In the Matter of:

WILLIAM VILLANUEVA,

COMPLAINANT,

v.

CORE LABORATORIES NV,

and

SAYBOLT DE COLOMBIA LIMITADA,

RESPONDENTS.

ARB CASE NO. 09-108

ALJ CASE NO. 2009-SOX-006

DATE: December 22, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
David N. Mair, Esq., *Kaiser Saurborn & Mair, P.C.*, New York, New York

For the Respondent:
W. Carl Jordan, Esq. and Corey E. Devine, Esq.; *Vinson & Elkins, L.L.P.*, Houston, Texas

For the Assistant Secretary of Labor for Occupational Safety and Health, as Amicus Curiae:
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; Megan E. Guenther, Esq.; and Mary E. McDonald, Esq.; *United States Department of Labor*, Washington, District of Columbia

***For the National Employment Lawyers Association and the National Whistleblowers Center, as Amicus Curiae*:**

R. Scott Oswald, Esq. and Nicholas Woodfield, Esq., *Employment Law Group,* Washington, District of Columbia; Rebecca M. Hamburg, Esq., *National Employment Lawyers Association,* San Francisco, California; Stephen M. Kohn, Esq. and Richard R. Renner, Esq., *National Whistleblower Center,* Washington, District of Columbia

***For the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America, as Amicus Curiae*:**

Robin S. Conrad, Esq. and Shane B. Kawka, Esq., *National Chamber Litigation Center, Inc.,* Washington, District of Columbia; Rae T. Vann, Esq., and Ann Elizabeth Reesman, Esq., *Norris, Tysse, Lampley & Lakis, LLP,* Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge,* presiding en banc. Deputy Chief Brown and Judge Royce dissent.

FINAL DECISION AND ORDER

This case arises out of a complaint William Villanueva filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX).[1] On June 10, 2009, a Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed the complaint against the Respondents for lack of subject-matter jurisdiction.[2] We affirm the dismissal of the complaints.

INTRODUCTION

This case involves a whistleblower complaint filed by a non-U.S. citizen, Villanueva, working in Colombia for a Colombian company. The Colombian company does not list securities under Section 12 or file reports under Section 15(d) of the Securities and Exchange Act of 1934. Villanueva alleges that he suffered adverse employment actions, including the

[1] 18 U.S.C.A. § 1514(A) (Thomson/West 2011). The SOX's implementing regulations are found at 29 C.F.R. Part 1980 (2011).

[2] *Villanueva v. Core Labs. NV, Saybolt de Colombia Limitada*, ALJ No. 2009-SOX-006 (ALJ June 10, 2009) (ALJ Decision).

termination of his employment, because he reported that a "transfer pricing scheme" and claimed exemptions from a value-added tax constituted fraudulent conduct under Colombian law. The undisputed facts demonstrate that the fraudulent conduct Villanueva reported fell outside of the concerns of SOX and Section 806(a)(1) over domestic corporate financial and legal responsibility. The ALJ questioned whether he had subject-matter jurisdiction over this complaint and dismissed this case. While we disagree that Villanueva's complaint presented an issue of subject-matter jurisdiction, we affirm the dismissal of this case on narrow grounds, focusing solely on the extraterritorial nature of Villanueva's disclosures about alleged violations of foreign law without a sufficient connection to violations of domestic laws.

BACKGROUND

A. Facts

The undisputed facts are set out in the administrative record.[3] Respondent Core Laboratories N.V. (Core Labs) is a Netherlands limited liability company headquartered in Amsterdam. The company's securities are registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), and are publicly traded on the New York Stock Exchange. Core Labs provides services to petroleum industry clients in more than 50 countries and has more than 70 offices. The company's U.S. office is in Houston, Texas. Saybolt de Colombia Limitada (Saybolt Colombia) is a Colombian limited liability company that is headquartered in Bogota, Colombia, and is an indirect affiliate of Core Labs. Saybolt Colombia does not register securities under Section 12 or file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)). Saybolt Colombia is 95 percent owned by Saybolt Latin America B.V., which is wholly owned by Saybolt International B.V., which is wholly owned by Core Labs.[4]

Complainant Villanueva lived and worked in Botoga for Saybolt Colombia for more than 24 years, the last 16 years as the company's General Manager (CEO).[5] Villanueva is a non-United States citizen who never worked in the United States during his employment at Saybolt Colombia.[6] Villanueva alleged that Core Labs orchestrated a transfer pricing scheme in 2008, by requiring Saybolt Colombia to use Core Laboratories Sales, N.V. (Core Lab Sales) as the contracting party for inspection services that Saybolt Colombia performed for non-Colombian clients. Core Lab Sales is domiciled in the Dutch Antilles. As part of the scheme, 10% of the

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[3] See Joint Statement of Undisputed Facts (filed Jan. 9, 2009); Respondent's Supplemental Facts (filed Apr. 13, 2009); see also ALJ Decision at 2-3.

[4] See ALJ Decision at 2; see also Statement of Undisputed Facts at 1-2; Supplemental Facts at 1-2.

[5] Villanueva Declaration (Dec.) at 1-2.

[6] Statement of Undisputed Facts at 2.

contract revenues were paid to Core Lab Sales even though it did not procure the contracts or conduct the services.[7] The Complainant believed that Core Labs' corporate accounting department in Colombia wrongfully claimed Value-Added-Tax (VAT) exemptions on work transferred to Core Lab Sales and that, as a result, Saybolt Colombia, his employer, was able to under-report its taxable revenue to Colombian authorities. Villanueva raised these concerns in January 2008 to various employees within Saybolt Colombia and Core Labs, including in e-mails to Fernando Padilla, Controller for Saybolt Colombia, and Osiris Goenaga, Core Labs' accounting assistant for Colombia.[8] Villanueva requested that Padilla correct the tax exemptions before closing the books for Saybolt Colombia on March 31, 2008.[9] Villanueva copied C. Brig Miller, who was Chief Accounting Officer for Core Labs, and was based in Houston, Texas.[10] Miller responded that to make the requested corrections required more information, and that Villanueva's Colombian operation received financial credit for all the Core Lab Sales transactions.[11]

Between January and April 2008, two Colombian law firms provided Villanueva with opinion letters, both of which failed to find any impropriety in the VAT exemptions taken under Colombian law for the transactions between Saybolt Colombia and Core Labs.[12] Villanueva, who has a Colombian law degree, was dissatisfied with the legal findings and conducted his own review of Colombian tax law and the VAT exemptions.[13] Villanueva refused to sign Saybolt Colombia's tax returns, which were due for filing with Colombian tax authorities by April 17, 2008.[14]

A few days before the tax returns were due, Villanueva alleged that he was denied a pay raise that other Saybolt Colombia employees received on April 3, 2008. Villanueva believed that the decision to deny him the raise was made by Ivan Piedrahita, Regional Manager for Saybolt Latin America B.V., and Jan Heinsbroek, President of Saybolt Latin America, B.V. and a director of Saybolt International B.V. Later that month, on April 29, 2008, Villanueva's

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7 Villanueva Dec. at 2-3.

8 Villanueva Dec. at 3-4.

9 Villanueva Dec. at 8, Exhibit A.

10 Villanueva Dec. at 4.

11 Villanueva Dec., Exhibit B; see also *id.* at 4.

12 Villanueva Dec. at 5-6, 10-11.

13 Villanueva Dec. at 7-8, Exhibit H.

14 Statement of Undisputed Facts at 2.

employment was terminated in a letter signed by Heinsbroek, and written in Spanish and delivered to Villanueva by Piedrahita. [15]

B. Administrative proceedings

Villanueva filed a complaint with the Occupational Safety and Health Administration (OSHA) on July 28, 2008, alleging that Saybolt Colombia and Core Labs violated SOX Section 806 by retaliating against him and terminating his employment. OSHA dismissed the complaint on August 29, 2008.[16] Villanueva disagreed with OSHA and requested an ALJ hearing. The parties filed a joint statement of facts, and the Respondents filed supplemental facts. On November 5, 2008, the ALJ issued an order to show case why Villanueva's complaint should not be dismissed for lack of subject matter jurisdiction "due to the foreign nature of the employment relationship" and that the facts presented did not appear to be covered under SOX. ALJ's Order to Show Cause at 4.

Citing various reasons, Villanueva argued that his complaint did not trigger the extraterritorial application of SOX. He argued that the statute's coverage is not restricted to employees located in the United States. He also proffered evidence to support his claim that the allegedly fraudulent scheme he disclosed and the retaliatory termination of his employment were perpetrated by American executives of Core Labs within the United States. Villanueva argued that the circumstances presented in his case were analogous to the facts of *O'Mahony v. Accenture LTD*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008), which held that extraterritorial application of Section 806 was not triggered where there is a substantial nexus between the foreign complainant and the United States.[17] Relying on *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir.), *cert. denied*, 548 U.S. 906 (2006), Respondents Core Labs and Saybolt Colombia argued that SOX Section 806 did not apply extraterritorially. The Respondents also argued that the ALJ had no jurisdiction over the complaint because Villanueva alleged fraud and retaliation that occurred outside the United States.[18]

C. ALJ Decision

Relying on the court of appeals' decision in *Carnero*, the ALJ determined at the outset that Section 806 does not contain a clear expression of congressional intent to extend its reach extraterritorially. ALJ Decision at 4 ("The First Circuit has found that Congress intended the Act to apply only domestically" and that the statute "does not extend extraterritorially to cover a

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[15] See Respondent's Response to Show Cause, Exh. A (Affidavit of Mark F. Elvig, General Counsel, Core Labs) (stating that Villanueva was terminated by Heinsbroek, President of Saybolt Latin America, B.V); see also Villanueva Complaint at 8 (stating that the "termination letter, which was written in Spanish" was "delivered to Mr. Villanueva . . . by Mr. Piedrahita.").

[16] OSHA letter dated Aug. 29, 2008.

[17] Complainant's Brief in Response to Order to Show Cause at 1-9.

[18] Respondent's Brief in Response to Order to Show Cause at 4-11.

foreign employee working overseas for a foreign company conducting its business in a foreign country."). The ALJ determined that any "[j]urisdiction over Villanueva's complaint hinged on whether its adjudication required extraterritorial application." *Id.*

The ALJ rejected Villanueva's contention that the facts of his case do not trigger extraterritorial application of Section 806. Comparing the facts of Villanueva's case with those presented in *Carnero*, where the court of appeals dismissed the complaint, and *O'Mahoney*, where the district court reversed the DOL's dismissal of the complaint, the ALJ determined that the facts of Villanueva's complaint were "more aligned" with those of *Carnero* than with *O'Mahony*. ALJ Dec. at 4. The ALJ observed that *Carnero* involved an Argentine citizen residing in Brazil and working for a Latin American subsidiary of a publicly traded American company listed on the New York Stock Exchange. *Id*. The complainant in *Carnero* alleged that he was "wrongfully terminated for revealing that the [American company's foreign] subsidiary created false invoices and inflated sales figures in Latin America." *Id.*, citing *Carnero*, 433 F.3d at 2-3. The ALJ found that Villanueva had "no connection with the United States" and that "[d]uring his 24-year career with Saybolt Colombia, he was never a U.S. citizen or resident, he was never assigned to work in the United States, and he was never directly employed by any other Core Labs affiliate," the "exact scenario" in *Carnero*. ALJ Decision at 5.

The ALJ further determined that even "focus[ing] solely on the location of where the alleged fraudulent conduct and retaliation occurred" there "is still not a sufficient nexus with the United States." *Id.* at 6. The ALJ found that the alleged fraudulent pricing scheme involved Saybolt Colombia's actions outside the United States. Saybolt Colombia "assigned contracts to Core Lab Sales in the Dutch Antilles," and the "contracts covered inspection services by Saybolt Colombia outside the United States, which allegedly resulted in tax underpayments to the Colombian government." *Id.* at 6. The ALJ stated that the "same holds true for the alleged retaliation." *Id.* The ALJ found that Villanueva's pay raise issue involved "payment of salary to a foreign national directly employed by an overseas company for work performed outside the United States." *Id.* The ALJ also found that Villanueva's discharge came in a letter written in Spanish and hand delivered to his office in Colombia. The ALJ stated that these actions "occurred outside the United States and involved an employment relationship between a foreign employer and its foreign employee" and further observed that, even assuming Core Labs' executives in Houston made the decision to discharge Villanueva, he still had "no connection" with the U.S. and all of the alleged protected activity and retaliation occurred abroad. *Id.* at 6-7. Based on these findings, the ALJ concluded that applying Section 806 to Villanueva's case would require an "impermissible extraterritorial application" of the Act. *Id.* at 7.

The ALJ dismissed Villanueva's complaint for lack of subject matter jurisdiction. Villanueva petitioned for review. The case is now before the ARB, sitting en banc.[19]

[19] On June 24, 2011, the ARB issued an Order for Supplemental Briefing asking four questions on extraterritoriality. The Complainant and the Respondent filed supplemental briefs. The Assistant Secretary of Labor for Occupational Safety and Health filed an amicus curiae brief. The National Employment Lawyers Association, National Whistleblowers Center, the Equal Employment

JURISDICTION

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under SOX. *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1980.110(a). The ARB reviews the ALJ's factual determinations for substantial evidence, and conclusions of law de novo. *See Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005); *see also* 29 C.F.R. 1980.110(b).

DISCUSSION

A. Statutory framework

The SOX's employee protection provision generally prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to categories listed in the SOX whistleblower statute. Section 806 states:

> (a) *Whistleblower Protection For Employees Of Publicly Traded Companies.*— No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 79c), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
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> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to

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Advisory Council, and the U.S. Chamber of Commerce also filed amicus briefs. The ARB thanks these entities for their participation.

> fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
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> > (A) a Federal regulatory or law enforcement agency;
> > (B) any Member of Congress or any committee of Congress; or
> > (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A.

SOX complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West Supp. 2011). 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) he suffered an adverse personnel action; and (3) the protected activity was a contributing factor in the unfavorable action. *Getman*, ARB No. 04-059, slip op. at 7; *see also Peck v. Safe Air Int'l, Inc*., ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004).

B. Section 806(a)(1) of SOX lacks the extraterritorial reach required in this case

In *Morrison v. National Australian Bank, Ltd.*, the Supreme Court recently reaffirmed the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" 130 S. Ct. 2869, 2877 (2010), quoting *EEOC v. Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991). "This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate." *Id.*, citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932). "It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Morrison*, 130 S. Ct. at 2877. The Court stated that "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" *Id.*, quoting *ARAMCO*, 499 U.S. at 248. In analyzing "clear evidence of Congress's intent, courts consider 'all available evidence' about the meaning of the statute,

including its text, context, structure, and legislative history." *Carnero,* 433 F.3d at 7 (citing *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993).

The Court in *Morrison* engaged in a two-step process to resolve the disputed extraterritoriality issue in reviewing the dismissal of a securities fraud claim. In *Morrison,* Australian investors filed claims in a United States federal court pursuant to Section 10(b) of the Securities Exchange Act of 1934, alleging that the defendant Australian bank committed securities fraud. First, the Court determined whether Section 10(b) had any extraterritorial reach. Second, the Court determined whether the essential part of the transnational transactions occurred domestically or extraterritorially. The Court concluded that (1) Section 10(b) had no extraterritorial reach, and (2) the essential part of the transnational business activity occurred extraterritorially and outside the domestic reach of Section 10(b). See *Morrison*, 130 S. Ct. at 2877-2883.

In the first step of its analysis, determining the extraterritorial reach of Section 10(b), the Court in *Morrison* reiterated that the question of extraterritoriality requires a textual analysis, which begins with a presumption against extraterritoriality. In other words, whether a statute has extraterritorial reach turns on the statutory text, the relevant statutory context, and the statute's legislative history. *See Morrison,* 130 S. Ct. at 2883 (Court engaged in textual analysis and concluded there was no extraterritorial reach). The conduct or effect in any particular case does not alter a statute's extraterritorial reach. *Id.* at 2878 ("[w]hen a statute gives no clear indication of an extraterritorial application, it has none" and no amount of conduct or effect could change the textual conclusion). Moreover, if the text allows for any extraterritorial reach, it must be narrowly construed to avoid going beyond the terms of the statute. *Id.* at 2883.

In the second step, determining where the essential events occurred, the Court first determined the primary focus of the Securities Exchange Act of 1934. It is important to note that the Court analyzed the primary focus of the Securities Exchange Act and not simply 10(b).[20] The Court determined that the Act's primary focus was to protect the "purchase and sale of securities in the United States." 130 S. Ct. at 2884. The transactions in question in *Morrison* were purchases of shares on the Australian stock exchange rather than United States' securities exchanges. Consequently, the Court reasoned that the transactions in question were extraterritorial. Under the Court's reasoning then, the securities fraud claims in *Morrison* were extraterritorial and, therefore, outside the domestic reach of 10(b). The Court affirmed the dismissal of the claims in that case.

We apply *Morrison* and believe that we can begin with either step in that analysis, i.e., analyzing Section 806's extraterritorial reach or determining the SOX's primary focus.[21] We

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[20] In *Morrison, the* Court expressly relied on *ARAMCO* when it turned to the "focus of the Exchange Act" as a whole rather than Section 10(b). Similarly, the Court looked to the "focus of the Securities Act of 1933" to bolster its conclusion. 130 S. Ct. at 2884.

[21] We appreciate that *Morrison* rejected the "conducts and effects" test and arguably identified a new method of determining whether a claim involves extraterritorial activity. But the presumption

will begin with the latter question, and while we decide this case on the locus of the fraud Villanueva reported, we recognize that the labor elements can also play a role in determining whether or not events alleged in a complaint would require extraterritorial application of Section 806. [22] We do not have to decide the labor aspects presented in this case, however, because we have no doubt that a primary focus of SOX generally is to prevent and uncover corporate

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against extraterritoriality is not new law. *See, e.g., ARAMCO*, 499 U.S. at 248; *Blackmer*, 284 U.S. at 437. We also permitted the parties to file supplemental briefs to discuss *Morrison*'s implications for this case. In Villanueva's supplemental brief, he addressed the second step in the *Morrison* model and expressly agreed that we should focus on SOX in general rather than solely on Section 806. He then described the "focus of SOX in general [as] the protection of investors in securities listed on US [sic] Exchanges." Complainant's Supplemental Brief at 7. Even so, he reasserted that he complained about violations of foreign laws and did not expressly implicate violations of domestic securities or financial disclosure laws. See *id*.,at 12 (Villanueva continued to refer to the evasion of "Colombian taxes"). He attached a one-page exhibit to his supplemental brief showing that Saybolt Colombia was a subsidiary of Core Labs, but this document did not implicate violations of U.S. laws. Consequently, we believe that Villanueva had ample opportunity to indicate that his concerns implicated domestic laws or concerns and, perhaps to his credit, he did not alter or amend his allegations.

[22] But in starting with the second step, we fully recognize that within the context of SOX, Section 806 has the additional focus of protecting employees who suffer an adverse action for reporting allegations of financial fraud committed by their employer. 15 U.S.C.A. § 1514A; see also Statement of the President of the United States signing H.R. 3763, 38 Weekly Compilation of Presidential Documents 1286 (July 30, 2002) (stating that the "legislative purpose of section 1514A of Title 18 of the U.S. Code, enacted by section 806 of the Act, is to protect against company retaliation for lawful cooperation with investigations"). While this paramount issue of congressional concern is captured by the enactment of Section 806, we need not decide this particular case on that basis since the facts weigh so heavily in favor of the ALJ's finding that Villanueva's reporting activity was extraterritorial and outside Section 806's scope. ALJ Decision at 6; see also *infra* at 12-13. A complainant alleging a violation of Section 806 must show that he engaged in protected activity, that the employer took an unfavorable action against him, and the protected activity was a contributing factor in the adverse action. *See Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 2010-SOX-003, slip op. at 5 (ARB Nov. 9, 2011). In assessing whether a complainant's claims would require extraterritorial application of Section 806, the location of the protected activity would be a factor (which is indeed the driving factor in this case), the location of the job and the company the complainant is fired from, the location of the retaliatory act, and the nationality of the laws allegedly violated that the complainant has been fired for reporting – all of these are indeed a focus of the Section 806 component of SOX. The ALJ in this case determined that the principal parts of this case are indeed extraterritorial, even if there are also components that might be domestic, and denied the complaint largely on that basis. ALJ Decision at 6-7. We deny the complaint as well, but on the basis that the driving force of the case, the fraudulent activity being reported, was solely extraterritorial and takes the events outside Section 806's scope. Indeed, a case where the complainant, for example, is working for a covered company in the United States, but may have worked in a foreign office of the company for part of the time, may require a different outcome; however, we do not address such a situation at this time.

financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (July 30, 2002); see also *id.* Title VIII – Corporate and Criminal Fraud Accountability, Sections 801-807. In this case, the alleged fraud and/or law violations involved Colombian laws with no stated violation or impact on U.S. securities or financial disclosure laws. See Statement of Undisputed Facts at 2 (Villanueva "did not certify and file Saybolt Colombia's income tax returns with Colombian tax authorities"); Villanueva Complaint at 2 (alleging "V[alue] A[dded] T[ax] Fraud" stemming from "services provided by Saybolt Colombia with respect to CLSNV transactions [that] did not qualify for any exemption to the VAT tax imposed on services by the Colombian government"); Villanueva Dec. at 2, 3 (same). Enforcing compliance or punishing noncompliance with Colombian financial laws necessarily implicates extraterritorial enforcement. Consequently, the narrow question becomes whether Section 806(a)(1) includes extraterritorial laws within its definition of protected activity or whether the presumption against extraterritoriality limits the definition to domestic securities and financial disclosure laws, which brings us to the first part of the *Morrison* test.

Turning to the words of the statute first, there is certainly no indication that Section 806(a)(1) includes extraterritorial securities and financial laws. In fact, the words suggest that the six categories are limited to violations of U.S. laws given its reference to the "[U.S.] Securities and Exchange Commission" and "[U.S.] Federal law." 18 U.S.C.A. § 1514A(a)(1). Otherwise, that section simply lists six categories of protected disclosures. Absent a clear context in SOX or clear legislative history, we must interpret Section 806(a)(1) to refer only to the violation or implication of domestic securities laws, criminal laws, and financial regulation only. We see no clear context or legislative history extending the six protected categories to include extraterritorial laws without demonstrating a connection to a domestic law.[23]

Looking at other statutes by comparison, the Supreme Court has invoked the presumption against extraterritoriality in cases involving the text of broad regulatory statutes that arguably contained stronger textual language than that of Section 806(a)(1), and has found that these statutes fall short of overcoming the presumption. In *Morrison*, the Court looked at certain language set out in Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), to determine whether Congress gave a clear indication of extraterritorial application. The definition of "interstate commerce" in Section 10(b) of the Exchange Act included "trade, commerce, transportation, or communication between any foreign country and any State." 15 U.S.C. 78c(a)(17); see also *Morrison*, 130 S. Ct. at 2882. The Court stated that "even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad.'" *Id.*, citing *ARAMCO*, 499 U.S. at 251 (discussing cases). In describing its purposes, the Exchange Act stated that "prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries." 15 U.S.C. 78b(2). The Court held, however, that this language did not overcome the

[23] Even if we accept as true that Core Labs used the United States mail and wires to allegedly orchestrate the violation of foreign laws, under the specific facts of this case involving alleged fraudulent transfers from one foreign country to another, we do not believe that reliance on 18 U.S.C. 1341 can save this claim. *Compare Pasquantino v. U.S.*, 544 U.S. 349, 353 (involved the smuggling of liquor purchased in the United States).

presumption against extraterritoriality. *Morrison*, 130 S. Ct. at 2882. *See also Sale*, 509 U.S. at 173 (holding that Section 243(h) of the Immigration and Nationality Act of 1952 did not protect aliens seized by authorities on high seas, despite broad language in statute referring to "any alien"); *ARAMCO*, 449 U.S. at 249 (holding that Title VII then in force did not regulate employment practices of U.S. firms employing U.S. citizens abroad, even though the statute contained broad provisions extending its prohibitions to, for example, "any activity, business, or industry in commerce"); *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (holding that federal labor statute requiring an eight-hour day provision in "[e]very contract made to which the United States . . . is a party" did not apply to contracts for work performed in foreign countries).

After Villanueva filed his complaint, Congress enacted Section 929A of the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1852 (2010), clarifying that Section 806(a) applied to "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of an otherwise covered company. Like Section 806, the statutory text of Section 929A, however, is silent as to its extraterritorial application. *See also* The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, 111th Cong., 2d Sess. (Apr. 30, 2010), 2010 WL 1796592, at *99 (2010). Unlike in Section 929A, the statutory terms of which make no reference to its extraterritorial application, Section 929P of Dodd-Frank, see 124 Stat. 1864-1865, does make that reference and expands the scope of jurisdiction of federal courts over actions or proceedings "brought or instituted by the [Securities Exchange] Commission or the United States alleging a violation" involving "securities transactions occur[ing] outside the United States and involves only foreign investors" or "conduct occurring outside the United States that has a foreseeable substantial effect within the United States." 124 Stat. 1864-1865 (referring to authority of SEC and United States to bring actions in federal courts under 15 U.S.C. 77v(a), 15 U.S.C. 78aa, and 15 U.S.C. 80b-14). Likewise, when Congress enacted SOX, it gave federal courts extraterritorial jurisdiction over criminal proceedings involving individuals charged with "retaliating against a witness, victim or an informant." 18 U.S.C. § 1513(d) ("There is extraterritorial Federal jurisdiction over an offense under this section."). Where Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion of exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see ARAMCO*, 499 U.S. at 258. Section 806(a)(1)'s silence as to its extraterritorial application requires that we not extend it in that way. Thus we hold that Section 806(a)(1) does not allow for its extraterritorial application.

C. The fraudulent activity Villanueva reported is outside Section 806(a)(1)'s reach

Villanueva contends that applying Section 806 to the facts of his case would not trigger extraterritorial application of the statute. More specifically, he asserts that SOX Section 806 need not be applied extraterritorially because Core Labs' executives in Houston, Texas, directly controlled the fraudulent scheme to evade taxes, refused him a pay raise, and ordered his discharge.[24] We disagree. These arguments would not obviate applying Section 806(a)(1) extraterritorially.

[24] Complainant's Brief at 12-15.

The alleged fraud that Villanueva complained of involved allegedly improper transactions between two foreign companies, Saybolt Colombia and Core Laboratories Sales NV, which is located in the Dutch Antilles, and is grounded in what Villanueva perceived as Saybolt Colombia's under-reporting of income to the Colombian tax authorities. The onus of the alleged fraud involved actions affecting foreign companies doing business in a foreign country, and a failure to comply with foreign tax law. Indeed, there is nothing in the record asserting that Core Labs' U.S. accounting policy was fraudulent. Instead, the alleged fraud centered on the accounting practices of Saybolt Colombia and its compliance with Colombian tax law. The fact that Villanueva reported the alleged misconduct to Core Labs officials in Houston, or that they responded to his inquiries[25] does not change the foreign nature of the alleged fraud. In *Morrison*, plaintiffs were foreign investors alleging securities fraud against an Australian bank as to a foreign transaction. To undercut the extraterritorial implication, plaintiffs alleged that the deception took place in Florida. The Court ultimately rejected this argument and held that even some domestic contact will not convert an extraterritorial application to a domestic one. See *Morrison*, 130 S. Ct. at 2884 ("it is a rare case of prohibited exterritorial application that lacks all contact with the territory of the United States.").

In response to the ALJ's order to show cause, Villanueva submitted evidence that he purports shows that Core Labs directly controlled all aspects of Saybolt Colombia's business, finances, and operations.[26] These facts, if true, however, do not change the fact that the disclosures involved violations of extraterritorial laws and not U.S. laws or financial documents filed with the SEC. Villanueva did not point to a U.S. law or domestic financial statement that was fraudulent. Therefore, under the facts presented in this case, Villanueva's reporting of foreign tax law is beyond the reach of Section 806.

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[25] *See* Villanueva Dec., Exhibits A, B, E, F, I, and K.

[26] Villanueva asserts that Core Labs controls Saybolt Colombia because Core Labs (1) approves all hiring and firing of its employees, (2) approves sales of all assets, (3) requires all sales contracts between Saybolt and its international customers to be signed by Core Labs, (4) controls all Saybolt bank accounts, (5) mandates training in and compliance with its corporate ethics code, and (6) influences Saybolt's accounting through its "Corporate Accounting Policies" and routine audits. In support of these assertions, he points to Exhibit C, M-S, Villanueva Dec. at 13-15. Exhibit C consists of flow charts showing which legal entity should sign a contract and invoice a customer. The e-mails in Exhibits M and O were sent to Piedrahita, Saybolt Latin America regional manager, not to a Core Labs manager. Exhibit N is a 2003 contract between Sunoco and Saybolt, a division of Core Labs Sales. Exhibit P is a letter From Core Labs' Treasury Department seeking an update on signatories for all company bank accounts. Exhibit Q is a bad debt reserve worksheet from Core Labs' accounting for the period ending March 31, 2008. Exhibit R is scheduling a routine internal audit of the Shared Service Center in Bogota. Exhibit S is a reminder letter instructing all employees to take the refresher course in ethics information online.

CONCLUSION

We find that Section 806(a)(1) does not allow for the extraterritorial application that this case would require and **AFFIRM** the ALJ's order dismissing the complaint.[27]

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

Joanne Royce, Administrative Appeals Judge, dissenting.

The ALJ dismissed this case based upon a finding that Section 806 of the Sarbanes-Oxley Act (SOX) lacked extraterritorial application. Citing the fact that Villanueva was a foreign employee who worked for a foreign subsidiary, the ALJ dismissed the case based upon "the foreign nature of the employment relationship."[28] This was error. Under *Morrison*, 130 S. Ct. 2869, the "foreign nature of the employment relationship" is not determinative of whether Section 806 may be applied extraterritorially. For reasons explained below, I believe Section 806 applies extraterritorially, and Villanueva has alleged a set of facts sufficient to survive summary dismissal. I would remand to the ALJ for further proceedings.

In *Morrison*, the Supreme Court reiterated its longstanding presumption against extraterritoriality, namely that unless a contrary intent appears, a statute is meant to apply domestically.[29] Congress clearly expressed extraterritorial intent in Section 806. Section 806 applies to all companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of

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[27] The ALJ in this case dismissed the complaint for lack of subject matter jurisdiction. We re-label the dismissal as a sua sponte order by the ALJ dismissing the case for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), as the Court did in *Morrison*, and deny the complaint on that basis. *See Morrison*, 130 S. Ct. at 2876-2877.

[28] ALJ Decision at 6, 7.

[29] *Morrison*, 130 S. Ct. at 2877.

the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d))." This coverage, by definition, includes "foreign private issuers" (corporations incorporated under the laws of a foreign country), which have long been subject to U.S. securities laws by virtue of electing to trade in the U.S.[30] The intrinsic inclusion of foreign parties within the plain language of Section 806's proscription evinces Congressional intent for the statute to apply extraterritorially. Section 806 does not explicitly distinguish between U.S. and foreign companies subject to its authority. Nonetheless, Congress chose to define the statute's coverage by using a particular and technical definition that unambiguously includes foreign firms.[31]

Morrison noted that the "clearly expressed" affirmative intention of Congress required to give a statute extraterritorial effect is derived not only from the text of the statute, but also its context, structure, and legislative history.[32] In *Morrison,* the Supreme Court addressed interpretation of securities laws passed a generation ago. By contrast, Section 806 was passed in 2002 in the context of an increasingly global financial market where extraterritorial operations are the rule rather than the exception. The context and legislative history of Section 806 lend additional support for its extraterritorial application.

Congress enacted SOX Section 806 as part of wide-ranging legislation aimed at restoring market integrity by preventing and uncovering corporate financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws.[33] Section 806 was viewed as a "crucial" component of SOX for "restoring trust in the financial markets by ensuring

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30 Reporting and disclosure requirements under U.S. securities law have long applied to foreign private issuers who wished to sell securities to the public in the U.S. or to list a class of their securities on a U.S. national securities exchange. SOX represented a departure from this disclosure-based regulation by subjecting issuers, domestic and foreign alike, to more burdensome mandates. While SOX, and the SEC rules promulgated under SOX's authority, are generally applicable to foreign companies, a number of SEC rules provide exceptions from SOX requirements for foreign private issuers. *See, e.g.*, Natalya Shnitser, Note, *A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers*, 119 YALE L.J. 1638, 1653 (2009).

31 *Compare* Harvey L. Pitt, Chairman, SEC, A Single Capital Market in Europe: Challenges for Global Companies, Remarks at the Conference of the Institute of Chartered Accountants of England and Wales (Oct. 10, 2002), available at http://www.sec.gov/news/speech/spch589.htm ("As we continue our reform of our disclosure and auditing processes, we need to consider how any changes we make will affect foreign as well as domestic issuers and investors. Sarbanes-Oxley generally makes no distinction between U.S. and foreign private issuers listed in the United States. It applies equally to all who seek to access U.S. capital markets. We are committed to implement the Act in a manner fully consistent with its purpose and intent.").

32 *See Morrison*, 130 S. Ct. at 2883 ("Assuredly context can be consulted as well" to determine whether a statute applies abroad.).

33 *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (July 30, 2002); *see also id.* Title VIII – Corporate and Criminal Fraud Accountability, Section 801-807.

that corporate fraud and greed may be better detected, prevented and prosecuted."[34] Congress adopted SOX against a backdrop of corporate misconduct conducted on a global arena and was well aware that sustaining market integrity would require more than a purely domestic focus. The SOX's legislative history contains repeated references to the interconnectedness and internationalization of national markets.[35] To quote just one such reference, Senator Bayh stated:

> We exist in a global economy today and transparency and reliability of financial data is critically important to the functioning of the global economy. This has significant effects upon the United States. . . . We are affected by the reliability – or lack thereof – of financial accounting standards abroad. And our country, as we have seen several times in the last decade, can be affected by financial shocks abroad, occasionally brought on by a lack of financial transparency in some other markets.[36]

With the passage of SOX, Congress sought to regulate the U.S. financial market in the second millennium – a market heavily globalized and complicated with vast foreign markets and substantial foreign ownership, not to mention outsourcing, off-shoring, and instantaneous cross-border electronic securities transactions in cyberspace. Limiting Section 806, a critical weapon in SOX's arsenal of combating financial misconduct, to domestic activity would severely undercut Congress' remedial purpose. Congress could not have intended a mechanism so anachronistic and ill-suited to modern market conditions.[37]

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[34] *Sylvester v. Parexel Int'l,* ARB No. 07-123, ALJ No. 2007-SOX-039,-042; slip op. at 9 (ARB May 25, 2011), quoting S. Rep. 107-146 at 2 (May 6, 2002).

[35] *See generally Walters v. Deutsche Bank AG,* ALJ No. 2008-SOX-070, slip op. at 34-38 (Mar. 23, 2009).

[36] Accounting Reform and Investor Protection: Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs, 107th Cong. (Feb. 14, 2002)(comments of Senator Evan Bayh), Arnold & Porter Sarbanes-Oxley Act Legis. History 8-B (SAROX-LH 8_B available at http://www.westlaw.com.

[37] Within a month of issuance of the *Morrison* decision, Congress responded by partially overriding the opinion. Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1852 (2010)(Dodd-Frank) explicitly codified the long-standing federal court jurisprudence regarding the extraterritorial reach of securities law. Congress clearly intended this provision to reinstate extraterritorial reach to securities law in the context of federal enforcement. *See* Richard Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act,* 20 MINN. J. INT'L L. 1, 2 (Winter 2011). In so doing, Congress reaffirmed its recognition that securities law enforcement in today's environment of multinational corporations and global finance requires extraterritorial authority.

The essential extraterritorial authority contained in Section 806 is reflected throughout SOX where numerous other provisions are routinely accorded extraterritorial application despite the absence of express extraterritorial language.[38] This intrinsic extraterritoriality is based upon the fact that, like Section 806, they contain prescriptions linked to companies that are publicly traded. The express language of Section 806 covers any company required to register its securities under Section 12 of the Exchange Act or required to file reports under Section 15(d) of that Act. Publicly traded companies are similarly the focus of SOX as a whole,[39] as well as the target of many specific mandates contained in the larger Act. For example, Section 301 regulates internal accounting and auditing controls of publicly traded companies, domestic and foreign alike. It also mandates that these companies establish a procedure for anonymous and/or confidential reporting of accounting misconduct.[40] Section 302 requires certain corporate officers to attest to the accuracy of financial reports filed with the SEC. This provision also applies extraterritorially.[41] Under Section 307 attorneys, including foreign attorneys, are required to report evidence of securities law misconduct to company officials. [42] Section 404 requires corporate officers, including those of foreign private issuers, to establish and maintain an adequate internal control structure and procedures for financial reporting.[43] In connection with passage of Section 302, Senator Graham stated as follows:

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[38] For a more complete listing of the SOX myriad provisions that have been accorded extraterritorial reach, see *Walters,* ALJ No. 2008-SOX-070, slip op. at 32-33.

[39] The definition of "issuer" to which SOX is pegged, is slightly broader than the definition of companies subject to Section 806; issuer also includes companies in the process of becoming listed on a U.S. exchange. *See* SOX, Section 2(a)(7).

[40] Companies operating in France and Germany have objected to the extraterritorial application of the anonymity requirement under Section 301's whistleblower hotline mandate. *See* Marisa Anne Pagnattaro and Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375, 377 (2007). Nevertheless, it begs the question of why SOX would require foreign issuers to set up whistleblower hotlines but not protect employees who face retaliation for using the hotlines.

[41] *See Walters,* ALJ No. 2008-SOX-070, slip op. at 32.

[42] Section 307 directs the SEC to "issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers," including a rule requiring the internal reporting material violations of securities laws. The SEC has applied this internal reporting provision to domestic and foreign attorneys. *See* 17 C.F.R. § 205.2(a)(2)(ii), (c), (j) (2011).

[43] The SEC explained this provision as follows: "Section 404 of the Sarbanes-Oxley Act makes no distinction between domestic and foreign issuers and, by its terms, clearly applies to foreign private issuers. These amendments, therefore, apply the management report on internal control over financial reporting requirement to foreign private issuers. . . ." Management's Report on

> If companies are being publicly traded in the United States, regardless of where their headquarters are located, they ought to be required to meet the same level of accountability that we are establishing for everyone else in this legislation.
>
> Let's not give U.S.-based companies one more reason to leave our Nation and incorporate someplace else. We need to hold all companies in our markets to the same high standard –there should be no reward of a lower standard if your company leaves the U.S. for a new overseas headquarters.[44]

The same reasoning applies with equal force to application of Section 806. Because provisions of a statute dealing with the same subject matter should be interpreted similarly,[45] Section 806 must be construed to apply extraterritorially, consistent with the other SOX provisions regulating publicly traded firms.

One final contextual argument supports the reading of Section 806 to apply abroad. The judicial backdrop to the passage of SOX was nearly 40 years of federal jurisprudence supporting the extraterritorial application, however qualified, of securities laws.[46] Legislation must be interpreted in light of the scheme of jurisprudence existing at the time of its enactment.[47] Because Congress acts with knowledge of existing law and expects its statutes to be read in conformity with established precedent, Section 806 should be interpreted to apply extraterritorially.[48]

Section 806 contains a clear indication of an extraterritorial application with respect to covered employers and, by extension, employees. Although Section 806 does not explicitly cover foreign employees, it *does* explicitly cover employees of publicly traded companies, which

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Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports; Final Rule, 68 Fed. Reg. 36,636, 36,647 (June 18, 2003)(codified at 17 C.F.R. Parts 210, 228, 229, 240, 249, 270, 274).

[44] 148 Cong. Rec. S6698 (daily ed. July 12, 2002)(statement of Sen. Bob Graham).

[45] *See* Norman J. Singer & J.D. Shambie Singer, 2B SUTHERLAND STATUTORY CONSTRUCTION § 51:1 (7th ed. 2011).

[46] *See Morrison*, 130 S. Ct. at 2878-2880.

[47] *See* Singer & Singer, supra note 17, at § 50:1 ("The antecedent common law pertaining to the subject with which a statute deals comprises part of its legal history.").

[48] *See White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434-35 (11th Cir. 1997).

by definition include foreign employers. It is logical to assume that Congress contemplated that foreign employers would employ foreign employees. Under the plain language of the statute, available remedies are not therefore limited to U.S. residents or citizens.

Despite the extraterritorial reach implicit in Section 806's coverage of foreign employers and employees, Congress went no further in explicitly defining the extent of Section 806's extraterritorial authority. *Morrison* is not particularly helpful in parsing a provision like Section 806, which provides for some extraterritorial application but is silent as to the details.[49] In *Hartford Fire Ins. Co. v. California*,[50] the Supreme Court suggested that where a statute (the Sherman Act) had a measure of extraterritorial application, its authority to reach certain foreign conduct might nevertheless be constrained by principles of international comity. The Court ruled however that the circumstances of the case before it contained no conflict of laws and international comity was not implicated. The same holds true of the facts as alleged by Villanueva. At this juncture, there is no need to further define the foreign reach of Section 806. As explained by Judge Brown in his dissent, the facts as alleged by Villanueva, which we must accept as true, do not implicate application of extraterritoriality beyond coverage of foreign employers and employees. I would reverse the judgment of the ALJ and remand the case for further proceedings.

JOANNE ROYCE
Administrative Appeals Judge

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, dissenting.

I join with Judge Royce in her dissent because I agree, for the reasons she states, that 18 U.S.C. § 1514A (Section 806 of SOX) has extraterritorial applicability. I write separately because I am also of the opinion that if, as the majority concludes, Section 806(a)(1) does not have extraterritorial applicability, the evidence of record presently before the Board, viewed in the light most favorable to Villanueva,[51] nevertheless presents what is clearly under *Morrison v.*

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49 The second part of the *Morrison* analysis in my view presumes the finding of no extraterritoriality reached in the first part of the analysis. As the majority notes, "our threshold conclusion that § 10(b) has no extraterritorial effect does not resolve this case, it is a necessary first step in the analysis." *Morrison*, 130 S. Ct. at 2884, n.9. If it is determined that a statute has some extraterritorial effect, I do not see how application of *Morrison*'s "focus" test would assist in determining the reach of that extraterritoriality.

50 509 U.S. 764, 798 (1993).

51 The instant case comes before the ARB as the result of the dismissal of Villanueva's complaint pursuant to an Order to Show Cause issued by the presiding ALJ. Within this context, the Board is obligated to view the evidence of record in the light most favorable to Villanueva. *Mara v. Sempra Energy Trading*, ARB No. 10-051, 2009-SOX-018 (ARB June 28, 2011); *Jackson v. SNE Transp. Co.*, ARB No. 07-050, 2006-STA-037 (ARB Oct. 31, 2008).

National Australia Bank, Ltd., 130 S. Ct. 2869 (2010), a domestic claim within the "focus of congressional concern" contemplated by Section 806.

Boiled down to its essence, this case involves a claim by a foreign-based employee of a foreign subsidiary of a publicly-traded company that his employment was terminated by U.S.-based officials of the publicly traded company, who controlled virtually all aspects of the foreign national's employment, in retaliation for "blowing the whistle" on these same U.S.-based officials for initiating and directing a scheme, using the U.S. mail and wires, to defraud a foreign country of tax revenues. It may be that upon a full evidentiary development of this case, the facts will dictate a contrary conclusion. However, given the evidentiary record that is before us, applying the analysis dictated by the Supreme Court in *Morrison*, 130 S. Ct. at 2884, leads to the inescapable conclusion that Villanueva's claim falls within the focus of concern that Congress sought to address by Section 806 and is thus judiciable.

To construe the legal presumption against extraterritoriality as a bar to claims such as that presented by Villanueva constitutes, in my estimation, a legally indefensible restriction on the protection that Congress intended Section 806 to afford to covered employees. As herein demonstrated, jurisdiction to entertain Villanueva's whistleblower retaliation complaint exists because, contrary to the majority's opinion, all relevant factors necessary for establishing a judiciable complaint under Section 806 are domestic in nature:

- The Core Labs conduct that Villanueva complained was fraudulently depriving Colombia of tax revenues was initiated and directed by Core Labs officials in Houston utilizing U.S. mail and wire services, thereby constituting, as a matter of law, the domestic violation of the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. *Pasquantino v. United States*, 544 U.S. 349, 371 (2004).

- Villanueva's protected activity involved bringing his concerns about the tax scheme to the attention not only of company officials in Colombia but to officials at Core Labs' U.S. headquarters as well.

- Villanueva's employment relationship of legal relevance for SOX whistleblowing purposes is his employment relationship with Core Labs' U.S. headquarters in Houston notwithstanding his employment by a foreign-based subsidiary. 29 C.F.R. § 1980.101.

- Finally, and most importantly for analytical purposes under *Morrison*, the alleged retaliations, involving decisions denying Villanueva's pay raise and the termination of his employment, were made by Core Labs officials based in Houston.

As the majority notes, in *Morrison* the Supreme Court reaffirmed the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" 130 S. Ct. at 2877, quoting *EEOC* v. *Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. at 248. In reaffirming this

principle, the Court rejected the so-called "conduct and effects" test that had been developed by the Second Circuit,[52] replacing it with the requirement that there exist an "affirmative intention of the Congress clearly expressed" giving a statute extraterritorial effect. *Id.* The expression of Congress's intent is not limited to what may exist in the text of the statute but, as *Morrison* reaffirmed, includes consideration of all available evidence, including the statute's context, its structure, and its legislative history. 130 S. Ct. at 2878.

However, the conclusion that the statute in question does not apply extraterritorially does not necessarily resolve the case where the complainant's contention is, as in the instant case, that the complainant merely seeks the law's domestic application. In such instances *Morrison* dictates further analysis notwithstanding extraterritorial aspects to the case. This additional analysis involves a determination as to the focus of congressional concern in enactment of the statute upon which the complaint is based, followed by a determination of whether the pertinent facts upon which the complaint is based fall within the focus of that concern. 130 S. Ct. at 2883-2886. As an example of this analysis, the Supreme Court cited its seminal decision in *Aramco, supra*, a case arising under Title VII. At issue was whether Congress intended the protections of Title VII to apply to a U.S. citizen employed by an American employer who charged that while working abroad his employer discriminated against him because of his race, religion, and national origin. Because the focus of Title VII's congressional concern was domestic employment, the Court concluded that neither the fact that the plaintiff had been hired in the U.S. nor the fact that he was an American citizen brought his claim within the statute's protection given that his employment was overseas. *Morrison*, 130 S. Ct. at 2884, citing *Aramco*, 499 U.S. at 247, 255.

Morrison involved a complaint by foreign investors against foreign and American defendants alleging fraud in violation of Section 10(b) of the Securities and Exchange Act in connection with securities traded on foreign securities exchanges. Applying the same mode of analysis that it had applied in *Aramco* to the plaintiffs' contention that their claim was domestic and thus did not require extraterritorial application of Section 10(b), the Court initially sought to determine Congress's focus of concern under the Exchange Act. That focus, the Court concluded, was "not upon the place where the deception originated [which in *Morrison* was alleged to have occurred in Florida], but upon purchases and sales of securities in the United States. Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" 130 S. Ct. at 2884, quoting 15 U.S.C. § 78j(b). "Those purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to 'regulate'; it is parties or prospective parties to those transactions that the statute seeks to 'protect'." 130 S. Ct. at 2884 (citations omitted). Consequently, because the case in *Morrison* involved allegations of fraud with respect to the foreign purchase of securities registered on a foreign securities exchange rather than securities listed on a U.S. domestic exchange, and did not involve allegations of fraud with respect to the domestic purchase or sale of securities registered on a foreign exchange, the Court held that the foreign investors' complaint failed to state a claim upon which relief could be granted. *Id*. at 2888.

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[52] *See e.g., SEC v. Berger*, 322 F.3d 187, 192-193 (2d Cir. 2003).

In applying the foregoing analysis to the present case, the majority first concludes that the "primary focus of SOX generally is to prevent and uncover financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws." *Infra* at pg. 10. Accordingly, the majority holds, because the *effect* of the alleged complained-of activity is the fraudulent evasion of Colombian taxes, and since there is no indication of a congressional intent to include complaints about the violation of foreign laws within the definition under Section 806 of protected activity, application of Section 806(a)(1) to Villanueva's complaint would constitute an impermissible exercise of extraterritorial jurisdiction.

The problem with the majority's analysis is two-fold. To begin with, the alleged fraud on the part of Core Labs is, as a matter of law, domestic in origin. The uncontradicted evidence of record supports Villanueva's complaint allegations that the fraudulent evasion of Columbian taxes was accomplished by Core Labs officials in Houston utilizing the U.S. mail and wires.[53] As such, the Core Labs activities about which Villanueva complained would constitute mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343, both of which are expressly covered under Section 806. The Supreme Court has held that the use of the U.S. wires to execute a scheme to defraud a foreign sovereign of tax revenue is not extraterritorial inasmuch as violation of the criminal fraud provision is complete the moment the scheme is executed inside the United States. *Pasquantino,* 544 U.S. at 371.

The majority discounts Villanueva's complaint allegations and supporting evidence pertaining to Core Labs' alleged fraudulent conduct on the grounds that it "did not expressly implicate violations of domestic securities or financial disclosure laws." *Infra* at pg 8, n.24. Aside from the fact that his allegations and supporting evidence did expressly implicate violation of the criminal wire and mail fraud statutes listed in Section 806, in *Sylvester v. Parexel Int'l*, ARB No. 07-123, ALJ No. 2007-SOX-039 (ARB May 25, 2011), the ARB, presiding en banc, held that an employee's complaint need not definitively or specifically identify the law believed to have been violated in order to constitute SOX protected activity. *Sylvester*, slip op. at pp. 17-19 (Chief Judge Igasaki for the majority), pp. 24-26 (Judges Corchado and Royce concurring), pp. 39-44 (Deputy Chief Judge Brown concurring).[54]

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[53] Villanueva's Complaint (July 28, 2008), at p. 8; Villanueva's Declaration Under Penalty of Perjury (December 5, 2008), at ¶ 31 (alleged Colombian tax fraud "at the express direction of Core Lab's executives in Houston using mail, email and telephones to accomplish the fraud").

[54] The majority further attempts to distinguish the instant case from *Pasquantino* based on the fact that the underlying activity in *Pasquantino* involved smuggling liquor across the Canadian border. *Infra* at footnote 23. This is an irrelevant distinction given that the focus of the Supreme Court's ruling in that case was use by a U.S.-based company of the U.S. wires in order to defraud the Canadian government of taxes to which it was entitled as a result of the sale of the liquor in Canada. The facts in *Pasquantino* upon which the majority focuses are of no more relevance to the question of violation of the U.S. mail and wire fraud statutes than the fact that in the instant case the alleged tax fraud upon the Colombia government was accomplished through the payment for services that were never performed.

More problematic for the majority, however, is that their focus on the fraudulent conduct of which Villanueva complained is misplaced. As previously discussed, application of the *Morrison/Aramco* mode of analysis requires, in the first instance, a determination of the focus of congressional concern that the statute seeks to prohibit and/or regulate. It is clear that the focus of congressional concern underlying Section 806 is the *prohibition of retaliatory conduct* by publicly traded companies and their subsidiaries,[55] or any officer, employee, contractor, subcontractor, or agent of such companies, against any employee who engages in "whistle-blowing" conduct as defined at 18 U.S.C. § 1514A(a)(1) and (a)(2). SOX was enacted by Congress as part of a comprehensive effort to address corporate fraud and protect investors and capital markets by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. *Sylvester*, ARB No. 07-123,, slip op at 8; *Johnson v. Siemens Bldg. Techs., Inc*., ARB No. 08-032, ALJ No. 2005-SOX-015, slip op. at 12 (ARB Mar. 31, 2011). *See* S. Rep. 107-205 (July 3, 2002), at 2; S. Rep. 107-146 (May 6, 2002), at 2 ("This legislation aims to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions."). In furtherance of these purposes, Congress included the whistleblower protection provisions found at Section 806, which Congress viewed as a "crucial" component for "restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." *Sylvester*, ARB No. 07-123, slip op. at 9, quoting S. Rep. 107-146 at 2. Section 806 accomplishes its protection of a "whistleblower" by prohibiting retaliation against the employee because he provided information about, or cooperated in an investigation related to violations of specified criminal and securities fraud statutes or other federal laws relating to fraud against shareholders. *Day v. Staples*, 555 F.3d 42, 52 (1st Cir. 2009); *Livingston v. Wyeth, Inc*., 520 F.3d 344, 351 (4th Cir. 2008); *Harp v. Charter Communications*, 558 F.3d 722, 723 (7th Cir. 2009); *Sylvester*, ARB No. 07-123, slip op. at 20. *See* 18 U.S.C.A. § 1514A(a)(1) and (2).

In *Morrison*, the "object" of Section 10(b)'s "solicitude" was determined to be the regulation and/or punishment of deceptive conduct in connection with the purchase or sale of securities listed on American stock exchanges and in connection with domestic transactions of securities listed on foreign stock exchanges. 130 S. Ct. at 2884. The same mode of analysis applied in the instant case leads to the inescapable conclusion that the "object" of Section 806's "solicitude" is the prohibition of retaliation against "whistleblowers" in connection with the laws identified under Section 806 pertaining to securities and corporate fraud.[56]

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55 Under Section 806 "publicly traded companies" refer to companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that are required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)). In 2010 Congress clarified Section 806 by amendment to include within the definition of publicly traded companies any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such companies. *See Johnson*, ARB No. 08-032.

56 The majority appears to agree with this, referring in a footnote to the protection against company retaliation as "this paramount issue of congressional concern . . . captured by the enactment of Section 806," although dismissing its relevance to the instant case in light of the majority's focus on Villanueva's "reporting activity." *Infra* at footnote 22. (Presumably this is a reference to the

The question is thus whether the alleged retaliation (i.e., denial of a pay raise and Villanueva's employment termination) occurred domestically, as Villanueva argues, or extraterritorially, as the ALJ held. The evidence of record supports Villanueva's assertion that both the decision denying his pay raise and the decision to terminate his employment were made by Core Labs officials stationed in Houston. While notification of adverse action is the event that triggers commencement of the statutory period for filing a complaint, whistleblower jurisprudence has recognized a distinction between the time and place of notification and the time and place of the proscribed wrong. In *Overall v. Tennessee Valley Auth.*, ARB No. 98-111, ALJ No. 1997-ERA-053 (ARB Apr. 30, 2001), for example, the ARB recognized that: "Claim accrual is the date a statute of limitations begins to run, i.e., the date a complainant discovers he or she has been injured. Accrual may differ from the date the respondent decides to inflict injury which may pre-date a complainant's discovery of the injury." *See also, Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984). In *Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991), the court similarly concluded: "Accrual [of a claim] is the date on which the statute of limitations begins to run. *It is not the date on which the wrong that injures the plaintiff occurs*, but the date – often the same, but sometimes later – on which the plaintiff discovers that he has been injured." (emphasis added).

Clearly the drafters of Section 806 understood that the retaliation and the notice to the employee of that retaliation are not necessarily one and the same. 18 U.S.C. § 1514A(b)(2)(D), governing the limitations period for filing a whistleblower complaint, provides that the time period for commencing an action runs from either "the date on which the violation occurs, or after the date on which the employee became aware of the violation." Moreover, Congress recognized that the two events could happen in different locales and provided for federal appellate court jurisdiction over a final decision of the ARB in the U.S. Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided at the time of such violation. 18 U.S.C. § 1514A(b)(2)(A) (incorporating the provisions of 49 U.S.C. § 42121(b)(4)).[57]

The communications received by Villanueva in Columbia may provide the notice of the adverse action. S*ee McGarvey v. EG & G Idaho, Inc*., No. 1987 ERA 031 (Sec'y Sept. 10, 1990). However, the when and where of Villanueva's notification are not the time and place of the

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alleged tax fraud by Core Labs of which Villanueva complained since later in the same footnote the majority, after referring to "the location of the protected activity" as "the driving factor in this case," clarifies that the basis of the majority's denial of Villanueva's complaint is "the fraudulent activity being reported," which is referred to as "the driving force of the case.") *Id*.

[57] The Department of Labor regulations implementing Section 806 similarly distinguish the events of retaliation and notice. 29 C.F.R. § 1980.103(d) requires filing of the complaint within 90 days after the discriminatory conduct "has been *both made and communicated* to the complainant." (emphasis added). 29 C.F.R. § 1980.112(a) provides that a petition for review of an ARB decision may be filed "in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation."

wrong that injured him. The evidence of record, viewed in the light most favorable to Villanueva, is that the decision to deny him the pay raise that Core Labs extended to all other Saybolt Columbia employees and the decision to terminate Villanueva in retaliation for his protected activity were made by Core Labs officials in Houston.[58] The alleged retaliation at issue in the instant case thus falls within the domestic focus of concern that Congress sought to prohibit through enactment of Section 806.

The foregoing concludes the analysis required by *Morrison*. Having determined that the retaliatory conduct of which Villanueva complains falls within Section 806's focus of congressional concern, the exercise of jurisdiction over the instant case would not require the extraterritorial application of Section 806. Nevertheless, in order to make it abundantly clear that exercising jurisdiction over Villanueva's complaint would not in any other manner implicate the extraterritorial application of Section 806, I turn to the other areas of concern that the majority has raised.

The majority notes in passing (*infra* footnote 22) that the foreign location of Villanueva's employment and the fact that he was employed by a foreign subsidiary of Core Labs are factors to be taken into consideration as well. Although the majority viewed these factors as of less importance than the alleged fraudulent conduct of which Villanueva complained, the ALJ primarily focused on Villanueva's employment relationship. In reaching his conclusion that adjudication of Villanueva's claim would require extraterritorial application of Section 806, the ALJ focused on what he viewed as the foreign nature of Villanueva's employment relationship, relying heavily on the First Circuit's decision in *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006). That decision, which held that Section 806 does not extend jurisdiction extraterritorially, was concerned with United States interference in the employment relationship of foreign employers and their foreign employee. In holding that Section 806 did not have extraterritorial applicability, the court sought to avoid opening "the door for U.S. courts to examine and adjudicate relationships abroad that would normally be handled by a foreign country's own courts and government agencies pursuant to its own laws." 433 F.3d at 15.

A SOX complainant's employment relationship should not be ignored. However, as the evidence currently of record demonstrates, the concerns articulated in *Carnero* that the ALJ sought to avoid are not implicated in the instant case given Villanueva's distinctive employment relationship with Core Labs' U.S. headquarters in Houston, Texas.[59] The plaintiff in *Carnero* was a foreign citizen employed in Latin America by Latin American subsidiaries of a publicly traded U.S.-based corporation, who was discharged from employment by the foreign subsidiaries

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58 Villanueva's Declaration, at ¶¶ 3, 29, 30, 32. *See e.g.*, Villanueva's referenced Exhibit L.

59 The factual differences in Villanueva's employment relationship also distinguish the instant case from the ARB's prior decisions in *Ahluwalia v. ABB, Inc.*, ARB No. 08-08, ALJ No. 2007-SOX-044 (ARB June 30, 2009); *Pik v. Goldman Sachs Group*, ARB No. 08-62, ALJ No. 2007-SOX-092 (ARB June 30, 2009); *Salian v. Reedhycalog UK*, ARB No. 07-80, ALJ No. 2007-020 (ARB Dec. 31, 2008); and *Ede v. Phanthala*, ARB No. 05-53, ALJ No. 2004-SOX-068 (ARB June 27, 2007).

for "blowing the whistle" on alleged fraudulent conduct instituted by the foreign subsidiaries. Carnero asserted that he should be considered an employee of the parent U.S. company because he had an "over-arching employment relationship" with the parent company due to supervision by U.S. headquarters personnel. *Carnero*, 433 F.3d at 3. The First Circuit was not persuaded that the U.S. parent company's control over Carnero was sufficient to bring him within the reach of Section 806, citing the completely foreign nature of Carnero's employment relationship. Extending SOX whistleblower protection in light of the facts of that case, the court opined, would have impermissibly empowered U.S. courts and the Department of Labor to "delve into the employment relationship between foreign employers and their foreign employees." *Id.* at 15. Granted, Villanueva is a foreign citizen who was employed in a foreign country by a foreign subsidiary. Nevertheless, not only is Villanueva's employment relationship with Core Labs' U.S. headquarters in Houston of far greater significance than Carnero's relationship with the U.S. headquarters of the subsidiaries with whom he was employed, the court's concern about interference with foreign employment relations does not in the instant case arise.

In determining whether an employee-employer relationship exists between a complainant and the respondent under the whistleblower statutes, the crucial factor upon which the ARB has focused in making this determination has been "whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions or privileges of the complainant's employment." *Muzyk v. Carlsward Transp.*, ARB No. 06-149, ALJ No. 2005-STA-060, slip op. at 5-6 (ARB Sept. 28, 2007)[60] For a respondent to be considered the complainant's employer under the whistleblower statutes, the control that is exercised must include "the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant." *Id.*

Consistent with this body of whistleblower law, the Department of Labor regulations implementing Section 806 define covered employees to include "an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101. As the district court in *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004), recognized, under this definition an employee of a publicly traded company's subsidiary is a covered employee within the meaning of Section 806 where officers of the publicly traded parent company have authority to affect the employment of the subsidiary's employees. 334 F. Supp. 2d at 1373 n.7.

The evidence presently of record indicates that Villanueva's relationship with Core Labs' U.S. headquarters meets the whistleblower definition of an employee-employer relationship more so than Villanueva's relationship with Saybolt Columbia. With respect to Saybolt Columbia's operations generally, Core Labs' Houston office exercised virtually complete control. All sales contracts entered into by the Columbian subsidiary and its international customers had to be signed

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[60] *See also Fullington v. Avsec Servs.*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 6-7 (ARB Oct. 26, 2005), *Forrest v. Dallas & Mavis Specialized Carrier*, ARB No. 04-052, ALJ No. 2003-STA-053 (ARB July 29, 2005); *Seetharaman v. Gen.l Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021 (ARB May 28, 2004); *Lewis v. Synagro Techs.*, ARB No. 02-072, ALJ No. 2002-CAA-012 (ARB Feb. 27, 2004).

by Core Labs officials in Houston.[61] The sale of all Saybolt Columbia assets had to be approved by the U.S. headquarters.[62] Even Saybolt Columbia bank accounts were under the control of Core Labs executives in Houston with, in certain instances, the signature of executives based in Houston required on account checks.[63] Core Labs' Houston office controlled and performed all of Saybolt Columbia's accounting,[64] and was responsible for assuring Saybolt Columbia employee compliance with corporate ethics codes.[65] Of particular relevance to the instant case, the Saybolt Columbia revenue transfers of which Villanueva complained were made at the direction of Core Labs' U.S. headquarters.[66] Finally, Core Labs' U.S headquarters in Houston was responsible for the hiring and firing of Saybolt Columbia employees.[67]

Villanueva was General Manager and CEO of Saybolt Columbia.[68] As such, he held "the highest ranking executive position" in Saybolt Columbia.[69] As the evidence of record demonstrates, there was no one above Villanueva at Saybolt Columbia to whom he reported or to whom he was accountable. Instead, he directly reported to and was immediately accountable to Core Labs' U.S. headquarters in Houston.[70] With respect to such matters as hiring and firing of Saybolt Columbia personnel, and the purchase or sale of Saybolt Columbia assets, Villanueva had to obtain approval from Core Labs' Regional Manager for Saybolt Latin America, who was based in Houston.[71] Consistent with Houston's overall control of Saybolt Columbia and of Villanueva, throughout the entire period from the time he initially raised his concerns about the revenue transfers until his

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61 Declaration, at ¶ 33(b) and referenced Exhibit N.

62 Declaration, at ¶ 33(c) and referenced Exhibit O.

63 Declaration, at ¶ 33(d) and referenced Exhibit P.

64 Declaration, at ¶ 33(e) and referenced Exhibits Q and R.

65 Declaration, at ¶ 33(f) and referenced Exhibit S.

66 Respondent does not contest Villanueva's declaration that Core Lab's Accounting Policies 1201 and 1204, which were developed and initiated by the Core Lab's U.S. headquarters in Houston, required Saybolt Colombia to make the challenged revenue transfers. *See* Declaration, at ¶ 8, and Exhibit B attached thereto.

67 Declaration, at ¶ 33(a) and referenced Exhibit M.

68 Parties' Statement of Undisputed Facts, at ¶ 8; Declaration of Villanueva (hereafter "Declaration"), at ¶ 3.

69 Respondents' Supplemental Statement of Facts, at ¶ 5.

70 Villanueva reported to, and was subject to the direct authority of Core Labs' Chief Accounting Officer, Core Labs' General Counsel, and Core Labs' Regional Manager for Latin America, all of whom were employed at Core Labs' U.S. headquarters in Houston, Texas. Declaration, at ¶¶ 16, 17, 19, 20, 29. *See also* Exhibit I attached to Villanueva's Declaration.

71 Declaration, at ¶ 33(b), (c), and referenced Exhibits M and N.

discharge, it was Core Labs' executives in Houston[72] to whom Villanueva addressed his concerns and from whom he sought corrective action. These executives, in turn, responded, initiated further inquiries or sought legal opinions, and on occasion countermanded initiatives Villanueva attempted on his own related to the matter.[73] Core Labs' officials in Houston exercised virtually complete and exclusive control over the terms, conditions, and privileges of Villanueva's employment, including his salary and entitlement to pay raises.[74] Most certainly, and ultimately of course most telling, Core Labs' officials in Houston had the authority to terminate Villanueva's employment, authority which they in fact exercised.[75]

Finally, a brief comment regarding the domestic nature of Villanueva's protected activity is warranted. The ALJ viewed "all of the protected activity" as occurring abroad,[76] and the majority mentions without explanation that "the location of the protected activity would be a factor (which is indeed the driving factor in this case)" in "assessing whether a complainant's claims would require extraterritorial application of Section 806."[77] Both assertions are in error. Addressing first the majority's assertion that the locale of the protected activity is (or should be) a factor, as previously discussed, under the *Morrison/Aramco* analysis it is the retaliation, and not the protected activity, that is the focus of congressional concern and the "object" of Section 806's "solicitude." Nevertheless, as the evidentiary record indicates, the protected activity is domestic in nature. Villanueva brought his concerns about Core Labs' tax scheme to the attention of both employees with Core Labs' Colombian subsidiary and officials at Core Labs' U.S. headquarters in Houston.[78] By definition, the only communiqués that qualify as protected activity are those brought to the attention of Core Labs' officials in Houston. 18 U.S.C. § 1514A(a)(1)(C) only protects whistleblower information provided to "a person with supervisory authority over the employee (or such other person working for the employer who has authority to investigate, discover, or terminate misconduct)."[79] In the instant case not only did Core Labs' officials in Houston have supervisory authority over Villanueva, as has been detailed, the evidence of record demonstrates that the Houston authorities to whom Villanueva complained had the authority, which they exercised, to investigate and resolve the concerns that Villanueva

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72 Including Core Lab's Chief Accounting Officer, Core Lab's General Counsel, and Core Labs' Regional Manager for Latin America.

73 *See* Declaration, at ¶¶ 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 27.

74 See Declaration, at ¶ 29, and referenced Exhibit L.

75 Declaration, at ¶¶ 3, 29, 30, 32.

76 ALJ D. & O., slip op. at 7.

77 *Infra*, footnote 22.

78 Declaration, at ¶¶ 7, 8, 9-28.

79 *See also* 29 C.F.R. § 1980.102(b)(1)(ii).

raised. Thus, to the extent that Villanueva engaged in SOX-protected activity, it is his complaints to Core Labs' Houston officials.[80]

Finally, no analysis of the extraterritorial reach of Section 806 would be complete without attention to the question of enforcement. The majority expresses the concern that, "[e]nforcing compliance or punishing noncompliance with Colombian financial laws necessarily implicates extraterritorial enforcement." *Infra* at pg. 10. This misses the point. As long as Villanueva has a reasonable good faith belief that the laws were violated, it is immaterial to whether he has stated a claim of protected activity that the laws were, or were not in fact violated. *Sylvester*, ARB No. 07-123, slip op. at 14-15. Moreover, the issue of enforcement with respect to a Section 806 claim is not whether the Department of Labor or the courts have authority to enforce the laws the complainant believes were violated, but whether the agency and the courts have the authority to enforce any relief that is ordered upon a determination that Section 806 was violated, and whether a party aggrieved by a final decision of the ARB could obtain court review of that decision.

Taking the latter question first, i.e., federal appellate court jurisdiction over an ARB decision, by incorporating the AIR 21 provisions of 49 U.S.C. § 42121(b)(4) pursuant to 18 U.S.C. § 1514A(b)(2)(A), Section 806 provides jurisdiction over a final decision of the ARB in either the U.S. Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided at the time of such violation. *See also* 29 C.F.R. § 1980.112(a). In the instant case, appellate court jurisdiction would thus rest with the Fifth Circuit, where the alleged retaliation occurred.

Concerning the question of enforcement, should the instant case ultimately result in a judgment against Core Labs, the ordered remedy would presumably include reinstatement of Villanueva to his former position or a position with the same seniority status that Villanueva would have had but for the termination of his employment, an award of back pay, and any compensatory damages to which Villanueva might be entitled. 18 U.S.C. § 1514A(c). As previously noted, the evidence of record reveals that it is within the Core Labs' Houston office's authority to implement these remedies, should they be ordered. Moreover, should Core Labs refuse to comply, the Secretary of Labor or Villanueva can seek enforcement of the ARB's order by filing a civil action "in the United States district court for the district in which the violation was found to have occurred." 29 C.F.R. § 1980.113. Thus, unlike the situation in *Carnero*, there would be no need to seek enforcement of the ARB's decision and order (or of that of a reviewing court) against a foreign entity in a foreign country. The domestic nature of the retaliation that took place in the instant case, coupled with the distinctive employment relationship that existed between Core Labs' Houston-based headquarters and Villanueva, means that the concern the *Carnero* court sought to avoid, of unwarranted U.S. court or agency involvement in employment relations abroad "that would normally be handled by a foreign country's own courts and

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[80] Indeed, had Villanueva not brought his concerns to the attention of Core Lab's officials in Houston, their subsequent action in terminating his employment would not constitute retaliation by definition for lack of knowledge on their part of his protected activity. *Se, Smith v. Hewlitt Packard*, ARB No. 06-064, ALJ No. 2005-SOX-088, -089, slip op. at 7 (ARB Apr. 29, 2008); *Getman v. Southwest Sec., Inc*., ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

government agencies pursuant to its own laws," 433 F.3d at 15, is simply non-existent in this case.

For the foregoing reasons, as well as those articulated by Judge Royce in her dissent, I would reverse the ALJ's Decision and Order and remand this case for further proceedings on the merits.

E. Cooper Brown
Deputy Chief Administrative Appeals Judge