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Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act

Alan Neff*

INTRODUCTION

In the last decade, the problems inherent in the global economy's approach toward environmental protection have been well documented. Resource contamination and degradation are no longer confined to specific geographical areas: they are now global in scope. Unfortunately, the legal mechanisms needed to address global environmental problems have been slow to develop. International legal arrangements regarding the environment can be years in the drafting. Once approved and ratified, they can be difficult to implement and enforce. At the national level, many countries, particularly lesser developed countries (LDC's), lack the resources and/or the regulatory mechanisms to adequately control environmental problems occurring within their borders. Consequently, those countries that do have the capacity to regulate the environmental impact of industrial operations have unique opportunities and responsibilities to be innovative and assertive in protecting the environment both inside and outside of their territories.

The United States has demonstrated its technical, financial, and political capacity to regulate its environment by enacting some of the most advanced environmental legislation in the world. Although some members of the U.S. business community have protested that stringent environmental regulations put U.S. firms at a competitive disadvantage,1

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1. See, e.g., Hilleman, Global Warming, CHEM. & ENG'G NEWS, Mar. 13, 1989, at 25 (concluding that future global climatological problems could develop if action is not taken now to reduce greenhouse-gas emissions); Managing Planet Earth, SCI. AM., Sept. 1989 (special issue) (collection of articles discussing current global environmental problems and how to achieve sustainable development on local, national, and global scales); Project Earthship: Healing the Planet, OMNI, Sept. 1989 (special issue) (collection of articles discussing the world economy and the environment).

U.S. citizens strongly support such legislation. Indeed, most Americans would strengthen laws protecting the environment, even at the cost of higher taxes or prices on goods. The American business community, bowing to popular demand for strong environmental regulation, now views compliance with such measures as part of the cost of doing business within U.S. borders. These regulatory accomplishments do not necessarily mean that the United States has found the proper accommodation of economic and environmental values, but they do suggest that progress toward a better balance has been and can be achieved.

The foreign operations of U.S. businesses, however, remain largely unaffected by the reach of U.S. environmental laws. While U.S. businesses must comply with the laws of the countries in which they operate, those laws are often less stringent than comparable U.S. laws. While some U.S. firms may voluntarily maintain high standards for both their domestic and overseas operations, some firms are not so scrupulous. The tragic release of methyl isocyanate at Bhopal, India is arguably an example of what can occur when firms operate in the lax regulatory environments typical in the developing world. The Bhopal disaster illustrates the appeal of finding a way to hold U.S. businesses accountable for the environmental impact of their activities in other countries.

In the 1970's, both Congress and the Executive considered ways to bring these extraterritorial activities under domestic control. These discussions all but ceased during the 1980's. This Article hopes to revive this moribund policy debate by proposing legislation that would compel U.S. businesses to comply with U.S. environmental protection and natural resource conservation statutes in their operations outside of the United States. The proposed statute is not advanced as a solution to this problem, nor does this Article presume to resolve the debate about the wisdom of such extraterritorial regulation. A facile solution is not the objective; instead, the goal is to stimulate policy and legal debate by offer-

3. Since 1981, a New York Times/CBS News Poll has asked U.S. citizens whether they agree with the following statement: “Protecting the environment is so important that requirements and standards cannot be too high, and continuing environmental improvements must be made regardless of cost.” The polls show a nearly continuous increase in the rate of agreement with this statement, from approximately 45% of respondents in September 1981, to approximately 80% of respondents in June 1989. Grass-Roots Groups Show Power Battling Pollution Close to Home, N.Y. Times, July 2, 1989, at 1, col. 1.

4. See, e.g., Want, Hazardous Waste: A Business Primer, 34 BUS. & ECON. REV. 3, 8 (1988) (concluding that business planners should “fully address the environmental parameters of business operations and transactions . . . [because] responsible environmentalism is just good, long-term economics”).


6. See infra notes 44-51 and accompanying text.


8. See infra text accompanying notes 88-92.
ing a starting point and some analysis of the first layer of issues: the need for such legislation; models for the structure, operation, and substantive content of the legislation; and responses to some of the predictable objections to such legislation.

Part I of the Article looks at some troublesome practices of the foreign operations of U.S. businesses and explores policy reasons for passing a Foreign Environmental Practices Act (FEPA). Part II examines the Foreign Corrupt Practices Act (FCPA), which prohibits U.S. businesses from engaging in bribery and other corrupt practices in other countries. FCPA is used as the model for FEPA's regulation of extraterritorial environmental conduct; an evaluation of FCPA should aid in the development and discussion of the FEPA proposal. Part III presents a detailed analysis of the most important sections of FEPA. The treatment focuses on the major challenges—substantive content, scope of coverage, enforcement, and administrative development—but does not attempt to resolve all of the challenges inherent in drafting such a statute. Part IV anticipates and responds to four fundamental objections that will surely arise in the policy debate that this Article hopes to initiate.

I
THE NEED FOR A FOREIGN ENVIRONMENTAL PRACTICES ACT

A. Why Unilateral Action Is Necessary

The global nature of today's environmental problems is generating widespread concern. For example, toxic industrial pollution can cross national borders in several ways. Pollutants dispersed into the atmosphere can travel great distances before falling back to the earth as acid rain, and discharges into waterways can harm downstream nations. Manufacturers based in industrialized countries now frequently ship the toxic wastes they produce to other countries for disposal. Furthermore, industrial activity is spreading into lesser developed countries, generating ever greater quantities of toxic wastes. These transnational environmental problems underscore the need for the nations of the world to arrive at politically feasible and effective ways to protect the common global environment.

Environmental problems that remain within a country's borders are customarily the responsibility of that country, but even those problems

12. See infra note 249 and accompanying text.
are assuming a transnational character as formerly local environmental problems aggregate to become global problems. In addition, the atmospheric currents and watersheds that determine the extent of a particular environmental harm may not correspond to given political boundaries. Where responsibility for environmental harm is shared by more than one country, solutions are not easy.

The relationship between the political jurisdictions involved in a particular environmental problem may determine the direction for effective responses. On the one hand are problems involving the global commons, such as ocean pollution, ozone depletion, and global warming, where activities under the control of a number of different nations contribute to a common harm. Another type of transnational environmental problem occurs when activities contained within one country's borders adversely affect another country's territory. Examples include acid rain caused by emissions of pollutants into the atmosphere, and alterations of the flows of international rivers. These two types of problems are similar in that they both involve harmful transnational effects. A separate but related category of transnational environmental problems, and the primary focus of this Article, is the harm caused to one country's environment by the activities of companies or citizens based in another country. An example of a problem caused by a transnational actor is an industrial facility owned by a corporation based in another country that pollutes in the host country.

As these categories indicate, today's environmental problems have a variety of transnational components. These transnational aspects make it difficult to determine which political entity should bear responsibility for problems that spill over national borders. According to customary international law, a country can do whatever it wants on its own territory, but it is responsible if any of the activities it permits cause extraterritorial harm. In practice, however, it may be difficult for the country suffering the harm to make the country in which the harm originates stop the activity or provide compensation for its harmful effects. The issue concerning which country should bear responsibility for the harm may not be as important as determining which country is willing or able to take effective action to stop the harmful activity.

13. The Trail Smelter arbitration case provides an early example of the adjudication of this principle. Trail Smelter Case (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1941), reprinted in 35 AM. J. INT'L L. 684 (1941). In awarding compensation to the United States for harm suffered because of fumes from a Canadian smelter, the tribunal declared: "[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein..." 35 AM. J. INT'L L. at 716.

Some have suggested that the best way to handle transnational problems is to arrive at comprehensive multilateral agreements. Advocates of multilateral treaties argue that governments must work together to establish global environmental protection standards and collective enforcement mechanisms. Certainly problems with the global commons like ocean pollution and ozone depletion require a response from the community of nations. But multinational agreements present their own set of problems. In general, when a number of nations enter into treaty negotiations, their interests are likely to be divergent. The more parties and issues involved, the more difficult it is to reach an agreement. Comprehensive multilateral treaties also tend to be vague and unenforceable.

Indeed, the course of negotiations leading to two recent multilateral environmental treaties suggests that comprehensive, treaty-based solutions to environmental problems will elude policymakers for many years.

15. See, e.g., Falk, The Global Environment and International Law: Challenge and Response, 23 U. Kan. L. Rev. 385, 390-92, 416-17 (1975) (asserting that while a world-order solution someday may be necessary to meet the global environmental protection challenge, more traditional intergovernmental agreements at regional and subregional levels are useful and likely to dominate steps taken to strengthen environmental protection for some time to come); Johnston, Systemic Environmental Damage: The Challenge to International Law and Organization, 12 Syracuse J. Int'l L. & Com. 255, 281-82 (1985) (concluding that effective environmental management will require long-range planning "on an international, interdisciplinary, and intervocational basis"); Nanda, The Establishment of International Standards for Transnational Environmental Injury, 60 Iowa L. Rev. 1089, 1123-24 (1974) (asserting that development of a universally acceptable version of the public trust doctrine, in the form of a broad multilateral agreement with wide acceptance in the international community, would be a useful vehicle to prevent transnational pollution); Robinson, Introduction: Emerging International Law, 17 Stan. J. Int'l L. 229, 259 (1981) (asserting that the United Nations Environment Programme (UNEP) should act as a broker among more specialized international agencies to help create international legal standards and procedures for regional and global environmental protection).


17. See Smith, The United Nations and the Environment: Sometimes a Great Notion?, 19 Tex. Int'l L.J. 335 (1984). Smith argues that efforts in the United Nations to address global environmental problems have often resulted in the refusal of member states to take responsibility for their environmentally damaging conduct. Id. at 337. He also asserts that environmental resolutions and declarations by the United Nations are futile if they do "not gain the support of the market economy states on those matters of interest to them." Id. at 339. On the other hand, developing states use the forum of the United Nations "to promote or foist their concept of ‘equitable utilization of shared natural resources’ upon the developed, economically mature states." Id. at 341-42 (citation omitted).

18. See, e.g., Galli, Hazardous Exports to the Third World: The Need to Abolish the Double Standard, 12 Colum. J. Envtl. L. 71, 89-90 (1987) (concluding that reciprocal state-to-state agreements to regulate trade of hazardous goods and materials are the best vehicle to promote environmentally prudent conduct because “[n]onbinding international agreements are mere aspirations, and binding international standards are difficult to promulgate and lack the flexibility needed to protect disparate environmental and economic agendas”).
For example, the deterioration of the ozone layer has been under observation for more than a decade, yet the Montreal Protocol took years to draft. The Protocol phases out the production and use of chlorofluorocarbons and related chemicals, but permits developing nations to continue using these chemicals for years after industrial countries are required to stop. Meanwhile, the chlorofluorocarbons already discharged into the atmosphere will remain destructive in atmospheric processes for many years to come. Similarly, the Basel Convention, developed in response to longstanding demands from developing countries, regulates the international trade of hazardous wastes. However, its requirements are vague, and loopholes through which to avoid compliance are available.

Agreements among a limited number of countries with strong shared interests such as bilateral and regional arrangements are more

19. For a review of hypotheses and data regarding stratospheric ozone depletion, see NATIONAL RESEARCH COUNCIL, OZONE DEPLETION, GREENHOUSE GASES, AND CLIMATE CHANGE 10-47 (1989) (proceedings of a Joint Symposium by the Board on Atmospheric Sciences and Climate and the Committee on Global Change, Commission on Physical Sciences, Mathematics, and Resources) [hereinafter NRC CLIMATE CHANGE REPORT].


21. See Kindt & Menefee, supra note 20, at 277-90. Kindt and Menefee conclude that the Montreal Protocol will not significantly reduce ozone-destroying chlorofluorocarbons in the atmosphere. Id. at 290.

22. Trichlorofluoromethane molecules have a mean life of approximately 75 years, dichlorodifluoromethane molecules have a mean life of approximately 100 years, and most of the other chlorofluorocarbon molecules have a mean life of approximately 140 years. NRC CLIMATE CHANGE REPORT, supra note 19, at 34-36.


27. The effort of Canada and the United States to investigate and resolve pollution problems in the waters shared by the two countries remains one of the most outstanding examples of bilateral cooperation for environmental protection. See Bilder, Controlling Great Lakes Pollution: A Study in United States-Canada Environmental Cooperation, 70 MICH. L. REV.
likely to be effective than agreements with many parties. But even if well-drafted international agreements are set into place, environmental protection is not guaranteed. The most comprehensive agreement is only as good as the efforts of the individual ratifying nations to follow through on their promises. In order for comprehensive multilateral agreements to work, each nation has to act individually to enact and enforce the laws that will curb environmentally harmful activities within its control.

Thus the effectiveness of international responses to transnational environmental problems depends on the regulatory actions of the individual governments participating in the arrangement. In the end, unilateral actions by concerned countries may hold the most promise for effective environmental protection. In the case of environmental harm caused by activities pursued in one country by actors based in another country, the question becomes which country is best situated to provide the most effective control.

B. Why the Country of Origin Should Control Transnational Actors That Cause Environmental Problems in Other Countries

In this era of the global marketplace, corporations based in industrialized countries routinely establish operations in other countries. Firms based in one country may set up operations in another country for a number of reasons: to save site-specific production costs, to tap into growing foreign markets, to overcome trade barriers, and to avoid fluctuations in currency markets. Some business planners in developed coun-


28. For example, after concluding that the chlorofluorocarbon threat to stratospheric ozone required stronger and faster action than would occur under the Montreal Protocol, the 12 European Community nations agreed in "an unexpectedly strong move" to reduce their production of chlorofluorocarbons by 85% as soon as possible and to ban all production and use by the end of the century. Whitney, 12 European Nations to Ban Chemical That Harms Ozone, N.Y. Times, Mar. 3, 1989, at 1, col. 6; see Nanda, supra note 15, at 1108 (asserting that regional and bilateral environmental protection agreements are a desirable way to fill existing gaps in international environmental law).

29. Possible advantages of unilateral environmental regulation include: promptness of remedial response, development of precedents and experience upon which other countries can draw, wide-ranging beneficial impacts in the case of certain kinds of unilateral environmental action, and promotion of the development of relevant international environmental agreements. See Bilder, The Role of Unilateral State Action in Preventing International Environmental Injury, 14 VAND. J. TRANSNAT'L L. 51, 79-83 (1981). Possible disadvantages include: discouraging growth of an international order based on mutual accommodation, creating international tensions and conflict, limited efficacy as to certain kinds of environmental problems, disproportionate interference with international trade and other transnational activities in comparison to the practical needs and goals of environmental control, and competitive risks to the unilateral actor. Id. at 83-86.

tries have concluded that exporting hazardous operations or products to the lesser developed countries is profitable. Some firms in industrialized countries with extensive environmental regulations may relocate because environmental controls in another country may not be as stringent or costly. At least with respect to decisions made by United States businesses, however, most exportation of operations, products, or wastes occurs because traditional economic factors—including access to markets, resources, and low wages—favor export.

Establishing operations in another country may bring industrial development and its associated economic benefits to that country, but at the same time it introduces the hazards associated with these operations. Hazardous production methods and management strategies, hazardous production methods and management strategies, after 1988 INTERNATIONAL DIRECT INVESTMENT REPORT. The report cites a number of strategic reasons for foreign direct investment by firms from the United States and other nations. Among them are: (1) improving the ability to serve foreign markets through products designed specifically for, and manufactured in, the foreign market area; (2) providing for the defense of foreign markets from actual or potential foreign competition; (3) lowering the cost of products intended for foreign markets by lowering the costs of production; (4) accomplishing international diversification of holdings and production capacity; (5) reacting to host government policies such as trade barriers, which encourage direct investment rather than exports from the host country; (6) where licensing is ineffective, controlling the use of the firm's technology by direct investment to bring about more efficient use of that technology and greater profits; and (7) exploitation by multinationals of their marketing and production competitive advantages. For a discussion of the effects of currency fluctuations, see Uchitelle, U.S. Businesses Loosen Link to Mother Country, N.Y. Times, May 21, 1989, at 1, col. 1 [hereinafter Businesses Loosen Link]; Uchitelle, Trade Barriers and Dollar Swings Raise Appeal of Factories Abroad, N.Y. Times, Mar. 26, 1989, at 1, col. 1 [hereinafter Trade Barriers].

31. See U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, TRANSNATIONAL CORPORATIONS IN WORLD DEVELOPMENT: TRENDS AND PROSPECTS 230 (1988) (reporting that there is some evidence of environmentally motivated relocations to developing countries with lower environmental standards by firms in certain specific industrial sectors such as the production of highly toxic products and the processing of heavy metals) [hereinafter UNCTC 1988 REPORT].

32. Leonard, Confronting Industrial Pollution in Rapidly Industrializing Countries: Myths, Pitfalls, and Opportunities, 12 ECOLOGY L. Q. 779, 782-83 (1985) (stating that, as a result of stricter environmental laws in the United States, some development planners began to consider "the competitiveness and location of industries involved in world trade"). A recent study concluded that there are only a "relatively small number of American industries whose international location patterns have been significantly affected by environmental regulations in the United States": manufacturers of asbestos, arsenic trioxide, benzidine-based dyes, certain pesticides, and a few other carcinogenic chemicals; some basic mineral processing industries, including those involved in copper, lead, and zinc processing; and some producers of intermediate organic chemicals. See H. LEONARD, POLLUTION AND THE STRUGGLE FOR THE WORLD PRODUCT 111-12 (1988); see also BUSINESS MATTERS, supra note 5, at 120-24 (review of empirical research on the effect of environmental regulations on domestic and international industrial location patterns).

33. See 1988 INTERNATIONAL DIRECT INVESTMENT REPORT, supra note 30, at 2-3; Trade Barriers, supra note 30, at 1, col. 1.

34. See generally D. WEIR, supra note 7, at 99-103 (citing chemical manufacturing operations in developing countries that lack the operational controls required in developed countries); BUSINESS MATTERS, supra note 5, at 217 (citing instances of industrial pollution accidents in Brazil at manufacturing operations of multinational corporations and reporting
waste disposal practices, and hazardous products cause environmental problems in LDC's, just as they do in industrialized nations. When citizens or businesses based in a country with high environmental standards operate in another country that cannot adequately regulate activities with adverse environmental impacts, a double standard can result.

To be sure, many nations may choose to have less stringent environmental protection and resource conservation laws than the United States. On the other hand, some host countries may have rigorous laws in place but lack effective regulatory resources to enforce those laws. It is even possible that a government may decide that importing industrial operations might bring enough revenues, jobs, and other benefits to warrant a relaxation of environmental safeguards.

In the long run, however, allowing lower standards of conduct for operations in other countries may be dangerously shortsighted. It exemplifies a certain tunnel vision, because many of these activities and their byproducts may return through the biosphere to injure the economy and environment of the home nation. Instead, the nations in which these transnational actors are based—usually the industrialized powers—that "numerous" multinational corporations' plants in Sao Paulo are classified as "noncomplying" with Brazil's pollution emission standards; Castleman, The Double Standard in Industrial Hazards, in The Export of Hazard 82-85 (J. Ives ed. 1985) [hereinafter Export of Hazard] (reporting exports of hazardous manufacturing processes for asbestos-related products, batteries, chromate and dichromate, mercury cell chlorine, dyes, steel, polyvinyl chloride, and arsenical pesticides).


39. For instance, during the 1970's the Romanian government apparently chose to relax or ignore its official environmental protection standards in order to attract pollution-intensive chemical-based manufacturing operations becoming subject to increasingly stringent regulation in the United States and Europe. See H. Leonard, supra note 32, at 147-53.

40. A 1978 study by the Food and Drug Administration showed that 45% of 55 samples taken from coffee shipments imported to the U.S. had residues of pesticides banned from use in the United States. See A. Ahmed, S. Scherr, & A. Richter, Pills, Pesticides, and Profits 25-26 (1982) [hereinafter Pills, Pesticides]. A 1980 shipment of tomatoes from Mexico had residues of celiathion, a pesticide prohibited for use in the U.S. and Mexico on food crops, but which is apparently illegally used by Mexican farmers. Id. at 27-28.
should ensure that their companies and citizens follow their home nation's environmental standards, wherever they may operate.

There are several practical reasons why responsibility for the activities of transnational actors should lie with the home nation. Countries differ in their regulatory experience and in public acceptance of environmental regulation. Countries with traditions of citizen involvement generally have more effective environmental protection laws. This is because the enactment and enforcement of environmental regulations often requires concerted pressure from concerned citizens. Moreover, countries also vary in their willingness to implement and enforce the environmental laws they enact. Because many environmental protection laws affect local or transnational businesses, environmentalists and regulators may find themselves involved in legal battles with very powerful opponents.

Even where countries may desire to regulate the environmental impacts of industry, economic realities may intervene to make such regulation nearly impossible. If basic necessities are in short supply, environmental protection may not be a national priority. Governments may not have the financial resources or the pool of trained civil servants to effectively manage and protect their natural resources. In countries under severe economic pressures, the push to develop their economies can override environmental concerns. For example, many LDC's encourage industrial development in an effort to grow out of their poverty, reasoning that some environmental degradation may be the necessary price for economic development. Ironically—for want of foresight, the need for foreign exchange, lack of regulatory resources, or various other reasons—these economic activities can backfire. Instead of relieving poverty, unregulated economic activities can deplete stocks of natural resources, endanger citizens' health, and pollute the environment to a far greater extent than would be tolerated in the developed countries. Finally, countries saddled with massive national debts loads—as many LDC's are—may have no alternative but to pursue environmentally costly development strategies and may not be able to pay for environmental protection, even if they so desire.

In addition, political factors may intervene to make effective environmental regulation difficult within the host country. In many coun-

41. Leonard & Morell, Emergence of Environmental Concern in Developing Countries: A Political Perspective, 17 STAN. J. INT'L L. 281, 302-03 (1981).
42. Id. at 304-05.
43. See UNCTC 1988 REPORT, supra note 31, at 229-31. One author argues that "most developing countries and large parts of many industrialized countries have resource-based economies," and that "[s]ome developing countries have depleted virtually all of their ecological capital and are on the brink of environmental bankruptcy." MacNeill, supra note 38, at 157. He also points to "grossly unequal" divisions of public power in developing countries, which leads to the favoring of national economic development agencies at the expense of environmental protection and resource management agencies. Id. at 163.
tries, government regulators have close personal and financial ties with the business community and are reluctant to enforce environmental protection laws which may work against their self-interest. In some instances, the economic and political power of large transnational corporations may be greatly disproportionate to that of the government of the country in which a particular facility is based.

On the other hand, the nations where transnational companies tend to be based are more likely to have strong traditions of environmental regulation. Industrialized countries like the United States, Germany, and Japan have demonstrated a willingness to control industrial pollution within their own territories. They have the financial resources and the independent civil servants required for effective environmental controls. In addition, they share a base of strong citizen support for controlling economic development in order to accommodate environmental values.

In short, some countries cannot effectively regulate the environmental effects of activities within their borders, including those that are owned or controlled by businesses based in other countries. Extraterritorial regulation of transnational businesses by the industrialized nations in which they are based may be the most effective way to address whatever environmental problems these businesses may cause.

C. Why the United States Should Regulate the Overseas Operations of Its Citizens and Corporations

In their efforts to expand markets and curb production costs, many U.S. businesses have established overseas operations. Some of these operations are causing environmental harms that would not be acceptable in this country. The Bhopal disaster is a particularly forceful example of the harm that can occur when a hazardous technology is exported to a country where environmental protection controls are inadequate, as well as an example of the potential cost to the U.S. business community of such exports. Thousands of people died and tens of thousands more suffered permanent injuries from the release of methyl isocyanate into the surrounding environment at a Union Carbide plant.44 Union Carbide spent several years and millions of dollars in legal fees45 trying to determine whether it was liable, and if so, for how much. The company fi-

44. D. Weir, supra note 7, at 16, 44.
nally settled all claims related to the matter for $470 million, but the Indian government may still seek more compensation.

Union Carbide now asserts that it was a victim of sabotage, but that is beside the point. By several measures, Union Carbide allowed its subsidiary, Union Carbide of India, to manage the plant under less stringent and more risk-laden standards than Union Carbide employed in its U.S. methyl isocyanate facility in Institute, West Virginia. Further, the Indian government's regulatory oversight of the plant ranged from deficient to nonexistent. While industrial accidents also occur in the United States, federal environmental protection laws and local zoning controls make Bhopal-like circumstances less likely to arise here.

The magnitude of the Bhopal disaster was unprecedented, but the circumstances that led to the tragedy are not uncommon. When firms headquartered in the United States operate in countries with less stringent environmental regulations, some companies will relax their operating standards, increasing the risk of causing harm to human health and the environment.

46. Bhopal Payments Set At $470 Million For Union Carbide, N.Y. Times, Feb. 15, 1988, at 1, col. 5.
47. In January of 1990, India's new Prime Minister, V.P. Singh, said he wanted to set aside the $470 million settlement, pursue criminal charges against Union Carbide, and seek $3 billion in damages for the deaths of approximately 3,500 people and injuries to an additional 20,000 persons. See India Seeks to Reopen Bhopal Case, N.Y. Times, Jan. 22, 1990, at D1, col. 3.
48. See, e.g., Hays & Koenig, supra note 45, at 1, col. 6 (documenting Union Carbide's laborious, but ultimately unsuccessful, effort to prove its sabotage theory); Kallelkar, Investigation of Large Magnitude Incidents: Bhopal as a Case Study (May 1988) (paper prepared for presentation at The Institution of Chemical Engineers Conference on Preventing Major Chemical Accidents, London, England) (detailing the investigation of the possible causes of the Bhopal disaster); Union Carbide, Setting the Record Straight on Employee Sabotage and Efforts to Provide Relief (undated press release).
49. For example, Union Carbide of the United States, Union Carbide of India Ltd., and the Indian government tolerated the uncontrolled growth of shantytown communities right outside the walls of the plant. See, e.g., D. Weir, supra note 7, at 35-36; Gladwin, A Case Study of the Bhopal Tragedy, in BUSINESS MATTERS, supra note 5, at 227. Union Carbide also provided no emergency planning or notice to the community of the risks associated with operation of the plant at that site. See, e.g., id. at 231; see also Castleman & Purkavastha, The Bhopal Disaster as a Case Study in Double Standards, in EXPORT OF HAZARD, supra note 34, at 213-18 (citing deficiencies in plant design, operation, executive management, staffing, community relations, and government regulation); Gladwin, supra, at 227-34 (citing failures to anticipate the risks; equip the plant; inform workers, surrounding communities, and the government; control the plant; and comply with Union Carbide's internal operational standards).
51. See generally Comment, California's Community Right-to-Know, 16 ECOLOGY L. Q. 1021 (1989) (discussing the various federal, state, and local laws that work to either prevent or quickly remedy environmental disasters).
52. See, e.g., Castleman, The Double Standard in Industrial Hazards, in EXPORT OF HAZARD, supra note 34, at 82-85 (describing asbestos textile manufacturing by an Amatex subsidiary in Agua Priete and Juarez, Mexico that caused neighborhood pollution and did not inform workers about health hazards; asbestos cement manufacturing in Ahmedabad, India by
Oil field development in the biologically rich Amazonian rainforests of Ecuador provides another example of how some U.S. firms operate in countries where they are relatively unencumbered by environmental regulations.\(^3\) In order to preserve the diverse species of flora and fauna indigenous to its rainforests, the Ecuadoran government established the Yasuni National Park in 1979.\(^4\) But since the 1967 discovery of commercial quantities of oil in the region,\(^5\) the Ecuadoran government has also granted concessions to a number of domestic and foreign oil companies, including five companies based in the United States.\(^6\) These concessions confer the right to explore large tracts of Ecuador's rainforest and to exploit those tracts if commercially valuable quantities of petroleum are found.\(^7\)

The development of the oil fields has proceeded apace, even where concessions are clearly within park borders. In fact, the draft management plan for the 680,000 hectare park zones more than half of its area for "industrial use," and projects extensive oil-field development and mining.\(^8\) Perhaps not coincidentally, the park's draft management plan was funded by CONOCO, DuPont's oil subsidiary, which has found commercially valuable quantities of oil in its own concession within park boundaries.\(^9\)

Oil companies explore and exploit their concessions both inside and outside Yasuni National Park with apparent indifference to their impact an operation in which Johns Manville owns a minority interest that has polluted water, dumped solid wastes, and produced products without asbestos warnings affixed to them; battery manufacturing in Indonesia by a Union Carbide subsidiary that has polluted drinking water supplies with mercury and has caused kidney disease among "hundreds" of workers; arsenical pesticides manufacturing by a Diamond Shamrock subsidiary in Malaysia that produced symptoms of arsenic poisoning from exposure; and dumping of polychlorinated biphenyls and other chemical wastes in Zacatecas, Mexico by a waste-disposal agent for Diamond Shamrock, B.F. Goodrich, and Monochem).\(^{53}\)


\(^{54}\) Id. at 2-3. Through October of 1989, botanists have identified more than 1,200 species of indigenous flowering plants and suspect that 4,000 to 5,000 such species exist. Other scientists have registered more than 600 species of birds, 500 species of fish, and 120 species of mammals. Herpetologists expect to register approximately 100 species of reptiles and 100 species of amphibians. Id.

\(^{55}\) Id. at 6. Ecuador's petroleum resources accounted for 44.5% of Ecuador's 1988 export income and 40-60% of the national budget for the past five years. Id. at 6-7.

\(^{56}\) The U.S. firms are ARCO, Occidental Exploration and Production Company, Unocal, CONOCO (a subsidiary of DuPont), and Texaco. Id. at 7.

\(^{57}\) The oil concessions are usually 200,000 hectares in size. Id. at 6. Approximately three million hectares of the region are under exploration at this time; approximately 630,000 hectares are under exploitation. Id.

\(^{58}\) Id. at 3.

\(^{59}\) Id.
on the Ecuadoran rainforest and its indigenous peoples. Studies prepared by DIGEMA, an environmental agency within the Ecuadoran Ministry of Mines and Energy, document widespread and severe air, water, and soil contamination from oil-related activities in the Yasuni park.

Exploratory drilling, for example, involves the cutting of rainforest at each site, and the drilling itself generates wastes which are toxic and may be highly heated. Oil drilling operations and the wastes such operations produce are highly regulated in the United States. In Ecuador, oil drilling wastes—including toxic industrial detergents used during drilling—are frequently discharged without treatment into local water supplies or placed in open pits that often collapse, spilling their contents onto nearby terrain.

60. Id. at 11. Seismic exploration involves cutting trails and helicopter landing sites through the forest and detonating explosive charges every 100 meters. The trail-cutting alone destroys substantial amounts of valuable vegetation. In one 1,000 hectare concession block operated by ARCO, cutting the trails destroyed trees valued at millions of sucrés (the Ecuadorian currency) and 167,944 cubic meters of useful species of fruits and medicinal plants. Id. at 11-12. In addition to the loss of plants and habitat, the destruction of rainforest during seismic investigations has eroded and contaminated streams, rivers, and lakes with sediments and accelerated eutrophication of the waters from sedimentation and garbage deposition. The trail-cutting, detonations, and helicopter landing-site clearings have apparently progressed without regard to proximity to homes, cultivated fields, lakes, rivers, and streams. As a result, crops, wildlife, and aquatic life have been destroyed. Noise pollution from explosions and helicopter overflights has disrupted breeding and nesting behavior and driven animals from the area. Id. at 12.

61. Oil development in Ecuador is coordinated by the Corporacion Estatal Petrolera Ecuatoriana (CEPE), part of the Ecuadorian Ministry of Energy and Mines. Id. at 6. In 1984, the Ecuadoran government established the Direcccion General de Medio Ambiente (DIGEMA) within the Ministry. Id. at 9. DIGEMA is supposed to regulate the environmental impact of petroleum operations within the national parks, but its role in the granting and operation of oil concessions is negligible. For instance, DIGEMA has no provisions or mechanisms for monitoring, oversight, or enforcement, and no power to regulate development outside Ecuador's parks. Id. DIGEMA does not participate in preoperational contract negotiations, has promulgated only very general regulations, has no authority under the new oil exploitation law, and lacks monitoring or sampling equipment. Id. In November 1988, DIGEMA directed the oil companies to prepare and file environmental impact statements. However, as of October 1989, not one of the oil companies had complied with the directive. Id. CEPE itself has shown little interest in the impact its oil concessions are having in the region. In 1987, the World Bank loaned CEPE $8 million on the condition that 10% of the loan would be used to study these impacts. As of October 1989, no environmental impact assessment had been prepared. Id.

62. Id.

63. Two to five hectares are cleared for each well, with 10 to 15 additional hectares being cleared to obtain wood for platforms and helicopter landing sites. Id. at 14.

64. The wastes generated at this stage include petroleum, natural gas, formation water, and "drilling mud." "Drilling mud," used to lubricate, cool, and pressurize the wells, contains clays, water, and toxic chemical additives, including bactericides, anticorrosives, and thickeners, as well as petroleum from the wells. Id. at 14-15.


67. The pits are often sited on sloping terrain. Erosion from rain water and excessive
The proposals forwarded by some of the oil companies, including CONOCO, for landfilling these wastes would not satisfy U.S. standards under the Resource Conservation and Recovery Act for disposal of hazardous wastes. For instance, the wastes would not be pretreated, nor would the landfills have liners, leachate collection systems, monitoring systems, caps, or maintenance arrangements to prevent toxins from leaching into ground or surface waters.

Commercial extraction of oil is equally unregulated. After the wells are operating, formation water and petroleum and chemical additives used to move the oil through pipelines are freely discharged, and waste gas is burned without emissions controls. Spills from wells, tanks, pits, and flow lines are frequent, and they are neither contained nor cleaned up. CONOCO proposes to reinject formation water and other waste filling also causes the wastes to spill. Id. Some wastes are burned without temperature or emissions controls. The burnings contribute substantially to local air pollution in the form of gases such as carbon monoxide, carbon dioxide, sulfur monoxide, sulfur dioxide, and nitrogen dioxide. Id. at 15.

69. Id. § 6924(m).
70. Federal regulations require liners to prevent migration of wastes out of landfill sites to adjacent subsurface soil or groundwater. See 40 C.F.R. § 264.301 (1989).
71. Landfills settle over time, and their toxic contents tend to find their way to the surface. Rainfall and high water tables will carry toxic leachate into groundwater formations, where the leachate might further migrate into surface waters or drinking wells. NRDC Ecuador Report, supra note 53, at 15. Federal regulations require leachate collection and removal systems immediately above the liner in existing landfills “to collect and remove leachate from the landfill.” See 40 C.F.R. § 264.301(a)(2) (1989). Run-on and runoff control systems, and collection and holding facilities for run-on and runoff systems, are also required. Id. § 264.301(f), (g), (h).
72. Federal regulations also require inspection and monitoring of liners during and immediately after construction and weekly monitoring and inspection during landfill operation of leachate control systems, run-on and runoff systems, and wind dispersal control systems. See id. § 264.303.
73. Upon the closure of the landfill, federal regulations require covering the fill to minimize migration of liquids through the closed landfill. Id. § 264.310(a), (a)(1). The cover is to function with minimum maintenance and to promote drainage, minimize erosion, and accommodate settling while maintaining the cover’s integrity. Id. § 264.310(a)(2), (3), (4). Because drilling muds are not solids, placing them in landfills in a wet rainforest would present grave problems for “cap” maintenance. NRDC Ecuador Report, supra note 53, at 15.
74. Federal law requires maintenance and monitoring of sites to assure the integrity of cover, operation of leachate collection systems until leachate is no longer detected, maintenance and monitoring of groundwater monitoring systems, and prevention of runoff, run-on, or erosion that might damage covers. 40 C.F.R. § 264.310(b)(1), (2), (3), (4) (1989).
75. Formation water comes from geological strata lying miles below the surface. It can be as hot as 168 degrees Fahrenheit, and can contain levels of chlorides as high as 200,000 ppm (sea water contains 20,000 ppm of chlorides). NRDC Ecuador Report, supra note 53, at 16, 18-19. Other toxic components include high levels of petroleum in emulsion; heavy metals such as mercury, cadmium, and lead; and hydrogen sulfide. Id. at 16-17, 19.
76. Id. at 17-23.
77. Id. at 20. According to DIGEMA, many small local waterways in the exploitation areas support almost no aquatic flora or fauna, except for microorganisms that have adapted to the heat and toxicity of the water. Id. at 19.
products back into the oil bearing formation, but the firm has not said whether these injection wells would meet U.S. EPA Class II injection well standards.78

Roads and pipelines constructed to transport oil from the wells have also damaged the region.79 The pipeline system itself, which crosses the Andes and a major earthquake fault, is prone to spills,80 but there is no spill response equipment in Amazonian Ecuador.81

The failure of the Ecuadoran government to control the environmental impact of oil drilling in the Ecuadoran rainforest should not relieve U.S. firms from an obligation to comply with U.S. standards in their operations. The harm caused to the cultural, environmental, and medical health of local communities may ultimately outweigh any benefit to local economies, and end up backfiring on the U.S. business community.

The United States could take a leadership role in international environmental protection by unilaterally declaring that U.S. citizens and U.S.-owned businesses must comply with U.S. environmental protection laws in all of their foreign operations. It can do that by enacting an environmental law patterned after the Foreign Corrupt Practices Act.82

In the past, debate over whether U.S. environmental laws should apply extraterritorially has focused on the reach of the National Environmental Policy Act (NEPA).83 The wording of NEPA itself is ambiguous in this regard, for some of its language suggests it was intended to apply to extraterritorial environmental impacts of federal agencies,84 while

78. Id. at 23. Experience in the U.S. shows that injection wells can become “fountains of contamination” if they are not properly designed and installed. Id. Regarding U.S. EPA Class II injection well standards, see 40 C.F.R. § 146.21-146.25 (1989).
79. The cutting of roads is regarded as the leading cause of deforestation in the region, since speculators and colonists follow the roads to settle in many areas, displacing the indigenous populations from their historic lands. For a survey of how oil development in the Oriente region of Ecuador is destroying the resource base on which the indigenous Amazonian culture depends, threatening that culture with “displacement, marginalization, poverty, and declining nutrition and health, as well as deterioration of [indigenous] community life and devaluation of indigenous cultures,” see NRDC Ecuador Report, supra note 53, at 27-30.
80. For example, a major 1987 earthquake caused a spill that destroyed flora and fauna for hundreds of miles along the Quijos, Coca, Aguarico, and Napo rivers. In May 1989 a landslide destroyed 40 meters of the pipeline, releasing 210,000 gallons of petroleum into the Papallacta River and thence into the Napo River, which reportedly ran “black with petroleum as it flowed into Peru hundreds of miles away.” Id. at 26. DIGEMA has recorded at least 30 major spills from the pipeline alone, with an estimated loss of 16,800,000 gallons of oil. Most of the contamination occurred within the Amazon watershed. Id.
81. Contingency plans in case of ruptures in the pipeline are limited to “locating the source of the drop in pressure in the pipeline, turning off the flow, waiting for the petroleum in the line to spill out, and repairing the pipeline.” Id. at 25. The nearest valve can be tens of kilometers away and petroleum can spill for days before the line is emptied. Id. Major oil spills can be expected to increase in frequency as the pipeline system continues to age. Id. at 27.
84. Id. Section 4332(2)(F) states that “[a]ll agencies of the Federal Government shall]
other language suggests it is to apply only to environmentally significant conduct within U.S. borders.\textsuperscript{85} As a result, some commentators have concluded that NEPA does reach extraterritorial federal actions,\textsuperscript{86} while others conclude NEPA applies only to domestic actions.\textsuperscript{87}

In the 1970's the White House sought to extend U.S. environmental legislation to cover U.S. government activities in other countries.\textsuperscript{88} The Council on Environmental Quality issued a memorandum in 1976 supporting the full application of NEPA to all federal actions having environmental impacts abroad.\textsuperscript{89} And in 1979 President Carter issued an Executive Order directing federal agencies to prepare environmental impact statements for major federal actions having any of several extraterritorial effects.\textsuperscript{90} The Reagan administration curtailed these efforts in the 1980's,\textsuperscript{91} but in 1989 draft legislation was introduced that would explicitly bring major federal actions outside U.S. territory under NEPA's requirements.\textsuperscript{92}

recognize the worldwide and long-range character of environmental problems and where consistent with the foreign policy of the United States lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's [sic] world environment.\textsuperscript{93}

85. Among the enumerated goals of NEPA are the "fulfill[ment of] social, economic, and other requirements of present and future generations of Americans," id. § 4331(a), and the "assur[ance] for all Americans [of] safe, healthful, productive, and esthetically and culturally pleasing surroundings." Id. § 4331(b)(2).


Whereas NEPA covers only activities involving a major action by a federal agency, a Foreign Environmental Practices Act (Proposed FEPA or FEPA)\(^{93}\) could hold U.S.-owned or controlled firms and their agents to U.S. standards for any conduct having an environmental impact in another country.\(^{94}\) The law would authorize civil suits against and criminal prosecution of culpable firms, their officers, and their agents whenever those firms failed to comply with U.S. standards and willfully or negligently harmed other countries' environments. Of course, firms operating in other countries would remain obliged to comply scrupulously with the environmental and conservation laws of those countries. But the law would require U.S. firms to comply with whichever set of regulatory standards protected environmental quality more rigorously.

The law proposed here rests on an assumption that U.S. firms can control their production, service, disposal, and marketing processes wherever they operate. When transferring technology, U.S. firms have the capacity to ensure that the technology is appropriate for the host country's infrastructure and labor market.\(^{95}\) Firms can invest in state-of-the-art pollution control and conservation equipment for their foreign facilities.\(^{96}\) They can scrupulously use and maintain foreign facilities and carefully choose, train, and supervise personnel for the operation of facilities in other countries. In addition, U.S. firms can maintain continuous, 

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\(^{93}\) A Proposed Foreign Environmental Practices Act is set forth in the appendix to this article.

\(^{94}\) The related problem of export of hazardous products would not be addressed specifically for two reasons. First, the chain of causation for environmental harm resulting from such products can become extremely attenuated and difficult to establish to the satisfaction of a U.S. court. At some point in the chain of causation, for example, foreign use of products from the United States might pass beyond the legal control of the U.S. exporter of the product, no matter how diligently a product exporter sought to assure safe use of its products. Controlling actual foreign use of exported products banned or subjected to restricted use in the United States may not be feasible, except by banning outright foreign sales of such products.

Second, several statutes currently governing—and permitting—the export of products banned or restricted in the United States would have to be amended, an issue that is beyond the scope of this Article. These include the Export Administration Act, 50 U.S.C. §§ 2401-2420 (1982 & Supp. V 1987); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1988); and the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-393 (1988). However, the proposed environmental statute would cover the environmental impacts of any foreign marketing and labelling practices of U.S. corporations in other countries.

\(^{95}\) See Ashford & Ayers, Policy Issues for Consideration in Transferring Technology to Developing Countries, 12 ECOLOGY L. Q. 871, 874, 891 (1985).

\(^{96}\) Castleman, Workplace Health Standards and Multinational Corporations in Developing Countries, in BUSINESS MATTERS, supra note 5, at 172.
systematized, and informative communication with host-country stockholders.\textsuperscript{97}

These types of practices fall well within the customary scope of control that managers exercise over their firm's operations in many developed countries.\textsuperscript{98} U.S. firms should implement similar controls over their environmentally hazardous operations in other nations,\textsuperscript{99} especially where host governments lack the capacity to effectively regulate such operations.

II

AN OVERVIEW OF THE FOREIGN CORRUPT PRACTICES ACT

Extraterritorial regulation of U.S.-controlled business activity is not without precedent. In the Foreign Corrupt Practices Act (FCPA),\textsuperscript{100} Congress legislated standards to which U.S. firms may be held accountable for their activities in other countries.

This section examines the events leading to the passage of FCPA and some of the lessons gained from enforcing its provisions. The discussion provides a background for evaluating the prospects for enacting and implementing a Foreign Environmental Practices Act. In addition to summarizing the history of FCPA, this section considers recent amendments to FCPA and the ongoing controversy that still surround its implementation and enforcement.

A. The Foreign Corrupt Practices Act

1. Summary of FCPA

In the early 1970's, reports of bribery and other corrupt practices by U.S. firms operating overseas were headline news. The Italian and Japanese governments were rocked by revelations that high officials had received payments from such firms as Lockheed, Exxon, and Mobil.\textsuperscript{101} In the Netherlands, Prince Bernhardt resigned in the wake of news stories charging him with receiving one million dollars from Lockheed.\textsuperscript{102}
In 1976, the Securities and Exchange Commission (SEC) reported that bribery was not an uncommon practice among U.S. corporations operating in other countries.\textsuperscript{103} Over 400 corporations, including 117 members of that year's Fortune 500, admitted making illegal or legally questionable payments totalling more than $300 million.\textsuperscript{104} At one extreme, payments to government bureaucrats and clerks ensured that permits and licenses for which the corporations qualified were issued in a timely fashion.\textsuperscript{105} At the other extreme, bribes to high foreign officials helped to secure favorable treatment of the firms' operations in host countries.\textsuperscript{106}

During the 94th Congress, committees of both the Senate and the House held hearings on the misuse of corporate funds by U.S. corporations. Both chambers denounced the practice of corrupt payments to foreign officials and politicians. In its report, the Senate Committee on Banking, Housing, and Urban Affairs said,

> The image of American democracy abroad has been tarnished. . . . In our free market system, it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business.\textsuperscript{107}

The House Committee on Interstate and Foreign Commerce criticized such payments in equally strong terms:

> Not only is [the payment of bribes] unethical, it is bad business as well. . . . It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality, or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency. . . . Bribery of foreign officials by some American companies casts a shadow on all U.S. companies. The exposure of such activity can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas.\textsuperscript{108}

The House Report asserted that the practice harmed the United States' foreign relations by embarrassing friendly governments, lowering esteem for the U.S. abroad, and lending credence to "suspicions sown by foreign


\textsuperscript{106} Id.

\textsuperscript{107} S. Rep. No. 114, supra note 104, at 3-4.

opponents . . . that American enterprises exert a corrupting influence on the political processes of their nations.”

In response to these concerns, Congress enacted the Foreign Corrupt Practices Act of 1977. FCPA amended the Securities Exchange Act of 1934 (the Exchange Act) to prohibit U.S. companies subject to SEC jurisdiction from making certain payments to foreign officials. FCPA’s prohibitions extended to officers, directors, employees, and agents of “issuers of securities,” and to stockholders acting on behalf of the issuers. FCPA also amended the Exchange Act to require issuers of securities regulated by section 12 and issuers regulated by section 15(d) to satisfy certain standards in their accounting and record-
keeping practices, subject to an exemption related to national security.\textsuperscript{117}

In addition to covering corporations subject to SEC jurisdiction, FCPA prohibited foreign corrupt payments by “domestic concerns,” including subsidiaries of U.S. corporations.\textsuperscript{118} These entities were defined as any individual who is a citizen, national, or resident of the United States [or] any corporation, partnership, joint-stock company, business trust, unincorporated association, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.\textsuperscript{119}

The purpose of extending FCPA’s reach to domestic concerns was, according to the House Report, “to reach not only all U.S. companies other than those subject to SEC jurisdiction, but also foreign subsidiaries of any U.S. corporation. . . . Failure to include such subsidiaries would only create a massive loophole in this legislative scheme through which millions of bribery dollars will continue to flow.”\textsuperscript{120}

\textsuperscript{116} Id. § 102, 15 U.S.C. § 78m(b) reads:

(2) Every issuer which has a class of securities registered pursuant to Section 12 . . . and every issuer which is required to file reports pursuant to section 15(d) . . . shall-

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management’s general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria generally applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management’s general or specific authorization; and

(iv) the recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.


117. In essence, the exemption excused from compliance any person cooperating with written directives from heads of federal agencies or departments, pursuant to Presidential authority to issue such directives. FCPA § 102(3)(A), 15 U.S.C. § 78m(b)(3)(A) (1988).\textsuperscript{118}


120. H.R. Rep. No. 640, supra note 101, at 12. The House Committee also stated that it: found it appropriate to extend the coverage of the bill to non-U.S. based subsidiaries because of the extensive use of such entities as a conduit for questionable or improper foreign payments authorized by their domestic parent. The committee believes this extension of U.S. jurisdiction to so-called foreign subsidiaries is necessary if the legislation is to be an effective deterrent to foreign bribery. . . . The Committee believes that the qualified extraterritorial application of this bill is clearly supported by the
By placing FCPA within the Securities Exchange Act, Congress assigned primary responsibility for enforcing FCPA to the SEC. Congress also established a supplemental role for the Department of Justice (DOJ) by authorizing the Attorney General to commence civil injunctive proceedings under FCPA, and by establishing criminal penalties for certain classes of violations of the Act. FCPA authorized the Attorney General to seek injunctive relief against domestic concerns to prevent or halt illegal payments overseas.

The Senate and House Committees both emphasized that the legislation prohibited only "corrupt" foreign payments, which they distinguished from lawful "facilitating" or "grease" payments. In essence, corrupt payments were those that sought to influence wrongfully the natural course of discretionary public decisionmaking in host countries with respect to U.S. business operations. Payments made solely to facilitate ministerial or clerical public processes were permitted, because they were accepted practices in certain countries and necessarily served legitimate business purposes. In line with Congress' decision that facilitating payments would remain legal, the statute as originally enacted specifically prohibited only "corrupt" foreign payments.

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Id. For a discussion of the legality of the statute proposed here in light of principles of U.S. foreign relations law, see infra notes 250-52 and accompanying text.


125. The Senate Committee, for example, defined "corrupt" payments as payments "intended to induce the recipient to misuse his official position in order to wrongfully influence the recipient." S. REP. No. 114, supra note 104, at 10. According to the report, "[t]he word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient." Id.

126. See 15 U.S.C. § 78dd-2(b) (1988) (amending FCPA § 103(a) to exempt payments to a foreign official, political party, or party official made to expedite or secure "routine governmental action"). As examples of permissible "grease payments," the Senate Report cited payments for expediting shipments through customs, placing a transoceanic phone call, securing required permits, or obtaining adequate police protection. S. REP. No. 114, supra note 104, at 10. The House Committee elaborated on the distinction between corrupt payments and lawful payments:

While payments made to assure or speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments. As a result, the committee has not attempted to reach such payments. However, where the payment is made to influence the passage of law, regulations, the placement of government contracts, the formulation of policy, or other discretionary governmental functions, such payments would be prohibited.

H.R. REP. No. 640, supra note 101, at 8.
cally exempted from coverage payments to foreign officials whose duties were "essentially ministerial or clerical."127

A payment or gift, or a lesser act or attempt that could culminate in a payment or gift, triggered the Act’s sanction if the actor specifically intended to affect the host country's discretionary public decisionmaking process.128 Payments to third-party "conduits" for corrupt payments and gifts triggered liability if the payor/donor knew or had reason to know that the third party would forward the payment with the intent to influence public decisionmaking processes.129 Thus, either knowing or negligent conduct could trigger FCPA’s provisions as to third-party conduits.

FCPA specified steep penalties for violations of its provisions. Issuers could be fined up to $1 million.130 Officers, stockholders, and directors who willfully violated the Act could be fined up to $10,000 and imprisoned for up to 5 years.131 To further deter individual misconduct, issuers were prohibited from directly or indirectly paying any fines imposed on officers, directors, stockholders, agents, or employees.132

2. Reactions and Amendments to the Foreign Corrupt Practices Act

Passage of FCPA set off a storm of protest. Some critics considered the Act "cultural imperialism," since it imposed normative constraints on U.S. businesses operating in countries that would not otherwise sub-

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128. FCPA as originally enacted provided that "[i]t shall be unlawful" for any issuer to make "an offer, payment, promise to pay, or authorization of the payment of any money" to any of the following:
   (1) any foreign official for purposes of
      (A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or
      (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;
   (2) any foreign political party or official thereof or any candidate for foreign political office for purposes of
      (A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or
      (B) inducing such party, official, or candidate to use its or his influence with a foreign government, or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

scribe to these norms. Opponents argued that an ethnocentric refusal to respect local rules would harm the prospects of U.S. businesses seeking to compete in those marketplaces. Others objected to the uncertainty regarding what constituted a violation and what degree of "knowledge" incurred liability.

In response to some of these concerns, Congress significantly amended FCPA in the Omnibus Trade and Competitiveness Act of 1988. The foreign corrupt payments provisions—the heart of FCPA—were amended in four primary ways. First, the "having reason to know" language concerning third-party payments was repealed, and definitions of "knowing" were added. Although the new language has not yet been tested in court, the likely effect of these amendments is to remove negligence as a basis for liability for foreign corrupt payments made through third-party conduits.

Second, FCPA's original language which specifically permitted payments to officials intended to facilitate their performance of ministerial or clerical duties was broadened to permit payments to any official, political party, or party official, if the purpose of the payments was "to expedite or to secure performance of a routine governmental action by a foreign official, political party, or party official." Third, the amendments added a

134. Id.

(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if -
(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such a result is substantially certain to occur; or
(ii) such person has a firm belief that such circumstance exists or that such a result is substantially certain to occur.

(B) When knowledge of the existence of such a circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

The language of the subsection relating to domestic concerns is identical. Id. § 5003(c), 15 U.S.C. § 78dd-2(h)(3).
139. Id. § 5003(a), (c), 15 U.S.C. §§ 78dd-1(b), 78dd-2(b). The amendments added a definition and examples of "routine governmental actions":

The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in —
set of affirmative defenses. Defendants could now plead that the payments were lawful under the written laws or regulations of the host country government or that the payment or gift was a “reasonable and bona fide expenditure incurred by the foreign recipient.”

The final set of amendments directed the Attorney General to issue guidelines governing the conduct of issuers, domestic concerns, and other covered persons. In addition, they directed the Attorney General to establish a procedure for issuing timely advisory opinions upon request to affected businesses and persons. These provisions constitute a type of early warning system: they enable firms concerned about potential liability to determine whether DOJ would be likely to prosecute under a particular set of facts. DOJ had already established such a procedure in 1980, but the 1988 amendments elevated it to the status of a statutory requirement.

Amendments to FCPA’s accounting provisions declared that violations of the Act’s accounting standards would not incur criminal liability unless the alleged violator “knowingly” circumvented an accounting system or falsified a book, record, or account required under FCPA. In addition, the amendments directed that an issuer owning less than 50% of a foreign subsidiary would lawfully discharge its accounting obligations if it used its influence in good faith and to a reasonable extent to

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
(ii) processing governmental papers, such as visas and work orders;
(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections of goods related to transit of goods across country;
(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration;
(v) actions of a similar nature.

Id. § 5003(a), 15 U.S.C. § 78dd-1(f)(2)(A). In addition, the amendments added a limitation on the definition of “routine governmental action”:

The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or continue business with a particular party, or any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party.


140. Id. § 5003(a), (c), 15 U.S.C. § 78dd-1(c)(1), 78dd-2(c)(1).
141. To be exempt, the payment, gift, offer, or promise of anything of value was to be “directly related to the promotion, demonstration, or explanation of products or services . . . or the execution or performance of a contract with a foreign government or foreign agency.” Id. § 5003(a), (c), 15 U.S.C. §§ 78dd-1(c)(2)(A), (B), 78dd-2(c)(2)(A), (B).
142. Id. §§ 5003(a), (c), 15 U.S.C. §§ 78dd-1(d), 78dd-2(e). The guidelines were to be issued within one year of the effective date of the amendments for issuers, and within six months for domestic concerns.
143. Id. § 5003(a), (c), 15 U.S.C. §§ 78dd-1(e), 78dd-2(f).
144. Id. § 5002, 15 U.S.C § 78m(b)(5).
persuade the subsidiary to use an accounting system that met FCPA's requirements.\textsuperscript{145} 

The net effect of the amendments was to relax FCPA's requirements.\textsuperscript{146} By removing negligence as a basis for liability and introducing a number of affirmative defenses, the amendments increased the difficulty of mounting successful administrative, civil, and criminal actions under FCPA. On the other hand, the added provisions requiring the Attorney General to issue guidelines for conduct and to respond to requests for advice regarding specific situations were helpful. By providing U.S. firms with ways to obtain additional guidance, these amendments should facilitate compliance by U.S. firms with FCPA's provisions.

3. Effectiveness of FCPA

The bottom line for any discussion of FCPA in the context of a proposed Foreign Environmental Practices Act is whether FCPA "works." Does FCPA deter U.S. firms from engaging in corrupt practices overseas? If so, are the U.S. firms that comply with FCPA's provisions still competitive in the global marketplace? Has it changed—positively or negatively—attitudes toward American businesses and the United States generally?

FCPA had two explicit regulatory purposes: to prohibit corrupt payments to foreign governments and to require U.S. firms to keep records that would enable regulators to determine whether the firms were abiding by the prohibition. These provisions purportedly served other more ambitious policy goals as well: (1) to protect the integrity of the global marketplace by forcing U.S. businesses to earn their foreign market shares through effective competitive performance; (2) to level the playing field by depriving less scrupulous U.S. firms of any competitive advantage purchased from corrupt host governments; (3) to promote good relations with other countries; and (4) to minimize the possibility of U.S. firms abroad being expropriated or otherwise sanctioned by governments hostile to or embarrassed by U.S. firms' corrupt practices.\textsuperscript{147}

It is easier to assess whether FCPA achieved its explicit regulatory purposes than its more ambitious policy goals. Specific enforcement ac-

\textsuperscript{145} Id. § 5002, 15 U.S.C. § 78m(b)(6). The amendments also provided that an issuer able to demonstrate its good faith would have the benefit of a conclusive presumption of compliance with the accounting provisions of FCPA. Id. Finally, the accounting amendments added definitions of "reasonable assurances" and "reasonable detail," as those terms pertained to the quality of issuers' accounting systems: "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." Id. § 5002, 15 U.S.C. § 78m(b)(7).

\textsuperscript{146} However, the amendments raised the fines that could be imposed under FCPA. The maximum corporate fine increased to $2 million per violation, id. § 5003(c), (b), 15 U.S.C. §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A); the maximum individual fine increased from $10,000 to $100,000. Id. § 5003(c), (b), 15 U.S.C. § 78dd-2(g)(2), 78ff(c)(2).

\textsuperscript{147} See supra text accompanying note 108.
tions and surveys provide direct answers about FCPA’s deterrent effect. The broader consequences of FCPA for the competitiveness of U.S. firms overseas and for U.S. foreign policy are more difficult to assess because of the complex interaction of international economic and political processes. Nevertheless, it is possible to reach some tentative conclusions.

a. FCPA’s Deterrent Effect

The history of FCPA’s enforcement provides a partial answer regarding the Act’s deterrent effect.\textsuperscript{148} The SEC has the primary authority to enforce FCPA, and its record of civil actions under FCPA has justifiably been characterized by at least one commentator as “conservative.”\textsuperscript{149} For example, as of January 1989, the SEC had sought only three injunctions to enforce the anti-bribery provisions of FCPA.\textsuperscript{150} All three actions were settled by consent judgments against the corporate and individual defendants. In addition, the SEC had initiated 27 administrative proceedings and requested 119 civil injunctions to enforce the accounting provisions of the Act.\textsuperscript{151} In the civil injunctive proceedings, the SEC has also alleged corrupt foreign payments where appropriate.\textsuperscript{152}

SEC v. Katy Industries,\textsuperscript{153} involving an oil production contract in Indonesia, is a representative case. SEC charged that the defendants had


\textsuperscript{151} For a list of those actions, see 1 Foreign Corrupt Pract. Act Rep. (Bus. Laws, Inc.) 274-274.08 (1988).


employed a close friend of a high-level official in the Indonesian government in order to win a contract. Katy then retained the official's representative as an agent of Katy, and made payments of $250,000 to a Cayman Islands corporation owned by the friend and the representative. 154 After filing the action, SEC entered into a consent agreement with the defendant corporation and its officers, in which the defendants neither admitted nor denied that they had violated the corrupt payments and accounting provisions of FCPA. 155 The defendants did agree to an order enjoining them from committing future violations of FCPA. 156

DOJ's role under FCPA is independent of and supplementary to the SEC's role. It launched a number of actions, including both criminal prosecutions and civil injunctive proceedings, under the antibribery provisions of FCPA. 157 Since 1980, DOJ has also issued review letters in response to inquiries concerning conduct that could trigger an enforcement action under the FCPA review procedure. 158 Through July 1988, DOJ issued 19 review letters. 159 It announced in every case but one that

154. Id. at 616. The complaint also alleged that the defendants knew or had reason to know that the Indonesian government official and his representative would share in the payments to the corporation. Id. In addition, Katy allegedly agreed to pay 13.3% of its profits from the oil contract to the Cayman Islands corporation for the period between 1975 and July 1978. Id.
155. Id.
156. Id. The order also required them to amend Katy's SEC filings and to establish a special review committee of outside directors to report to Katy's board of directors for any further action.

For a complete report of the pleadings and dispositions of these and all other SEC and DOJ enforcement actions to date, see 2 Foreign Corrupt Prac. Act Rep. (Bus. Laws, Inc.) 601-698.22 (1989).

it would take no enforcement action; DOJ refused to review the facts in the last case.160

In sum, a relatively small number of cases have been brought to trial. However, enforcement actions have culminated in consent agreements prohibiting specific individuals and firms from making corrupt payments in the future. In at least one case, the consent agreement established a special review committee of outside directors to ensure the corporation's compliance with FCPA.161

Despite the somewhat scanty enforcement of FCPA, surveys by the General Accounting Office (GAO)162 and the U.S. Chamber of Commerce163 indicate that FCPA does serve as a deterrent. U.S. firms evidently recognize that, given the absence of a bright line between corrupt payments and lawful facilitating payments, certain payments or other practices required by foreign officials or business agents might well violate FCPA.164 U.S. firms may also fear that they will be unable to control adequately the actions of foreign agents,165 or they may simply be reluctant to conform to local practices that could violate FCPA.166 FCPA may reduce the attractiveness of investing in countries where questionable payments are a condition precedent to obtaining business.167 For instance, foreign governments and businesses may be reluctant to deal with U.S. firms that refuse to engage in practices questionable under FCPA.168 Agents from other countries also may re-

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160. Department of Justice Release 80-3, published in 1 Foreign Corrupt Prac. Act Rep. (Bus. Laws, Inc.) 117 (1988). The inquiry in this case asked DOJ to review a proposed contract with a U.S. firm's agent in West Africa. The contract made two references to FCPA: in one of the contract's provisions, the agent averred that he was not a foreign official; in the other provision, the contract expressly prohibited payments to foreign officials, using the language of FCPA. DOJ refused to review the contract on the ground that, in the absence of reasonable concern about the application or violation of FCPA, contract review was not an appropriate object of the review procedure. Id.


164. Several U.S. firms have reportedly lost business and business opportunities, and incurred administrative costs because they refused to make questionable payments, or because they incurred accounting and legal expenses in attempting to determine whether payments were permissible facilitating payments. See id. at 19-20.

165. See id. at 23-26.

166. Id. at 22-24.

167. See id. at 13-25.

168. For example, the Australian government has expressed fear that FCPA might be costing the country export income because of the reluctance of some U.S. firms to agree to commercial arrangements that might violate FCPA. See id. at 14-15. Weisberg and Reichenberg also discuss a U.S. firm's divestment of a 20% interest in a Southeast Asian operation at a $2 million loss. This decision was supposedly made for several reasons: (1) the foreign-dominated board of that operation demanded that the U.S. firm's local manager cease filing compliance reports pursuant to a FCPA consent agreement; (2) the cancellation of an
fuse to deal with U.S. firms if they are offended by what they perceive as FCPA's moral imperialism.  

FCPA also may help deter corrupt payments by strengthening the bargaining position of U.S. firms in negotiations with other governments, foreign businesses, and foreign business agents. As one compliance officer for a U.S. multinational stated, "I think it has been helpful to most American businessmen to be able to say, ‘No, I can’t do that. It’s against U.S. law.’ " A host government that normally requires corrupt or questionable payments might be forced to forego such payments if it strongly desires U.S. investment.

Generally, the accounting and recordkeeping requirements of FCPA appear to deter such payments by making them harder to conceal. Because the penalties for making corrupt payments might ultimately outweigh the potential increase in business, firms may refrain from making such payments if they cannot conceal the payments effectively.

b. FCPA's Effect on U.S. Investments Overseas

A second concern is whether and how FCPA has affected U.S. firms' competitiveness. In other words, has FCPA harmed scrupulous U.S. firms by making them less competitive with unscrupulous competitors from other nations?

The limited data available are ambiguous. Two studies conclude that U.S. firms' market shares and export shares do not appear to be adversely affected in countries where FCPA allegedly harmed those shares. Arguably, those firms' market and export shares might have been larger without prohibitions on corrupt payments; however, this is highly speculative. Another study analyzing postcompliance corporate agreement with a U.S. firm by a government agency shortly after passage of FCPA, and the firm's subsequent loss of a tender even though its bid was competitive; and (3) an "extortive" settlement with a host national who threatened to report fictitious violations of FCPA to DOJ if the U.S. firm did not pay the national a commission for introducing the firm's representative to government officials who might have influenced the sale. Id. at 15-17.

169. According to Weisberg and Reichenberg, there is "considerable ill feeling on the part of foreign agents, companies, and governments, some of whom are reluctant to engage in business with companies whose government might accuse them of being corrupt." Id. at 13. Weisberg and Reichenberg also report losses of services of foreign national agents, who "often object to having their business dealings scrutinized by the U.S. government." Id. at 13-14.


172. Gillespie, supra note 171, at 28 (concluding that "FCPA's potential to hurt U.S. exports remains unproven"); Graham, supra note 171, at 107 (concluding that FCPA had "not negatively affected the competitive position of American industry in the world marketplace," and that the market share of U.S. industry in countries where FCPA was reported to be an important trade consideration was no different from U.S. firms' market shares in other countries).
profits of firms concluded that many of the firms that had discontinued corrupt payments reported "high, if not record, revenues, profits, and backlogs."173 While some of this undoubtedly reflects growth in those markets, it may also suggest that U.S. firms have discovered successful strategies that can comply with FCPA.

The Chamber of Commerce study concluded that FCPA has harmed U.S. firms,174 sometimes to the advantage of firms from other nations.175 Another study concluded that FCPA has placed U.S. firms at a competitive disadvantage,176 leading some firms to circumvent the law.177 The GAO reports that 30% of its respondents claim to have lost foreign business as a direct consequence of FCPA.178 Nevertheless, GAO cautions, "[c]laims that U.S. companies have lost sales . . . are difficult, if not impossible, to substantiate and quantify because of the sensitivity of the bribery subject and the numerous factors affecting overseas business."179 These studies clearly do not resolve the dispute over whether or not FCPA has helped or harmed the competitiveness of scrupulous U.S. firms. Rather, they imply that FCPA has both harmed and helped individual firms but has had no overall significant positive or negative effect on the competitiveness of U.S. firms.

FCPA's impact on foreign relations is also difficult to assess. One study found that investigations arising from FCPA may have harmed U.S. businesses in Iran by contributing to the fall of the Shah,180 and may have helped U.S. business interests in Turkey.181 It concluded, however, that such adverse impacts are the exception: "[T]he destabilizing effect [of FCPA on friendly regimes] fail[ed] to be realized in far more cases where regimes ignored, dismissed, or otherwise side-stepped U.S. allegations."182 For the most part, foreign corrupt practices do not appear to have been much of an issue in our recent international relations.183

173. Richman, Can We Prevent Questionable Foreign Payments?, BUS. HORIZONS, June 1979, at 16. However, these firms' record-setting performances might have resulted from investments made before the firms ceased their corrupt practices.

174. According to the Weisberg and Reichenberg study, FCPA's "statutory vagueness, together with uncertainty as to enforcement priorities and stiff criminal penalties, have caused [U.S.] companies to err on the side of excess in making costly adjustments in their business practices and recordkeeping and to avoid some export transactions altogether." See H. WEISBERG & E. REICHENBERG, supra note 133, at 1-2.

175. U.S. firms have reportedly lost contracts to European and Japanese firms because the U.S. firms refused to engage in conduct that might violate FCPA. Id. at 22-23.

176. Kaikati & Label, supra note 135, at 42.

177. Id. at 40-41 (citing a Boeing plan to sell its products through a foreign intermediary that would not be subject to FCPA's requirements).

178. H. WEISBERG & E. REICHENBERG, supra note 133, at 28 (citing GAO STUDY, supra note 162).

179. GAO STUDY, supra note 162, at 16.

180. Gillespie, supra note 171, at 15-17, 28.

181. Id. at 12-13, 28.

182. Id.

183. See contra H. WEISBERG AND E. REICHENBERG, supra note 131, at 13-26 (noting
any case, past events are not necessarily reliable indicators of the future impact of either FCPA or the proposed Foreign Environmental Practices Act, for attitudes in other countries may change over time.\textsuperscript{184}

\textbf{B. Applying Experience Under FCPA to a Foreign Environmental Practices Act}

If a Foreign Environmental Practices Act were enacted, such a law—like FCPA—could be expected to deter some environmentally undesirable, unsustainable business practices. The proposed law could also enhance the United States' foreign relations and U.S. firms' foreign image, since compliance would demonstrate that our government and our businesses were sensitive to the environmental health of other nations. However, like FCPA, FEPA might curtail foreign investments and operations if compliance with U.S. environmental laws became prohibitively expensive or impossibly uncertain. On the other hand, the passage of FEPA might cause potential host countries to find investments by U.S. firms more attractive, because such investments would pose less of a risk of environmental harm. Moreover, some U.S. industries—such as those that develop and market environmental protection products and services—might even gain business.\textsuperscript{185}

A major problem would be the uncertainty facing many U.S. firms regarding which U.S. environmental standards would apply to their overseas operations. FCPA's 1988 amendments indicate the advisability of a FEPA early warning system, like DOJ's advisory process, that could address this problem of uncertainty. Under a FEPA early warning system, a firm could request an opinion from the Administrator of EPA as to whether proposed or existing operations might violate FEPA. After consulting expert administrative personnel, the Secretary of State, and officials of the host country, the Administrator could issue advisory opin-

\textsuperscript{184} As one author has written:

\textit{[T]his study [of U.S. export shares] has shown that societal systems are dynamic. Multinational managers should be wary of believing the comforting writers of the 1970's who assured them that bribing in developing countries was an accepted cultural norm. . . . The fact is that revolutionary new social orders are changing the patterns of centuries. . . . In the Middle East alone, numerous heads of state are scrambling to somehow deal with issues of corruption before revolutionary movements affect them.}

Gillespie, \textit{supra} note 171, at 28 (emphasis added).

\textsuperscript{185} For example, Waste Management, Inc., a waste collection and disposal corporation that also cleans up polluted dump sites, grew from a local waste collection firm with revenues of \$750,000 in 1956 to a conglomerate operating more than 450 subsidiaries and divisions in 46 states, Canada, and other foreign countries, with revenues of \$4.5 billion in 1989 and projected annual growth of 20\% for "years to come." Waste Management has successfully exported its waste management processes to Saudi Arabia, Australia, Venezuela, Argentina, and Western Europe. Darby, \textit{Building an Empire on Waste}, 86 \textit{COMMERCE} 9-10 (1990) (publication of the Chicago Association of Commerce and Industry).
ions on whether and how the firm should comply with both U.S. laws and those of the host country. An advisory system would put all affected parties on notice and might curtail further environmental damage.

The chief importance of FCPA for the purposes of this Article is the precedent it establishes for bringing certain extraterritorial operations of U.S. businesses under U.S. domestic laws. FCPA's passage was impelled by outrage over the corrupt practice of some U.S. firms overseas. Congress concluded that these practices affected U.S. foreign relations and needed to be controlled. As global concern over environmental degradation grows, the harmful practices of some U.S. firms operating in other countries will also come to be regarded as a threat to foreign relations. It is therefore timely to consider the possibility of legislation that would bring the overseas operations of U.S. firms into compliance with U.S. environmental laws.

III
AN ANALYSIS OF THE PROPOSED LAW

How should a Foreign Environmental Practices Act be structured? The experience gleaned from the years of administering FCPA and various environmental statutes can provide guidance. Like FCPA, legislation covering the environmental practices of U.S. firms operating overseas should include all U.S.-owned and controlled entities. Like the recent FCPA amendments, the legislation should clearly state what is expected of U.S. firms and where they may turn for guidance as to how to comply with applicable provisions. The Act should also clearly spell out what conduct would lead to civil liability and criminal prosecution, and which federal agencies are responsible for implementing and enforcing the Act.

A Foreign Environmental Practices Act should also incorporate certain innovative features of existing environmental legislation. For example, placing the burden of environmental enforcement solely on federal agencies would limit the scope of enforcement because federal agencies have relatively limited resources and also have other responsibilities that go beyond enforcement. Congress has responded by including citizen suit provisions in recent environmental legislation. FEPA could simi-


larly extend standing to sue to private citizens, including citizens of other countries.\textsuperscript{188} In addition, enforcement provisions should counterbalance any economic incentive to violate the regulations. Unless the penalties and compliance costs resulting from a statutory violation exceed the benefits flowing from a violation, the rational actor will continue to violate the statute. Consequently, several statutes now impose penalties scaled to the economic benefit produced by statutory violations.\textsuperscript{189} This may be a useful tool in designing FEPA.

Furthermore, like the Waste Export Control Act bill now pending in Congress, FEPA should require U.S. firms to conform their environmental practices in a host country to comply with any host country regulations that are more strict than U.S. requirements.\textsuperscript{190} Although this proposal may seem extreme, it is not a drastic departure from current practice. Firms operating internationally must already satisfy the foreign country's regulations. Holding U.S. firms to the stricter of the two standards (U.S. or host nation), requires only that they investigate the newly applicable U.S. environmental laws, with which many of the firms may already be familiar. This, of course, underscores the necessity of a provision enabling enforcement agencies to issue advisory opinions.

The Proposed FEPA that appears in the appendix to this Article was drafted with these observations in mind. Before discussing this proposed law in more detail, it is worthwhile to make several introductory observations. First, wherever possible and sensible, this proposal tracks the language of FCPA. FCPA broke new ground in our thinking about our ability to regulate transnational conduct and has evidently had some success in that regard. FCPA's development should be used both as a guide and as a response to allegations that the regulation of transnational business practices is somehow impossible.

Second, it is assumed that FEPA would be enacted as an amendment to the Exchange Act, but that primary enforcement responsibility would be vested in the Administrator of EPA.\textsuperscript{191} EPA's expertise should be brought to bear on the implementation and enforcement of FEPA.

\textsuperscript{188} Such a grant of standing is within Congress' power. C. Wright, \textit{The Law of Federal Courts} 74 (4th ed. 1983). Giving private citizens standing does not, of course, resolve remedies issues. Careful thought must be given as to whether and when private plaintiffs should be allowed to seek injunctions and/or civil penalties.


\textsuperscript{191} FEPA § 9.
EPA would also be responsible for making rules, receiving notices, and drafting advisory opinions.

Finally, the drafting of FEPA should acknowledge that workable environmental regulation is not achieved simply by passing tough-sounding but ill-conceived laws. The proposed statute is drafted to spur dialogue among the business and environmental communities, and is not put forward for immediate enactment. FEPA's implications need to be considered carefully and the regulated community needs a transitional period to learn the new requirements. U.S. firms will also need time to bring their foreign operations into compliance with FEPA's substantive requirements. The subsections that follow discuss the important provisions of the proposed act in the order in which they appear in the appendix.

A. Purposes of the Foreign Environmental Practices Act

Section 1 of the proposed statute states the primary purposes of the proposed legislation: (1) to protect the environment of other nations; (2) to promote conservation and improved resource management in other nations; (3) to promote compliance with international environmental law by U.S. firms and citizens; and (4) to facilitate environmentally sound U.S. business investments in foreign countries. The first three purposes can be achieved by requiring the regulated entities to comply with various U.S. environmental regulations. However, that simple statement masks at least three difficult issues: (1) which statutes should be incorporated into FEPA; (2) whether the selected statutes should be incorporated immediately upon FEPA's enactment or at some later time; and (3) whether the applicable statutes should be incorporated unilaterally by the United States or be applied selectively or only with the concurrence of host nations. These issues are addressed in the next subsection.

The fourth purpose, preserving and promoting U.S. investments, is not obviously advanced by the proposed statute. Many undoubtedly would argue that such a statute is inherently inimical to U.S. investment overseas. However, the disadvantage of potentially higher operating costs must be weighed against the goodwill and improved relations with host nations that would result from more environmentally sensitive conduct by U.S. operations. Furthermore, requiring increased attention to the safe design, construction, operation, and closure of foreign facilities should reduce both the probability of catastrophic loss of human life and the economic damage that can result from disasters like Bhopal. Moreover, FEPA could help host governments, under internal and inter-

193. See supra text accompanying notes 174-79.
194. See supra notes 44-46 and accompanying text.
national pressure to improve their environmental practices, to set standards for other foreign businesses operating in their country by using U.S. firms as an example. Host nations could be encouraged to offer compensating benefits to U.S. firms to offset some of the cost of improved environmental protection.195

B. Definitions

Section 2 of FEPA supplements FCPA’s definitions by defining significant provisions specifically applicable in the environmental context. Throughout, the language is drafted in very broad terms to indicate that all foreign conduct by covered entities must comply with the statute. The breadth of the statute’s reach can then be adjusted by changing the definition of “any laws” of the United States.

The proposed act regulates foreign facilities. These are defined in subsection 2(a) as any use of a foreign nation’s air, land, or water, or any temporary or permanent structure for exploration, extraction, processing, or distribution of raw materials and species; cultivation or distribution of agricultural commodities; manufacturing, assembly, or distribution of products or parts of products; or waste management by storage, destruction, recycling, or other processes. The definition aims to avoid confusion and uncertainty by informing regulated entities and courts that Congress intends to reach all possible types of operations not specifically excluded. Similarly, subsection 2(b) attempts to avoid confusion over what level of involvement with foreign facilities is required in order to bring U.S. firms under FEPA. The Act does this by adopting a comprehensive standard that makes FEPA applicable to U.S. firms that “support in any other way” facilities in host nations.196 “Supporting in any other way” is defined to include provision of any financing, personnel, equipment, services, or materials (including wastes) that an issuer, domestic concern, or other covered entity knows or has reason to know will be used in the design, construction, operation, maintenance, and closure of foreign facilities.

195. See, e.g., UNCTC 1988 Report, supra note 31, at 262-68 (describing a range of incentives offered by developing countries to encourage foreign direct investment and a trend among developing countries to liberalize policies so as to encourage foreign direct investment).

196. FEPA’s comprehensive standard is an attempt to avoid the kind of confusion CERCLA engendered regarding the level of involvement required to become an “owner or operator.” Compare United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20996 (E.D. Pa. Sept. 4, 1985) (bank which purchased property at a foreclosure sale was merely protecting its security interest in the property and was not an owner and operator) with United States v. Maryland Bank & Trust, 632 F. Supp. 573, 577-80 (D. Md. 1986) (bank which purchased property at a foreclosure sale was an owner and operator for purposes of liability to the federal government for toxic waste cleanup).
"Knows or has reason to know" is defined in subsection 2(f) with language mirroring the 1988 amendments to FCPA. It includes actual knowledge that a practice, circumstance, or result is prohibited; substantial certainty that a practice, circumstance, or result is prohibited; and "firm belief" that such a practice, circumstance, or result is prohibited. Subsection 2(f) also creates a presumption of knowledge if the covered entity is "aware of a high probability" of the existence of the prohibited conduct, circumstance, or result, unless the covered entity actually believes that the prohibited conduct, circumstance, or result has not occurred, is not occurring, or will not occur.

Subsection 2(g) defines "any laws of the United States, or any rule or order of any agency of the United States pertaining to the preservation and enhancement of the environment or the conservation of natural resources, and all rules of agencies adopted and orders of agencies issued pursuant to said Acts" by incorporating various acts of Congress. However, subsection 2(g) exempts foreign facilities from the permitting requirements of U.S. environmental laws.

Deciding which U.S. environmental laws should apply to foreign facilities is obviously the most difficult element of drafting this type of statute. Three options are considered in the following discussion: (1) "any laws" could be defined to include all major environmental statutes; (2) "any laws" could be defined to require Congress to selectively incorporate existing environmental statutes and thereby gradually bring foreign operations into compliance with U.S. environmental regulations; or (3) "any laws" could be defined under either of the above schemes, but limited to situations where the host nation lacks statutes with equal or more stringent requirements. Once the substance of the legislation is resolved, the remaining issue is when and how the statute would become effective.

198. FEPA § 2(f)(1).
199. Id.
200. Id. § 2(f)(2).
201. Id. § 2(f).
1. *Complete Incorporation of U.S. Environmental Laws*

Total incorporation of U.S. environmental laws would obviously create the most immediate and dramatic impact on the foreign operations of covered entities. Incorporating the entire body of U.S. environmental law would lessen the environmental degradation of the host nations and the planet. In so doing, the United States would communicate to host governments our commitment to helping them protect their environment and natural resources. To the extent that other countries are prompted by the United States' example to regulate non-American foreign facilities, the statute could significantly affect an even larger portion of the world's industrial capacity.

Total incorporation, however, may be a poor option precisely because it is too ambitious. First, important sections of many environmental laws would be inapplicable to business operations abroad. For example, application of the Clean Water Act permitting requirements would not be possible because these requirements are frequently based on the total amounts of contamination discharged into a particular body of water. It would be futile to apply them to American-owned foreign facilities that are only partially responsible for the contamination problem. Non-American facilities that contribute pollutants obviously would not be subject to the statute. A permitting regime covering only American-owned facilities would not be capable of addressing the contamination in a comprehensive manner. Thus, a total incorporation approach would have to incorporate statutes like the Clean Water Act with major portions, such as the NPDES permitting requirements, excised. In addition to creating rhetoric far in excess of the actual provisions, total incorporation would undoubtedly create substantial confusion as EPA and foreign facility owners would scramble to determine precisely what was required.

Second, total incorporation would also suddenly require foreign facilities to produce enormous amounts of information of questionable utility. Many environmental statutes require the production of information. However, much information would be extraneous. Information produced in conjunction with permitting processes, for example, would be useless since FEPA would not in fact incorporate permitting requirements. Even useful reporting requirements could flood the host nations with information that they simply could not process.


The Emergency Planning and Community Right-to-Know Act, for example, requires businesses that handle hazardous chemicals to file reports with local, state, and federal officials. Much of this information is used poorly, if at all, in the United States, and it is unlikely that Third World nations will be prepared to handle this information any better. For all these reasons, a blanket requirement that the same information be produced for host nations is probably inappropriate.

Third, some of our environmental laws require certain actions by government agencies which would be inapplicable to foreign governments. NEPA and CERCLA present two obvious examples. NEPA requires federal agencies to produce environmental impact statements. Obviously, FEPA could not require the same from the agencies and departments of other nations. CERCLA authorizes EPA to take remedial action whenever there is a release or threatened release of a hazardous substance that may present an imminent danger to public health. FEPA could not empower EPA to begin investigations, much less remedial actions, in a foreign nation without prior approval by the host country.

Finally, with respect to total incorporation, many U.S. environmental statutes are extremely complex, enormously litigated, and still not fully implemented in the U.S. In addition, the regulations promulgated pursuant to the statutes frequently add to the complexity and confusion. Requiring immediate compliance with these statutes throughout the world would create a degree of confusion and perhaps paralysis that would be both wholly unnecessary and undoubtedly counterproductive.

2. Selective Incorporation

While the foregoing problems make selective incorporation appear to be the only feasible choice, that does not end the discussion. These problems suggest that "any laws" should be defined with reference to the full complement of U.S. environmental laws, but that subsection 2(g) of Proposed FEPA should include a proviso that the requirements of the listed statutes will apply to foreign facilities only after Congress specifically acts to incorporate the appropriate provisions. This approach would allow Congress and EPA to evaluate the provisions of existing environmental laws and determine which statutory provisions could be

206. See Comment, supra note 51, at 1044.
209. See Comment, supra note 51, at 1045-56.
210. Id. at 1051-56.
productively applied to American-controlled foreign facilities. Such a strategy should avoid the potential mismatches that make total incorporation unrealistic.

However, the selective incorporation strategy is subject to the vagaries of the congressional agenda. Congress has a limited amount of time, only some of which can be devoted to environmental issues. Of the time devoted to environmental issues, U.S. concerns are likely to have the highest priority. While many Members of Congress may appreciate FEPA's objectives, few are likely to perceive FEPA as a major concern among their constituents. Thus, a selective incorporation strategy runs a very real risk of being too low a priority to receive the ongoing attention FEPA would require. This problem might be solved by drafting FEPA in a way that would automatically incorporate existing environmental laws at the end of a certain period unless Congress takes action.

Even assuming ample congressional attention, selective incorporation still poses the problem of choosing the statutes or portions of statutes that can be meaningfully applied to and enforced against foreign facilities. As a complete review of the various provisions of the listed statutes is beyond the scope of this Article, the following discussion considers only the principles that should guide Congress' incorporation process.

First, Congress should address the need for information. Better regulation, whether by host nations, their citizens, or U.S. citizens, depends on understanding the operations and environmental impact of foreign facilities. To this end, Congress should instruct EPA to draft regulations analogous to EPCRA's notification and emergency response requirements. The response plan requirement should require foreign facilities that handle hazardous substances to develop contingency plans to protect local populations in the event of a release. Notification of the use of hazardous substances would allow local populations to understand the risks to which they are exposed. Prompt notification of releases and the development of emergency response plans might help mitigate the impact of Bhopal-type accidents.

Congress should also consider using NEPA and the Toxic Substances Control Act as models for a FEPA provision requiring foreign facilities to disclose to host nations the likely environmental and health impacts of existing operations and planned developments. Neither the governments of host nations nor indigenous environmental advocacy groups can move to protect the general population from the adverse impacts of certain industries until the nature of environmental and health risks is disclosed.

In addition to provisions that generate information, Congress should incorporate substantive regulatory provisions into FEPA. Using RCRA and CERCLA as models, FEPA should provide the basis for developing regulations governing the treatment, handling, and disposal of hazardous substances generated and processed by entities subject to the Act. Specifically, the liability provisions found in CERCLA section 107\textsuperscript{213} should be used to force foreign facilities to pay for damage caused by the improper disposal of hazardous waste. Moreover, section 107's private cause of action\textsuperscript{214} could prove to be a very powerful tool to force foreign facilities to deal with hazardous materials in an appropriate fashion. Congress could consider making these provisions nonretroactive, limiting their reach back, or exempting from liability those actions taken in conformity with a host nation's law. Developing suitable RCRA-based standards for generators and transporters of hazardous waste, as well as treatment, storage, and disposal facilities,\textsuperscript{215} will take time because many of these provisions are presently in the form of permit requirements.

Although statutes such as the Federal Insecticide, Fungicide, and Rodenticide Act\textsuperscript{216} and the Clean Air Act\textsuperscript{217} will be more difficult to apply, they should not be ignored. In developing versions of these statutes to incorporate into FEPA, Congress should direct EPA to focus on conduct that would be prohibited in the U.S. as opposed to conduct that is merely subject to permitting requirements.

Finally, Congress should direct EPA to consult with other federal agencies experienced in working with developing nations to ensure that FEPA does not conflict with environmental regulations already in place in host nations. FEPA's substantive requirements should work in harmony with host nation regulations.

Proposed FEPA would obligate U.S. firms and individuals operating foreign facilities to comply with both U.S. standards and host nation environmental protection and resource conservation laws.\textsuperscript{218} Any conflict between U.S. and host nation environmental and conservation laws would require compliance with whichever regulatory regime would provide more complete protection of the host-country's environment and natural resources. The preference for the stricter regime maximizes FEPA's protective impact, especially where a host nation has tough laws on the books but lacks the regulatory machinery to enforce them.

\begin{enumerate}
\item \textsuperscript{214} Id. § 107(j), 42 U.S.C. § 9607(j).
\item \textsuperscript{216} 7 U.S.C. §§ 136-136y (1988).
\item \textsuperscript{218} FEPA § 3-4.
\end{enumerate}
C. Parties Subject to FEPA

In language identical to that used in FCPA, section 3 of the proposed statute identifies the classes of entities covered by this proposed law: issuers of securities registered under the Securities Exchange Act and all agents of covered issuers or independently liable actors whose conduct can trigger application of this proposed statute. In a fashion similar to FCPA’s, section 3 of FEPA broadens FEPA’s reach beyond issuers of registered securities by extending the law to cover “domestic concerns,” as defined in FCPA. It is otherwise identical in form to the analogous sections of FCPA.

As should be apparent from its language, section 3 is designed to support generous judicial and administrative construction of its scope and reach. Section 3 does not require “ownership” or “control” of foreign facilities or operations to trigger the statute. Instead, the statute would be invoked when either the issuer or its agent(s) “knows or has reason to know” that its conduct would violate U.S. laws, rules, or orders. By focusing on the actor’s constructive knowledge of the ramifications of his conduct rather than on his legal interest in the actual conduct, these sections intend to forestall defenses to the Act which would be based on claims that an entity has insufficient proprietary or managerial interest in a covered activity to justify application of the statute.

D. Conduct Prohibited by FEPA

Section 3 of FEPA reaches an extensive variety of conduct. It prohibits design, construction, operation, maintenance, abandonment, or “any other support” of a facility in violation of applicable U.S. environmental protection and resource conservation statutes, rules, and orders. In addition, section 5 of FEPA would make it a separate criminal offense to induce or coerce violations of this Act by promising or giving benefits, or by threatening or using violence or economic reprisals. This provision prohibits covered entities from influencing surrogates to do what they could not do themselves. Thus, it extends the reach of this Act to its sensible outer limit.

Finally, section 4 is reproduced from the Waste Export Control Act, a bill pending in Congress at this time. WECA would require U.S. firms that participate in the international waste trade to ensure that their wastes are managed no less strictly in a host nation than they would be managed in the United States.

221. Id. §§ 5003(a)-(c), 15 U.S.C. §§ 78dd-1 to 78dd-2.
222. See supra note 190.
E. Enforcement

1. Criminal Sanctions

Section 6 of the proposed statute makes it illegal for an issuer or any other domestic concern to violate, attempt to violate, or conspire to violate sections 3, 4, or 5 of the Act. If convicted, an issuer or other domestic concern may suffer fines of up to $1 million per violation and supervision by a court for up to five years to ensure subsequent compliance with the statute. These penalties are similar in magnitude to those of FCPA.

Thus, the statute permits conviction for a completed act, an attempted violation of FEPA, or an agreement to commit an overt act of the kind generally prosecuted as criminal conspiracy. Attempts and conspiracies are included to correspond to the language in section 3 which makes unlawful “any other activity in support” of prohibited conduct. These penalties would apply to both knowing violations and conduct that the covered entity should know would violate the Act.

By criminalizing both knowing and negligent conduct, this proposed law goes beyond FCPA in its current form. As discussed above, the 1988 amendments to FCPA deleted “has reason to know” from the section criminalizing use of third-party conduits for corrupt payments. Including the “has reason to know” language in the proposed law should cause U.S. firms to err on the side of caution in their foreign environmental practices. In short, criminalizing this corporate negligence should provide greater deterrence.

The proposed statute also authorizes the conviction of domestic concerns who are natural persons. FEPA would impose criminal penalties on officers and other agents who violate, attempt to violate, or conspire to violate the Act. These actors may be fined and/or imprisoned as the circumstances of the violation warrant. FEPA would also forbid an issuer or a domestic concern who is not a natural person from reimbursing or indemnifying any natural person convicted under this law. It thus creates an individualized and personal disincentive to engage in unlawful conduct.

223. The proposed statute would not require criminal prosecution of a negligent violation. It would simply authorize criminal prosecutions for negligence and give the Attorney General discretion to decide whether to prosecute. It is assumed that the Attorney General would only prosecute relatively egregious acts, reserving most prosecutions for knowing and willful violations of the Act.


226. See supra notes 137-38.

227. FEPA § 2(f).

228. FEPA §§ 2(c), 5, 6(b).
Finally, FEPA makes these penalties cumulative. It expressly provides that they may be imposed in addition to any penalties imposed under any other laws, rules, or orders pertaining to environmental protection and resource conservation. Thus, it gives sentencing officials wide latitude to tailor penalties to each case’s circumstances without forcing them to choose between these penalties and those available under other laws. It also authorizes judges to harmonize the penalties of competing statutes that would be subsumed under this proposed law.

2. Civil Actions to Prevent Violations of FEPA

Section 7 copies FCPA’s authorization of the U.S. Attorney General to file civil suits to enforce FEPA229 but extends standing to sue to five additional parties: citizens of the U.S. who are natural persons, associations of U.S. citizens who are natural persons, officials of host nations’ governments, citizens of host nations who are natural persons, and associations of citizens of host nations who are natural persons. Section 7 is designed to serve interlocking purposes. It minimizes litigation on issues related to standing by specifying the range of parties who may bring such suits. It also adopts the policy of other similar statutes,230 permitting citizen involvement in environmental protection and resource conservation policy enforcement.231 Section 7(c) is very similar to the relevant language of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Congress’s most recent version of the citizen suit provision.232

Section 7 also authorizes, when appropriate, the payment of costs, attorneys’ fees, and witness fees to the prevailing-or substantially prevailing parties in such actions. This provision takes much of its language from the citizen suit provision of SARA.233 It serves two purposes. It could help insure that meritorious claims under the Act will not be impeded because of inability to pay the costs of litigation. It also could

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233. Id. § 206(f), 42 U.S.C. § 9659(f).
discourage the filing of frivolous actions by requiring plaintiffs to pay the defendants' costs and fees if the suits utterly lack merit.\textsuperscript{234}

Finally, like the citizen suit provision of SARA, FEPA would require a citizen to give notice of intent to file suit under this statute to the various governmental officials. It also requires the citizen to defer to any diligent prosecution of an action by the Executive under this proposed law. This provision gives those officials and governments the right of first refusal to file such actions and thus reduces the likelihood of duplicative actions.

\textbf{F. Duties of the Administrator of EPA}

Section 9 of Proposed FEPA is analogous to the amended provision of FCPA that requires the Attorney General to establish compliance guidelines for entities subject to that law.\textsuperscript{235} Section 9 obliges the Administrator of EPA to consult with the Secretary of State and the Attorney General to develop regulations that both satisfy the statute's environmental objectives and integrate those objectives into the nation's foreign policy.

The first subsection of section 9 directs the Administrator to promulgate regulations necessary to accomplish enforcement of the Act. The second subsection obliges the Administrator to promulgate regulations that establish, \textit{inter alia}, how covered entities must conform their foreign practices to the requirements of the Act;\textsuperscript{236} what records covered entities must keep to prove their compliance;\textsuperscript{237} what notice covered entities must give to the Administrator and host nation governments to prove their compliance;\textsuperscript{238} and what procedures covered entities and the Administrator should follow to resolve choice of law issues when they arise.\textsuperscript{239}

The third subsection explicitly conforms promulgation, adoption, enforcement, and review of regulations under this Act to the Administrative Procedure Act (APA).\textsuperscript{240} This ensures that affected parties will have the substantive and procedural due process provided by the APA. The last subsection of section 9 provides additional directions and guidance to

\begin{itemize}
  \item[\textsuperscript{234}] For recent discussions of the issue of awarding fees to prevailing or substantially prevailing parties under environmental protection and resource conservation statutes, see Comment, \textit{The Scope of Attorneys' Fees Under Pennsylvania v. Delaware Citizens' Council for Clean Air}, 14 \textit{ECOLOGY L.Q.} 517 (1987); Note, \textit{Awards Of Attorneys' Fees To Unsuccessful Environmental Litigants}, 96 \textit{Harv. L. Rev.} 677 (1983).
  \item[\textsuperscript{235}] FCPAA § 3003(b), 15 U.S.C. § 78ff(a) (1988).
  \item[\textsuperscript{236}] FEPA § 9(b)(1).
  \item[\textsuperscript{237}] Id. § 9(b)(2).
  \item[\textsuperscript{238}] Id. § 9(b)(3)-(b)(4).
  \item[\textsuperscript{239}] Id. § 9(b)(5). For a brief discussion of choice of law issues, see \textit{supra} text accompanying note 218.
  \item[\textsuperscript{240}] 5 U.S.C. §§ 551-559 (1988).
\end{itemize}
the Administrator as she or he develops and applies regulations pursuant
to the Act. It directs the Administrator to actively solicit public com-
ment on proposed regulations.\textsuperscript{241} It also guides the Administrator to-
ward producing the kinds of records and notices desirable under the
statute: those that “enable assessment of the impact of the issuer’s or . . .
concern’s conduct on [host nations’] resources and environments,” but
that limit automatic submissions of records and notices to the Adminis-
trator and the host nations’ governments.\textsuperscript{242} This arrangement is
designed to maximize useful and substantive recordkeeping and notice
about compliance, while minimizing paperwork obligations for covered
entities in the absence of administrative, civil, or criminal enforcement
proceedings under the Act. Finally, this subsection reiterates that the
regulations should not require covered entities to seek permits from
United States agencies for acts that would require permits were they to
occur within the territorial jurisdiction of the United States.\textsuperscript{243}

IV

ANTICIPATING THE CONTROVERSY: RESPONSES TO
ARGUMENTS AGAINST A FOREIGN
ENVIRONMENTAL PRACTICES ACT

A Foreign Environmental Practices Act is likely to be controversial.
Corporations with operations in other countries and American investors
in such operations may view any proposal to enact FEPA with alarm.
No doubt some will view FEPA as an unwarranted interference with
their “right” to do business in other countries on the same footing as
others. Others will criticize FEPA as environmental meddling or as in-
appropriate in the larger context of international law. These are all
weighty topics that deserve research and analysis beyond the scope of
this Article. The discussion that follows frames four of the fundamental
policy issues that must be considered.

First, some will characterize this proposed statute as environmental
imperialism, in the same way that charges of cultural imperialism have
been raised by opponents of FCPA.\textsuperscript{244} To be sure, FEPA would impose
normative constraints on U.S. businesses’ behavior in countries that
might not otherwise regulate those operations. The refusal to respect
local standards of environmental protection that are less stringent than
U.S. standards could be interpreted as ethnocentrism and could harm
our competitiveness in those marketplaces. In some countries, U.S. firms

\begin{itemize}
\item \textsuperscript{241} FEPA § 9(d)(1).
\item \textsuperscript{242} Id. § 9(d)(2)(A)-(B).
\item \textsuperscript{243} Id. § 9(d)(2)(C).
\item \textsuperscript{244} Critics of FCPA charge that the United States is attempting to impose its moral
values on other cultures. See, e.g., H. WEISBERG & E. REICHENBERG, supra note 133, at 21-
26.
\end{itemize}
might indeed be under pressure to relax standards in order to earn or retain a share of those countries' markets, no matter how objectionable or different from our own rules the host country's customs might be.

Attitudes towards environmental protection, however, have changed dramatically in the last two decades. In 1972, at the Stockholm Conference, Third World countries viewed international efforts to improve the protection of the global environment with suspicion and hostility. They demanded the right to develop their economies, even if such development brought environmental problems. Many Third World nations now fully appreciate the importance of environmental protection to the survival and vitality of their national economies. They have grown aware of the need to prevent pollution caused by activities within their boundaries. But the pressure to economically develop and the lack of both regulatory mechanisms and skilled personnel needed to control environmentally significant conduct within their borders may be too strong. Third World governments may so constrain their options that assistance from foreign governments with power over transnational economic actors may be essential. Indeed, a host country would probably welcome, rather than object to, a foreign-based business employing more stringent environmental quality safeguards than the host country otherwise requires.

Moreover, the pejorative label of moral imperialism does not mean that FEPA is without substantial instrumental value. The issue raised by this proposed statute is different than the one presented by FCPA. Environmental degradation is not as culturally bound a concept as bribery. The social consequences of deferring to another country's market customs do not extend far beyond that country's borders, but the environmental and economic consequences of poorly regulated industrial production could affect the entire planet for generations to come.

A second group of criticisms will focus on the extent to which FEPA interferes with other nations' sovereign right to control activities within their own borders. This argument has been raised before with regard to efforts to regulate the export of hazardous products. Rather


246. See Leonard & Morell, supra note 41, at 282-83.

247. See H. LEONARD, supra note 32, at 191-94.

248. See MacNeill supra, note 38, at 163 (describing the balance of power in many countries between economic development agencies and their environmental agencies as being analogous to a race between an olympic champion and a small-town runner).

249. See PILLS, PESTICIDES, supra note 40, at 83 (criticizing the "traditional view that each country, as sovereign, has the obligation to protect its own citizens and environment and the right to take action to prohibit or limit imports of hazardous goods").
than violating international law, however, passage and implementation of this proposed law would reinforce the United States' observance of principles of international law.

First, this statute would only authorize suits and prosecutions in the United States against businesses and persons already subject to the jurisdiction of U.S. courts. It could not authorize legal actions in other countries and it would not reach businesses or citizens of other countries. In short, it would reach only managerial directives from U.S. businesses and persons in home offices and practices by U.S. businesses and nationals in other countries that violate U.S. environmental laws.

While international law confines the application of a state's law to entities and persons within its boundaries, it still permits the extraterritorial application of a state's law to the state's citizens and other legal "persons" under its control. These types of "long arm" statutes are not violations of national sovereignty. In fact, by unilaterally bringing all environmentally harmful practices of U.S.-controlled businesses and citizens—wherever they occur—under U.S. jurisdiction, FEPA would demonstrate this nation's respect for international customary law regarding the environment. Nations have an obligation to take necessary measures to ensure that activities within their control conform to generally accepted international standards for preventing injury to another state's environment.


[A] state has jurisdiction to prescribe law with respect to (1)(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory.

(emphasis added).

251. Id. § 402(2) provides: "[A] state has jurisdiction to prescribe law with respect to ... (2) the activities, interests, status, or relations of its nationals outside as well as within its territory." (emphasis added).

For a comprehensive discussion of the legality of extraterritorial application of a state's law to prevent international environmental injury, see Bilder, supra note 29, at 63-79. But see Judy, Hazardous Substances In Developing Countries: Who Should Regulate Foreign Corporations?, 6 VA. J. NAT. RESOURCES L. 143, 165 (1986) (asserting that such regulation could violate the principle of national sovereignty).

252. Restatement, supra note 250, § 601 (State Obligations with Respect to Environment of Other States and the Common Environment) provides that:

(1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control

(a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or areas beyond the limits of national jurisdiction; and

(b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of its national jurisdiction.

(3) A state is responsible for any significant injury, resulting from a violation of its obligations under subsection (1), to the environment of another state or to its property, or to persons or property within that state's territory or under its jurisdiction or control.
One might argue that matters of environmental damage in a foreign nation should be settled in a court in the country where the facility is located, and where the impact of the facility’s operation can be most closely scrutinized. This argument, based on the concept of forum non conveniens, has some merit. However, advances in communications, transportation, information systems, and environmental monitoring greatly ease the problem of collecting information in one location and litigating the ramifications of that information somewhere else. Further, administrative and judicial fora in the United States often adjudicate environmental disputes hundreds or thousands of miles from the site of the disputed conduct. Collecting technical data in a host country about the environmental impact of a foreign facility's practices and transporting that information to the United States presents similar but not insurmountable problems.

A third group of criticisms of FEPA is that it would require U.S. courts to adjudicate technically complex disputes regarding issues over which they have little expertise. While this criticism is not insubstantial, it is overbroad. Taken to its logical extreme, the argument would defeat

The comment to § 601 specifically notes that "‘Generally accepted international rules and standards’... refers to both general rules of customary international law... and those derived from international organizations, and from standards adopted by international organizations pursuant to such conventions.” Id. The comment also notes that “An activity is considered to be within a state’s jurisdiction if the state may exercise jurisdiction to prescribe law with respect to that activity under sections 402-03.” Id.

In addition, Principle 21 of the 1972 Declaration on the Human Environment provides that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.


253. See Calavo Growers of California v. Belgium, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) (“A forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel. It will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit. Jet travel and satellite communications have significantly altered the meaning of non conveniens.”).

254. In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978, 471 F.Supp. 473 (J.P.M.D.L. 1979). The panel in this case ordered proceedings in four different jurisdictions consolidated to the Northern District of Illinois, thousands of miles from the site of the wreck. Id. In the consolidated trial, forum non conveniens was not raised as an issue. In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978, 491 F.Supp. 161 (N.D.Ill. 1979). See also Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990) (Costa Rican plaintiffs allowed to sue in Texas for wrongful death and personal injuries arising from exposure to toxins in Costa Rica).
adjudication of conflicts arising from practically any complex statutory scheme, leaving most of our laws unenforceable. While many argue that industry has been too heavily regulated recently, the very nature of the regulatory state, even in its mildest form, argues against denying courts jurisdiction to oversee the entities Congress sees fit to monitor.

Moreover, U.S. courts often resolve technologically complex disputes, particularly in environmental cases.\(^{255}\) In fact, the Supreme Court has held that, even where Congress has delegated power to administrative agencies to adjudicate disputes,\(^ {256}\) the Constitution requires the provision of appellate review of agency decisions in article III courts.\(^ {257}\) Thus, even where Congress has made a judgment that administrative or legislative courts are the more appropriate tribunal because of their greater technical expertise, the Constitution appears to require judicial review of these agency decisions in a traditional federal court. Any criticism based on the technical inabilities of U.S. courts, therefore, leads at the very least to adjudication in a legislative court rather than to no adjudication at all.

Although these issues of environmental imperialism, national sovereignty, and administrative difficulties that courts might face are serious, by far the most substantial challenge to FEPA will come from the business community. The objection is straightforward: FEPA will make it more difficult for U.S. businesses to operate abroad. Our foreign competitors, who will not have to comply with FEPA's requirements, will exploit their competitive advantage. We lose money to our competitors, and their pollution replaces ours. In the end, we will have nothing to show for our effort.

While the proposed statute might increase the costs of facilities and operations in other countries, U.S. investments in foreign operations will not vanish altogether. The costs of compliance will not necessarily make existing operations unprofitable. Moreover, the marginal cost advantage available to those not subject to FEPA may not offset other competitive advantages enjoyed by U.S. firms: access to U.S. markets, benefits bestowed on U.S. firms by host governments, and differential tax treatment.

\(^ {255}\) See Lead Indus. Ass'n, Inc. v. EPA, 647 F.2d 1130 (D.C. Cir. 1980) (plaintiff challenged the sufficiency of the scientific evidence based on which EPA prescribed maximum ambient airborne lead concentrations); National Lime Ass'n v. EPA, 627 F.2d 416 (D.C. Cir. 1980) (plaintiff challenged the new source performance standards for lime manufacturing plants issued by EPA); South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) (court asked to review a metropolitan air quality transportation control plan).

\(^ {256}\) Article I of the United States Constitution grants Congress the power to "constitute tribunals inferior to the supreme court." U.S. CONST. art. I, § 8.

\(^ {257}\) Article III vests the "judicial power of the United States" in federal courts established by Congress. Id. art. III, § 1. Whether an article III court is required to adjudicate a dispute, and thus whether Congress can restrict jurisdiction over particular issues, depends on whether an adjudication is an exercise of "judicial power." C. WRIGHT, supra note 188, at 38.
U.S. firms have made much the same argument against domestic environmental laws as will be made about FEPA.

A comparison with FCPA is instructive. Although there is some anecdotal evidence that FCPA has deterred foreign investments by some U.S. firms,258 U.S. foreign investments apparently increased steadily during the period between 1984 and 1988, despite the existence of FCPA.259 Moreover, studies of FCPA's impact on market shares of U.S. firms abroad suggest that FCPA has had no adverse impact on those shares.260

Finally, more stringent pollution and conservation requirements for U.S. firms' operations abroad might actively increase investments in other countries. Capital investment would be required to cover the costs of environmental protection equipment and processes, for example. In addition, companies would need to hire more workers to operate and maintain this protection equipment. The possibility of increased local investment and decreased demand on host nation resources (both political and economic) required to oversee foreign-controlled operations might make U.S. businesses more attractive to host countries.

CONCLUSION

The global environment increasingly is being placed under stress. Not only are most countries and regions of the world confronted with manmade pollution of natural resources, but the global commons are rapidly deteriorating.261 There is a great need for serious worldwide efforts to prevent deterioration of the environment.

This Article proposes a Foreign Environmental Practices Act as one way to address this need. If enacted, the proposed statute could promote and preserve U.S. economic interests abroad, improve global environmental protection and resource conservation, and facilitate recovery by parties in other countries for environmental harm caused by the negligence of U.S. concerns. Such a statute seems necessary as an interim effort to promote global environmental protection and resource conservation until comprehensive, enforceable, and enforced international treaties accomplish the same purposes.

Passage of a Foreign Environmental Practices Act is possible. Concern about sustainable development is increasing steadily among governments and nongovernmental organizations. The public is increasingly receptive to strengthening regulation of environmentally consequential

258. See H. WEISBERG & E. REICHENBERG, supra note 133, at 22-25.
259. See Businesses Loosen Link, supra note 30, at 1, col. 1; Trade Barriers, supra note 30, at 1, col. 1. Of course, our foreign investment might have grown more without FCPA, and might grow more without the statute proposed here, but that is only conjecture.
260. See supra notes 171-84 and accompanying text.
261. See supra notes 10-12 and accompanying text.
activity, whatever the cost.\textsuperscript{262} As discussed above,\textsuperscript{263} Congress already is considering bipartisan legislation that would impose stringent new regulations on the export of wastes to other countries. Further, President Bush campaigned for office in part on an environmentalist platform, although his administration's commitment to international environmentalism has been ambiguous so far.\textsuperscript{264} The increase in public, congressional, and executive support for environmental issues in general give this proposed statute a reasonable chance of passage within the next few years.

Simply introducing Proposed FEPA in Congress could aid the effort to strengthen global environmental protection. Consideration of such a law would promote useful national and international debate about both sustainable and nonsustainable development, and the proper role of U.S. businesses in global environmental protection. Legislative consideration of the law could prompt a detailed examination of U.S. businesses' environmental practices abroad, as the hearings on the Waste Export Control Act have done. Moreover, because Proposed FEPA would require the Administrator of EPA to establish guidelines for environmentally prudent operations by U.S. firms overseas, it could also prompt a long overdue comprehensive examination and overhaul of our own system of environmental regulation.

For all of these reasons, it is timely for Congress, the Bush administration, and the public to consider this legislation. At the very least, considering a Foreign Environmental Practices Act would prompt legislators and administrators to ascertain what the nation's businesses are doing overseas and what environmental consequences flow from their foreign business practices. This alone would be a valuable first step.

\textsuperscript{262} See supra note 3.

\textsuperscript{263} See, e.g., Hearings on the International Export of U.S. Waste: Hearings before the Subcomm. on Energy, Environment and Natural Resources of the House Comm. on Government Operations, 100th Cong., 2d Sess. (1989); Waste Control Hearings, supra note 26, at 1 (discussing H.R. 2525, proposed legislation "which would establish strict requirements for the international export of waste from the United States").

\textsuperscript{264} Compare Dowd, Sununu on Environment: His Influence is Debated, N.Y. Times, Feb. 15, 1990, at A1, col. 1 (reporting President Bush's apparently growing reliance for environmental advice on his Chief of Staff, John Sununu, described as an "environmental skeptic"); Montgomery, U.S., Japan, and Soviets Block Pollution Pact, N. Y. Times, Nov. 8, 1989, at 13, col. 1 (reporting thwarted endorsement of a specific timetable to reduce carbon dioxide emissions); Shabecoff, Over E.P.A. Protest, White House Alters Wetland Agreement, N.Y. Times, Feb. 8, 1990, at A1, col. 1 (reporting that the Bush administration reduced the stringency of a federal wetlands plan over the protests of William K. Reilly, EPA Administrator) with Shabecoff, Bush Would Agree to Elevate EPA, N.Y. Times, Jan. 22, 1990, at A1, col. 1 (President Bush agrees to legislation that would elevate EPA to cabinet-level department); Shabecoff, U.S. to Urge Joint Environmental Efforts at Summit, N.Y. Times, July 6, 1989, at A9, col. 1 (reporting that the United States, via the Bush administration, would seek to take initiative in international environmental protection efforts at July Paris Summit by proposing a broad agenda for protecting the environment and conserving natural resources).
APPENDIX

A PROPOSED LAW: THE FOREIGN ENVIRONMENTAL PRACTICES ACT

Section 1. PURPOSES OF THIS ACT

The purposes of this Act are to promote

(a) preservation and enhancement of the environment of foreign nations;
(b) conservation of natural resources in foreign nations;
(c) compliance with international law regarding environmental protection and resource conservation by issuers, domestic concerns, and persons who act on their behalf; and
(d) preservation and growth of U.S. business investments in foreign nations.

Section 2. DEFINITIONS

As used in this Act,

(a) "Foreign facility" means any use of the air, land, water, or navigable waterways of a foreign nation, or any permanent or temporary structure thereon used, for

(1) exploration for sources of minerals, energy, animal species, or plant species;
(2) extraction, processing, storage, or distribution of minerals, energy, animal species, or plant species;
(3) agricultural cultivation or distribution of the products of agricultural cultivation;
(4) manufacturing, assembly, or distribution of products, unfinished products, or components of products; or
(5) waste management by destruction, storage, recycling, or other form of waste treatment.

(b) "Support in any other way" means the provision of assistance that the provider of the assistance knows or has reason to know will be used in the design, construction, operation, maintenance, or abandonment of any foreign facility. Such assistance includes, but is not limited to, the provision of

(1) financing;
(2) personnel;
(3) equipment;
(4) transportation vehicles, services, personnel, or any combination thereof;
(5) communication equipment, services, or personnel, or any combination thereof;
(6) construction equipment, services, or personnel, or any combination thereof;
(7) demolition equipment, services, or personnel, or any combination thereof;
(8) professional, technical, or other consulting services, or any combination thereof;
(9) any raw materials, unfinished products, components of products, or finished products; and
(10) solid, liquid, or gaseous wastes consigned to the facility for destruction, storage, recycling, or other form of waste treatment.

(c) “Domestic concern” means

(1) any individual who is a citizen, national, or resident of the United States; or
(2) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or in a territory, possession, or commonwealth of the United States.

(d) “Public official” means any officer or employee of a foreign government or any department, agency, or instrumentality of a foreign government, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial.

(e) “Interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof. Such term includes the intrastate use of

(1) a telephone or other interstate means of communication or
(2) any other interstate instrumentality.

(f) “Knows or has reason to know” means with respect to any conduct, circumstance, or result prohibited by this Act, that an issuer, domestic concern, or other person or entity acting on behalf of the issuer or domestic concern,

(1) is aware of such conduct or circumstance, or that such a result is substantially certain to occur; or
(2) has a firm belief that such conduct or circumstance exists or that such a result is substantially certain to occur.

When knowledge of prohibited conduct, circumstance, or result is required to establish an offense under this Act, such knowledge is estab-
lished if the issuer, domestic concern, or person or other entity acting on behalf of the issuer or domestic concern is aware of a high probability of the existence of such conduct, circumstance, or result, unless the issuer, domestic concern, or other person or entity acting on behalf of the issuer or domestic concern actually believes that such conduct or circumstance does not exist or that the result will not occur.

(g) "Any of the laws of the United States, or any regulation or order of any agency of the United States, pertaining to the preservation and enhancement of the environment or the conservation of natural resources" means the following Acts of Congress, as they may be amended from time to time, and all regulations of agencies adopted and orders of agencies issued pursuant to said Acts:

(1) The National Environmental Policy Act;
(2) The Clean Water Act;
(3) The Solid Waste Disposal Act;
(4) The Toxic Substances Control Act;
(5) The Comprehensive Environmental Response, Compensation, and Liability Act;
(6) The Federal Insecticide, Fungicide, and Rodenticide Act;
(7) The Federal Food, Drug, and Cosmetic Act;
(8) The Noise Regulation Act;
(9) The Occupational Safety and Health Act;
(10) The Safe Drinking Water Act;
(11) The Marine Protection and Sanctuaries Act;
(12) The Uranium Mill Tailings Radiation Control Act;
(13) The Nuclear Waste Policy Act;
(14) The Ocean Dumping Act;
(15) The Endangered Species Act;
(16) The Superfund Appropriations and Reauthorization Act;
(17) The Clean Air Act; and any other Acts that Congress may designate from time to time as giving rise to civil or criminal actions under this Act. However, such acts shall not apply to foreign facilities until Congress has expressly incorporated them into this Act.

Section 3. PERSONS SUBJECT TO ACT

(a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer, or for any stockholder acting on behalf of such issuer, to make use of the mails or any other means or instrumen-
tality of interstate commerce to design, construct, operate, maintain, or abandon a foreign facility, or agree to design, construct, operate, maintain, or abandon a foreign facility, or to support in any other way the design, construction, operation, maintenance, or abandonment of a foreign facility, if the issuer knows or has reason to know that the design, construction, operation, maintenance, abandonment, or support of the facility violates or will violate any of the laws of the United States, or any regulation or order of any agency of the United States, pertaining to the preservation or enhancement of the environment or the conservation of natural resources.

(b) It shall be unlawful for any domestic concern, other than an issuer which is subject to section 3(a) of this Act, or any officer, director, employee, or agent of such domestic concern, or any stockholder acting on behalf of such domestic concern, to make use of the mails or any other means or instrumentality of interstate commerce to design, construct, operate, maintain, or abandon a foreign facility, or agree to design, construct, operate, maintain, or abandon a foreign facility, or to support in any other way the design, construction, operation, maintenance, or abandonment of a foreign facility, if the domestic concern knows or has reason to know that the design, construction, operation, maintenance, abandonment, or support of the facility violates or will violate any of the laws of the United States, or any regulation or order of any agency of the United States, pertaining to the preservation or enhancement of the environment or the conservation of natural resources.

(c) Notwithstanding subsections (a) and (b) of this section, no issuer or domestic concern, and no person or other entity acting on behalf of the domestic concern, shall be required to obtain permits from any agency of the United States government as a condition precedent for the design, construction, operation, maintenance, abandonment, or other support of a foreign facility.

Section 4. COMPLIANCE WITH FOREIGN ENVIRONMENTAL PROTECTION AND NATURAL RESOURCE CONSERVATION LAWS

(a) Notwithstanding section 3 of this Act, any foreign facility of any issuer or domestic concern shall comply with the laws, regulations, and orders of host nations pertaining to the preservation or enhancement of the environment or the conservation of natural resources.

(b) In the event of a conflict between U.S. laws, rules, or orders, and the laws, rules, and orders of a host nation, on application by an issuer, domestic concern, or other person or entity covered by this Act, the Administrator of the EPA shall decide, in accordance with procedures established under section 9 of this Act, how the issuer, domestic concern, or other person or entity covered by this Act shall comply with the re-
quirements of this Act. In all such decisions, the Administrator shall
direct the issuer, domestic concern, or other person or entity to comply
with the stricter law, rule, or order regulating the preservation and en-
hancement of the environment of the host nation or conservation of the
resources of the host nation.

Section 5. PROHIBITION OF INDUCING OR COERCING VIOLATIONS OF THIS ACT

It shall be unlawful for any issuer or domestic concern, or any direc-
tor, officer, employee, agent, or stockholder of an issuer or a domestic
concern, to

(a) Offer, confer, or agree to offer or confer any benefit to induce
any person to violate the provisions of this Act or any regulation adopted
or order issued pursuant thereto; or

(b) Coerce any person by violence or economic reprisal or the threat
thereof to violate the provisions of this Act or any regulation adopted or
order issued pursuant thereto.

Section 6. CRIMINAL PENALTIES FOR VIOLATIONS OF THIS ACT

(a) Except as provided in subsection (b) of this section, any issuer or
domestic concern which violates, attempts to violate, or conspires to vi-
olate sections 3, 4, or 5 of this Act shall, upon conviction, be fined not
more than $1,000,000 for each violation of this Act, or be placed under
supervision of the court which entered the judgment of conviction for a
period not longer than five years, or both.

(b) Any natural person who is a domestic concern and who violates,
attempts to violate, or conspires to violate sections 3, 4, or 5 of this Act,
shall, upon conviction, be fined not more than $100,000, or be impris-
oned not more than five years, or be placed under supervision of the
court which entered the order of conviction for a period not longer than
five years, or be subject to any combination of such penalties.

(c) Any United States citizen, national, resident, or other natural
person who is subject to the jurisdiction of the United States and who is
either

(1) an officer, director, employee, agent, or stockholder of
an issuer and who violates, attempts to violate, or conspires to
violate sections 3, 4, or 5 of this Act; or

(2) an officer, director, employee, agent, or stockholder of
a domestic concern and who violates, attempts to violate, or
conspires to violate sections 3, 4, or 5 of this Act shall, upon
conviction, be fined not more than $100,000, or imprisoned not
more than five years, or both.
(d) Whenever a fine is imposed upon any natural person under subsections (b) or (c) of this section of this Act, such fine shall not be paid, directly or indirectly, by the issuer or domestic concern in whose interest or on whose behalf the natural person violated, attempted to violate, or conspired to violate sections 3, 4, or 5 of this Act.

(e) Any penalties imposed under this section shall be in addition to penalties imposed under any laws, regulations, or orders giving rise to a criminal, civil, or administrative action under this Act.

Section 7. CIVIL ACTION TO PREVENT VIOLATIONS OF THIS ACT

(a) Whenever it appears to the Attorney General, or any citizen of the United States who is a natural person, or any association of citizens of the United States who are natural persons, that an issuer or a domestic concern is engaged or is about to engage in any act or practice that violates sections 3, 4, or 5 of this Act, the Attorney General, or the citizen, or the association of United States citizens, may bring a civil action in an appropriate court of the United States to enjoin such act or practice, and upon a proper showing, a permanent or temporary restraining order shall be granted without bond.

(b) Whenever it appears to a public official of a foreign nation, or a citizen of a foreign nation who is a natural person, or any association of citizens of a foreign nation who are natural persons that an issuer or a domestic concern is engaged or is about to engage in a violation of sections 3, 4, or 5 of this Act in a foreign nation, the official, or the citizen, or the association of citizens, may bring a civil action in an appropriate court of the United States to enjoin such act or practice, and upon a proper showing a permanent or temporary restraining order shall be granted without bond.

(c) (1) No action may be commenced under subsection 7(a) or 7(b) of this section before 60 days after the plaintiff has given notice to each of the following:

(A) The President;

(B) The government of the foreign nation in which the alleged violation is occurring or is about to occur; and

(C) Any alleged violator of the law, rule, or order under which the action would be commenced.

(2) No action may be commenced under subsection 7(a) or 7(b) of this section if the President has commenced and is diligently prosecuting an action under this Act or any of the Acts incorporated herein by reference.

(d) The court, in issuing any final order brought pursuant to this section, may award the costs of litigation, including reasonable attorneys'
and expert witnesses' fees, to the prevailing or substantially prevailing party whenever the court determines that such an award is appropriate.

Section 8. PROHIBITION OF FALSE OR MISLEADING STATEMENTS

Any person who knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this Act, or any regulation or order thereunder, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $100,000, or imprisoned not more than five years, or both; but no person shall be subject to imprisonment under this section for the violation of any regulation or order if he or she proves that he or she had no knowledge of such regulation or order.

Section 9. DUTIES OF THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

(a) Within one year of the effective date of this Act, the Administrator, after consultation with the Secretary of State, shall promulgate such regulations as are necessary to carry out this Act.

(b) Said regulations shall establish

(1) Requirements for compliance in host nations with laws, regulations, and orders of the United States pertaining to the preservation and enhancement of the environment and the conservation of natural resources and incorporated herein by reference;

(2) Requirements for recordkeeping by issuers and domestic concerns sufficient to establish proof of compliance in host nations with the provisions of this Act;

(3) Requirements for notice by issuers and domestic concerns to the Administrator sufficient to establish proof of compliance in host nations with the provisions of this Act;

(4) Requirements for notice by issuers and domestic concerns to governments of host nations sufficient to establish proof of compliance in host nations with the provisions of this Act; and

(5) Procedures that the Administrator, issuers, and domestic concerns shall follow to resolve conflicts between

(i) the laws, regulations, and orders of the United States and

(ii) the laws, regulations, and orders of host nations that pertain to the preservation and enhancement of the environment and the conservation of natural resources.
FOREIGN ENVIRONMENTAL PRACTICE ACT

(c) The promulgation, adoption, enforcement, and review of regulations necessary to carry out this Act shall be conducted in conformity with the requirements of the Administrative Procedure Act.

(d) In developing regulations under this section, the Administrator shall

(1) actively solicit public comment on any proposed regulation;

(2) devise regulations for recordkeeping and notice to the Administrator and governments of host nations that

   (A) enable assessment of the impact of the issuer's or domestic concern's conduct on the environment and natural resources of the host nation; and

   (B) require submission of such records and notices only to the Administrator and to the government of the host nation, excepting any submissions as may be required in administrative, civil, or criminal proceedings under this Act; but

   (C) do not require issuers, domestic concerns, or persons or other entities acting on their behalf to obtain administrative permits from agencies of the government of the United States for conduct in host nations that would require such permits were the conduct to occur within the territorial jurisdiction of the United States.