial and errors, which reminds of a custom under formation. It is made of a set of pre-constructed responses elaborated upon mutually invested exchanges shaped by the stakes at play by a legal community under formation (of which the elites gather in circles like those of arbitration). This is how the elementary grammar of international business is built and must operate. This logic at play is the second meaning we have given to the included third.

An Uneasy Position

Here lays all the uneasiness and the difficulty of the corporate counsel's position. He must defend his business enterprise, while at the same time protecting his role in association with other lawyers. Like the military legal counsel, he is torn between two loyalties. This is why he can be perceived as someone who thwarts action. His position can face internal disagreements in which he is not in a position of strength, unless he is close to the decision-

maker. He needs external support. He is therefore in a necessary and permanent conflict with the business operatives – military in the field or commercial – who conceive of no other goal than winning the war. In the same manner, the corporate counsel wants to contribute to the development of his company (and risks losing his job if the company loses business). He is not necessarily aware of all secrets, but he must nevertheless decide, and he is the one who could face the wrath of justice in case of a grave legal violation.

Under all its facets, the included third therefore has two faces: one is human – that of the general counsel – and the other is normative: he is the embodiment of a more or less implicit set of practices and references.

Business strategy is the key to the development of the function of general counsel but, to stand out and demonstrate the worth of its specific contribution, he must use a very particular skill. That skill is his ability to evolve in a fundamentally new legal culture that has not been adequately described nor rigorously taught. The good general counsel of a globalised business is the one who has to understand the new methods and will use them to further the interests of his company. And if his company is ever accused of wrongdoing, the general counsel will likely have to take an altogether different approach to ensure that a viable defence is crafted.

2. The General Counsel's Contribution to the Creation of Global Law

The corporate counsel must not only learn a completely new vocabulary, he must also learn a new sort of grammar, which requires "unlearning" the fundamentals mastered in law school. What are these new grammar rules? Whereas in traditional law, the one regulating yesterday's world, rested on a clear separation between the standard setter and the one who had to abide by that standard, in global law, the business enterprise decides which standards it determines to apply to itself. So whereas our reasoning used to rest on a clear distinction between the fact and the law, this distinction has become blurred in globalised law. In the past the hierarchy of norms was a conveniently fixed guide of conduct. Now globalised practices, guided by creative destruction, have caused that hierarchy to collapse under its own weight.

The World as a Space Without Prior Framework

As already mentioned, business enterprise embodies, above all, the legitimacy to act upon its own initiative, to associate with other persons and to organise accordingly. In brief, the business enterprise rests on an authorisation to create a full legal order ex nihilo. As Robert Lowe put it, it is a "mini Republic."[25] This dream has a completely different meaning depending on whether the business enterprise is local in nature or extends its reach into the

[25] Basso, *op. cit*. p. 123.

global space that, by definition, is exempt from prior regulation because it is beyond the reach of particular governments. The world presents itself as a space without prior legal or political framework, making it resemble the sea. There must be rules to introduce a minimum of security, but these must be very limited. Without prior authorisation, one can act like a pioneer or a colonizer. This is why American businesses are so comfortable in this situation because they have already experienced such a state of affairs in their history. "The apparition of large business organisations in the United States is contemporaneous with the progressive establishment of political order (i.e. the constant westward push of the frontier and the chaos generated by the Civil War between 1861 and 1865) in a territory which was very difficult to control."[26]

Thus, the relationship between action and law is profoundly different in context of globalisation as compared to the domestic context. De-territorialisation and openness to markets provide virgin territory for action (which now requires doing away with barriers and old frameworks, particularly found in Europe). "In the business world, common law means: 'I do what I want, I see what is happening", whereas those of us in France have a different mindset that prompts us to ask ourselves: "What written rule must I abide by? What is the frame within which my action is constrained?" Eventually, all we have to decide the specific terms. Otherwise, everything is already written."[27] Two elements will regulate action: one, consequences, therefore a consequential regulation, and two, conflict, that is to say when someone's act runs counter to someone else's act. There are, therefore, two kinds of mediation of human interactions: one by the market and the other by the law. But the latter comes in second place. That is the new chronology which so perturbs continental lawyers trained, in any given situation, to locate the regulation under which one can chose an act.

Such an inversion of relations between the law and business operation explains, in part, why responsibility, notably corporate social responsibility (CSR), has grown so much in recent times.

Law is Fact and Fact is Law

When a company must abide by as many legal systems as countries where it operates (e.g. Thalès must work with more than 70 regulators across the world), law is no longer law. It becomes a fact, a constraint we must take into consideration like a technical standard (which often is confused with such a standard). Law, therefore, loses a bit its normative character. A profound transformation occurs when law morphs from a normative status into a cognitive one. In a premonitory analysis, Niklas Luhmann had, as early as 1971, imagined that global law would fragment itself not on a territorial basis, but on one of industry sectors. The globalised world would make us transition from normative expectations (law, politics, morality) to a cognitive vision (economics, science,

[26] *Id.*, p. 137, referring to Alfred Chandler *La Main visible des mamagers*, Paris Economica, 1988.

[27] Béatrice Castellance, Yves Chaput, « *Common law* – civil law : l'entreprise. Schéma d'un face-à-face », cited par Basso, *op. cit*. p. 137.

technology). The transition from a world organised on a territorial and national basis toward a global configuration would effectuate the passage from a normative world, that is to say one which plans the world through standards, politics or morals, to a world which looks to constantly adapt itself reflexively, like economics, science or technology. The law derives its value solely as an element of reality, for example a risk.

The specificity of the rule of law is that reality is ultimately analysed by reference to legal categories: e.g. "such behaviour is an offense". The judge is the one figure who calls out reality. But in the regulated environment, that relation is reversed: it is the economic determination of reality, which comes before the law. "Thus, it does not matter whether a agreement is enforceable, provided it is enforced. Performance substitutes the absence of compulsion, the performed substitutes the executor, that highly legal notion is not required anymore."[28]. What we observe here is a general shift from formal law to fact, a factual judgment over a legal judgment.

This shift can be observed in the contract, which is the principal tool of international trade. The legality is determined, not only, by the contract terms, but also the reality of dealings, its history, the technology involved. This explains the recent apparition of so-called contract management. The main idea of contract management is that relations are secured by the fact and by the memory of facts as much as by the law, because today, reality is as constraining as legal standards. The law has become inseparable from the fact and a good corporate counsel must not only know the history of contractual relations but also the technical dimensions of the contract. This is why contract managers could interchangeably be lawyers with technical knowledge or legally trained engineers. To understand the contract, one must observe the relationship's importance of which is emphasized by the "deals of justice". Marie-Anne Frison Roche observed an "archaisation" of the contract by competition law, which operates a transition from the legal category to the relationship.[29]

The Upheaval of the Hierarchy of Norms

The diversity of enforceable laws undeniably represents a constraint for business enterprise but also provides them with the possibility to chose its own law and establish its operations in a country where the production costs, the social protection levels, the tax burden and the weakness of criminal enforcement are the most favourable. This suggests why business enterprises have become fickle, thereby modifying the various power relationships with governments. Thus, the phenomenon has altered the relations between governments and businesses.

[28] Marie-Anne Frison-Roche, "Contrat, concurrence, régulation », *Revue trimestrielle de droit civil, 2004*, n°3, §48.
[29] *Id.*, n°3, §48.

Whereas before, sovereign states maintained relations based upon consultation, cooperation or competition, and sometimes even devolved into armed competition, today it is the market that mediates competition among businesses. Here is how that configuration reversed: whereas governments compete to attract investment and business implantation (eventually by reforming their laws to make the guarantees more robust) businesses enter into a relationship of bargaining and cooperating with governments. Thus, globalisation reinforced the role of business and even placed them above governments. Certain CEOs actually receive better treatment than heads of states or of governments. The general counsel constantly interacts with the regulator or the judge, whether national or foreign and can "weigh in" on the modifications to the regulatory environment.

The general counsel thus "becomes global" the day he understands he is not only tasked with enforcing all the constraints posed by the various countries but that he is also responsible for internal balance, communications and the workable intelligence of all subsidiaries. This is all necessary to engineer a common culture, to erect a semi-autonomous legal order on a global scale. This order is as much secreted by the internal regulation as by the internal culture of the business organisation. This law is much more important for the business enterprise than various domestic laws which resemble, not so much soft law, but the constraints that must be carefully taken into consideration.

Large businesses therefore reverse the hierarchy of norms. It is no longer government law which figures prominently at the top of the hierarchy, but rather the deals made between these titans and the governments. External law, once perceived as the only "hard law" is not necessarily constraining for businesses (this can result in several laws that apply simultaneously on the same territory: domestic law for small business and free trade agreements or bilateral treaties for large business), whereas "soft law" de facto gains ground with the development of a market imperium. Global businesses' internal regulations sometimes amount to true sort of constitution… but it is a constitution without constituent authority, nor constitutional judge. The normative model is more organic in nature where it is at the same time the function, the constituted bodies and tradition that are binding. Though business enterprises herald liberal values in their outside communications, they also display a great conservatism behind closed doors.

Corporate social responsibility illustrates the way commitments are silently replacing obligations. For example, requests for proposals commonly require that business organisations commit to respecting the environment. They also require certain labour rights by mandating the hiring of a certain ratio of handicapped or former detainees under rehabilitation programs. Many of these new constraints, which appear related to the contract, are determinative of the choice of the site of operations. The business enterprise must spontaneously honour many new missions, which are not economic in nature. This explains the importance, and pressure, of commitments made by the business organisation.

Sometimes, the emancipation from domestic laws can create a true, specific ecosystem among business organisations. In many industries, to begin with new technologies, the global businesses' lawyers form a normative community, which shares its own codes and standards. There is no reference to a territory but to a bundle of relationships in a specific environment. The word "ecosystem" implies the idea of a small world, which generates its own normative environment (like nature). Nevertheless, problems arise when one party wants to go back to a local legal order because compatibility is not always possible.

A Dynamic of Creative Destruction

Isn't seeing corporate counsels as the craftsmen of globalisation a little exaggerated? Could we say instead that the engineers, the industry leaders, the Steve Jobses and Jack Welches conceived our world? Of course, but they would have gone nowhere without lawyers to structure their discoveries and translate their audacity. Lawyers are the often-unknown artisans of our world under construction: they get their strength from entrepreneurs, but it is the lawyers who give innovation its shape.

To this end, general counsels have had to demonstrate innovative skills as well as audacity. The challenge for global businesses and their corporate counsels is to abide by the rules of global law which are no longer located within national states, but are now found in certain US agencies, international organisations, the European Commission and the world's great courts. The true challenge is "to be able to be one step ahead of official regulation."[30] The winner is the one who articulates rules better, before and in wider territories than do national governments! Business enterprises would give anything to escape the tutelage of governments: after all they tend to present themselves as institutions designed to go around public institutions.

This state of affairs is well illustrated by the case of Google v. Spain in which a large Silicon Valley company was compelled to enforce the right to be forgotten.[31] The company immediately reacted to the judgement by assembling a group of experts tasked with proposing solutions. The group of experts even included avowed opponents to the big firm's hegemony. Thus, Google took things into their own hands by using a procedural (as opposed to organic) legitimacy to create a "Google Law" integrating the concerns of the regulators and global judges without submitting to it, like a citizen must abide by the laws of his own country.

As Joel Bakan put it, "the corporation's mandate to pursue its own self-interest, is itself a product of the law, and actually propels corporations to break the

[30] Basso, op. cit., P. 173. Emphasis added.
[31] Cour de justice de l'Union européenne, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (C-131/12) rendered on May, 13 2014.

law."[32] The general counsel is at the heart of contradictory injunctions: as a lawyer, he must guarantee law enforcement, but as a participant in global law, he must make the law evolve and to this end, he must seek its upheaval. This is both enthusing and extremely difficult because tomorrow's law entails a destruction of today's law. The issue of transgression is contemporaneous with the growth of the internet because the internet itself is based on a necessary subversion, largely revolutionary, of the law. It is the famous principle, consubstantial to capitalism, of creative destruction.

The role of the general counsel's office is to essentially subvert the law in the name of establishing a more superior law. The question is what is that superior law? And in what name can the business organisation pretend to be better than governments, which remain the locus of political legitimacy? The nature of business and its "movement principle", i.e. its deepest reality, are not decided politically but are direct consequences of the power of financial markets. However, we should not stop just at the law of the marketplace, which may only be a staging post.

The current phenomenon of "dis-economisation" cannot only be understood as a ploy of capitalism but suggests that the business enterprise's strength goes much deeper than the law of the marketplace: it finds its energy and its legitimacy in the law of movement. It is the latter which confers upon the business enterprise that supplement of strength and legitimacy, which makes a difference with governmental institutions. The marketplace law represents a supra-legality the same way in which the law of the nature of the twentieth century or the law of history did.[33] Ultimately, what matters is the life freed by this movement. The law of movement rests on a will to live, which explains that the global enterprise rests more heavily on a life philosophy than on the purview of a common world. The business enterprise rests on a desire to maximise its existence, to become healthier. Globalisation must be seen as an immense liberation of energy.

The business enterprise forms a common cause with individual liberty to overturn the government. In order to affirm and legitimate itself, it takes advantage of the liberal rationale of opposition to the government because of the fragility of its body and its aspiration to achieve freedom. Individual liberty and life pursuit are the beacons which business enterprises use to justify their power in the world. Their mission (even more so in the digital era) is an emancipating and civilising one.

3. Defend Business Enterprises with Systemic Justice

In yesterday's world, the authorities took the initiative to investigate. The prosecutor lead the accusation charges and nobody asked the accused to self-incriminate or the defence to cooperate. Nobody expected the accused to

[32] Quoted in Basso, op. cit.
[33] Hannah Arendt, *Le système totalitaire. Les origines du totalitarisme,* Points, Seuil,

necessarily accept his punishment. In our global universe, a company protects itself from accusations by turning itself in and confessing. Cooperation is the best defence and the wrongdoer must accept punishment by reforming the organisation's structures. This model is very far removed from the traditional model of criminal justice and that of an authority which investigated, accused and punished.

Justice is not to be found solely in the courthouses (which are often overtaken) as in the past, nor in legislation (often inexistent or too plethoric) but within the business enterprise itself and, more particularly, in the way its offices are organised. This is not without rationale in a world vision where de-territorialised states and societies are cast off and where there are only individuals and businesses.

Self Denunciation

When a company works with close to 70 national regulators who all have their routines, their phobias and their particularities, it becomes impossible not to commit mistakes. When such things happen, the best defence consists not in hiding the wrongdoing, but to anticipate and self-report. The general counsel's role is to suggest the confession in order to prevent further and graver consequences. The DoJ and the SEC warned that they would give a "greater importance to self-denunciation as well as to cooperation and rehabilitation efforts" in order to determine their offer of settlement to the companies.[34] Depending on the level of cooperation on the part of the company, US authorities can actually decide to pursue a Non-Prosecution Agreement (whereby the company is not criminally prosecuted) rather than a Deferred Prosecution Agreement (which merely suspends criminal prosecution) or require a Guilty Plea.[35]

The general counsel must explain to the executive management that they must demonstrate to the authorities their willingness to anticipate and act as soon as they are informed of alleged wrongdoing. One reproach addressed to French companies was to react only upon being served subpoenas, i.e. official injunctions from the US judicial authorities. Today a wiser approach is to anticipate the move of controlling authorities.

Cooperation

In today's environment, organizing a defence implies cooperating. Cooperation has become the rule of the game (which is very far removed from French culture). Not surprisingly, French banks have been reluctant to cooperate, which was highlighted by the US authorities. This emphasises the

[34] Department of Justice & Securities & Exchange Commission, « A Resource Guide to the U.S ». *Foreign Corrupt Practices Act* (2012), page 54.
[35] *Id.*, pages 77-79.

importance of the relationship and of the quality of cooperation with the US federal authorities, which must be done is the spirit of good faith. Alas, there is no equivalent in French culture, which is more "confrontational". In France, one does not negotiate with the power. One submits, one hides or one kowtows.

Once the decision is made to cooperate, it must be done fully. The willingness to cooperate must continue after a settlement agreement is entered into. This implies a proven determination to implement measures designed to avoid that such wrongdoings repeat themselves. The willingness to cooperate is evaluated by reference to like-occurrences and "exemplary" cooperation is rewarded: the sooner the company cooperates, totally and without reservation, the more it increases its chances to reduce the amount of the financial sanction inflicted, which could even lead to the abandonment of prosecution.

Negotiation

The heart of global law resides in negotiation, which is the art of the general counsel par excellence. There is no other choice considering the growing importance it takes. Negotiation is at the heart of business but this rationale has, in recent times, expanded in the judicial arena to the extent that the mirror effect between the act that inaugurates any commercial dealing and the one that brings an end to a conflict have been labelled "deals of justice". We are possibly about to make a further step in this growing importance because bargained justice does not hide in the shadow of the law like an alternative to the rigidities and lack of coherence of public judiciaries. It is now an integral and autonomous part of the global landscape operating in plain sight. This is illustrated by the success of transactional justice as the trending solution for all offenses concerning corruption: it proposes a spontaneous denunciation without responsibility. The payment of a sum to the Treasury must absolutely not be equated to a fine. Then there is also the validation by a judge stating expressly that it should not be thought of as a judgment. This brings to mind the quote,"I saw the shadow of a coach driver who, holding the shadow of a brush, was scrubbing the shadow of a coach."[36]

Flexibility alone, i.e. the most adapted response to the internal sophistication of laws, their multiplication or the predictability of law thanks to technical instruments which are perfected everyday, cannot fully explain the success of this new form of bargained justice. Bargained justice has become a self-standing form of justice because it responds to the needs of the business community in terms of costs, speed and flexibility. Business, like life, is a flow that no one should obstruct, or should do the least to obstruct. Instead, the great accomplishment of global law is, in fact, its disappearance! Likened, perhaps, to the general counsel who must accumulate a wealth of technical knowledge to avoid using it.

[36] Charles Perrault, quotation from the sixth Book of the *Enéide Travestie*

The justice system being shaped before our eyes can be labelled “systemic”. Justice is systemic when it is opposed to the failure of a system, of another system. We can therefore observe a convergence between the origin of the wrong (the system is flawed because the market carries in itself corruption) and the imagined remedy: compliance. The latter would inaugurate a new justice model: that of systemic justice.

Whereas in the tradition of criminal law, it is the criminal intent which is often taken into consideration, in systemic justice the objective is to correct a system by making it possible to integrate good information so as to redress its mode of operation (and not castigate men’s immorality or discourage them through the threat of punishment). To paraphrase Montesquieu, punishment espouses the wrong inflicted. This is a new punishment rationale, which aims not at fixing the moral order of the world but ensuring the system’s stability.

There is no need to expand on the novelty and the strangeness of this new global legal culture for French classical legal culture. In this field, the general counsel has acquired a skill and a flexibility that should guide our national ways. The traditional participants in the trial tend to be defiant of “plea bargaining” and of transactional justice but it is nevertheless the direction we must take. A lot of work remains to be done for which the general counsels’ know how will be a huge asset.

The general counsel will therefore be evaluated on his capacity to play with all the new uses of global law: astute uses, creative, borderline or well beyond the yellow line. All these options exist in reality and ultimately, if the general counsel were freed from listening to the executive managers, he would push further and further creativity and audacity, upon the condition that it furthers the company’s interests. Yet the general counsel is also a lawyer and a citizen and he cannot engage in any operation without denying himself, without violating the tacit oath toward law and justice. This leads us to what is at the heart of the general counsel and makes him face himself: his conscience.

IV. MORAL STAKES: ACOMPLICE, DISSIDENT OR FUSE

Whether we are concerned with internal challenges within the business enterprise or external ones raised by our interdependent world, each time the general counsel must face a tension at the heart of his function, which we propose to label the “included third’s dilemma”. The general counsel constantly

oscillates between two laws, that of profit and that of the law which rests upon noneconomic values. He must play with these two rationales: the cognitive rationale (which he shares with other executive managers) and another rationale which is alien to business, legal reason. To assume a strategic function means that the general counsel must combine both… up to a point. This capacity to deal with that rupture is the very definition of his role.

1. A True Loyalty Conflict

The general counsel's role today is to ensure the convergence between these two rationales and it is far from easy. Ben Heineman pushes this rationale to the extreme by advocating the fusion of economic performance and moral integrity in High Performance with High Integrity[37]. This point of view proceeds from a kind of syncretism: in the end, business interests coincide with society's interests. It belongs to the same family of concept as the invisible hand but without merging with it because it does not aim at self-regulation but, instead, at the convergence between a company's interests and social utility. Therefore it places the general counsel between the demands of integrity and performance. This proposition can be read in two ways: one must be virtuous because it will increase performance and increasing performance breeds virtue. The description Ben Heineman makes of his profession at the end of a long and brilliant career is both very seducing and very revealing of the evolution of global business in the last thirty years. It is also inspired by an Anglo-American vision of the business organisation and of the Protestant ethic. Hence, Heineman describes a social group in which each individual bears the responsibility of morality altogether, but he does not realise that this is a typically American vision and he does not understand that what appears natural to him is culturally alien to others.

Corruption, which may be the ultimate test, is the very embodiment of the tension between these two rationales. Corruption is the blind spot of marketplace law: if the business organisation does everything it can to capture a market, what will discourage it from corrupting a foreign civil servant? The conscience dilemma affects the general counsel when he is confronted with having to choose between these two rationales and risk losing his job over the choice he must make (sometimes going so far as to be cast off from the professional community entirely).

At various times during our investigations, we were surprised to meet men and women from within the business world who were questioned the meaning and consequences of their actions and their strategic choices. But it is not only a matter of individual morality. We must also consider the social determinants,

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[37] Ben Heineman, High Performance with High Integrity, *Harvard Business Review Press*, Boston, Mass. 2008.

which influence their action (common to all social actors without exception).[38] Entrepreneurial reason, which rests on the logic of profit, and the requirement to persevere are objective realities which transcend and determine the willingness of the men and women who constitute the business enterprise. The whole goes beyond the individuals who form the business and business enterprises can sometimes act in a way that directly contradict their initial intention.

It is because this convergence is not self-evident and because individual morality is not a sufficient counterweight that the function of general counsel is so important. It is in the conflict of normative orders that the general counsel will affirm its true social responsibility, the word "social" being used here in the strongest sense.

It is in the premium that he is willing to pay to ensure that law triumphs that the general counsel will flourish personally, as well as, professionally. It is as much his capacity to resist pressure as his ability to find solutions to all operations, including the most suspect, that the professional will gain public recognition. What makes the nobility of a profession is of course the importance of the task its accomplishes for the community, and as we have seen, it is potentially gigantic, maybe more so, the ethical behaviour displayed in the performance of that task.

The profession is sometimes in a state of denial of that conflict because it may take for granted that general counsels always find the right solution, somewhat magically. This is a rather ordinary corporatist reaction whose expression is nevertheless stronger because it concerns the business organisation. The latter has understood before everybody the importance of communications, which led to the edification of a self-referential discourse, and which can hide the true challenges it faces. But the business enterprise is also a place where all human contradictions are expressed. We won't resolve these contradictions with magic solutions or with Sunday sermons. What needs to be done is to take into consideration what troubles the conscience of the general counsel who is also a human being, a citizen, who has his own aspirations. Inevitably the tension building internally within the general counsel will translate into internal tensions within the company between compliance and commercial functions.

2. What Solutions?

As it is always the case with the issue of independence, one solution is to trust the strength of character of the general counsel. But it probably won't be enough. A second solution is to establish ethical and moral standards, build Chinese walls, provide avenues of recourse and develop a wide array of

[38] On this, see Pierre Bourdieu, Jean-Claude Chamboredon, Jean-Claude Passeron, *Le métier de sociologue, Préalables épistémologiques*. Éditions de l'EHESS, Paris 2006 (rééd.).

procedures. The business enterprise's ultimate purpose is to generate shareholder value. The "business organisation structure" is, nevertheless, rather specific because it does not benefit from an internal voice of wisdom, which could counterbalance this principle. This is why it is an exaggeration to speak of self-regulation: the business organisation must seek its regulation outside in a heteronomic way, that is to say one which is formulated by a judge, a public agency from the same nation or from a foreign country.

A third way is to try to resolve that conflict of loyalty through the market itself. This is a middle road in that it partially negates the problem because it is precisely the rationale, the market rationale, which causes the origin of the conflict. For some authors, that conflict is only apparent and results from a short view analysis: to choose business interests against legal integrity is a blow to the law and a bad decision for the business. After all, if the market rewards the corrupt in the short term, it will sanction or exclude them in the long run.

The market is therefore incapable of making room for the voice of prudence and wisdom, which must be supplied and enforced in a voluntary way by governmental authorities. That has underpinned the nature of US policy in recent years, which used the strength of their market to command the observance of certain ethical standards in business. Because the market is imperfect, the US regulator must give it a hand with its "deals of justice" policy, which hopes to reframe corruption in economic terms by making it a major commercial risk. The US government has pragmatically taken for granted that risk is the only language the business community understands. By transforming corruption into a mere risk, US authorities are thereby formulating a dilemma, not in normative terms, but in cognitive ones.

3. The Symbolic Resource of Independence

The issue of the general counsel's guarantees of independence from the other inhabitants of the C-Suite remains a central one. That is, how to protect the general counsel when he is like a mere fuse? Because he is also an employee of the company, the difficulty for him would be to find the symbolic, psychological and social resources required to oppose management. This is where the legal culture, the spontaneous respect for law and force of a profession play a part. Ben Heinemann does not see the necessity of a cultural driver or a substitute to it by clubs and associations supporting the individuals; he does not see it because he belongs to a legal culture in which these drivers are embedded. However, they are critically lacking in our country.

CONCLUSION

Our first discovery in this investigation was a human one. We have been impressed by the warm welcome we received, by the hindsight of the professionals we have met, by their modesty, which sometimes hinted at a kind of inferiority complex. What a paradox! We hope that this rapid overview of the challenges and dilemmas which today assail general counsels will demonstrate how these functions are both fascinating and novel. In our contact with those general counsels, we have encountered all the main challenges of contemporary, living global law. Our investigation uncovered a wealth of accumulated experience, which, in fact, provides a unique perspective. This is very precious professional knowledge which risks being wasted if it is not formalised, transmitted, shared, discussed and criticised. Hence the ideas that form our conclusion are easy to guess.

The first one concerns the urgency in France to bring the various legal professions closer together and to bring an end to the saying that in our country, the elites don't "do" law and law has no elites. Such a division is counter-productive; it has become a luxury we cannot afford. One must gain consciousness today that a strong and respected legal community in our times of globalisation must be both plural and federated around a clear consensus. The time of reckoning has come for our Balkanised legal community wherein each profession is defiant toward the others. We have highlighted the necessity to organise that co-production of the common good by the State and business enterprises but if public authorities want to work better with the private sector, they must learn a common language. This does not only concern universities or high civil service. It must include the public debate obsessed with clichés or fantasies.

The corporate counsel's world and the one of prospective thinking remain too far removed from one another. Granted, in recent times, certain universities have introduced specialised degrees such the Masters in Contract Management or Compliance. These initiatives deserve appraisal but that does not mean we should leave the keys of the university to practitioners and miss an opportunity to acquire an even deeper understanding of these subjects. It is essential because, today, the leading forces of innovation in the business law world are the corporate lawyers more than any other legal profession (attorneys, judges or law professors). We must stop giving them purely technical training and enrich our curricula with more open subjects like legal culture or legal strategy.

This is, as we have seen, central, but how is one to teach it? And before that, how is one to institute it as a field of knowledge? There is an urgent need to build legal strategy into a field of knowledge that responds to practical and theoretical interests. We hope to have, at least, sketched out the important philosophical questions raised by the place that business enterprises occupy. Decidedly, we have much to learn from general counsels.

Annexes

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- Alexandre Menais, Atos
- Eric Michel, Total
- Rémy Rougeron, Thalès
- Eric Sandrin, Kering
- Daniel Schimmel, Foley Hoag
- Joseph Sievers, SFR
- Carole Xueref, Essilor

List of Interviewed Persons

- Olivier Chaduteau, October 13, 2014
- Hervé Delannoy, September 22, 2014
- Nicolas Guérin, July 29, 2014
- Ben Heinemann, October 15, 2014
- Laure Lavorel, September 26, 2014
- Philippe Melot, September 3,2014
- Alexandre Menais, September 22, 2014
- Rémy Rougeron, July 11, 2014
- Jean-David Sichel, September 29, 2014
- Adam Smith, February 13, 2015
- Eric Thomas, October 20, 2014
- Carole Xueref, March 2, 2015

Brainstorming Dates and Topics

- " From Litigation to Compliance", December 3, 2014
- "From Local to Global", December 17, 2014
- "Lawyer, Manager, Strategist" January 21, 2015
- "Corporate Social Responsibility", March 16, 2015

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