

# GLOBAL ACTION

A Newsletter of the **International Law Section** of the Cleveland Metropolitan Bar Association

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## EDITOR'S NOTES

Mark J. Sundahl

This issue of Global Action reports on the recent successes of the International Law Section and looks forward to the Section's upcoming events. In his Message from the Chair, Tony Konkoly sets forth the Section's vision for the coming months and invites robust participation from our members as we prepare for our next Global Forum and the spring symposium. The articles in this issue address the new wave of foreign investment in the U.S. and the emergence of a new age of reason in the field of export controls. Although the subjects addressed by these articles are quite different, the pieces share a common spirit of optimism that should be welcome to your ears.

As always, members of the section are invited to submit an article for future issues of Global Action. Please email your submission directly to me or Reginald Russell at the addresses below. Submissions should be brief pieces (500-800 words) on a topic of interest to members of our section. If you would like to view previous issues of Global Action, a link to previous newsletters can be found on the International Law Section homepage.

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## A MESSAGE FROM THE CHAIR

Anthony D. Konkoly

On September 24th, the International Law Section sponsored its first Global Forum for the 2009-2010 CMBA Fiscal Year. The topic was the federal E-Verify system and employers' duties regarding employee immigration status checks. Thanks very much to George Carr of Gallagher Sharp for leading the discussion. The event was well attended and the discussion was very informative for all.

Future Global Forum events are currently being planned and will include discussions regarding international product liability laws and international dispute resolution. Watch for future announcements of the specific dates and topics. If you have topics which you would like to see addressed in future Global Forum events, feel free to email me or Bob Heintel (Vice-Chairman of the ILS). Your input will aid us in selecting topics for Section events that are of particular interest to the ILS membership. My email address is [akonkoly@mcdonaldhopkins.com](mailto:akonkoly@mcdonaldhopkins.com) and Bob's email address is [rheintel@cavitch.com](mailto:rheintel@cavitch.com).

For those who might not have attended any of our Global Forum events over the past several years, these are

short meetings (60-90 minutes) held at the CMBA offices over the lunch hour. Although the invited speaker leads the forum, most of the meeting centers around an open discussion of the topic and the experiences of everyone in attendance. It is a good opportunity to have questions answered in a small-group setting. While the sessions do not qualify for CLE credit, I believe that most attendees find them to be extremely valuable and interesting. I encourage everyone to attend them in the future.

Soon we will begin to make preparations for the Section's Spring 2010 CLE program. Once again, if you have a topic of particular interest that you would like to suggest, we welcome your input to help us put together a program that will be of benefit to the Section's membership, as well as to the greater legal and business community in Northeast Ohio. An invitation to the planning meeting will be sent to all Section members in the near future.

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## A NEW WAVE OF FOREIGN INVESTMENT PROVIDES CHALLENGES AND OPPORTUNITIES FOR INTERNATIONAL BUSINESS LAWYERS

For most of my career, my experiences in international business law have been primarily focused on assisting U.S. companies in doing business abroad. Whether the particular projects involved negotiating commercial agreements with foreign business partners, making investments in foreign countries, or complying with the myriad laws and regulations (both U.S. and foreign) that impact international trade and business, my primary focus has been on business activities outside of the United States. This experience is typical for most international business lawyers here in Northeast Ohio, and probably across the country as well. When engaged by a foreign company doing business in the United States, it was most often a large multinational company from another “westernized” country. In most cases, these companies already had considerable experience doing business in the United States, they were familiar with U.S. laws and regulations, and cultural and language barriers were fairly minimal.

Today, a new wave of foreign investment is coming to the United States which will offer new challenges and opportunities for international business lawyers. Over the past several years, we have seen a significant increase in the number of foreign companies seeking to establish operations and a market presence here in the United States. Unlike in the past, these companies do not exclusively come from Western Europe or Japan, but come increasingly from Asian nations, such as China and India. In some cases, these companies may have previous experience selling goods to American customers, but frequently these companies have only been part of the supply chain of a U.S. company, and have not sought to actively penetrate U.S. markets or establish U.S. operations. In many cases, these foreign companies are not familiar with typical U.S. business practices, nor are they certain about how to go about establishing operations in the United States. Language and cultural differences are also more significant than is true when representing companies from Western Europe or Japan. Nevertheless, these Asian companies are forging ahead with ambitious plans to establish operations here in the U.S. as part of their overall efforts to become global companies. They are seeking not merely to develop export sales from their own countries, but to establish integrated operations here, involving marketing, manufacturing, and other similar activities. In some cases, they may be planning acquisitions of U.S. companies or joint ventures with U.S. partners. Given likely future trends

in global trade and development, it seems likely that this trend will only increase in the future, with more global companies emerging not only from Asia, but from Africa and Latin America as well.

For attorneys advising such companies, there are innumerable areas where these clients need both legal counseling and business advice. As an example, my firm was recently engaged by an Indian company that has begun to do some business with U.S. customers, and has ambitious plans to expand their operations here. We have been advising them on a wide range of issues arising out of their proposed establishment of operations in the U.S., ranging from the complex to the mundane. They have sought our advice with respect to establishment of a U.S. subsidiary, tax issues, imports/tariff issues, employment law issues, employee benefits issues, and general corporate law issues. The company is also interested in making one or more acquisitions here in the U.S., so we have been advising them on typical aspects of M&A transactions and the environmental issues which may be associated therewith. Much of our time has been spent explaining basic aspects of U.S. corporate, tax and other laws affecting business activities and advising the client regarding typical U.S. business practices.

In short, many of the Asian companies that are now entering the U.S. market for the first time are not as well prepared as large Western multinationals to begin operating in the U.S. and so they are in need of a full range of expertise and advice from U.S. lawyers. For American business lawyers, these clients present excellent opportunities to develop new business and new relationships. However, language and cultural issues, as well as the substantial lack of familiarity of these companies with U.S. business practices also present certain challenges for U.S. lawyers. Lawyers will need to adapt to these challenges in order to effectively represent these clients. By doing so, U.S. attorneys have the opportunity to provide valuable assistance to these companies as they seek to expand into what is still the biggest economy in the world.

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## ITAR AND SPACE TECHNOLOGY: THE DAWN OF A NEW AGE?

Export controls on space technology are notoriously strict in the United States, where all space technology is deemed to be munitions and is therefore subject to the burdensome International Traffic in Arms Regulations (ITAR) – even if the technology is purely commercial in nature. This harsh regulatory environment has harmed the ability of U.S. companies to compete on the world market, as is perhaps best illustrated by the practice of certain European satellite manufacturers to advertise “ITAR-free” satellites. As a result, European satellite sales have increased significantly, cutting deeply into the market share of U.S. satellite manufacturers (as well as the market share of all U.S. component manufacturers). Complying with ITAR is particularly difficult for smaller companies that cannot easily bear the cost and complexity of implementing a thorough ITAR-compliance policy.

Technically speaking, ITAR prohibits the export of any “defense article” without a license from the Department of State’s Directorate of Defense Trade Controls (DDTC). All items listed on the United States Munitions List (USML) qualify as “defense articles,” including all spacecraft, satellites, and related components. The term “export” is broadly defined under ITAR to include not only the physical movement of defense articles across the borders of the United States, but also the disclosure of any “technical data” relating to spacecraft to a foreign national – even if the foreign national is in the United States. Moreover, the provision of any “defense services,” which include the provision of technical data, requires a Technical Assistance Agreement with the recipient of the data which must then be approved by the DDTC.

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## SPECIAL THANKS TO:

Scott Zimmer of ZIMMERdesign  
for the design and production  
of this newsletter.

[www.zimmerdesign.net](http://www.zimmerdesign.net)

## LINKS

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The burdens of ITAR grow far greater when a U.S. company launches a space object from non-NATO territory. For example, the launch of a satellite from Spaceport Sweden would trigger these additional requirements under ITAR. First, the U.S. satellite owner must create a Technology Control Transfer Plan to be approved by the Department of Defense. Second, the owner must notify the Department of Defense in advance of any discussions with foreign nationals related to the launch – and the DOD then has the right to monitor these discussions. Finally, the DOD has the right to send agents to the launch site to monitor the launch as well as all related activity and discussions (with all travel expenses being borne by the satellite owner).

The outcry from industry, academics and think tanks over these unusually stringent controls over the export of space technology has been strong and sustained over many years. Change has been slow in coming, but the political will to relax these restrictions now appears to be emerging. A better balance must be struck between the need to control exotic technologies that can be used to develop intercontinental ballistic missiles and the need to minimize regulatory burdens on the commercial space industry. Although the precise shape of the coming reforms is not yet clear, the Obama administration has announced in August of this year that it shall undertake a comprehensive review of ITAR, including the controls applicable to space technology.

The optimal result of export control reform would be the transfer of jurisdiction over space technology exports from the Department of State to the Department of Commerce (DOC). The benefit of a jurisdictional transfer to the DOC would be significant (depending on the technology being transferred) because the Export Administration Regulations administered by the DOC are notably less burdensome than are the controls under ITAR. Generally speaking, a company is less likely to be required to seek a license from the DOC prior to the export of a controlled

item due to numerous exceptions to the licensure requirement and the lenient treatment of exports to friendly countries.

Although the Obama administration has not yet implemented any ITAR reforms, other promising developments in the field have taken place. For example, the DDTC recently granted an exemption from the licensing and other ITAR requirements to Bigelow Aerospace, a Nevada-based company that is developing private space stations to serve as laboratories and manufacturing facilities. The mere presence of a foreign national on a Bigelow space station would be deemed to be an export, therefore requiring a license from the DDTC. Moreover, due to the fact that Bigelow launches its space stations from Russia and other foreign spaceports, there was a possibility that a Technology Assistance Agreement, Technology Transfer Control Plan and monitoring of discussions would also be required with respect to each passenger. These burdens would have made it economically and operationally untenable for Bigelow to serve the global market – and therefore Bigelow sought relief in the form of a Commodity Jurisdiction Request in which the company sought a determination from the DDTC that its technology was not covered by ITAR. In response to its request, the DDTC ruled that the presence of foreign nationals on a Bigelow space station was “non-licensable” under ITAR, thus relieving Bigelow from the licensing and other requirements under the regulations. This action at the agency level was a significant milestone in the evolution in the regulatory environment governing human spaceflight. Hopefully this development will be followed by meaningful and broad-ranging export control reform by the Obama administration.

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## UPCOMING EVENTS

The next Global Forum will be announced soon. The International Law Section’s Spring Symposium is also being planned. All suggestions for topics for the Global Forums or the Symposium are welcome and can be emailed to the newsletter editors or to our Chair, Tony Konkoly.

To join the section, to be placed on our mailing list, or to make inquiries regarding section activities please contact Samantha Pringle, Director of CLE & Sections, at [springle@clemetrobar.org](mailto:springle@clemetrobar.org) or Jessica Paine, Asst. Director of Sections & Community Programs, at [jpaine@clemetrobar.org](mailto:jpaine@clemetrobar.org).