

The Business Magazine For The
Chief Legal Officer

CORPORATE COUNSEL

corp.counsel.com • October 2006

ALM

Hands Across the Water

CASE STUDY

By Ben W. Heineman, Jr.

Transnational companies need a coherent, forward-looking “foreign policy,” but most don’t have one. Although governmental decisions significantly affect global business success, many corporations and legal staffs are only involved in defensive, short-term, or narrowly self-interested “government relations.”

Fewer companies have sought to make sophisticated public policy formation and implementation an important dimension of their business’s global growth strategies—they haven’t evolved from a reactive to a proactive approach. This step is necessary, given the increasing global interaction between government and business.

During my time as the general counsel of General Electric Company, we tried, with mixed results, to move from the reflexive to the proactive through a “growth and government” initiative across the company’s broad portfolio of businesses. This type of initiative can address a striking range of governmental actions and have relevance for many enterprises in global commerce (and the lawyers who staff them), although its scale will vary.

In recent years, GE business units (from health care to aircraft engines, energy, NBC Universal, and financial services) have dealt with the following types of policies in global markets:

**GE crafted a
“foreign policy”
for doing business
abroad. Should
your company have
one too?**

- Stimulating policy paradigm shifts. For example, putting more emphasis on early diagnosis and prevention in health care or on carbon constraints and renewable fuel sources in energy.
- Obtaining government support for whole new markets, like wind or water, to advance important public goals.
- Establishing company-to-country partnerships with Third World nations like Qatar, to provide a range of needed goods and services.
- Approving new products, such as replacement of angiography by volume CT scans, to minimize invasive procedures; or replacement of conventional coal-fired plants with coal gasification, to curb pollution.
- Helping define a nation’s infrastructure needs and mix of technologies in key sectors (e.g., transportation).

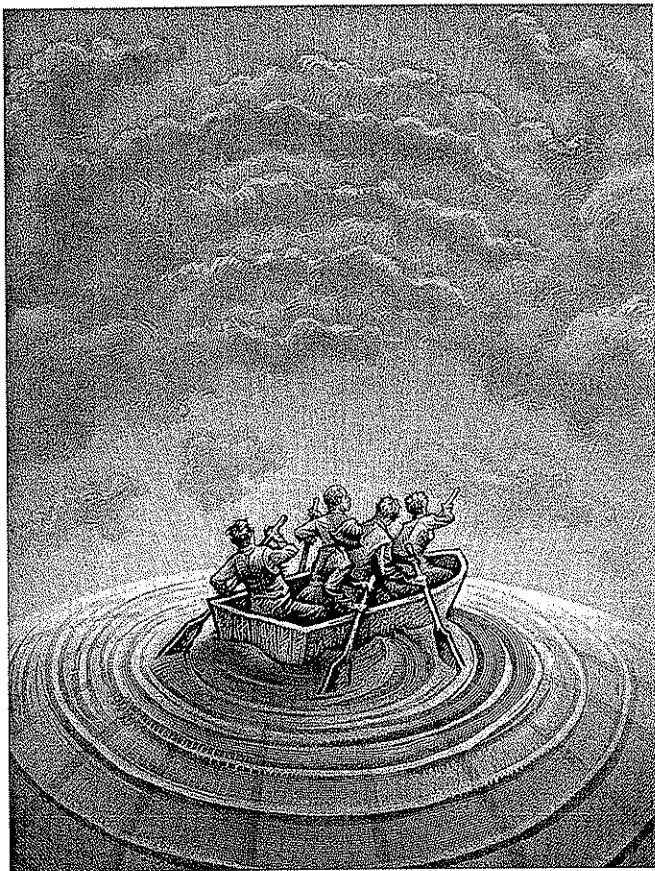
■ Obtaining government tax incentives, grants, and loans for a wide variety of public purposes: research and development, training, location incentives, structural aid to new E.U. members or emerging markets.

■ Approving transactions that raise not just antitrust issues but other policy issues, like the role of direct foreign investment, or technology transfer, or local content (e.g., in China and India).

■ Creating new regulatory regimes, in both the developed and developing world, in fundamental areas such as consumer finance, health care, or environmental health and safety. These programs are needed to meet important public concerns, but they must also fairly spread costs across businesses or societies to ensure competitiveness.

■ Taking defensive actions to modify proposed laws or regulations, which do not properly balance social concerns and economic efficiency—for example, the original overly broad chemical registration directive in the European Union (which has since been made more targeted).

In addition, we had to address a whole range of legislative and regulatory issues stemming from general legal and public policy areas that affect corporations (not just specific industries), such as antitrust, tax, dispute resolution, trade, environment, intellectual property, and labor and



employment. As well, we faced operational issues arising under those laws, which required interpretation and enforcement by foreign governments.

These daunting policy issues, which apply to many companies, are even more challenging in emerging markets. There, especially, transnational companies must align their interests with solutions to societal problems. Corporations must reject completely the seductions of corruption. And they must operate in environments where the transparent, accountable, and durable economic, political, and legal institutions that are so important to stable commercial activity are embryonic or nonexistent.

Here are some basic concepts of a "growth and government" initiative, which includes vital roles for inside and outside counsel.

1) CONCEPTS

The essence of this initiative is to have policy expertise built into planning processes that are customarily run by sales, marketing, technology, business development, and finance. This policy expertise should be either business

unit-based (e.g., health care, energy, communications, security, consumer finance) or specialty-based (e.g., antitrust, taxes, trade environment, labor and employment, intellectual property). Moreover, companies must have a systematic policy development process for assessing global opportunities (and threats) across business segments around the globe. These matters should then be evaluated and prioritized by the business team for CEO review and resource decisions. The priority policy choices are implemented by teams led or aided by experts in the governing processes and politics of specific regions and nations.

The growth and government initiative must start with the CEO's commitment to a business strategy process that includes a public policy dimension. The CEO must make clear to division business leaders and top executives that their growth plans should include global government initiatives. This CEO commitment must be based on a sophisticated understanding of policy and political processes—and the varying cultures across the globe—as well as the contingent nature and variable time horizon of investment in these issues. Not all priorities will be short-term. Not all will be winners. But the investment in policy and political experts is tiny compared to potential benefits.

A critical player in a government and growth initiative is the policy expert. Companies should hire a senior person whom they regard with the same esteem as the general counsel (if the person is not already the GC). He or she should be a key inside actor—an essential business team member—who is rewarded with solid pay and incentives. This person needs to combine expertise in the policy and politics of the field with an aptitude for business. This is the person who—through knowledge,

experience, and networks—understands the trajectory of policy debates, and can spot and develop policy issues with the business teams. Ideally, this senior person has experience in government and so understands the interplay of policy, politics, and governmental process.

Just as the policy experts must have political experience and aptitude, the political experts must also have a policy aptitude—an ability to understand in depth all the moving parts of complex issues—and a business aptitude. These experts need to help perform the difficult task of translating the desirable, from both a policy and business perspective, into something feasible. Their expertise is knowledge of and sensitivity to global political and governmental processes, and an understanding of how to get things done with integrity in Beijing, Brussels, or Budapest.

The person with overall responsibility for integrating public policy and politics into business strategy, short of the business leaders, should be the general counsel. At the end of the day, policy, legislation, regulation, and (as necessary) test case litigation are about setting meaningful rules and achieving their intended impact in a variety of cultures. When hiring GE's legal specialists (tax, trade, IP, etc.) who reported directly to me, I almost always sought a person who could skillfully handle GE's myriad operational issues, but who also had served in government and thus had policy and political expertise. My hires for division general counsel were broad "athletes," who might not have had a background in the particular industry but often had governmental experience.

Systematic policy development across a global company is a difficult, multifaceted task. GE's energy business was a best practice within the company. Energy has many different product lines: gas turbines, coal gasification, nuclear, wind, solar, hydro, and transmission/distribution, as well as services for those products. The annual review process systematically looked at all these businesses in each region/country (the United States, Europe, the Middle East, Asia) and asked a set of systematic questions: What is the policy environment? What policies, laws, and regulations could affect performance in the next three years—and in the longer term (usually a ten-year time period)? From this extensive issues list, what

are priorities in terms of potential orders/sales or other financial metrics? What should be the level of GE involvement, and for how long? How does the GE position align with the political culture and issue trajectory? In 2006 this painstaking process led to specific

policy and the unique, legitimate local processes and sensitivities.

In global markets (as in domestic ones), the business rationale must include genuine benefits to the host country or region. This cannot be PR flimflam. In this age of

resources. They might not have a balanced or realistic understanding public policy and governmental processes. Their business school education and their experience of rising initially within narrower career bands in the company may leave them unprepared. This is why effective CEO exhortation and explanation, perhaps coupled with mid-career education in-house or at professional schools, is so important.

Hiring, retaining, and promoting policy and political experts inside the company is an extraordinary challenge in world markets. Broader roles for lawyers may be underdeveloped outside the U.S. The transition from government to the private sector is not as well developed; only recently, for example, has the “revolving door” started to swing in Brussels. And, while there are burgeoning think tanks in China, many are associated with the State Council or with major universities (like Beijing, Tsinghua, or Jiaotong), where there is little tradition of going “in-house.” It cannot be repeated too emphatically: Hiring policy and political experts, especially in emerging markets, requires great sensitivity as to whether the person has credibility, or has enemies, whether the person is clean and trustworthy,

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global policy actions. Those include: GE technology nuclear power plants in China and Europe; incentives for coal gasification technology (which GE produces) in China; a detailed plan for a new Indian civilian nuclear program (working with the Indian government) to help gain congressional support for the Bush administration’s India nuclear deal; removal of tariff and nontariff barriers to energy products and services; and global greenhouse gas emission reductions, which stimulate demand for GE energy-efficient products. Each priority described key actors, their policy concerns, and detailed GE positions.

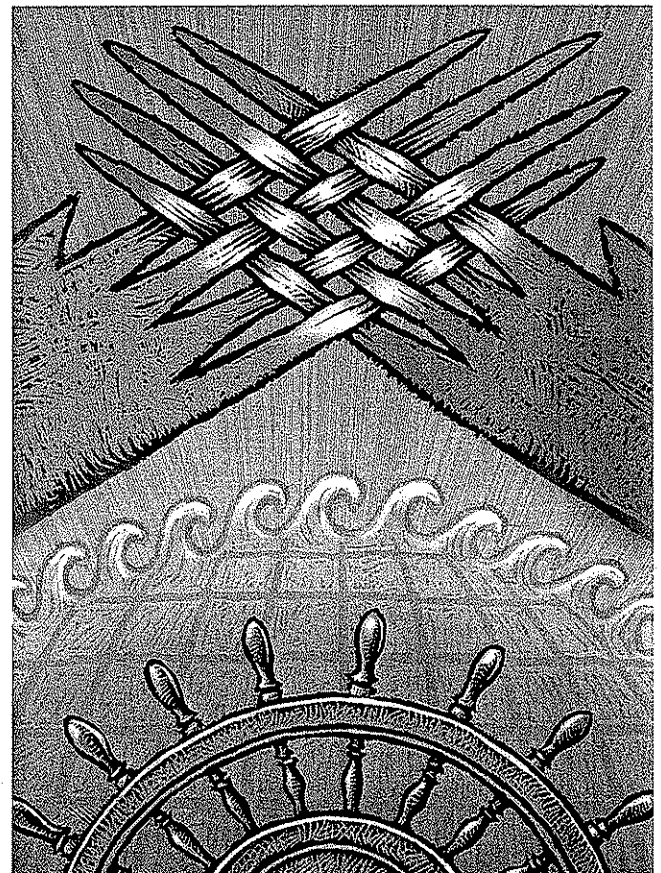
Global policy implementation is no less complex. It requires a detailed understanding of governmental decision making across widely diverse cultures, and an uncompromising ability to make appropriate, lawful representations to key officials. A best practice was the complex campaign of GE Aircraft Engines to put the engine on a regional jet that was built by a consortium of six Chinese companies and research institutes. The key, of course, was to have the best product. But Engines, with support from other parts of GE, mapped out an extensive plan. It started with comprehensive briefings on the technical case. And it finished with a series of presentations to a variety of Chinese officials—the six consortium members, the airlines, the general development authorities in Beijing, and Chinese trade officials—with feedback at every step. In 2004 China chose GE as the sole engine supplier for the ARJ21 regional jet. The key lessons: Map the legitimate decision process for each project in different cultures; assemble the best ad hoc team, with specific skills and contacts; and have a clear champion who understands the

corporate distrust and instant communications, disingenuous posturing will be quickly exposed as such. Special deals that only line a company’s pockets are inherently troublesome. Working with the honest, public-spirited people in government is important in defining corporate interests that also advance important public interests. For example, consultation with Chinese energy officials on the need for wind power to reduce China’s dependence on local coal production and expensive overseas oil helped GE Energy attain legislation with wind power incentives that boosted orders significantly.

2) THE GAP

My experience at GE, and the experience of other transnational companies with whom I often spoke when traveling outside the U.S. (e.g., General Motors Corporation, Microsoft Corporation, Motorola, Inc., Citigroup Inc., BP plc, Unilever N.V., Sony Corporation, HSBC Holdings plc), exposed important gaps between the concept of a proactive policy process and actual practice.

Even when the CEO strongly supports a growth and government initiative, subordinate business leaders who are crucial to its success may not. They may have only a short-term view, or not want to invest in



and whether the person has the skill to act effectively and ethically. A bet on young talent can be made by hiring foreign graduates of U.S. LLM programs. Finding bicultural, bilingual local nationals—for this initiative and for many others—is one of the most significant problems facing transnational companies.

The need for such experts is paramount, however, because of the complexity of opportunities and threats in overseas jurisdictions—China, for one. China's trade balance, currency, and IP issues garner U.S. headlines. But its society is also in the midst of fundamental policy debates: about creating a balanced energy policy; about constructing and financing a social safety net (health, disability, pensions); about generating growth through consumer finance and consumption (to reduce China's trade surplus), not just through investment and export; about achieving growth with environmental protection; about the respective roles of foreign investors and national industrial champions; and about establishing a rule of law for commercial activity (and for other issues). Most of these (and other) debates have significant implications for business.

To deepen understanding of China for public and private decision makers, GE and other U.S. transnationals recently underwrote a book by two independent, nonpartisan think tanks—the Center for Strategic and International Studies and the Institute for International Economics—aimed at providing a dispassionate and factual description of these issues: *China: The Balance Sheet*. China's political decision making is often difficult for outsiders to understand, let alone influence. Relations are variable and opaque between local, provincial, and central governments; between the ministries and the upper level of the Executive (the State Council); and between the government and the Communist Party. So policy efforts, while critical, are difficult.

Company or division general counsel may have a largely commercial background and may not have extensive experience in governmental policy and process. Governmental affairs departments may not report to them. But the growth and government initiative is an important way for the GC to play offense, not just defense, with

significant potential benefits for the company. GCs should aspire to attain this position and do the job well. Hiring legal experts with policy expertise, becoming deeply involved in important, discrete policy issues, and seeking education and advice from experienced outsiders are possible steps toward those goals.

Additionally, outside advisers—whether in law firms, consulting firms, think tanks, or academia; in the U.S. or overseas—have a critical role to play in this initiative. A

commercial law (e.g., tax, antitrust, IP, privacy) are salient examples. It is especially difficult for individual companies, even those with great size and scale, to address these issues alone. Concerted private-sector action is needed, given the complexity of the problems and the intricacy of processes, but companies are so busy that such concerted action is hard to orchestrate. Nonetheless, the future requires sophisticated, sustained, and effective participation by the private sector in these international public/private issues.

Businesses need to take the initiative to define their own issues and projects, and not just hand them off blindly to so-called outside experts.

company cannot possibly hire enough internal resources for these matters, given varying national processes and the complexity of the issues. But vetting outsiders is key. And businesses need to take the initiative to define their own issues and projects, and not just hand them off blindly to so-called outside experts. Meaningful inside-outside partnering on public policy is similar to leveraging outside resources in complex deals or litigation.

Assessing economic, political, and reputational risk is a difficult corollary task of the growth and government initiative. Beyond the need to act with complete integrity, this assessment requires answers to such questions as: how can a company mitigate a country's economic, legal, and political risk, which, in turn, could undermine policy and then commercial efforts; how can a business avoid being used in factional political fights; is the company acting as a U.S. corporation seeking U.S. government aid on policy issues, or is it a global (or European or Chinese) entity when it petitions non-U.S. governments?

Finally, major corporations need to go beyond a nation-by-nation approach to global public policy. Some of the most important issues for the world economy must be addressed by multilateral institutions and processes. Anticorruption efforts, trade negotiations, energy security, institution-building in less developed countries, private-sector responses to terrorism, and harmonization/convergence of international

While GE's growth and government initiative was daunting in its complexity, and while I left with mixed results in helping to find the right people and making the policy a GE norm, it was one of the most exciting aspects of being GE's general counsel. I deeply believe that building sophisticated global public policy capacity into growth teams and strategies is critical to maximizing business opportunities for many companies.

Ensuring that corporate positions are based on strong facts and sound analysis—and that they credibly advance not just business interests but public interests—is critical to the success and reputation of a company in the global economy.

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