



## USCIB Legal Issues Overview

(A Representative Sample)

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing the International Chamber of Commerce, the International Organization of Employers and the Business and Industry Advisory Committee to the OECD, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

USCIB addresses a wide range of policy and regulatory issues through some 26 full committees and a multitude of task forces, many of which cover timely legal issues ranging from nanotechnology to environmental matters. This “Legal Issues Overview” provides a small sample of some of the legal challenges USCIB is privileged to confront on behalf of its membership, and is by no means comprehensive:

- Amicus Brief Network
- Intellectual Property
- International Arbitration
- Competition
- Legal Privilege in Europe
- Privacy
- Hague Convention on Choice of Courts
- Tax
- Jurisdiction and Extraterritoriality
- Alien Tort Statute

### Amicus Brief Network

**Issue:** Both members and outside interested parties are increasingly approaching USCIB to consider filing *amicus curiae* in judicial matters both here and abroad that relate to USCIB’s mission.

**Action:** USCIB has created an Amicus Brief Network to evaluate the multitude of requests for USCIB *amicus curiae* briefs and interventions both here and abroad. This Network is comprised of any interested individual from USCIB member corporations, law firms, and associations. USCIB will proceed with an amicus or an intervention if (1) the case at bar represents the interests of the membership and would prove in the interest of U.S. business; and (2) the matter is international in scope, in that it directly affects U.S. business interests as it relates to the international marketplace.

## **Intellectual Property**

*Issue:* The protection of American rightsholders' interests abroad from both a legislative and enforcement perspective.

*Action:* As many intellectual property rightsholders can attest, it is not only essential to have adequate laws in place to protect investments in any given country, but it is also vitally important to ensure the enforcement of these laws. USCIB has been consistently working with member companies, through its Intellectual Property Committee as well as various regional committees such as China and Emerging Markets, to combat global intellectual property theft. Member companies have reached out to their colleagues on the ground across the world to compile industry data regarding piracy and counterfeiting and to communicate these findings through USCIB to both the U.S. and foreign governments. Whether there is a legislative threat or the potential for insufficient enforcement of the law, USCIB Committee members and staff experts work within the ICC structure and through international organizations and a variety of public and private sector coalitions to educate and advocate for members' interests.

Additionally, USCIB has partnered with ICC to launch "Business Action to Stop Counterfeiting and Piracy" (BASCAP), which engages the highest levels of industry in the fight against these crimes while providing invaluable resources to company investigators and lawyers via a comprehensive website and searchable database.

Lastly, the Intellectual Property Committee encounters a range of issues relating to intellectual property protection globally that do not directly invoke piracy and counterfeiting concerns. Today's challenges, where IP protection is often at the center of the debate, include climate change, technology transfer, and development issues. USCIB effectively addresses these concerns through its various committees and its global affiliates, and is committed to the notion that an adequate intellectual property regime spurs innovation.

## **International Arbitration and the ICC International Court of Arbitration**

*Issue:* To offer an effective and efficient international alternative dispute resolution (ADR) mechanism as a better option to court litigation.

*Action:* USCIB's affiliate, the International Chamber of Commerce (ICC), hosts the world's foremost institution in the resolution of international business disputes -- The ICC International Court of Arbitration (the "Court"). The Court is the world's most widely representative dispute resolution institution, composed of members from over 90 countries and every continent. When the Court seeks to appoint a U.S. arbitrator/mediator/expert, USCIB members enjoy first consideration. Additionally, USCIB member companies may sit on task forces that aim to create a forum for experts to pool ideas and impact new policy on practical issues relating to international arbitration, the settlement of international business disputes and the legal and procedural aspects of arbitration.

As the ICC arbitration body, the Court ensures the application of the Rules of Arbitration of the International Chamber of Commerce. The Court oversees the ICC arbitration process, including but not limited to, the appointment of arbitrators. At present, arbitral awards enjoy much greater international recognition than judgments of national courts. These proceedings are often faster

and more cost effective than court proceedings. Furthermore, arbitral awards are final and binding and are not subject to appeal.

Increasingly, global companies are acknowledging that it makes good business sense to pursue international ADR mechanisms in cross-border disputes. And many prospective litigants are turning to ICC as a well-respected, unbiased, multinational expert in this area with a demonstrated commitment not only to obtaining the best arbitrators but also to closely monitoring matters to resolution.

### **Competition Law and Policy**

*Issue:* To enhance global competition and promote international legal policies favoring an open and competitive environment for U.S. business worldwide.

*Action:* Directly, and through its affiliates, USCIB secures business participation in the International Competition Network (ICN) as well as the OECD Competition Committee and Global Forum, which address the convergence of competition policies globally. Members bring concrete proposals from the business community to the ICN, the U.S. government, the OECD, and others as appropriate. For example, USCIB's Competition Committee helped develop a successful proposal suggesting that the OECD undertake work related to international comity. The Competition Committee has also provided comments to the European Commission on U.S. business views regarding the application of abuse of EC dominance provisions, as well as contributing to the development of ICC comments on this subject. More recently, the Committee developed "best practices" to foster due process in global antitrust investigations, which led to similar initiatives at ICC and the OECD. USCIB's Competition Committee also works jointly with other USCIB Committees, such as the China Committee, to achieve common goals. For example, the two joined forces to examine China's new Anti-Monopoly Law (AML) and its potential effects on U.S. business interests.

The U.S. government has continued to pursue enhanced international cooperation on enforcement of competition laws in all areas, including coordination of cartel enforcement. USCIB and its international affiliates serve as a strong voice for business in the ICN, the OECD, and in discussions over proposed linkages between trade and competition.

### **Legal Privilege in Europe**

*Issue:* Unlike the United States, Europe currently does not protect the confidentiality of communications between in-house attorneys and the companies that employ them.

*Action:* In 2005, USCIB prepared a statement, "Protecting the Confidentiality of Communications Between a Corporation and a Lawyer Employed by the Corporation." The statement explains why the current European Union rule denying privilege and confidentiality of communications is a serious business problem for American corporations, and why it also runs counter to the interests of the European Union in encouraging voluntary compliance by corporations with EU laws and regulations. Subsequently, members of the USCIB Task Force that prepared the document, in conjunction with U.S. Department of State and U.S. Department of Justice representatives, met with members of the European Commission to discuss this topic.

In response to members' concerns, ICC drafted a position paper adapting the USCIB statement, entitled "Competition Law and Legal Privilege," which also advocated for the Commission to reconsider laws that preserve the unprotected status of in-house communications between company lawyers and the business decisionmakers that they advise. Both USCIB and ICC filed interventions in the matter of *Akzo Nobel* before the European Court of Justice in 2008, which squarely addressed this issue. Unfortunately, neither organization's views prevailed. However, USCIB continues to educate its multinational members about the current unprotected status of in-house lawyer communications within the European Union.

## **Privacy**

*Issue:* There is increasing consumer and regulatory concern regarding private sector collection and use of personal information. Yet, collection and use of such information, increasingly across borders, enables the development of improved products and services.

*Action:* USCIB's Information, Communications, and Technology Policy Committee (ICT) and its Privacy and Security Working Group are engaged with policymakers and regulatory authorities as they develop and revise relevant laws and other initiatives. USCIB works to educate policy makers on new technologies and applications, such as cookies, RFIDs, social networking sites and behavioral advertising so that any regulation considers technical realities and is narrowly tailored to achieve its goals. USCIB has also been active in promoting regional solutions, such as the APEC Privacy Framework, that rely on self-regulation and harm-based approaches to enforcement. The reviews of the EU Data Protection Directive may also provide an opportunity to pursue a more business-friendly global solution.

## **Hague Convention on Choice of Court Agreements**

*Issue:* The lack of a clear international consensus pertaining to choice of court agreements that would contribute to a more predictable global legal framework so as to ensure the robust development of global commerce.

*Action:* USCIB is a private sector participant in the evolution of the Hague Convention on Choice of Court Agreements, a worldwide convention on jurisdiction and judgments negotiated within the framework of the Hague Conference on Private International Law. The goal of the Convention is to ensure that choice of court agreements are widely recognized and enforced. Such an agreement would reduce the risks associated with extraterritoriality and foster certainty with respect to international contracts and transactions.

USCIB supports this international agreement and has worked closely with the U.S. State Department during the negotiating and drafting phase of the Convention. On January 19, 2009, the U.S. became a signatory to the Hague Convention. On April 1, 2009, the European Commission signed on to the Convention.

## **Tax Law and Policy**

*Issue:* Promote economically sound taxation policies by building international business consensus that enhances U.S. business competitiveness.

*Action:* U.S. businesses rely on sound international tax laws and policies, including the prevention and elimination of double taxation, to facilitate trade and investment. Many of these

policies are developed and coordinated in the OECD Committee on Fiscal Affairs (CFA). The Business and Industry Advisory Committee (BIAC) to the OECD is the channel through which USCIB works to build and communicate international business consensus on key taxation issues to the CFA. Currently, USCIB is working on important issues including transfer pricing of intangibles, tax and development, and the definition of a permanent establishment. USCIB also works with the International Chamber Commerce on tax issues of importance to members, including those involving the UN. Current work of the UN includes a transfer pricing manual for developing countries and revisions to the UN Model Income Tax Treaty.

Additionally, USCIB works through established relationships with the U.S. Treasury Department, Internal Revenue Service, and Congress to eliminate obstacles to international trade and investment in domestic tax legislation.

### **Jurisdiction and Extraterritoriality**

*Issue:* Conflicts of laws and jurisdictional clashes create an uncertain environment in which to conduct global business. Similarly, domestic laws that extend beyond territorial boundaries also contribute to an uncertain global business climate.

*Action:* In today's global marketplace, understanding both your customer's culture as well as the surrounding legal system is crucial to success in international transactions. Legitimate actions by a corporate entity in one jurisdiction may be considered altogether illegal in a venue where that company may be conducting business, and it has become increasingly difficult to anticipate where disputes may occur and which laws apply. Thus, many USCIB Committees work towards convergence and/or harmonization of laws across borders so as to facilitate global transactions.

The International Chamber of Commerce (ICC), in conjunction with USCIB members, has been updating a report addressing the consequences of extraterritoriality, or rather the imposition of a country's laws beyond its borders as it pertains to business. Thus far, ICC has issued a policy statement entitled "Extraterritoriality and Business." The aim of the statement is to urge policymakers, including legislators, regulators and courts, to focus renewed attention on the negative impact that the extraterritorial application of national laws has on international commerce. Recommendations include but are not limited to renewed commitment to principles of international comity, a standard of substantial and predictable links to a territory, enhanced cooperation between regulators, and greater use of intergovernmental organizations.

Another example of the ongoing work in this area includes issues confronted in the context of global electronic commerce. In the online environment, it is difficult to determine where parties to a transaction are located, and therefore jurisdiction is often unclear. Some governments seek to establish jurisdiction based on the presence of technical equipment or even the presence of cookies installed on users' computers. This leads to significant uncertainty, subjecting companies to laws of which they are unaware. Opinions from the EU Data Protection Working Group (Article 29 Working Party) on search engines and social networking sites have raised such concerns. USCIB's ICT policy committee engages regularly with the US Department of Commerce to support its bilateral dialogue with the Europeans to prevent extraterritorial applications of EU laws that go beyond the existing framework.

## **Alien Tort Statute**

*Issue:* A 1789 United States statute, virtually dormant for 200 years, has recently been invoked to create a cause of action in U.S. federal court against multinationals and others who have allegedly either committed or have been associated with tortuous activities overseas.

*Action:* The Alien Tort Statute of 1789 (ATS), 28 U.S.C. § 1350, was enacted in the early days after the adoption of the Constitution so as to offer non-U.S. citizens the opportunity to be heard in federal court for claims involving very specific crimes against the “Laws of Nations,” or international law. At the time, it was understood that these crimes would concern either acts of piracy or violations of the rights of diplomats and government officials on state business. It was never intended to create a cause of action, as the Supreme Court noted in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), but rather to ensure that cases of this nature be heard in federal rather than state courts. Today, however, the statute has been interpreted to extend to a variety of crimes, individuals, and multinationals far beyond the original intent of this legislation. It is often used as a means to adjudicate violations that have occurred elsewhere in the world in a U.S. court, where the rule of law is respected and the damages, both criminal and monetary, can be substantial.

The statute has often been invoked against businesses in particular where there is no clear nexus between the alleged criminal activity and the U.S. company or U.S. affiliate. Thus, USCIB, in conjunction with other business groups, has been active in attempting to narrow the scope of the ATS so as to provide some predictability and certainty for companies who conduct business beyond U.S. borders. USCIB participated in the filing of an *amicus* brief in *Sosa v. Alvarez-Machain*, where the Supreme Court concluded that the scope of the statute should be limited but then went on to note that federal courts “may recognize” private tort claims for violations of international law. The contradiction inherent in *Sosa* has invited continued litigation in this area and therefore USCIB continues to monitor the effects of these decisions on international business and to act accordingly.

*For more information regarding these and other emerging legal challenges in the global marketplace that USCIB regularly encounters, please contact:*

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