International Labor and Employment Laws
Fourth Edition
Volumes IA and IB

Major Economies
(NAFTA and Non-NAFTA) and International Issues

2017 Interim Supplement
(current through 2015, with selected updates through mid-2016)

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EXTRATERRITORIAL APPLICATION OF U.S. LAWS

INTRODUCTION

B. Statutes Not Covered in Other Sections of This Chapter That Have Extraterritorial Effect

1. The Foreign Corrupt Practices Act

[Editor's Note: The following text replaces the first paragraph of the Introduction at B.1.a. in the main volume.]

The antibribery provisions of the FCPA prohibit the offer, payment, promise of payment—or even the authorization of a payment or promise—of money or anything of value to any foreign government official,\(^1\) foreign political party or party official, candidate for foreign political office, or official of a public international organization for the purpose of obtaining or retaining business for or with, or directing business to, any person. The business to be obtained or retained is not limited to business with a foreign government or foreign government instrumentality. Indeed, in some situations, the line between government and

\(^{1}\)As discussed in more detail in the Introduction at B.1.g., in the main volume and below, the question of who qualifies as a foreign official is subject to much debate. To date, the most definitive authority on this issue comes from the Eleventh Circuit Court of Appeals’ interpretation of the term in United States v. Esquenazi, 752 F.3d 912, 925–29 (11th Cir. 2014) and United States v. Duperval, 777 F.3d 1324, 1334-34 (11th Cir. 2015).
private companies is blurred, which creates a legal minefield for U.S. companies engaging in business, or even in joint ventures, in countries such as China, where many of the domestic companies are state-owned.

[Editor’s Note: The following text replaces the third paragraph of the Introduction at B.1.a. in the main volume.]

The FCPA’s antibribery provisions include a scienter component. Specifically, it is unlawful to make or attempt to make a payment while knowing that all or a portion of the payment will be offered, given, or promised, directly or indirectly, to any foreign official for purposes of assisting a U.S. company to obtain or retain business. Importantly, though, “knowing” encompasses the legal concepts of “conscious disregard” and “deliberate ignorance.”

\[2\]

c. The OECD Convention and the FCPA [Substitute Text]

[Editor’s Note: The following text completely replaces the Introduction at B.1.c. in the main volume.]

Under the auspices of the Organisation for Economic Co-operation and Development (OECD), \[3\] the 35 member countries have signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. \[4\] The Convention was the result of U.S. efforts to have its trading partners conform to U.S. anticorruption standards. It did not criminalize payments to facilitate the performance of official duties.

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\[3\] See the chapter on the OECD, at II.C., in Volume 1B, Part 5. In May 1997, the OECD issued a Revised Recommendation calling on member states to ban the tax deductibility of bribes and take other measures to eliminate the practice of bribery. 14 Int’l Trade Rep. (BNA) 930 (May 28, 1997). Although the Convention itself does not provide for elimination of the tax deductibility of bribes in countries where this is accepted practice, the majority of member states have prohibited these deductions.

On November 10, 1998, President Clinton signed into law the International Anti-Bribery and Fair Competition Act,\textsuperscript{5} which incorporated the OECD Convention standards into the FCPA. In May 2007, the OECD adopted enhanced cooperation programs with Brazil, India, Indonesia, the People’s Republic of China, and South Africa.

\textit{d. Enforcement Authority}

\textit{[Editor’s Note: The following text replaces the first paragraph of the Introduction at B.1.d. in the main volume.]}\n
The U.S. Department of Justice (DOJ) handles all civil and criminal enforcement of the antibribery provisions as they apply to domestic concerns. With respect to issuers, civil enforcement of the FCPA antibribery provisions (as well as the accounting and recordkeeping provisions) is the charge of the SEC.

\textit{e. Penalties}

On September 9, 2015, DOJ Deputy Attorney General Sally Yates released a memorandum titled \textit{Individual Accountability for Corporate Wrongdoing} (Yates Memo).\textsuperscript{6} The Yates Memo identifies “six key steps to strengthen [DOJ’s] pursuit of individual corporate wrongdoing,” as follows:

\begin{enumerate}
\item in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct;
\item criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
\item criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
\end{enumerate}


(4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;

(5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and

(6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

A recent case is an example of the DOJ’s policy in action. In February 2016, the SEC and DOJ settled charges against two subsidiaries of PTC Inc., a Massachusetts-based company. PTC agreed to pay a combined total of $28.1 million to settle the alleged violations. Consistent with the policy described in the Yates Memo, PTC did not receive voluntary disclosure or cooperation credit because, at the time of its initial disclosure to the government, it did not disclose relevant facts that it had learned in connection with its internal investigation; it did not disclose those facts until the DOJ uncovered additional information independently and brought it to PTC’s attention. Therefore, the penalties, disgorgement, and interest paid by PTC more than doubled the value of the contracts obtained by PTC’s subsidiaries through the alleged improper payments and gifts.

Relatedly, on April 5, 2016, the DOJ introduced a yearlong Pilot Program, aimed at bringing transparency to FCPA investigations and accountability to companies. The Pilot Program has three primary requirements—self-disclosure, cooperation and remediation—and offers specific mitigation credit to the

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subject of an investigation based on its compliance with these requirements.9

f. Enforcement Actions

[Editor’s Note: The following text replaces the eighth paragraph of the Introduction at B.1.f. in the main volume.]

Since 2007, both the DOJ and SEC have devoted increasing resources to the FCPA, and the number of enforcement actions, as well as the zeal with which they are pursued, have increased correspondingly. In 2008, the DOJ and SEC (in conjunction with German authorities) brought coordinated enforcement actions against Siemens AG.10 In what remains the largest FCPA settlement to date, Siemens and several of its affiliated entities pleaded guilty to violations of the FCPA’s internal controls, antibribery, and books and records provisions. As part of the plea agreements, the defendants agreed to pay a combined total criminal fine of $450 million, plus an additional $350 million to settle claims brought by the SEC. In settling the cases, the government credited Siemens’ cooperation in that it disclosed these violations after initiating an internal FCPA investigation of unprecedented scope; shared the results of that investigation with the Department efficiently and continuously; cooperated extensively and authentically with the Department in its ongoing investigation; took appropriate disciplinary action against individual wrongdoers, including senior management with involvement in or knowledge of the violations; and took remedial action, including the complete restructuring of Siemens AG and the implementation of a sophisticated compliance program and organization.11

In April 2010, Charles Jumet received an 87-month sentence after pleading guilty to FCPA charges involving Panamanian maritime contracts. At that point, the DOJ called this the longest sentence ever imposed for FCPA violations. However, that sentence was exceeded in October 2011, when, following a joint investigation between the DOJ and Immigration and Customs Enforcement, Joel Esquenazi received a 15-year term for his role in bribes paid to officers of Haiti’s national telecom company.

The 2016 Pilot Program (discussed immediately above) yielded notable results almost immediately. Within three months of its announcement, the DOJ issued two declination letters, to Nortek Inc. and Akamai Technologies Inc., in direct response to the companies’ compliance with the initiative. While the two cases were unrelated, both involved foreign subsidiaries’ payments to Chinese government officials. In explaining the decisions not to prosecute, the DOJ credited the parent companies’ “prompt voluntary self-disclosure,” “fulsome cooperation,” and “full remediation.” Drawing a clear parallel between the Yates

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12 See Press Release, U.S. Dep’t of Justice, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crm-442.html>. This sentence contrasts sharply with those given the same month in Germany to two Siemens executives who were central actors in the company’s global bribery scandal discussed above. The two were convicted of breach of trust and abetting bribery, but received only probation and fines. In September 2009, Hollywood producers Gerald and Patricia Green were convicted of paying $1.8 million in bribes to a Thai official in exchange for contracts worth about $13.5 million to produce the Bangkok Film Festival. While the government initially sought sentences of 10–25 years each, in August 2010, the Greens were sentenced to six months’ imprisonment, plus three years’ supervised release, and ordered to pay $250,000 each in restitution. The Greens’ prison terms are the most lenient in recent FCPA cases.


Memo (discussed immediately above) and the Pilot Program, the DOJ underscored the companies’ willingness to identify the employees responsible for the corrupt payments and to cooperate in the investigations of those employees. The DOJ also credited the remedial measures taken by the companies, including bolstering their compliance programs and internal controls, swiftly disciplining and/or terminating the culpable individuals, and willingly disgorging to the SEC any profits earned as a result of the corrupt payments.

Analogic Corp. and its Danish subsidiary, BK Medical, achieved an only slightly less favorable result when they entered into a non-prosecution agreement with the DOJ in June 2016.\(^{15}\) The companies received full “voluntary disclosure credit,” and the DOJ acknowledged the “extensive remedial measures” they implemented; however, they did not receive full “cooperation credit” because they did not completely and willingly identify several of the state-owned entity end-users of their products.\(^{16}\) The result was a $3.4 million penalty and $7.6 million in disgorgement to the SEC—but no prosecution. The non-prosecution agreement did not make reference to the Pilot Program. Nonetheless, it predicated the result on the same considerations laid out therein, including the following: prompt, voluntary disclosure; robust remedial measures; continued enhancement of the company’s anti-corruption compliance program; “no prior criminal history”; and ongoing cooperation.\(^{17}\)

Prompted by the DOJ’s settlement of an FCPA investigation with Germany’s Daimler AG and its subsidiaries in 2010,\(^{18}\) Greek authorities reportedly began an investigation into Daimler’s activities in 2012. On April 27, 2015, Greek prosecutors announced


\(^{16}\)Id.

\(^{17}\)Id.

charges against seven people for their role in an alleged kickback scheme involving military vehicle contracts.19

On March 20, 2015, U.S. officials asked Sweden to freeze more than $30 million in assets linked to an investigation into possible bribery and money laundering involving Uzbek officials.20 This is the latest development in an investigation centered on the daughter of Uzbek President Islam Karimov, who allegedly received more than $1 billion worth of benefits in exchange for access to Uzbekistan’s telecommunications market.

g. Definition of “Foreign Official”

[Editor’s Note: The following text replaces the last paragraph of the Introduction at B.1.g. in the main volume.]

More recently, in United States v. Esquenazi,21 the court held that an instrumentality “is an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”22 In upholding the conviction, the court engaged in a two-part factual inquiry: (i) whether the entity is controlled by the foreign government; and (ii) whether it performs a function of the foreign government. The court rejected the idea that instrumentalities must be limited to traditional, core government functions.23 However, the court also stressed that it was not providing an exhaustive list of factors to use in determining control and function under the FCPA.24

2. The Alien Tort Claims Act

In a 2016 decision, the Fourth Circuit Court of Appeals interpreted recent U.S. Supreme Court decisions as having “significantly limited, if not rejected, the applicability of the Filártiga

21 752 F.3d 912 (11th Cir. 2014).
22 Id. at 921.
23 Id. at 923.
24 Id. at 925.
Extraterritorial Application of U.S. Laws

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Intro.B.2.b. Extraterritorial Application of U.S. Laws

rationale,” making “the reach of the ATS … narrow and strictly circumscribed.”

a. Defining the Law of Nations—The Sosa Case

In Hernandez v. U.S., the Fifth Circuit declined to extend the U.S. Supreme Court’s decision in Boumediene v. Bush (holding that aliens detained as enemy combatants at Guantanamo Bay Naval Station are entitled to privilege of habeas corpus to challenge legality of their detention) to a Fifth Amendment claim that a U.S. Border Patrol agent had used “excessive and deadly force” in the shooting of an unarmed Mexican teenager standing on Mexican soil. In an en banc decision, the Court gave allegiance to “the general rule of constitutional avoidance” and reasoned that “nothing in [the Boumediene] opinion presages, with the directness that the ‘clearly established’ standard requires, whether the Court would extend the territorial reach of a different constitutional provision—the Fifth Amendment—and would do so where the injury occurs not on land long controlled by the United States, but on soil that is indisputably foreign and beyond the United States’ territorial sovereignty.”

b. Interplay Between the ATCA and the Foreign Sovereign Immunities Act

[Editor’s Note: The following text replaces the first paragraph of the Introduction at B.2.b. in the main volume.]

The Foreign Sovereign Immunities Act (FSIA), which was enacted in 1976, grants federal and state courts jurisdiction to decide claims of immunity by foreign states, their political subdivisions, or any “agency or instrumentality” of a foreign state that is sued in the United States. Under the structure of the FSIA, and subject to existing international agreements, foreign states

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26785 U.S. F.3d 117 (5th Cir. 2015).
28785 U.S. at 125-28.
are immune from the jurisdiction of U.S. courts, except in specific cases, including actions based on a commercial activity performed by the foreign state, actions in which property is taken by a foreign state in violation of international law, actions in which personal injury or death is caused within the United States by the tortious act of a foreign state or its officials and employees, or terrorist acts against U.S. nationals by a foreign state designated as state sponsor of terrorism.  

[Editor’s Note: The following text replaces the last paragraph of the Introduction at B.2.b. in the main volume.]

With respect to conduct-based immunity, which applies to acts taken by government officials for their official acts, the Fourth Circuit found “no equivalent constitutional basis” for deferring to the State Department’s determination, which therefore, was “not controlling, but … carries substantial weight.” 31 Citing a line of pre-Samantar cases, 32 the court reasoned that, “as a matter of

30 Id. §1605. See, e.g., Saludes v. Republica de Cuba, 577 F. Supp. 1243 (S.D. Fla. 2008). In Saludes, a Cuban journalist, who was imprisoned in Cuba for his political activities, and his mother sued the Cuban Government, the Cuban Communist Party (PCC), and several officials of the Cuban Government for, inter alia, arbitrary arrest and torture based on the ATCA and torture based on the TVPA, as well as battery, assault, and intentional infliction of emotional distress. When the defendants did not respond to the complaint, they were held in default, and the mother moved for a default judgment on her claim for intentional infliction of emotional distress against the Republic of Cuba and the PCC. The district court granted the motion, holding, in part, that Cuba and the PCC were exempt from sovereign immunity under the terrorist exception to the FSIA because: (a) Cuba was designated as a state sponsor of terrorism; (b) Cuba had been given a reasonable opportunity to litigate the claim; (c) the mother was a U.S. National; (d) defendant Cuba was a foreign state, and defendant PCC was an agency or instrumentality of Cuba; and (e) the plaintiff was seeking damages for personal injury caused by torture. Id. at 1251–55. In a subsequent decision, following the mother’s submission of additional evidence to prove the amount of damages, the district court awarded the mother $2.5 million in compensatory damages and $25 million in punitive damages. See Saludes v. Republica de Cuba, 655 F. Supp. 2d 1290 (S.D. Fla. 2009). The award is “believed to be the first time U.S. courts have awarded damages to the kin of a living political prisoner.” Frances Robles, U.S. judge awards jailed journalist’s mom $27.5 million, MIAMI HERALD, Sept. 3, 2009, available at <http://www.miamiherald.com/news/americas/cuba/story/1215227.html>.


32 Id. at 776 (citing Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718 (9th Cir. 1992); Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993)).
international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.\textsuperscript{33} In this case, the court ruled that Samantar’s alleged conduct—“torture, extrajudicial killings, and prolonged arbitrary imprisonment of politically and ethnically disfavored groups”—fell within the category of *jus cogens* violations, and for that reason, could not be considered official acts entitled to conduct-based immunity.\textsuperscript{34} The court further concluded that its decision to deny immunity to Samantar was supported by the State Department’s determination of non-immunity, which was based on the facts that there was no officially recognized Somali government to request immunity on Samantar’s behalf and that, at the time of suit, Samantar was a permanent legal resident of the United States. A petition for certiorari asking for review of the Fourth Circuit’s decision was denied by the Supreme Court on January 13, 2014.\textsuperscript{35}

c. Extraterritorial Jurisdiction

*[Editor’s Note: The following text replaces the last paragraph of the Introduction at B.2.c. in the main volume.]*

In a 2015 decision, the Eleventh Circuit applied *Kiobel* in *Doe v. Drummond Co., Inc.*,\textsuperscript{36} where it concluded that, “in determining whether a claim sufficiently touches and concerns the territory of the United States to confer jurisdiction to U.S. courts, the citizenship or corporate status of the defendant is relevant.”\textsuperscript{37} The court reasoned that, “[i]f the defendants are U.S. citizens,

\textsuperscript{33}Id. at 776.

\textsuperscript{34}Id. at 778. Cf. Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (deferring to State Department’s determination that former head of Israeli General Security Service was entitled to common law sovereign immunity from claims brought under ATCA and TVPA alleging war crimes and wrongful death resulting from bombing and refusing to override that determination by finding *jus cogens* exception under FSIA); Belhas v. Ya’Alon, 515 F.3d 1279 (D.C. Cir. 2008) (holding that FSIA governed immunity of foreign officials and declining to recognize *jus cogens* exception); Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004) (holding that there was no *jus cogens* exception to head-of-state immunity).


\textsuperscript{36}782 F.3d 576 (11th Cir. 2015).

\textsuperscript{37}Id. at 580.
some of the foreign policy concerns that the presumption against extraterritorial application is intended to reduce may be assuaged or inapplicable, since we would not be haling foreign nationals into U.S. courts to defend themselves,” and “the acts of U.S. citizens may impact the United States, whether their actions occur extraterritorially or within the United States, particularly if those actions include international law violations.”

Most recently, the U.S. Supreme Court used the law of extraterritoriality as guidance in *RJR Nabisco, Inc. v. European Community* to decide whether courts have authority to recognize a cause of action under the Racketeer Influenced and Corrupt Organizations Act (RICO) for injury suffered overseas. In that case, the European Community and 26 of its member states sued RJR Nabisco and numerous related entities, alleging that they participated in a global money-laundering scheme involving narcotics smuggling into Europe, in association with various organized crime groups. In a 4-3 ruling, the Supreme Court held that RICO does not extend to claims that are not made by U.S. authorities concerning conduct that takes place overseas, reversing the Second Circuit’s underlying decision. The Court explained that RICO requires a plaintiff to

allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries. The application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is “foreign” or “domestic.” But we need not concern ourselves with that question in this case. As this case was being briefed before this Court, respondents filed a stipulation in the District Court waiving their damages claims for domestic injuries. The District Court accepted this waiver and dismissed those claims with prejudice.

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38 Id.
40 Id. at 2109. For a general discussion of RICO, see the chapter on the United States, in the Introduction at H.1., in Volume IB, Part 2.
41 136 S. Ct. at 2098.
42 Id.
Respondents’ remaining RICO damages claims therefore rest entirely on injury suffered abroad and must be dismissed.\footnote{Id. at 2111.}

e. Corporate Liability

[Editor’s Note: The following text replaces the last paragraph of the Introduction at B.2.e. in the main volume.]

Contrasting with these courts is the Second Circuit’s decision in \textit{Kiobel v. Royal Dutch Petroleum Co.},\footnote{621 F.3d 111, 148 (2d Cir. 2010).} which held that the ATS does not confer jurisdiction over claims against corporations. Since the time of the Supreme Court’s \textit{Kiobel} decision, which affirmed the Second Circuit’s judgment on different grounds, the appellate court re-addressed the question of corporate liability in \textit{Chowdbury v. Worldtel Bangladesh Holding, Ltd.},\footnote{746 F.3d 42 (2d Cir. 2014).} where the judges disagreed on the effect of the Supreme Court’s opinion.

A notation in the majority opinion takes the position that the Supreme Court’s decision in \textit{Kiobel} “did not disturb the precedent of this Circuit that corporate liability is not … currently actionable under the ATS,”\footnote{Id. at 49 n.6.} while the concurring opinion notes that “[a]t least one sister circuit has determined that, by not passing on the question of corporate liability and by making reference to ‘mere corporate presence’ in its opinion, the Supreme Court [in \textit{Kiobel}] established definitively the possibility of corporate liability under the ATS.”\footnote{Id. at 55 n.2 (Pooler, J., concurring).}

District courts within the Second Circuit exhibit a similar split. In \textit{Tymoshenko v. Firtash},\footnote{2013 WL 4564646, at *3 (S.D.N.Y. Aug. 28, 2013).} the court dismissed the plaintiff’s ATS claims against a Ukrainian bank, citing the Second Circuit’s \textit{Kiobel} decision as binding law. Conversely, the district court in \textit{In re South African Apartheid Litigation}\footnote{15 F. Supp. 3d 454 (S.D.N.Y. 2014).} concluded (i) that corporate liability for claims brought under [the ATS is an...
open question in the Second Circuit because the Supreme Court’s *Kiobel* decision “either implicitly accepts corporate liability under the ATS or, at the very least, undercuts the Second Circuit’s] rationale and re-opens the question”; 50 and (ii) that corporations may be held liable for claims brought under the ATS. Even though there have been few cases against corporations for violations of international norms, the court found nothing in the text, history, or purposes of the ATS to indicate that corporations are immune from liability based on federal common law. 51

**h. Separation of Powers**

**ii. Role of the executive branch in international human rights litigation**

[Editor’s Note: The following text replaces the third paragraph of the Introduction at B.2.h.ii. in the main volume.]

The State Department also weighed in on the South African apartheid litigation, 52 urging dismissal of the action against the multinational companies on the grounds that continuation of the lawsuit risked impairing significant interests of the United States. When the Second Circuit allowed the case to proceed, the Justice Department urged the Supreme Court to hear the case and reverse the Second Circuit’s decision. As discussed below, the Supreme Court, lacking a quorum, affirmed. 53

50 Id. at 461.

51 Id. at 464.


i. Survey of Human Rights Cases

iv. The Khulumani case

[Editor’s Note: The following text replaces the last paragraph of the Introduction at B.2.i.iv. in the main volume.]

On remand to the district court, the defendants filed a motion to dismiss the two amended, consolidated actions that constitute the entirety of the litigation, i.e., *Ntsebeza v. Daimler AG* and *Khulumani v. Barclays National Bank Ltd.*, and the plaintiffs moved to re-solicit the views of the governments of the United States and South Africa concerning the litigation. On April 8, 2009, U.S. District Judge Shira Scheindlin issued a lengthy opinion and order, granting the defendants’ motion in part and denying the plaintiffs’ motion. The district court significantly narrowed the scope of the plaintiffs’ claims but refused to dismiss claims that Ford Motor Co., General Motors Corp., IBM, and other companies aided and abetted torture and other atrocities committed by the apartheid regime, including arbitrary denationalization and cruel, inhumane, and degrading treatment, because such torts are well established in the community of nations. The defendants moved to certify the district court’s opinion for interlocutory appeal and also moved for reconsideration of two aspects of the opinion, all of which motions the district court denied.

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54 *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). In September 2009, the South African government announced that it had dropped its opposition to the litigation. See article reporting announcement at <http://www.law.com/jsp/article.jsp?id=1202433581051>.


56 *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228.

v. The ExxonMobil case

[Editor’s Note: The following text replaces the second paragraph of the Introduction at B.2.i.v. in the main volume.]

In October 2005, the district court ruled that the case could proceed on the state law claims, which included wrongful death, theft by coercion, and assault and battery, but dismissed the ATCA and TVPA claims, based largely on the U.S. State Department’s assertion that the case would damage U.S. relations with Indonesia.58 Thereafter, in March 2006, the district court denied ExxonMobil’s motion to dismiss.59 The U.S. Court of Appeals for the D.C. Circuit dismissed ExxonMobil’s appeal and its alternative petition for a writ of mandamus, seeking review of the district court’s denial of the motion to dismiss.60 On June 16, 2008, the Supreme Court denied a petition for a writ of certiorari.61 On September 9, 2009, the court granted ExxonMobil’s motion for summary judgment and dismissed the entire case, concluding that the foreign plaintiffs had no standing to sue in a U.S. court. The plaintiffs appealed both the dismissal of the ATCA claims and the dismissal of the remaining state law claims. On July 8, 2011, the court of appeals reversed both dismissals, holding that there was no standing bar to foreign plaintiffs in U.S. courts and reinstating the claims under the ATCA and the TVPA.62 On July 26, 2013, the circuit court vacated its holding “in light of intervening changes in governing law regarding the extraterritorial reach of the Alien Tort Statute.”63 The question of whether the Supreme Court’s decision in Kiobel requires dismissal of the plaintiffs’ ATCA claims is now before the district court.

58 393 F. Supp. 2d 20 (D.D.C. 2005). For additional discussion, see the Introduction at B.2.h.ii., in the main volume and above.
60 473 F.3d 345 (D.C. Cir. 2007).
62 654 F.3d 11 (D.C. Cir. 2011).
63 527 F. App’x 7 (D.C. Cir. 2013) (citing Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013)). For discussion of the Kiobel case, see the Introduction at B.2.c., in the main volume and above.
3. The Torture Victim Protection Act

34-17 Intro. B.3.g.

Extraterritorial Jurisdiction [Substitute Text]

[Editor’s Note: The following text completely replaces the Introduction at B.3.g. in the main volume.]

To date, it appears the courts will not extend Kiobel’s territorial limitation to the TVPA.64

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64 See Doe v. Drummond Co., Inc., 782 F.3d 576, 601–02 (11th Cir. 2015) (“Although we have not before had occasion to do so, we hold now that the TVPA applies extraterritorially”; “the Act itself gives ‘clear indication of an extraterritorial application’”: “[t]he Act provides for the liability of any individual who acts ‘under actual or apparent authority, or color of law, of any foreign nation’; further, it contains an exhaustion of remedies requirement instructing courts to dismiss a claim if the plaintiff has not ‘exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred’” and “the legislative history fully supports this conclusion”); Chowdhury v. Worldtel Bangladesh Holding, Ltd., 746 F.3d 42, 50–51 n.7 (2d Cir. 2014) (“We find no support in Kiobel or any other authority for the proposition that the territorial constraints on common-law causes of action under the ATS apply to the statutory cause of action created by the TVPA”; concluding that “the TVPA, unlike the ATS, has extraterritorial application”; relying in part on Justice Kennedy’s concurrence in Kiobel: “Justice Kennedy—one of the five Justices who joined the Kiobel majority opinion—explicitly endorsed the extraterritorial reach of the TVPA in his concurring opinion in Kiobel, noting that the TVPA addresses ‘human rights abuses committed abroad.’”), cert. denied sub nom., Khan v. Chowdhury, 135 S. Ct. 401 (2014).
VIII. PENSIONS AND BENEFITS*

A. Introduction

Global mobility professionals are taking on an increasingly strategic talent management role in large organizations, according to the 2015 Forum for Expatriate Management’s Managing Global Mobility Survey, which also acknowledges the benefits of tying global mobility and talent acquisition. Eighty-five percent of respondents to PricewaterhouseCooper’s (PwC’s) 2014 Modern Mobility Survey agree that mobility is important to meeting business objectives.¹ Nine in 10 organizations polled in the PwC survey said that they planned to increase their number of expatriate workers in the next two years. The report predicted that the number of people going on global assignments will increase by 50 percent by 2020.

B. Government-Sponsored Social Security Systems

5. Totalization Agreements

   In 2015, India and the United States progressed in their negotiations for a totalization agreement, but the treaty is not yet ratified.

C. Private Pension Plans

1. Issues Faced by Multinationals

   a. The United Kingdom’s “Corresponding Approval” Approach

   [Editor’s Note: The following text replaces the second paragraph of VIII.C.a. in the main volume.]

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*Frances Phillips Taft, GE Oil & Gas, Executive General Counsel, Global Labor & Employment, Boston, USA. This section is an update and revision of an earlier version authored by John F. Woyke, Woyke and Company, New Canaan, Connecticut, and James P. Klein, Deloitte LLP, New York, New York, respectively.

As of April 6, 2006, pension plans known as Qualifying Recognized Overseas Pension Schemes (QROPS) allow those who are or will be non-U.K. residents to transfer U.K. pensions without tax deduction and ultimately draw them without U.K. tax liability. To be an eligible plan, the QROPS must be fully approved by Her Majesty’s Revenue and Customs (HMRC). A transfer to an overseas plan is possible only if that plan is an HMRC-approved QROPS.2

[Editor’s Note: The following text replaces the fourth paragraph of VIII.C.1.a. in the main volume.]

On March 21, 2012, the U.K. Government published regulations that changed the QROPS rules with effect from April 6, 2012.3 The 2012 regulations revised the conditions that a plan must meet to qualify as a QROPS and introduced a requirement that the individual acknowledge that U.K. tax charges may apply. In addition, transfers from U.K.-registered pension schemes to QROPS are now subject to stringent review by the HMRC.

b. Cross-Border Pension Plans in the European Union

[Editor’s Note: The following text replaces the 11th paragraph of VIII.C.1.b. in the main volume.]

On March 27, 2014, the European Commission adopted a new legislative proposal, setting out new rules on IORPs.4 The proposal aims at improving governance and transparency of these funds in Europe, promoting cross-border activity, and helping

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2See HM Revenue & Customs, Overseas pensions: recognised overseas pension schemes notification list, List available at <https://www.gov.uk/government/publications/list-of-qualifying-recognised-overseas-pension-schemes-qrops>. The HMRC list contains pension schemes that have told HMRC that they meet the conditions to be a QROPS. However, publication on the HMRC list is not a guarantee that a particular pension scheme is a QROPS or that any transfer will be free of U.K. tax. Id.


long-term investment. These include requirements for IORPs to do the following:

- put in place effective risk management, internal audit, and actuarial functions;
- produce and maintain a risk evaluation report;
- operate the funds with persons having adequate professional qualifications, knowledge, and experience, potentially signaling the end of lay trustees;
- produce and maintain a remuneration policy;
- provide prescribed information to members, including detailed requirements regarding the format and contents of pension benefit statements;
- appoint a depository to safeguard plan assets, where members and beneficiaries fully bear the investment risk (which will be the case for most defined contribution occupational pension plans in the U.K.); and
- notify their national regulator before any activities are outsourced.

In July 2016, the European Commission issued the final text of a revised Institutions for Occupational Retirement Provision (IORP) Directive, known as “IORP II.” The prior version, issued in 2014, generated some controversy, leading to the involvement of a number of parties in substantially revising the 2014 proposal and delaying its implementation. The revised IORP II represents a negotiated outcome and another step to encourage cross-border pensions.

The new IORP II Directive has a strong focus on risk management and governance and furthers the development of cross-border pensions. The new Directive will improve the way pension funds are governed, make it easier for pension funds to conduct cross-border business, and provide clear information to pension plan members and beneficiaries. The revised Directive, based on

the proposal adopted by the Commission in 2014, strengthens and replaces the existing 2003 IORP Directive.

The final proposal for IORP II includes the following key provisions:

- recognition that cross-border IORPs can be underfunded in limited circumstances;
- set requirements on member benefit statements;
- a relaxation in the rules establishing cross-border pension structures;
- an easing of the rules for the transfer of IORP assets between EU Member States;
- a new non-binding mediation option which is to be addressed by the European Insurance and Occupational Pensions Authority (EIOPA) when disputes arise between EU Member State regulators concerning transfers; and
- greater responsibility to be placed on IORPs to consider environmental and social investment risks, e.g., climate change.

IORP II does not include any harmonized solvency rules for occupational pension funds. At this point, funding rules will be left to individual Member States, at least until the Directive is due to be revisited, six years after it is effective.

The revised Directive must now be formally approved by the European Parliament. Following approval, it will be published in the Official Journal and will officially enter into force. Member States will then have two years from that date to transpose the text into their national legislation.

\[ e. \text{ Cross-Border Tax Issues [Amended Heading]} \]
\[ [\text{Substitute Text}] \]

[Editor’s Note: The following text completely replaces VIII.C.1.e. in the main volume.]

\[ i. \text{ OECD initiatives} \]

In January 2010, the OECD Committee on Fiscal Affairs established a Treaty Relief and Compliance Enhancement
(TRACE) Group to (1) develop treaty relief systems that are as efficient as possible, in order to minimize administrative costs and allocate such costs to the appropriate parties, and (2) identify solutions that enhance countries’ abilities to ensure proper compliance with tax obligations from the perspective of both source and residence countries, in order to promote transparency.\(^6\)

In January 2013, the Committee on Fiscal Affairs approved the TRACE Implementation Package, which is a set of agreements and forms to be used by any country that wants to implement the Authorized Intermediary (AI) system. The AI system removes the administrative barriers that portfolio investors currently face in effectively claiming the reduced rates of withholding tax to which they are entitled pursuant to tax treaties or to domestic laws of the country of investment. The AI system also minimizes administrative costs for all stakeholders and enhances the ability of both source and residence countries to ensure proper compliance with tax obligations.

In 2013, the OECD released an Action Plan on Base Erosion and Profit Shifting (BEPS), setting out recommendations for a coordinated international approach to combat tax avoidance by multinational companies. The Action Plan subsequently was endorsed by the G20 and became the basis for the OECD/G20 BEPS Project. With the participation of more than 100 countries and jurisdictions, the BEPS package of 15 measures was delivered in October 2015. In response to the call of the G20 leaders in November 2015, OECD and G20 members, along with a number of developing countries, established an inclusive framework to allow interested countries and jurisdictions to work together on an equal footing to create a set of international tax rules to end tax treaty abuse and shifting of profits by companies to jurisdictions to avoid paying tax.

More than 100 countries and jurisdictions, including South Africa, are now collaborating to achieve cross-border equity and integrity between tax systems, and much effort is being exerted to

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achieve fiscal transparency and tax capacity-building programs, particularly for developing countries. These countries are working together on the development of a multilateral instrument capable of incorporating the tax treaty-related BEPS measures into the existing network of bilateral treaties.

ii. EU tax directives and investigations

The Treaty on the Functioning of the European Union (TFEU) provides that “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.” The state aid provisions of EU law ensure that the functioning of the internal market is not distorted by anticompetitive behavior favoring some Member States to the detriment of others.

Beginning in June 2014, the European Commission announced that certain transfer pricing rulings given by Member States to particular taxpayers may have violated the EU’s restriction on state aid. These EU investigations and decisions have implications for the United States—for the U.S. Government directly as well as U.S. companies—in the form of potential lost tax revenue and increased barriers to cross-border investment.

(a) EU tax avoidance package

On June 21, 2016, the European Council adopted a directive addressing tax avoidance practices commonly used by large companies. The directive is part of a January 2016 package of Commission proposals to strengthen rules against corporate tax avoidance in the EU. The package builds on the 2015 OECD recommendations to address tax-base erosion and profit shifting (BEPS Project) to stimulate growth-friendly taxation in the EU with new proposals to tackle corporate tax avoidance. On January

9See VIII.C.1.e.i., above.
28, 2016, the EU issued the Anti-Tax Avoidance Package\textsuperscript{10} and recommended that EU Member States take a stronger and more coordinated stance against companies that seek to avoid paying their fair share of tax and to implement the international standards against base erosion and profit shifting. The goal of the Package is to prevent aggressive tax planning, increase tax transparency, and create a level playing field for businesses in the EU.

Key features of the new proposals include the following:

- legally-binding measures to block the most common methods used by companies to avoid paying tax;
- a recommendation to Member States on how to prevent tax treaty abuse;
- a proposal for Member States to share tax-related information on multinationals operating in the EU;
- actions to promote good tax governance internationally;
- a new EU process for listing third countries that refuse to play fair.

Collectively, the European Commission aims for these measures to decrease aggressive tax planning, boost transparency between Member States, and ensure fairer competition for all businesses operating in the EU.

\hspace{1cm} (b) \textit{European Commission investigations of U.S. multinationals}

The European Commission has initiated a series of Member State investigations directed at U.S.-headquartered companies that had obtained tax rulings from Member States.

Starting in June 2014, the European Commission announced that certain transfer pricing rulings given by Member States to particular taxpayers may have violated the EU’s restriction on state aid.\textsuperscript{11} To date, the Commission has initiated state aid investigations


against Apple, Starbucks, Fiat (now Fiat Chrysler Automobiles), and Amazon\footnote{Press Release, European Commission, State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg (Oct. 7, 2014), available at <http://europa.eu/rapid/press-release_IP-14-1105_en.htm>}. Each of the State Aid Cases calls into question the ability of Member States to honor their bilateral tax treaties with the United States. The state aid investigations are occurring in the context of both the BEPS Project and the EU focus on perceived aggressive tax planning and tax avoidance by multinational companies.

In its rulings, the EU Commission is trying to curb companies’ ability to avoid taxes by shifting profits made across the bloc to a subsidiary in one particular country where the company enjoys a very low tax rate. In each of these recent decisions, rather than adhere to the OECD Transfer Pricing Guidelines,\footnote{See OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010, available at <http://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>. For discussion, see the chapter on the Organisation for Economic Co-operation and Development, at II.W., in Volume IB, Part 5.} the European Commission employed a different arm’s length principle that is derived from EU treaty law. Member State tax determinations generally, i.e., determinations with respect to prices that related parties charge each other for purposes of determining income tax liability (also known as transfer pricing arrangements), have historically been within the province of individual Member States and not within the realm of the European Commission.

- **Apple**: On June 11, 2014, the Commission initiated an investigation of advance pricing arrangements provided by the Irish tax authorities regarding the attribution of profits to an Irish branch of an Irish company that, under Irish law, was treated as non-resident for Irish tax purposes because it was not managed and controlled in Ireland. The European Commission has not issued a final decision; however, its preliminary view is that the arrangements constitute state aid.\footnote{Commission Decision COMP/SA.38373, 2014 O.J. (C 369) 22.}
• *Starbucks*: On June 11, 2014, the Commission initiated an investigation of advance pricing arrangements provided by Dutch tax authorities relating to the transfer price of royalties paid by a Starbucks affiliate in the Netherlands to its U.K. affiliate, as well as the prices paid by a Dutch manufacturing affiliate to a Swiss affiliate for roasting coffee beans. The Commission issued a final decision, concluding that the arrangements constitute state aid. The decision is on appeal to the Court of Justice for the European Union (CJEU).15

• *Fiat*: On June 11, 2014, the Commission initiated an investigation of an advance pricing arrangement provided by Luxembourg tax authorities to a Fiat financing company based in Luxembourg. The Commission issued a final decision, concluding that the arrangements constitute state aid.16 The decision is on appeal to the CJEU.

• *Amazon*: On October 7, 2014, the Commission initiated an investigation of advance pricing arrangements provided by Luxembourg tax authorities relating to the transfer price of royalties paid by an Amazon Luxembourg affiliate. The Commission has not issued a final decision; however, its preliminary view is that the arrangements constitute state aid.17

The United States is now questioning the European Commission’s actions, on the grounds that they undermine the international consensus on transfer pricing standards, call into question the ability of Member States to honor their bilateral tax treaties, and undermine the progress made under the OECD/G20 BEPS Project.18 Arguably, these actions also call into question the Commission’s endorsement, as part of the G20, of the BEPS Project and its outputs.

18For a discussion of the BEPS Project, see VIII.C.1.e.i., above.
Globally, there is a battle raging for jobs and growth, and concern has been raised that the EU’s proposals not act as a deterrent to international investment and employment. The Commission’s rulings send a clear message to other companies seeking to expand in Europe and to the European countries that want to attract them with low corporate rates and tax incentives: that these companies are undertaxed and Member States should not compete against each other for investment. Among many U.S. policymakers, there is growing concern that the BEPS Project and foreign tax authorities’ unilateral actions constitute a “revenue grab” by foreign governments and could result in double taxation of U.S. companies operating abroad. These global tax developments will increase the risks faced by U.S. companies with a significant international presence.

U.S. companies have been taking advantage of various foreign incentives and holidays for years now to avoid the U.S. corporate rate of 35 percent, the highest in the industrialized world. Members of both parties in Congress have highlighted the recent Apple ruling by the European Commission as evidence that the U.S. Tax Code should be rewritten to give American companies an incentive to bring back to the United States corporate profits held abroad. However, there is no sign that lawmakers are any closer to bridging the substantial divides that have prevented agreement to date.

f. U.S. Taxation of U.S. Multinationals
[Amended Heading]

On February 9, 2016, the Obama Administration released its fiscal year 2017 budget proposals (FY2017 Budget). The U.S. Treasury Department also released its General Explanations of the Administration’s Fiscal Year 2017 Revenue Proposals (Green Book). The FY2017 Budget includes the following tax-related proposals:

- impose a 19 percent minimum tax on foreign income;
- impose a one-time 14 percent tax on previously untaxed foreign income;
- repeal delay in the implementation of worldwide interest allocation;
• permanently extend the look-through treatment of payments between related controlled foreign corporations (CFCs); and
• amend the CFC attribution rules of Section 958(b).

On April 4, 2016, the U.S. Treasury Department took action to limit “corporate inversions,” i.e., transactions in which U.S. companies move their tax residence overseas to avoid U.S. taxes. In a typical inversion, a U.S. company acquires a smaller company based in a foreign country—usually a low-tax country—and then locates the residence of the combined company in that other country for tax purposes. Treasury addressed the following practices:

• **Serial Inverters:** In a “serial inversion,” a U.S. company undertakes an inversion by acquiring a foreign company that itself has inverted or grown larger through acquisitions of U.S. firms. Serial inverters may be able to avoid penalties under existing law that kick in if the foreign firm in an inversion transaction is below a certain size in relation to the U.S. firm that is acquiring it.

• **Earnings Stripping:** Earnings stripping is a tactic that large foreign-based companies use to avoid paying U.S. taxes by artificially shifting their profits out of the United States. They are able to shift profits by having their U.S. affiliate pay interest on a loan from an affiliate in another country, typically a low-tax country. This is a win-win for the corporation: the U.S. affiliate lowers its taxes in the United States by deducting the cost of their interest payments, and then the foreign affiliate owes little or no tax on those interest payments.

Under current law, the Treasury Department is limited in its ability to fully address inversions. Congressional action is necessary for that, and long-term solutions are only achievable through comprehensive corporate tax reform. Tax reform takes time, and in the current United States political climate is unlikely to occur before 2017 at the earliest.
3. **Employee Taxation**

   a. **U.S. Citizens and U.S. Residents**

      i. **The HEART Act**

      For 2015, the net income tax test for determining application of the expatriation rules of the Heroes Earning Assistance and Relief Tax Act (HEART Act) was adjusted as follows: for the five-year period before expatriation, the individual must have had an average annual U.S. income tax liability of at least $160,000.

      ii. **I.R.C. Section 911**

      [Editor’s Note: The following text replaces the seventh paragraph of VIII.C.a.ii. in the main volume.]

      In the case of funded nonqualified pensions, tax is due from the employee as soon as he or she has a vested right to the amounts accrued under the plan. Accordingly, a U.S. citizen participating in a foreign-funded plan that is not qualified in the United States is (at least as a technical matter) taxed on the value of his or her vested interest in the plan. The foreign earned income exclusion does not apply to this income.\(^{19}\)

      For 2015, the maximum amount of the foreign earned income exclusion under I.R.C. Section 911 was $100,800.

      For 2015, the maximum combined exclusion for married individuals who both work abroad and meet either the bona fide residence test or the physical presence test was $201,600.

      iii. **U.S. tax treaties**

         (b) **Economic employer concept**

         In Germany, the importance of the economic employer approach recently has been strengthened, meaning that a German tax liability on employment income could be triggered even if there is no formal employment contract between an employee and a German firm. In fact, a German company can be considered to be an economic employer under the following circumstances:

\(^{19}\)I.R.C. §911(b)(1)(B)(ii).
• the employee—although formally employed by a non-
German affiliated company—works for the benefit of the
German firm; and
• the employee is embedded in the German firm’s organiza-
tion (e.g., chain of command); and
• the German firm either actually absorbs the underlying
employment costs (e.g., inter-company cross-charge) or
should have been charged with the costs according to the
arm’s-length principle.

In March 2015, Germany’s Ministry of Finance issued a cir-
cular, with effect from January 1, 2015, which fully replaces the
previous circular of 2006 and provides an update on the German
tax authorities’ opinion regarding the tax treatment of employ-
ment income, according to Article 15 of the OECD Model Tax
Convention. This circular currently serves as the basis for all tax
assessments and tax audits by German tax offices.

Based on the current practice of Singapore’s Inland Revenue
Authority (IRAS), that country has not yet adopted the economic
employer approach. There is no indication as to whether the IRAS
would adopt this approach in the future.

e. I.R.C. Section 409A

   iii. Deferred compensation arrangements that include
   U.S. citizens and/or resident aliens

On June 22, 2016, the IRS issued proposed regulations to
modify and clarify existing regulations under I.R.C. Section
409A.20 Under the proposed regulations, plan sponsors will have
more flexibility to use exemptions provided by Section 409A and
vary payment schedules under special circumstances. The pro-
posed updates clarify a number of ambiguities that raised com-
pliance concerns with standard practices relating to stock option
grants and settlements, bonuses, and severance payments. The
proposed regulations would also permit changes in the timing of
payments complicated by securities law compliance or recipient

20 Application of Section 409A to Nonqualified Deferred Compensation Plans, 81
Deaths. Finally, the proposed regulations seek to penalize repeat offenders and promote the use of the correction methodologies described in the IRS’s Section 409A correction program.

iv. General exemptions for foreign plans
   (h) Non-resident aliens

For 2015, the dollar limit applicable under I.R.C. Section 402(g) was adjusted to $18,000.

h. I.R.C. Section 457 [New Topic]

I.R.C. Section 457 prescribes the tax rules that apply to “eligible” and “ineligible” nonqualified deferred compensation plans that are established and maintained by state or local governments or tax-exempt organizations. Code Section 457(b) defines the requirements to be an “eligible” nonqualified plan; a deferred compensation plan that does not satisfy the requirements of Code Section 457(b) is an “ineligible” plan under Code Section 457(f).

In June 2016, the IRS proposed new regulations under Section 457.21 At the same time, the IRS proposed clarifications to the regulations under Code Section 409A, which applies to certain nonqualified plans of those entities as well as to nonqualified plans of for-profit entities.22

4. Reporting and Disclosure Requirements
   a. Foreign Account Tax Compliance Act of 2009
      [Substitute Text]

[Editor’s Note: The following text completely replaces VIII.C.4.a. in the main volume.]

In recent years, a significant increase in offshore activity has been noted among U.S. taxpayers. Numerous schemes have been devised in which the true ownership of income streams and assets is either hidden or disguised so as to improperly shield substantial amounts of financial activity from the U.S. tax system.

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22See VIII.C.3.e.iii., above.
In October 2009, the Foreign Account Tax Compliance Act of 2009 (FATCA) was introduced, aiming to detect, deter, and discourage offshore tax abuses through increased transparency, enhanced reporting, and strong penalties. FATCA is an important development in U.S. efforts to improve tax compliance involving foreign financial assets and offshore accounts. The FATCA became law in March 2010. Key highlights of FATCA include the following:

- FATCA targets tax non-compliance by U.S. taxpayers with foreign accounts;
- FATCA focuses on reporting:
  - by U.S. taxpayers about certain foreign financial accounts and offshore assets;
  - by foreign financial institutions about financial accounts held by U.S. taxpayers or foreign entities in which U.S. taxpayers hold a substantial ownership interest;
- The objective of FATCA is the reporting of foreign financial assets; withholding is the cost of not reporting.

FATCA makes it much more difficult for U.S. individuals to hide assets in offshore accounts. First, it increases information reporting by U.S. taxpayers holding financial assets outside the United States and imposes stiff penalties for failure to comply. It also expands due diligence standards and mandates that foreign financial institutions must agree to disclose U.S. investors to the IRS.

Under FATCA, U.S. taxpayers holding specified foreign financial assets are required to report those interests, beginning with the 2011 tax filing season. Guidance and instructions issued by the IRS list several types of “specified foreign financial assets” that should be reported on Form 8938, including interests in a foreign pension or deferred compensation plan generally exceeding an aggregate value of $50,000.

Limited relief from the reporting requirement may apply, including where an account has been reported on a Form 8891 (U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans) or for an interest in foreign governmental retirement systems, such as social security. Additionally,
Extraterritorial Application of U.S. Laws

no reporting under FATCA is required for a financial account that is maintained by a U.S. payer, including a retirement account at a U.S. branch of a foreign financial institution or a foreign branch of a U.S. financial institution.

Because it may be difficult for a company to determine which employees have a filing obligation under FATCA, it is advisable to provide a general notice to all participants in the company’s foreign plans to alert them of the possible filing requirements and applicable penalties, and to encourage them to contact their personal tax adviser to determine whether they have a filing obligation. However, in most cases, a U.S. taxpayer’s interest in a foreign pension plan must be reported on Form 8938, even if the individual is no longer actively accruing benefits under the plan.

Tax consequences for failure to comply with FATCA can apply to the U.S. owners and U.S. beneficiaries of foreign trust, and to the foreign trust itself.

Taxpayers who fail to meet their obligation to file Form 8938 are subject to significant penalties, including $10,000 for failure to file, with a maximum penalty of up to $50,000 for continued failure to file and a 40 percent penalty on the understatement of any tax attributed to non-disclosed assets.

Beginning in 2014, a 30 percent withholding tax is imposed on certain qualifying payments paid to foreign financial institutions (FFIs) and non-financial foreign entities (NFFEes), unless they collect and disclose to the IRS information regarding their direct and indirect U.S. account holders. FFIs include foreign entities that accept deposits in the ordinary course of a banking or similar business, that hold financial assets for the account of others as a substantial part of their business, or that are engaged primarily in the business of investing or trading in securities, commodities, and partnership interests. Any foreign entity that is not an FFI is an NFFE.

While the withholding obligation on qualifying payments to FFIs and NFFEes did not begin until 2014, FFIs were required to enter into agreements with the IRS by June 30, 2013, to avoid being subject to the withholding tax. In general, under these agreements, FFIs were required to provide the IRS with certain information, including the name, address, taxpayer identification number, and account balance of direct and indirect U.S. account
holders and had to agree to comply with due diligence and other reporting procedures with respect to the identification of U.S. accounts.

On July 12, 2013, the Internal Revenue Service announced revised timelines in connection with the staged implementation of the various due diligence, verification, withholding, and reporting requirements contained in FATCA. The announcement, set forth in Notice 2013-43, provided that the FATCA registration portal would not be available by the promised date of July 15, 2013; extended the deadline for participating FFIs to use appropriate due diligence over their accounts by six months; extended other key dates with respect to the implementation of FATCA by six months; and announced relief for financial institutions that were in the process of negotiating FATCA implementation agreements with the United States. IRS Notice 2013-43 also delayed the timelines during which withholding agents and FFIs were required to begin withholding on non–FATCA compliant accounts. In addition, the notice expanded the definition of grandfathered obligations generally exempt from FATCA to include loan obligations outstanding on July 1, 2014. These delayed timelines have been incorporated into the FATCA regulations.23

c. OECD Convention on Mutual Administrative Assistance in Tax Matters

As of 2016, the OECD Convention on Mutual Administrative Assistance in Tax Matters has been signed by 67 countries. Ninety-eight jurisdictions currently participate in the Convention, including 15 jurisdictions covered by territorial extension.

D. Litigation Under ERISA* [Substitute Text]

[Editor’s Note: The following text completely replaces VIII.D. in the main volume.]

In addition to the tax provisions of Title II, ERISA regulates most voluntarily established private pension and welfare benefit plans by establishing minimum standards, providing fiduciary responsibilities for those who manage and control plan assets, requiring plans to provide participants with information about plan features and funding, and establishing a grievance and appeals process for participants who are denied plan benefits.24

Section 502 of ERISA sets out a comprehensive scheme of civil causes of action that relate to covered plans. These include, for example, suits by plan participants and beneficiaries for failure to supply required plan information; suits by plan participants and beneficiaries to recover benefits due under the plan, enforce their rights under the plan, or clarify their rights to future benefits under the plan; and suits by participants, beneficiaries, fiduciaries, or the Department of Labor for breach of fiduciary duty.25 In addition, under Title IV of ERISA, the Pension Benefit Guarantee Corporation (PBGC), the independent agency charged with insuring participant benefits under defined-benefit pension plans, may bring suit to terminate an underfunded plan or, in its role as trustee of a terminated plan, may bring a claim to collect unpaid contributions, impose liability for unfunded benefits, or for breach of fiduciary duty.26 Plan trustees may also sue to impose liability for a share of the unfunded vested benefits of a multiemployer pension plan on employers that withdraw from those plans (known as “withdrawal liability”).27

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27 See ERISA §§4201 et seq., 29 U.S.C. §§1381 et seq.
I. Extraterritorial Application and Choice of Law

The issue of ERISA’s extraterritorial application begins from the canon “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” Applying this canon of construction requires a court to “see whether ‘language in the [relevant act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.’” Unless there is “the affirmative intention of the Congress clearly expressed,” a court must presume that ERISA is “primarily concerned with domestic conditions.”

The scope of ERISA’s application is set forth in Section 4(a), which provides that the statute applies “to any employee benefit plan if it is established or maintained—(1) by any employer engaged in commerce or in any industry of activity affecting commerce.” Notably, this provision does not expressly extend coverage outside the United States. Also relevant is ERISA Section 4(b)(4), which explicitly excludes from coverage employee benefit plans that are “maintained outside of the United States primarily for the benefit of individuals substantially all of whom are nonresident aliens.”

As a general rule, these provisions have been interpreted to find that ERISA does not apply to employee benefit matters that arise outside the United States. For example, in Mauritais v. Snyder, a physician who provided medical services in Canada to a U.S. citizen brought suit for payment against the patient and the patient’s group health insurance provider. Although the health insurance provider argued that the claims were governed by ERISA, the federal district court held that ERISA did not apply to claims for medical services performed in Canada because

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31 Id. §1003(b)(4).

there was no language in the statute that could establish a clearly expressed congressional intent to extend coverage outside the United States.

Another case, *Comrie v. IPSCO, Inc.*, involved an executive who was originally from Saskatchewan, Canada. According to the complaint, he entered into an oral contract to come to the United States to work in a division headquartered in Illinois, upon the company’s oral commitment that he would be allowed to keep his Canadian benefits. The executive came to the United States (and eventually became a U.S. citizen), but was later removed from his position. Alleging that the company had miscalculated the benefits due to him under its U.S. pension plan and had disregarded the promise made to him prior to his relocation to the United States, the plaintiff brought suit both under ERISA and the common law of contract. With respect to the contract claims, the court applied a “most significant contact” conflict of laws analysis to conclude that the claims should be governed by Canadian law. The court then went on to hold that, given the presumption against territorial application, the claims sounding in Canadian law were not preempted by ERISA.

As demonstrated by the *Maurais* and *Comrie* cases, ERISA cases brought in the United States often involve a mixture of domestic and offshore elements. An important factor in deciding whether ERISA should apply in these cases is the location of the plan participants. In *Chong v. InFocus Corp.*, a citizen of Singapore who worked for and was terminated by an Asian subsidiary of a U.S. company claimed severance benefits under an ERISA plan administered in the United States by the U.S. parent. The court granted summary judgment in favor of the employer, ruling that ERISA did not apply to a foreign national who worked outside the United States.

When the benefits plan is offshore but the plan participants are U.S. citizens working domestically, ERISA will likely apply. In *New Jersey Carpenters Annuity Fund v. Meridian Diversified*

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34Id. at *5.
Fund Management, LLC, a multiemployer pension plan brought a putative class action asserting claims for securities fraud and violation of ERISA against investment-fund managers who allegedly lost the investors’ funds in the Madoff Ponzi scheme. Defendants argued that, because the ERISA fund was organized in the Cayman Islands, ERISA did not apply. The court disagreed, finding the fund actually contained “ERISA” in its name and was clearly marketed toward American investors seeking an ERISA-covered fund. The court concluded it would be “truly bizarre” to hold that ERISA did not apply simply because the fund was organized offshore.

Whether the claims of U.S. participants of a foreign plan will be governed by foreign law, as dictated by the plan’s own terms, may turn on whether the plan’s terms are consistent with ERISA’s policies and language. In Williams v. Association De Prevoyance Interentreprises, a Louisiana plaintiff sought recovery of long-term disability benefits under ERISA from a French company contracted by the plaintiff’s employer to administer the long-term disability plan. The French plan documents included a mandatory arbitration provision. Arguing that the arbitration provision and French law applied, the administrator pointed to the plan’s choice-of-law provision, which stated that French law governed. It further argued ERISA does not preempt foreign law based on well-settled doctrine. The court held that ERISA governed, given ERISA’s non-arbitration mandate, its civil enforcement scheme, and the fact that French law “would be arbitrary and overly burdensome” to apply. The court dismissed as irrelevant the doctrine that ERISA does not preempt foreign laws. That doctrine, it held, was formulated in cases seeking to enforce ERISA extraterritorially. The accident at issue in Williams occurred in the United States to a U.S. worker, hence neither extraterritoriality nor preemption were relevant.

2. **Controlled Group Liability**

The issue of personal jurisdiction over non-U.S. entities sometimes arises in the context of enforcing the controlled group liability provisions of ERISA, under which each member of a “controlled group”—consisting of the employer and each trade or business under common control with the employer—is jointly and severally liable for the pension liabilities that are incurred in connection with the termination of, or the employer’s withdrawal from, an underfunded pension plan.\(^{38}\) ERISA does not expressly address whether controlled group liability extends to entities based outside the United States. However, the PBGC has taken the position that the controlled group liability provisions of ERISA were intended to have extraterritorial effect.\(^{39}\)

Case law addressing the ability of the PBGC to assert liability against a non-U.S. member of a controlled group recognizes that a court must first decide whether it has personal jurisdiction—either general (for all purposes) or specific (case-linked)—over the non-U.S. defendant. In *PBGC v. Satralloy, Inc.*,\(^{40}\) the PBGC was attempting to enforce pension-related liens against a U.S. corporation, as well as two U.K. entities that were members of the same controlled group of companies. The federal District Court for the Southern District of Ohio dismissed the PBGC’s claims for lack of personal jurisdiction, stating that being a controlled group member, by itself, did not amount to sufficient minimum contacts to establish personal jurisdiction. However, the court remanded the case for rehearing on the issue of jurisdiction over one foreign controlled group member, noting that, while a parent-subsidiary relationship is not, in and of itself, sufficient to establish personal jurisdiction, that relationship may serve as a basis for jurisdiction if the subsidiary acts as the “alter ego” of the parent.

In *GCIU-Employer Retirement Fund v. Goldfarb Corp.*,\(^{41}\) the Seventh Circuit rejected an attempt by a multiemployer pension fund to impose withdrawal liability on the Canadian parent of the withdrawing U.S. employer. In that case, the court declined

\(^{39}\)PBGC Op. Ltr. 9701 (May 5, 1997).
\(^{41}\)565 F.3d 1018, 1023 (7th Cir. 2009).
to exercise jurisdiction based merely on the fact that the Canadian corporation owned a majority of the U.S. corporation’s stock. Instead, the court reasoned that specific jurisdiction depended on the Canadian corporation’s contacts with the United States and whether the fund’s claims arose out of those contacts. Based on this analytical framework, the court held that the Canadian corporation did not have sufficient contacts with the United States to confer jurisdiction on a U.S. court; in particular, the court noted that none of the Canadian parent’s actions in the United States “directly” resulted in the withdrawal from the multiemployer plan.

The PBGC was more successful in establishing jurisdiction over a non-U.S controlled group member in *PBGC v. Asahi Tec Corp.* 42 There, the PBGC brought suit against the Japanese parent company of an insolvent U.S. subsidiary for a deficit in the subsidiary’s pension plan. In October 2013, the federal District Court for the District of Columbia granted the PBGC’s motion for summary judgment, finding that it had personal jurisdiction solely on the basis of the parent company’s ownership interest in the subsidiary at the date the plan was terminated. The court held that it had personal jurisdiction because the Japanese parent had acquired its U.S. subsidiary with the knowledge that the U.S. employer maintained a significantly underfunded pension plan. The *Asahi Tec* court also determined that the PBGC’s claim was based on the Japanese parent’s status as a controlled group member, which resulted from its acquisition of its U.S. subsidiary, and that the PBGC claim against the non-U.S. entity therefore arose out of the activities that it had directed against the United States.

The *Asahi Tec* court distinguished the Seventh Circuit’s decision in *Goldfarb* by noting that, in that case, “liability had to have been triggered by some act of the defendant,” i.e., the decision to withdraw from a multiemployer plan, whereas in *Asahi Tec*, liability was determined by “mere ownership at the time of termination.” 43 The *Asahi Tec* court also criticized the *Goldfarb*

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court’s test for determining personal jurisdiction, i.e., that specific jurisdiction exists against a non-U.S. defendant only where the action “directly arise[s] out of the specific contacts” between the defendant and the forum state, as being “a more stringent test than the one required by the Supreme Court.”

On November 4, 2014, Asahi Tec and the PBGC settled their dispute for $39.5 million, with no admission of liability or jurisdiction. However, the Asahi Tec case is recognized as the PBGC’s most successful effort to date in asserting ERISA liability on non-U.S. controlled-group members. The court’s decision that it had jurisdiction over Asahi (a non-U.S. corporation) should be carefully considered by non-U.S. companies that own or seek to acquire U.S.-based companies with significant pension liabilities.

Given the jurisdictional limits on claims brought in the United States, the PBGC may seek recovery in foreign courts. For example, in In re Ivaco, the PBGC brought proceedings in Ontario, Canada, asserting claims under a controlled group liability theory against Ivaco and its Canadian subsidiaries for liability related to the pension plan of Ivaco’s U.S. subsidiary. Ivaco and certain of its affiliates had filed in Ontario Superior Court for protection from their creditors under the Companies’ Creditors Arrangement Act, the Canadian equivalent of Chapter 11 of the Bankruptcy Code. The case settled before the court had to address the issue of the reach of ERISA into Canada. Thus, the case does not clarify whether the PBGC would prevail on pension-related claims in a foreign court.

The PBGC’s approach in the Ivaco case does demonstrate the PBGC’s willingness to pursue non-U.S. entities in foreign courts with respect to the pension plans of their U.S. affiliates. Another instance in which the PBGC took an aggressive approach toward foreign controlled group members is In re AMR Corp. That case arose when American Airlines’ parent company, AMR Corporation (AMR), and certain of its affiliates filed for bankruptcy on November 29, 2011. AMR then failed to make the full pension payment of $100 million due in January 2012—paying

44 Id.
46 No. 11-15463 (Bankr. S.D.N.Y.).
only $6.5 million instead—with the result that the PBGC filed liens against many of AMR’s foreign assets. Most of the liens were recorded on assets located in Latin America, which were not included in the bankruptcy cases. Whether the PBGC’s pursuit of those foreign assets would have been successful is unknown because AMR and the PBGC ultimately reached an agreement with respect to the pension plans. On February 13, 2013, AMR entered into a merger agreement with US Airways Group, Inc., and on February 11, 2014, the PBGC withdrew all of its proofs of claim filed in the bankruptcy cases.47

The PBGC will likely continue to pursue aggressively the assets of foreign controlled group members in connection with pension-related obligations. Therefore, companies with underfunded pension plans must now consider the potential liability of foreign members of the controlled group in their bankruptcy planning.

The PBGC may bring ERISA controlled group liability claims against foreign entities in foreign, as well as U.S., courts. Even if a non-U.S. jurisdiction generally respects U.S. law, this approach may raise other intra-jurisdictional issues involving comity exceptions such as the “revenue rule” (courts of one country will not enforce final tax judgments of other countries) and the “public law” exception (foreign courts will not enforce statutory claims based on a “public” or “penal” purpose, as opposed to claims between private parties).

In any event, plan sponsors should carefully consider the possibility that the PBGC will assert claims in either the United States or the applicable foreign jurisdiction, and/or use the threat of such claims to gain leverage in out-of-court negotiations.

47 See Notice of Claims Withdrawal by the Pension Benefit Guaranty Corp. (Docket No. 11713).
[Editor’s Note: The following text completely replaces Appendix F. in the main volume.]

National Advisory Committee for Labor Provisions of U.S. Free Trade Agreements

Bureau of International Labor Affairs

Purpose

In conducting its work, the Bureau of International Labor Affairs (ILAB) seeks advice from outside experts. Forming the National Advisory Committee (NAC) for Labor Provisions of U.S. Free Trade Agreements is one way of channeling external advice from key stakeholders into ILAB free-trade-agreement policy. Advisory committees are a regulated way of soliciting public input that is consistent with the goals of U.S. Free Trade Agreements (FTAs). The Committee is established pursuant to provisions in various free trade agreements as listed at <http://www.dol.gov/ilab/trade/agreements/nac.htm>. The NAC provides advice on how to better implement the labor provisions of any FTAs that the United States signs, and on related submissions received under these agreements.

The Secretary of Labor regularly reviews the charter of the NAC, and periodically renews/revises it, deeming it necessary and in the public interest by providing information that cannot be obtained from other sources. Information on the latest action in this regard is posted at <http://www.dol.gov/ilab/trade/agreements/nac.htm>.

Membership

The NAC is comprised of 12 members, including a chairperson, appointed by the Secretary of Labor. To ensure a fairly balanced, diverse, and widely credible committee, four representatives are selected from the public sector, four from the labor community, and four from the business community. Members are asked to serve for a period of two years. The list of current members is posted at <http://www.dol.gov/ilab/trade/agreements/nac.htm>.