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ATTACKING MILITARY ENVIRONMENTAL CLEANUP ON FOREIGN SOIL: SHOULD CERCLA PRINCIPLES APPLY?

Randon H. Draper

Table of Contents

ATTACKING MILITARY ENVIRONMENTAL CLEANUP ON FOREIGN SOIL: SHOULD CERCLA PRINCIPLES APPLY?[1]

Randon H. Draper[2]

Introduction

On December 3, 2003, a United States District Court held in *Arc Ecology, et al. v. US Dept. of the Air Force, et al.*,[3] ("*Arc Ecology*") that Filipino citizens had standing to bring suit against the United States military under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for an action to compel the United States government to conduct preliminary assessments of the environmental damage to former US military bases in the Philippines.[4] However, the court also held that CERCLA does not apply extraterritorially.[5] Accordingly, the District Court granted the government's motion to dismiss the suit.[6]

While the *Arc Ecology* court correctly interpreted CERCLA's current scope to be limited to domestic or national applications, the court's ruling not to extend the statute extraterritorially begs the questions: *Should* the law be changed to embrace CERCLA principles in the cleanup of overseas military bases? If so, what principles should apply? Is a compromise possible?

This article provides background to better help understand these questions, and suggests possible answers. In Section I, this article briefly explores the extent of the US military's footprint or presence overseas, and the potential for environmental damage on foreign soil. Section II discusses the specific findings of *Arc Ecology* and addresses the Court's holdings. Section III reviews the current status of laws and policy that govern environmental operating standards and cleanup for overseas bases. Section IV analyses the possible application of CERCLA principles in the context of cleaning up former US military bases overseas. Specifically, this section reviews the appropriateness of requiring a uniform, comprehensive environmental assessment (EA),

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[3] 2003 WL 22890112 (N.D. Cal.) (2003).

[4] *Id.* at 3-4.

[5] *Id.* at 7.

[6] *Id.* at 8.

public participation and liability under CERCLA. This article concludes that while CERCLA's joint and several liability scheme cannot function in the overseas context without infringing on sovereign rights of both nation States in negotiating a base's closure and cleanup, certain CERCLA principles should be applied. Specifically, an EA, standard in form and content for every base, should be required prior to negotiating closure and cleanup. Such an assessment can and should be used to encourage foreign and domestic public participation when appropriate prior governmental negotiation for a base closure. Further, host nation law which does not impose judicially imposed joint and several liability should apply to the cleanup of US military bases overseas. This proposal embodies principles of diplomacy, and fairness and helps to put the US in a proper environmental leadership role without jeopardizing properly placed principles of sovereignty and fair economics.

I. The US Military's "Bootprint" Overseas

There are approximately 1,000 US military bases or facilities in foreign countries or territories.[7] This number has fluctuated during the last sixty years since World War II when the number hit a high of nearly 2,000.[8] Since that time, the numbers have surged and declined during and after the Korean, Vietnam and Gulf Wars.[9] More recently, the number of military bases overseas has seen a dramatic increase since 9/11.[10] Currently, the Department of Defense has approximately 119,000 troops stationed in Europe, 37,000 in Korea and 45,000 in Japan.[11]

The overall number of military bases or facilities the US maintains overseas does not always reflect the number of bases or facilities which close as new bases and facilities open to take their place. The military, for example, continues to contemplate closing bases in Germany, and moving troops to countries such as Hungary, Romania, Poland and Bulgaria to accommodate changing mission requirements.[12] Activity involving overseas bases is not shrinking. Senator Kay Hutchinson stated that, "the proposed overseas military construction budget for 2004 is over $1 billion. Over 70 percent is in Europe and Korea" and that, "as we approach a new round of [base] closures, overseas bases should be scrutinized as closely as those stateside."[13]

According to Arc Ecology, a non-governmental organization (NGO) "the United States military produces more hazardous waste annually than the five largest

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[7] R. Carlson, *The Cost of Empire-US Military Bases Overseas*, www.zenzibar.com/news/article.asp?id=2988 (posted 7/7/2003); Arc Ecology, Environment, Economy, Society and Peace, http://www.arcecology.org/International.shtml

[8] Arc Ecology, Environment, Economy, Society and Peace, http://www.arcecology.org /International.shtml

[9] *Ibid.*

[10] *Ibid.*

[11] Lawrence Morahan, *US Plans for Military Bases Reflect new Political Reality*, www.freecongress.org/media/030430cns.asp (April 30, 2003); quoting in part Senators Kay Bailey Hutchinson (R-Texas) and Dianne Feinstein (D-Calif).

[12] *Ibid.*

[13] *Ibid.*

international chemical companies combined. Arc Ecology refers to both the military's domestic and overseas production of hazardous waste. The military controls more than 25 million acres of land (larger than either the state of Tennessee or the Netherlands)."[14] Arc Ecology observes that, "military bases can be like small industrial cities. In addition to the gas stations, dry cleaners and storm water pollutants that are typical of any city, military bases can host a wide variety of heavy industrial activities from ship repair to ordnance manufacture."[15] Other major military activities impacting on the environment include training with heavy destructive equipment and explosives, maintenance on equipment, research and development for enhanced war fighting capabilities, war games and other exercises involving expansive and varied terrain, and modern, destructive warfare.[16]

With the number of US military bases and facilities overseas, as well as the wide reach of operations and activities conducted on these installations, it does not stretch the imagination to conclude that the US military can have a significant impact on the environment. While this article will address the environmental legal controls applicable to the US military in maintaining its bases overseas, the focus of this article rests upon cleanup obligations shared or shouldered by the host country and the US military at the onset of a base closure. The scope of military operations and activities is important to consider as an indication of the type and scope of cleanup issues the military faces upon the closure of an overseas base.

II. Arc Ecology v. US Dept. of the Air Force

In *Arc Ecology*, Filipino citizens who live and travel around the land once occupied and operated by the US as Air Force and Navy bases – respectively, Clark A.F.B. and Subic Naval Base – brought claims against the US to assess the alleged pollution on the former bases.[17] Individual citizens were joined by Arc Ecology and the Filipino-American Coalition for Environmental Solutions, both non-profit NGOs (plaintiffs).[18] The plaintiffs, requested, pursuant to CERCLA, the court's order compelling the US Department of Air Force, the US Department of Navy, the US Department of Defense and US Defense Secretary, Donald Rumsfeld, acting in his official capacity, (defendants) to conduct preliminary assessments of the properties of the two former US military bases, and an order declaring that the provisions of CERCLA apply.[19] In addition to their claims under CERCLA, the plaintiffs also sought an order indicating that Section 300.420(b)(5) of the National Contingency Plan (NCP)

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[14] Arc Ecology, Environment, Economy, Society and Peace, *supra* note 8

[15] *Id.* at 2.

[16] *Ibid.*

[17] Arc Ecology v. US Dept. of the Air Force, 2003 WL 22890112, 1 (N.D. Cal.) (2003).

[18] *Ibid.*

[19] *Ibid.*

applied to the former US bases in the Philippines, and the same claim pursuant to the Administrative Procedures Act (APA) 5 USC. 701 et seq.[20]

The defendants moved to dismiss the complaints on the grounds that plaintiff lacked standing, failed to state a claim on which could be granted, and that the venue was not proper.[21] The defendants asserted that CERCLA does not apply extraterritorially.[22]

The *Arc Ecology* Court first turned to the issue of standing.[23] The Court wrestled with this issue, specifically with the determination whether the plaintiffs suffered actual injuries. The Court indicated that, "whether individually named plaintiffs have standing in this case is a close call."[24] The Court, however, ultimately found that the plaintiffs had standing to bring their CERCLA claim.[25] Even though the Court's ultimate ruling dismisses the plaintiff's claim, the Court's finding for standing should not be taken for anything less than a significant victory to the plaintiffs. The Court's ruling on standing indicates that at least this Court is willing to keep the door ajar after *Lujan v. National Wildlife Federation*[26] wherein the Supreme Court granted summary judgment, finding that plaintiffs did not have standing. As Commander Michael Waters notes, "in overseas base closure actions, plaintiffs may have a difficult time testing DOD closure decisions in the wake of the *Lujon* precedents and the current 'right' leaning of the Supreme Court." [27]

What the Court gives to the plaintiffs on the standing issue, it takes away in its ruling on substantive matters by granting the Defendants' motion to dismiss.[28] The Court first addressed the purpose of CERCLA,[29] then the heart of the Plaintiffs' complaint.[30] Finally, the Court concludes that CERCLA does not apply extraterritorially.[31]

The Court notes that, "enacted in 1980, CERCLA was designed to 'provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal

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[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Id.* at 3.
[25] *Id.* at 3.
[26] 497 US 871, 110 S.Ct 3177, 111 L.Ed.2d 695 (1990).
[27] M. Waters, *Closure of US Military Bases Overseas: International-Environmental Law Implications*, 67 (LL.M. Thesis – Fall 1998) available at https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/ENLAW/THESE/TheSubj.htm
[28] Arc Ecology v. US Dept. of the Air Force, *supra* note 17 at 8.
[29] *Id.* at 4.
[30] *Id.* at 4.
[31] *Id.* at 5-7.

sites.' Pub.L.No.96-510, 94 Stat. 2767 (1980)."[32] Turning to the legislative history, the Court found that CERCLA "reflects a decidedly domestic focus."[33]

> The Court addressed the thrust of the Plaintiff's complaint:
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> > The provision that addresses the primary relief sought in the Complaint—CERCLA § 105(d), 42 USC. § 9605(d)—provides that, in certain circumstances, a person who is or may be affected by a release or threatened release of a hazardous substance, pollutant or contaminant may "petition" the President to conduct a preliminary assessment of any associated hazards to the public health and the environment. Section 105(d) is implemented by a provision in the National Contingency Plan, 40 C.F.R. § 300.420, under which a person may petition for a preliminary assessment when the person is or may be affected by a release of a hazardous substance, pollutant, or contaminant. Petitions involving federal facilities are addressed to the head of the appropriate federal agency and describe the release and how it affects the petitioner. Petitions must contain information about activities where the release is located and explain whether "local and state authorities" have been contacted.[34]

The *Arc Ecology* Court ultimately and appropriately rested its ruling upon a US Supreme Court's holding "that it is a 'longstanding principle of American law' that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[35] The Court further held that, "courts must assume that Congress legislates against the backdrop of an underlying presumption against extraterritoriality and therefore must presume that a statute applies only within the United States unless it contains 'the affirmative intention of the Congress clearly expressed' that it applies abroad."[36] Beyond legislative history, the Court found ample "plain language" in CERCLA to conclude that the statute does not apply extraterritorially to "cover properties located within another sovereign nation."[37]

Arc Ecology is consistent with other court holdings limiting the extension of domestically based legislation in an overseas context.[38] *Environmental Defense Fund v. Massey*[39] still provides the broadest extraterritorial application of domestic law. But even *Massey* did not stray too far. *Massey* held that the National Environmental Policy Act

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[32] *Id.* at 4.

[33] *Ibid.*

[34] *Ibid.*

[35] *Id.* at 5, citing EEOC V. Arabian American Oil Co., 499 US 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d. 274 (1991)(quoting Foley Bros. v. Filardo, 336 US 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949).

[36] *Id.* at 5, *citing EEOC*, 499 US at 248 (quoting Benz v. Compania Naviera Hidalgo, SA., 353 US 138, 147, 77 S.Ct 699, 1 L.Ed.2d 709 (1957).

[37] *Id.* at 7.

[38] *See* generally, Arc Ecology v. US Dept. of the Air Force, 2003 WL 22890112, 1 (N.D. Cal.) (2003).

[39] 985 F.2d 528 (1993).

(NEPA) could apply in sovereign-less Antarctica where policy decisions to use an incinerator at a scientific research center were made within the US.[40]

Although there is a strong presumption against applying legislation extraterritorially, the *Massey* Court points out that the presumption can be overcome "where there is an 'affirmative intention of the Congress clearly expressed' to extend the scope of the statute to conduct occurring within other sovereign nations."[41] In other words, it is clear that Congress can, if it chooses, extend its authority overseas. It clearly has authority to reach beyond the territory of the US[42] This reach, however, should also be tempered with the international law presumption against extraterritorial application of domestic laws.[43] While *Arc Ecology* is solidly grounded, shutting out the extraterritorial application of CERCLA, it remains silent as to whether Congress should act to make CERCLA, or CERCLA principles, law for cleaning up US military bases overseas in spite of presumptions to the contrary. Or, in the alternative, should the president act by executive order to apply such principles?

III. Current Law and Policy Governing the Cleanup of US Military Overseas Bases

a. Congressional Legislation

The application of Congressional legislation is limited overseas, mainly for the reasons discussed above. There are, however, congressionally made laws which reach overseas military bases by the general application to Department of Defense (DoD) activities.[44] One example cited by Lieutenant Colonel Richard Phelps, is asbestos abatement requirements mandated by the Asbestos School Hazard Abatement Act of 1984. These requirements apply to "any school of any agency of the United States," to include DoD Dependant Schools overseas.[45]

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[40] *Ibid.*

[41] *Id.* at 531 (citing Arabian Oil, 499 US at 248)(in turn quoting Benz v. Compania Naviera Hidalgo, SA., 353 US 138, (1957); see also James E. Landis, *The Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States Oversea Environmental Policies*, 49 NAVAL L. REV. 99, 114.

[42] See generally Foley Bros. v. Filardo, 336 US 281, 285, 69 C=S.Ct. 575, 577, 93 L.ED. 680 (1942), and American Banana Company v. United Fruit Co. 213 US 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909); and M. Waters, *Closure of US Military Bases Overseas: International-Environmental Law Implications*, 55 (LL.M. Thesis – Fall 1998, available at https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/ENLAW/THESE/TheSubj.htm

[43] See RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, Princ. 2, produced at the United Nations Conference on the Human Environment at Rio de Janeiro, Jun. 13, 1992, UN A/CONF. 151/5/Rev. 1 (1992). Rio Principle 2 provides, "States have... the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies..."

[44] R. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 50 (1996).

[45] *Ibid.*

However, statutory laws in the category of "general extraterritorial applicability" are "exceptional."[46] Congress simply does not enact many laws with stated extraterritorial application,[47] mainly for the reason that this exercise of power would encroach upon the President's warfighting role and capacity.[48] This does not mean, though, that the US military operates freely without the rule of law when it comes to environmental protection overseas.

b. Executive Orders, DoD Policy and Guidelines

Mostly as a reflection of the separation of powers,[49] environmental protection at federal facilities is governed by Presidential Executive Orders (EO).[50] In 1978, President Jimmy Carter signed EO 12088, the first EO to address environmental protection at US facilities overseas.[51] EO 12088 requires the head of executive agencies responsible for the construction and operation of federal facilities outside of the US to ensure the facilities' construction and operation complies with "standards of general applicability in the host country or jurisdiction." [52] President Carter later signed EO 12114, which had the effect of creating a NEPA-like requirement for Environmental Impact Analysis requirements for certain categories of "major Federal actions significantly affecting the quality of the human environment"[53] outside the geographical borders of the United States, its territories and possessions."[54] This executive order was implemented in 1979 by DoD Directive 6050.7.[55] Later versions of this directive, lead to the development of the Overseas Environmental Baseline Guidance Document (OEBGD). This baseline guidance document essentially allows the Secretary of Defense to develop an overseas compliance policy.[56]

DoD policy evolved into the more recent DoD Directive 6050.16 and was later replaced by DoD Instruction 4715.5, *Management of Environmental Compliance at Overseas Installations*, in 1996. As James Landis explains, "in essence, these policy

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[46] *Ibid.*

[47] D. HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1436 (Foundation Press 2d ed. 2002).

[48] J. Landis, *The Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States Oversea Environmental Policies*, 49 NAVAL L. REV. 99, 125-126. (2002) *But see* generally, M. Crusto, *All that Glitters is not Gold: A Congressionally-Driven Global Environmental Policy*, 11 Geo. Int'l. L. Rev. 499. (1999) Crusto argues, at 528, that congress has failed to "act proactively on global environmental issues."

[49] Landis , *op. cit. supra* note 48 at 125-126.

[50] See generally, Phelps, *op. cit. supra* note 44 at 52.

[51] *Id.* at 52.

[52] EO 12088 at para. 1-801; see also Phelps, *op. cit. supra* note 43 at 53.

[53] 42 USCA § 4332(2)(c)

[54] EO 12114, *Environmental Effects Abroad of Major Federal Actions*, para. 2-1.; See also Phelps, *op. cit. supra* note 44 at 53.

[55] DoD Directive 6050.7, *Environmental Effects Abroad of Major Department of Defense Actions* (Mar. 31,1979).

[56] Landis *op. cit. supra* note 48 at 117.

mandates require the overseas installations in each foreign country to compare the OEBGD with local environmental standards of general applicability in determining the appropriate standards for the US military bases in that country."[57] The result is the Final Governing Standards (FGSs), which combines and blends the most restrictive requirements of the OEBGD, host national laws of general applicability, and applicable international agreements with the host country.[58] The FGS is the yardstick the military ultimately uses to measure its environmental protection compliance for its operations on overseas installations.

The OEBGD was more recently rewritten and issued in March, 2000.[59] Landis comments on this baseline guidance document, "lest anyone think that little time or effort has gone into compiling and assessing the applicability of US environmental law, the OEBGD is 230 pages long, covering 22 ostensibly military references which in turn incorporate virtually every US environmental regulation."[60] Despite some diluting of the principles of the Endangered Species Act (ESA),[61] the list of environmental standards, requirements and procedures for the operation of military bases overseas is fairly comprehensive.[62] However, strict guidance and requirements for overseas base environmental cleanup is conspicuously absent from any DoD guidance documents or policy. DoD's current policy for base closures requires mandatory cleanup of environmental contamination for two circumstances: 1) if contamination posed a "known imminent and substantial danger to human health and safety", and 2) if cleanup is necessary to "sustain current operations."[63] Other than for reasons to comply with these two standards, it is DoD policy not to expend funds for environmental remediation when a base is being returned to the host country.[64] Further, according to Phelps, "policy drafters were purposefully ambiguous in not defining the phrase 'known imminent and substantial endangerment to human health and safety' to allow decision makers maximum flexibility."[65] Essentially, the FGS will "not apply to remedial or cleanup actions to correct environmental problems caused by the DoD's past activities."[66] The US does not bind itself to local domestic laws, absent express agreement.

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[57] *Id.* at 118-119.

[58] DODI 4715.5, Sec. 4.1 at 3; Sec. 6.3.3.1; and Sec. 6.3.3.2

[59] Landis, *op. cit. supra* 48 note at 118.

[60] *Ibid.*

[61] *Ibid.*

[62] Department of Defense, *Overseas Environmental Baseline Guidance Document* (OEBGD), DoD 4715.5-G (Mar. 2000). See http://www.denix.osd.mil.

[63] See generally, Phelps, *op. cit. supra* note 44 at 77; Message of the Secretary of Defense, SECDEF MSG 142159Z DEC 93, DoD *Policy and Procedures for the Realignment of Overseas Sites*; also, Memorandum from Deputy Secretary of Defense John P. White, *Environmental Remediation Policy for DoD Activities Overseas* (18 Oct 1995).

[64] *Ibid.*; See also, Secretary of Defense message 131758Z Jan 92 (Jan. 13, 1992).

[65] R. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 79 (1996).

[66] Department of Defense, Department of Defense, *Overseas Environmental Baseline Guidance Document* (OEBGD), DoD 4715.5-G, 1-1 (Mar. 2000).

Cleanup of contamination for past activities is performed only "in accordance with applicable international agreements, Status of Forces Agreements, and US government policy."[67] Without an international agreement or outside domestic or international political pressure, the military is not bound to any remediation obligation. Phelps comments:

> Since the cleanup is conducted in cooperation with local authorities, that risk-based cleanup level would necessarily be determined in coordination with those authorities. However, absent some other international legal obligation or political imperative when local authorities demand a more protective level of cleanup than we believe is needed to adequately protect health and welfare, we are under no obligation to comply.[68]

US policy requires defense agencies to gather and maintain existing information and allows them to gather additional information regarding environmental contamination at DoD bases. This information is delivered to the host nation upon request when the base is turned over.[69] However, there is no consistency or specific requirement to gather more than existing information.

c. Status of Forces Agreements

The bedrock international agreement pertaining to US military overseas bases is the Status of Forces Agreement (SOFA). The SOFA addresses issues such as the right of primary criminal jurisdiction over US members of the force, claims, force protection and the use of deadly force, entry and exit requirements, customs and taxes, contracts, vehicle licensing and registration, and communication support.[70] The SOFA is often bilateral, but can also be multilateral, as in the case of the NATO SOFA drafted for all NATO countries after World War II.[71] In the case of multilateral agreements, supplements are often added to address particular concerns of a country. Some SOFAs are classified.[72]

If environmental remediation of a US base overseas were to be addressed in an international agreement, it would most appropriately be addressed in the SOFA. However, environmental concerns and any reference to what might be made into an

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[67] *Ibid.*

[68] *Phelps, op. cit. supra* note 44 at 77.

[69] *Id.* at 81, citing Memorandum from Deputy Secretary of Defense John P. White, Environmental Remediation Policy for DoD activities Overseas (18 Oct 1995) at paras. 2.a.(2), 2.b.(2), 2.c.(2), and 3.

[70] Operational Law Handbook (hereinafter OLH), The Judge Advocate General's School, United States Army, JA 422, 12-11 (1998).

[71] C. Rodgers, *Closing Overseas Military Installations: Environmental Issues, International Agreements and Department of Defense Policy*, A Thesis submitted to the Faculty of the National Law Center of the George Washington University (September 30, 1991). https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/ENLAW/THESE/TheSubj.htm at 26; Waters, *op. cit. supra* note 27 at 19.

[72] OLH, *op. cit. supra* note 70 at 12-4; Waters, *op. cit. supra* note 27 at 19.

environmental cleanup requirement are absent in most SOFAs.[73] This is largely the result of how long ago the agreements were made in relation to the more recent and increased awareness of the environment in general. As Waters observes, "most military bases were built before 'environment' was a household word." [74]

The majority of SOFAs, such as the NATO SOFA, only contain general references to the sending State (the state sending the armed forces to a host country) respecting the laws of the receiving State (the host country).[75] A unique exception is the1993 German supplementary agreement.[76] With some limitations, this agreement requires sending State forces to apply German law in their use of an installation or facility during the operation of the installation or facility.[77] Even more relevant to this article, the German supplementary agreement requires the sending State to bear the costs of assessing, evaluating, and remediating environmental contamination which it caused.[78] However, as stated above, the German Supplementary Agreement is an exception. The majority of SOFAs are silent to any obligation to remediate environmental damage.[79] Such silence puts the sending and receiving States at opposite ends of the bargaining table when they negotiate a base closure. The results ofter depend upon, "practically speaking, who will blink first."[80]

IV. Applying CERCLA Principles to the Cleanup of Overseas Military Bases

a. A Double Standard?

The US has been sharply criticized for clinging to a double standard when it comes to cleaning up its former military bases overseas.[81] Generally, the view shared by its critics is that the US does not "treat hazards created by the US military outside of the country with the same degree of seriousness that it has accorded defense sites within its

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[73] Waters, *op. cit. supra* note 27 at 18, Phelps, *op. cit. supra* note 44 at 58; and, Rodgers, *op. cit. supra* 71 at 26.

[74] Waters, *op. cit. supra* note 27 at Footnote 1.

[75] Phelps, *op. cit. supra* note 44 at 58; OLH, *op. cit. supra note 70* at 18-20.

[76] Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces With respect to Foreign Forces Stationed in the Federal Republic of Germany, 18 Mar. 1993. ("German Supplementary Agreement")

[77] See Phelps, *op. cit. supra* note 44 at 58-59. This obligation requires cooperation with the German government for seeking permits and the use of low-pollutant fuels and compliance emissions, and in the transportation of hazardous materials.

[78] *Id.* at 59. These requirements can be satisfied through SOFA claims, residual value off-sets, or directly, subject to "the availability of funds and the fiscal procedures of the Government of the sending State."

[79] *Id.* at 82.

[80] Waters, *op. cit. supra* note 27 at 6.

[81] K. Chanbonquin, *Holding the United States Accountable for Environmental Damages Caused by the US Military in the Philippines, a Plan for the Future*, 4 ASIAN-PAC. L. & POL'Y J. 10, 349 (2003): M. Carlson, *Environmental Diplomacy: Analyzing Why the US Navy Still Falls Short Overseas*, 47 NAV. LAW REV. 62, 70 (2000) ; M. Bayoneto, *The Former US Bases in the Philippines: An Argument for the Application of US Environmental Standards to Overseas Military Bases*, 6 FORDHAM ENVTL. L.J. 11, 155 (1994).

territorial borders."[82] Whether or not this is true, there is perhaps some truth to the adage that perception is reality. Perhaps it makes sense to look at the end result of contamination remaining on closed domestic US bases and compare it, factually, to closed bases located overseas.[83] Perhaps there is value in taking notice that laws applied domestically within the US are different from the laws applied to overseas military bases.[84] But these presumptions are starting points. Generalized observations that the US is acting differently overseas than it does domestically does not sufficiently address whether the US is neglecting its responsibility to the host nation, its citizens or to the global community. Generalized criticism glosses over particular methods or practices that the US can realistically employ to improve its cleanup efforts on overseas military bases.

Applying CERCLA principles, whole-cloth, to the cleanup of overseas military bases is an overly simplistic approach to improving environmental conditions on US military bases overseas. A better approach is dissecting CERCLA in to basic components to find which of its underlying principles can be appropriately applied or transplanted into the overseas context. There are least three basic phases of CERCLA cleanup relevant to this article: 1) assessing contamination through an environmental assessment, 2) public participation regarding the plan for remediation, and 3) assessing liability for the cleanup cost. The phase where contamination initially occurs is primarily addressed by the Solid Waste Disposal Act, as amended by the Resource Recovery and Conservation Act (RCRA), 42 USCA 6901, et al. domestically, and by executive order and by DoD policy, as discussed above. This initial phase is largely beyond the scope of the remainder of this article.

This section will address general international law principles that help shape the US military's environmental responsibilities overseas, and the benefits the US gains as an environmental leader in the international community. More importantly, this section addresses how these principles and benefits interrelate to specific CERCLA principles.

b. International Law and Diplomacy

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[82] Kim David Chanbonquin, *op. cit. supra* note 81 at 349.

[83] *Id.* at 342, Chanbonquin argues, "When the US troops left the Philipines in the early 1990s, the DoD relinquished all responsibility for he huge environmental task that remained as a result of its presence at Subic and Clark. The US military dumped millions of gallons of sewage on the ground and in its water, and chemicals have seeped into the soil and water table. The US General Accounting Office (GAO) estimated the clean-up would cost more the $12-15 million per site." However, Chanbonquin also notes at 343, "... there is a marked difference in the way the US government has chosen to deal with its cleanup duties in the Phillipines compared to the duties it has voluntarily shouldered in developed countries, such as Germany."

[84] *Id.* at 349-350. Chanbonquin generally observes, "Although DoD operations within the fifty states, the District of Columbia, and each of the fourteen US territories and possessions are subject to the strict regulation of federal environmental laws, its overseas installations are not."

The United Nations' Stockholm Declaration ("Stockholm") of 1972[85] and Rio Declaration on Environment and Development ("Rio") of 1992[86] lay a primary groundwork for assessing global cooperation and environmental responsibility among sovereign States.[87] Although the principles outlined in these declarations are not of themselves binding,[88] their increased use in international arenas has launched many of their principles into the emergence of customary law.[89] It would be disingenuous for the US, as a signatory, to simply dismiss or ignore the principles contained in the declarations. The US Restatement (Third) of the Law of Foreign Relations §601(1)(a) acknowledges a State's obligation to "conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction."[90] Further, the United Nations (UN) Charter, Article 1.3, includes within the purposes of the UN "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character." [91]

Central to the Rio Declaration is the tug-of-war dichotomy between the developed and lesser developed countries.[92] Principle 7 of the Rio Declaration, places greater responsibility on developed nations to achieve sustainable development:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to the global environmental degradation, States have common but differentiated responsibilities. *The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.* (emphasis added).[93]

The US was careful not to allow broad-brush interpretations of Principle 7, but acknowledged its role as an environmental world leader. When signing on to the Rio Declaration, the US attached its interpretation to this principle:

> The United States understands and accepts that principle 7 highlights the special leadership role of the developed countries, based on our industrial

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[85] Hereinafter Stockholm declaration, produced at the United Nations Conference on the Human Environment at Stockholm, Jun. 16, 1972. U.N. Doc. A/CONF. 48/14 and Corr. 1. (1972).

[86] Hereinafter Rio declaration, produced at the United Nations Conference on the Human Environment at Rio de Janeiro, Jun. 13, 1992, Un A/CONF. 151/5/Rev. 1 (1992).

[87] *See* generally, HUNTER, *op. cit. supra* note 47 at 173,176; citing Louis B. Sohn, *The Stockholm Declaration on the Human Environment* 14 HARV. INT'S L.J. 423, 431-33, 187-203 (1973).

[88] *Id.* at 196.

[89] Waters, *op. cit. supra* note 27 at 32.

[90] See HUNTER, *op. cit. supra* note 47 at 425.

[91] *Id.* at 428.

[92] *Id.* at 186-204.

[93] Chanbonquin, *op. cit. supra* note 81 at 342.

> development, our experiences with environmental protection policies and actions, and our wealth, technical expertise and capacities.
>
> The United States does not accept any interpretation of principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries.[94]

The US military best accomplishes its missions when it can win over the hearts and minds of the foreign citizens in the countries with which they interact.[95] Focused on this purpose and the continued desire to spread democracy, the US military engages in military-to-military liaisons[96] in foreign countries and embraces projects in the furtherance of the DoD's Humanitarian and Civic Assistance (HCA) program.[97] Under the design of this program, the US military "engages in relief and development-type projects in developing countries in conjunction with the armies of host nations. Such projects include the construction of roads, wells, and schools, as well as the provision of medical, dental, and veterinary services."[98] Military attachés are also assigned to embassies to assist in information exchange and to preserve the image of the US military in foreign countries.[99]

In winning over the hearts and minds of foreign citizens, the US military can play a leading role in environmental leadership overseas. Coining the phrase, "environmental diplomacy"[100] within the military context, Commander Margaret Carlson comments, "although, members of the US Armed Forces have always been diplomats of a sort, trying to leave a good impression in every port visited, never did the task require so much intricacy and finesse as the current international environmental obligations." DoD proclaimed a leadership role in environmental compliance and protection.[101] It seems appropriate that the US military, as an arm of the sovereignty, should aspire to a higher level of environmental protection, than, say, corporate

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[94] *Id.* at 403.

[95] See generally Foresight Intelligence Summary, *Winning the Hearts and Minds* (November 24, 2003), http://www.realforesight.com/INTELSUM HTML

[96] See generally, *Mil-to-Mil: Assessing US National Security Cooperation Strategies*, a conference invitation to the Boston University (17 October 2002) http://www.bu.edu/ir/milintro.html; D. Glantz and L. Grau, *The State of Military to Military Intellectual Cooperative Programs* (August 1996), http://fmso.leavenworth.army.mil/fmsopubs/issues/minskpap.htm; and, US Foreign Military Assistance, Database on US Security Assistance FY 1990-2003, http://www.fas.org/asmp/profiles/aid/aidindex.htm

[97] *US Military Civic Action Programs and Democratization in Central America*, 1 The Democracy Backgrounder 3 (September, 6 1995). http://www.hartford-hwp.com/archieves/47/004.html; see also, Frida Berrigan, *US Military Training: Exporting Democracy?* (November 2000) http://www.afsc.org/pwok/1100/112k08.htm

[98] *Ibid.*

[99] *See* generally: D. Potts, *The Rise of Military Diplomacy: New Roles for the Defense Attache'*, http://www.faoa.org/journal/pottsx00.html

[100] M. Carlson, *Environmental Diplomacy: Analyzing Why the US Navy Still Falls Short Overseas*, 47 NAVLR 62, 63 (2000).

[101] Phelps, *op. cit. supra* note 44 at 88.

America. The US government should at least set the pace. While Carlson claims there is "room for improvement" in the US military's environmental policies overseas,[102] the question remains as to how far should the US go in extending US environmental domestic law and policy to its overseas bases.

c. The Human Right to a Healthy Environment: Environmental Assessments, Public Participation and the Right-to-Know

As a general proposition, EA's participation in the cleanup process by affected citizens, and the public's right-to-know (RTK) are interrelated and fundamental to environmental management and cleanup. It is simply difficult for the public to knowingly participate in the cleanup process if uniform assessments of environmental contamination are not performed and made available to the public. This concept is embraced by Principle 10 of the Rio Declaration:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[103]

In addition to Principle 10, Principle 1 of the Rio Declaration states that human beings "are entitled to a healthy and productive life in harmony with nature."[104] The human right to a healthy environment appears to be emerging as a customary law. In addition to the principles found in the Rio Declaration, the African and Inter-American human rights charters have adopted the human right to a healthy environment.[105] More sophisticated in scope and enforcement, the European Human Rights Court (EHRC) has interpreted the right to privacy as embracing the right to a healthy environment.[106] In the *Lopez-Ostra v. Spain,*[107] for example, the EHRC held in

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[102] Carlson, *op. cit. supra* note 100 at 61.

[103] Produced at the United Nations Conference on the Human Environment at Rio de Janeiro, Jun. 13, 1992, Un A/CONF. 151/5/Rev. 1 (1992).

[104] *Ibid.*

[105] See AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS, June 27, 1981, 21 I.L.M. 58, 63. Article 21 of the African Charter on Human and people's Rights grants that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development." See HUNTER ET AL., *op. cit. supra* note 47 at 1298 for the Additional Protocol to the American Rights (San Salvador Protocol). Article 11(1)holds that, "[e]veryone shall have the right to live in a healthy environment..."

[106] HUNTER ET. AL., *op. cit. supra* note 47 at 1301. *See* also, Dinah Shelton, *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, available at http://www.cedha.org.ar/docs/doc63.htm (visited on Mar. 12, 2004). This paper was presented at the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment in Geneva from January 14-16, 2002. Article 8(1) of the European Convention on Human Rights provides that everyone has "[t]he right to respect for family and private life [and the right] to

favor of an applicant and her daughter for health problems caused by the operations of a tannery waste treatment plant located near their home. The court found that the environmental harm violated their right to a private and family life.[108] The EHRC later reconfirmed *Lopez-Ostra* in *Guerra & Others v. Italy*,[109] holding for applicant citizens in Manfredonia, Italy who complained of pollution resulting form the operation of a chemical factory.[110]

Beyond the Rio Declaration and regional human rights systems, several national and constitutional laws have emerged to recognize the right to a healthy environment.[111] The Supreme Court of Costa Rica, for example, affirmed the right to life and a healthy environment after a plaintiff complained when his government allowed a cliff in his neighborhood to be used as a dump.[112] The Philippine Supreme Court upheld the constitutional right to a balanced and healthful ecology under their national Bill of Rights after plaintiffs sued to have logging licenses revoked as a result of excessive deforestation.[113]

With the blend and proliferation of international principles, regional human rights and national laws focusing on the environment, the human right to a healthy environment is gaining solid footing as customary international law. It is a right that the US military will likely need to address with greater energy in the future.

The right-to-know (RTK) is a companion to the human right to a healthy environment. In 2003, environmental and human rights groups joined efforts in a publication addressing the need for international RTK.[114] Although this report focuses primarily on the need for corporate transparency by US companies operating overseas, it also encourages all nations to enact its own RTK laws. It urges, "[e]ventually, we hope that each country will pass its own right-to-know laws. Organizations such as the European Union and the Organization for Economic Cooperation and Development have already urged their member countries to do so."[115] The movement toward

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peaceful enjoyment of property and possessions." See International Center for Commercial Law & The Legal 500, Human Rights and the Environment 16 (1999) at http://www.icclaw.com/devs/uk/ev/ukev_040.htm.

[107] App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1994).

[108] *Ibid.*

[109] App. No. 14967/89, 26 Eur. H.R. Rep.357(1998).

[110] *Ibid.*

[111] See generally, Carl Bruch et al, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 143 (2001).

[112] International Human Rights internship Program & Forum Asia, *Circle of Rights-Economic, Social & Cultural Rights Activism: A Training Resource* Pt. 1§V, Module 15, ¶ 8, available at http://www1.umn.edu/humanrts/edumat/IHIP/circle/modules/module15.htm

[113] *Id.* at ¶ 42.

[114] See AFL-CIO, Amnesty International USA, EarthRights International, Friends of the Earth, Global Exchange, Oxfam America, Sierra club & Working Group on Community Right to Know, *International Right to Know: Empowering Communities Through Corporate Transparency* (Jan. 2003) at http://www.foe.org/camps/intl/corpacct/irtk.pdf

[115] *Id.* at 22.

empowering average citizens with information is on the march. The RTK also seems fundamental and consistent with continued US efforts to spread democracy.

As discussed above, the petitioners in *Arc Ecology* sought a preliminary assessment of the hazards to public health under CERCLA §105 (d), 42 USC. 9605(d).[116] However, as also discussed above, the court found no extraterritorial extension of CERCLA,[117]and the military is under no obligation under executive order and its policies to comply with such a demand.[118] This article urges that a comprehensive and uniform EA[119] be required by executive order prior to the closure of every US military base overseas, and that the assessment be made publicly available to the extent that it does not compromise classified information or legitimate US security interests. An EA of this nature should take into account alternative levels of cleanup, and possible uses of the base's land.

Public participation prior to remediation is required under CERCLA §117(a); 42 USC. 9617(a). This right, enjoyed by US citizens for domestic cleanups, includes the "opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue."[120] CERCLA requires that notice of the final plan is published and that citizens are given the opportunity respond to it:

> Notice of the final remediation plan adopted shall be published and the plan shall be made available to the public before commencement of any remedial action. Such final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations...[121]

This article does not suggest that the US require public hearings in foreign countries where it would be inappropriate to do so. Consider Thomas Couture's observation that, "unlike the US, many nations do not have a history of allowing public participation in the activities of governing, nor do many show any inclination to initiate such public scrutiny of government actions."[122] Nevertheless, hearings should be required when it is appropriate to have them. This position, though more compelling in result, is not far from current DoD policy which provides:

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[116] Arc Ecology v. US Dept. of the Air Force, *supra* note 17 at 4.

[117] *Ibid.*

[118] *Phelps, op. cit. supra* note 44 at 77.

[119] The use of the acronym "EA" for "environmental assessment" should not be confused with "EA" representing the phrase "environmental executive agent" provided for in DoD Directive 6050.16, paras. C.2. and D.1.b.

[120] CERCLA §117(a)(2); 42 USC. 9617(a) (a)(2).

[121] CERCLA §117(b); 42 USC. 9617(b).

[122] *See,* T. Conture, *DoD Compliance With The National Environmental Policy Act: Should NEPA Apply To DoD Major Federal Actions Overseas?* A Thesis submitted to the Faculty of George Washington University Law School in partial satisfaction of the requirements for the degree of Master of Laws (September 30, 1997) https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/ENLAW/THESE/TheSubj.htm at 23.

> Public hearings are not required. Consideration should be given in appropriate cases to holding or sponsoring public hearings. Factors in this consideration include: foreign relations sensitivities; whether the hearings would be an infringement or create the appearance of infringement on the sovereign responsibilities of another government; requirements of domestic and foreign governmental confidentiality; requirements of national security; whether meaningful information could be obtained through hearings; time considerations; and requirements for commercial confidentiality.[123]

Without a comprehensive, uniform EA of the contamination, meaningful public participation cannot occur. Treatment of one base in one country will be, or will at least appear to be, inconsistent.[124] While the actual cost born by the US may differ from one base to another, as will be discussed in the next subsection, the playing field will be level from the onset of negotiations if a uniform, comprehensive EA is first performed. While the cost of uniform EAs can be costly to US taxpayers, it should be considered part of the cost of doing business overseas and the military budget should be supplemented to accommodate for this requirement.

The Government Accounting Office (GAO), serving as a type of landlord for the military, argues against the extraterritorial application of NEPA requirements for Environmental Impact Statements (EIS).[125] The arguments can also be applied to CERCLA. The GAO argues that extraterritorial application of an Environmental Impact Statement (EIS) will infringe on sovereignty, increase lawsuits, disrupt US relations with other countries and limit the President's ability to act in foreign affairs, be cost prohibitive, and that public participation in other countries would be politically and culturally difficult to accomplish due to translating documents.[126] Carlson's counter-arguments, though more relevant to NEPA than to CERCLA, are noteworthy. She states:

> These arguments against extraterritorial application of NEPA do not explain why US assessment standards could not be used for US overseas military activities that do not include the host-nation. The argument for extraterritorial application is that NEPA procedures would foster better decisions with regard to the environment. Surely, NEPA requirements would not infringe on sovereignty of the host-nation if the federal action was exclusive to US personnel and operations.[127]

Carlson's response must be viewed in light of the differences between NEPA and CERCLA. While a NEPA or a NEPA-like EIS addresses major actions being

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[123] DoD Directive 6050.7, Section D.7.
[124] K. Chanbonquin, *op. cit. supra* note 81 at 349.
[125] Carlson, *op. cit. supra* note 100 at 90-91.
[126] *Id.* at 91.
[127] *Ibid.*

undertaken by the federal government,[128] CERCLA looks to cleanup. In the overseas context, this means that a federal activity is ending and that the base is being fully handed over to the host country. By the very nature of the event, it is rare that the host country is not involved in the negotiations to make this happen. With such interaction, there is a greater likelihood that the laws and policy of the two nations will conflict.[129] However, if the US remains focused on performing an EA for contamination cleanup, without unilaterally imposing subsequent requirements, there should be little threat to the concerns expressed by the GAO.

A comprehensive, uniform EA will advance the cause of consistency among closing overseas bases and help level the playing field at the negotiating table between two sovereign nations. Citizens of the host nation will be appropriately empowered with knowledge of the extent of contamination on the closing base and can petition their government for an appropriate response during the negotiations. This article does not suggest that citizens or NGOs become involved in the actual negotiations between the two sovereign States, but that they become fully informed and given a chance to communicate with their respective States prior to the negotiations. A uniform, comprehensive EA will not inappropriately tie the hands of the US military in negotiating an overseas base closure. As discussed below, the EA will not be the only factor in the ultimate cleanup of the overseas base and the results of negotiations will vary.

d. CERCLA in Circles and Sovereign States as Potentially Responsible Parties

Although a uniform, comprehensive EA sets the appropriate backdrop for closure and cleanup negotiations of US military bases overseas, it cannot, nor should it drive the end result of cost allocation. As will be discussed below within this subsection, those demanding greater US cleanup liability often miss the significance and involvement of the host country during the operations of the US base. They also often overlook the benefits a host nation receives during the base's operations and after its closure.

During the closure negotiations of US military bases overseas, some host countries have argued that Principle 21 of the Stockholm Declaration applies to their environmental cleanup.[130] This principle, similar to Principle 2 of the Rio Declaration,[131] provides:

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[128] 42 USCA § 4332(2)(c).

[129] Waters, *op. cit. supra* note 27 at 42.

[130] *Id.* at 29.

[131] See RIO DECLARATION, Principle 2; which includes the "sovereign right to exploit their own resources pursuant to their own environmental *and developmental* policies..." [emphasis added].

> 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 own jurisdiction or control do not cause damage to the environment of other States*** or areas beyond the limits of national jurisdiction. (emphasis added).[132]

Additionally, some critics of the US military's environmental practices overseas, refer to Principle 16 of the Rio Declaration supporting the "polluter pays" principle:[133]

> National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[134]

In support of the "polluter pays" argument, critics refer to the 1941 *Trail Smelter Arbitration ("Trail Smelter")*,[135] between the US and Canada. In that case, the US argued that Canada should be accountable for air pollution crossing the border into the US from a private smelter located within the borders of Canada.[136] The arbitral tribunal held for the US and awarded damages for harm caused to crops, farm animals and private property.[137] This case has influenced a number of International Court of Justice (ICJ) opinions creating or acknowledging a general obligation not to cause harm to other states.[138]

The application of *Trail Smelter* to the cleanup of overseas military bases is significantly flawed in the facts. In *Trail Smelter*, the US was damaged by the effects of a private smelter while they received none of the benefits from the smelter operation. The US did not mutually participate or negotiate for resources resulting from the operation of the smelter. This factually differs from a host nation who receives economic,[139] political and national security benefits[140] from the operation of a US

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[132] K. Chanbonquin, *op. cit. supra* note 81 at 349-350.

[133] *Id.* at 358-359.

[134] RIO DECLARATION, see note 85.

[135] K. Chanbonquin, *op. cit. supra* note 81 at 356-357, citing to Trail Smelter Case (US v. Can.), 3 R. Int'l Arb. Awards 1905 (Apr. 16, 1938 & mar. 11, 1941); see also United Nations, 3 REPORTS OF INTERNATIONAL ARBITRAL AWARDS, 1905-81.

[136] *Id.* referring to *Trail Smelter Arbitration.*

[137] *Ibid.*

[138] HUNTER ET AL., *op. cit. supra* note 47 at 420.

[139] WATERS, *op. cit. supra* note 27 at 4; and, K. Chanbonquin, *op. cit. supra* note 81 at 341.

[140] M. Victoria Bayoneto, *The Former US Bases in the Philippines: An Argument for the Application of US Environmental Standards to Overseas Military Bases*, 6 FORDHAM ENVT'L. L.J. 11, 116 (1994).

military base located within its territory.[141] The host nation is the property owner and landlord of the property which the US military leases by treaty. Often, US military base operations are joint ventures with the host nation, such as with Royal Air Force bases in the United Kingdom which are overwhelmingly occupied by US Forces.

Over years of military occupation, the military improves the infrastructure of its bases with buildings, roads, utilities and runways. When the base is closed and turned over to its host, this infrastructure has what is called "residual value" and is usually put to use by the host government.[142] DoD's policy is to have the residual value offset tax dollar investment to repair environmental damage.[143] Residual offsets then can become the subject of negotiations between sovereign nations.

Critics of the US tend to gloss over years of benefits which a host nation receives from the presence of a US military base within its territory. Instead, they advocate holding the US solely or overwhelmingly responsible for the base's environmental condition. Victoria Bayoneto, discusses how the "Philippines entered into the Military Bases Agreement in 1947 in recognition of a mutual interest in the defense of their respective territories, and the United State's interest in providing for the defense of the Philippines and in developing an effective Philippine armed forces,"[144] and how "the Philippines received millions of dollars in aid, in addition to military security."[145] Yet, Bayoneto concludes that, "the United States enjoyed this benefit [use and control over US facilities] for forty-five years. The aid given to the Philippines was independent of this right and benefit; the aid was not 'rent' for the use of the bases."[146] While the collateral economic benefit to local communities is evident in how US states and local US communities scramble to keep military bases within their borders,[147] Bayoneto fails to acknowledge these and other collateral benefits realized by the Philippines. Instead, Bayoneto argues that because there was a shared and mutual relationship, the US should unilaterally pay for the entirety of environmental damage. She does not suggest the Philippines should bear any responsibility for the benefits it

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[141] Arguably, all domestic environmental laws impose liability and sanctions on the responsible party regardless of any benefits actually obtained from the contamination. However, as discussed in greater detail below, owners and operators, those venturing to gain from the property and activity, are those held responsible for cleanup costs.

[142] This author, while stationed with the US Air Force in Germany from 2001 to 2003, witnessed the success of a former US Air Base in Hahn, Germany that had been converted into a flourishing inter-continental airport and secondary airport to the Frankfurt International Airport.

[143] Carlson, *op. cit. supra* note 100 at 80; Waters, *op. cit. supra* note 27 at 50.

[144] Bayoneto, *op. cit. supra* note 140 at 124.

[145] *Id.* at 116.

[146] *Id.* at 154.

[147] *See*, George Cahlink, *First Skirmishes in the Battle of the Bases*, (December 2002), http://wwwafa.org/magazine/Dec2002/1202bases.html; Jim Snyder, *Communities Turn to Washington Lobbyists to help prepare for the Next Base Closing Round*, The Hill (March 18, 2004), http://www.hillnews.com/business/051403_base.aspx; Dale Eisman, *Battle Rises to Save Bases*, The Virginia Pilot (October 11, 2003), http://home.hamptonroads.com/stories/story.cfm?story=60922&ran=233678; Fighting for the Economy (Sep. 1, 2003), http://americancityandcountry.com/ar/government_fighting_economy/

enjoyed from the US bases. She states in conclusion, "in light of the long and propitious relations shared by the Philippines and the United States through politics, diplomacy, security, and economics, it is incumbent upon the United States to accept responsibility for the environmental damage it caused during its occupation of the bases in the Philippines."[148]

A comment by Kim David Chanbonpin that, "[i]n its treatment of former bases in the Philippines, the United States has utilized a double standard for the application of its environmental laws,"[149] fails to recognize the joint benefits realized by both sovereign States, and the fact that the Philippines will have complete future use of the land and facilities of the former bases. Unlike a base in the US where the US government and its citizens retains the land for future enjoyment of alternative uses, the land and facilities on a base overseas returns to the host nation and its citizens. This article does not suggest that the US can irresponsibly pollute in other countries simply because it provides jobs, supply contracts and other benefits to foreign nations. It simply argues that a host nation cannot claim that the US polluted with unilateral and exclusive benefit. To assume that a host nation does not benefit in various economic, political and national security ways from US presence is naïve. To make a blanket assumption that the host nation cannot negotiate initial base SOFAs and cleanup is patronizing. The host nation and the US should shoulder some degree of joint responsibility to the environment.

This view is supported by the principles underlying CERCLA. An application of CERCLA in the overseas context provides no relief to petitioners seeking to hold the US exclusively liable for environmental damage to former overseas military bases. At the heart of CERCLA liability is the principle of strict joint and several liability by facility owners or operators where hazardous wastes are disposed, and upon contracted arrangers of such wastes.[150] The CERCLA defense that a third person caused the environmental damage is not available if the third person is connected to the owner or operator by any contractual relationship.[151] CERCLA liability is broad enough to ensure cleanup from any and all involved parties, and allows one potentially responsible party (PRP) to seek compensation for cleanup from another PRP.[152]

A host nation who owns the land on which the US military operates can be compared to the CERCLA "owner" of the land and resources of a base, and the US as the "operator" of the facilities. Extending the comparison, the SOFA binds the two

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[148] Bayoneto, *op. cit. supra* note 140 at 155.

[149] Chanbonquin, *op. cit. supra* note 81 at 350.

[150] CERCLA § 107(a); 42 USCA 9607(a).

[151] CERCLA § 107 (b); 42 USCA 9607 (b); Perhaps the defense of "an act of war" under the same subparagraph could apply in some circumstances to overseas military bases. However, this article looks to only those circumstances where a base does not come under direct attack. It also assumes that regular operations in launching a war from an overseas base would not invoke the protections of the defense.

[152] CERCLA §113(f); 42 USCA 9613(f).

parties with a contractual relationship. Under a CERCLA analysis, both the US and the host nation are jointly and severally liable for the environmental harm. The significant difference between a domestic and an extraterritorial application of CERCLA is that contribution actions,[153] cost allocations[154] and settlements[155] are not overseen by a court or an agency in an international relationship. Instead, the two parties are left to themselves to negotiate as sovereign nations.

Arc Ecology plaintiffs sought a preliminary assessment under CERCLA.[156] Had the court been legally able to extend CERCLA extraterritorially, it could have arguably extended the principles of strict joint and several liability. According to the adage, picking up one end of the stick picks ups the other end as well. This would leave the plaintiffs without recourse to compel the US to bear any more cost than the US was willing to bear -- subject, of course, to international agreements.[157]

The Rio Declaration encourages liability schemes to protect victims of pollution. Principle 13 reads:

> States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.[158]

A liability scheme envisioned by Principle 13, however, should not interfere with sovereign integrity. Principle 12, though expressly addressing international trade concerns, captures this idea:

> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. *Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental problems should, as far as possible, be based on an international consensus.* [emphasis added].[159]

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[153] CERCLA § 113 (f); 42 USCA 9613(f).
[154] CERCLA §107; 42 USCA 9607.
[155] CERCLA § 122; 42 USCA 9622.
[156] Arc Ecology v. US Dept. of the Air Force, 172003 WL 22890112, 4 (N.D. Cal.) (2003).
[157] *Phelps, op. cit. supra* note 44 at 81.
[158] RIO DECLARATION, *supra* note 86.
[159] *Ibid.*

As CERCLA heavily depends upon judicial and administrative agency intervention, oversight and adjudication, imposing CERCLA's liability scheme in the international context is unworkable and intrudes upon national sovereignty. The notion of strict joint and several liability without judicial oversight merely puts sovereign nations in the place where they already exist – at the negotiating table.

While joint and severable liability, the very heart of CERCLA, is unworkable extraterritorially, adherence to local host nation standards is both compatible with domestic US policy and international principles. If the US military complies with the doctrine of blending the most restrictive requirements of the OEBGD, host national laws of general applicability, and applicable international agreements in the ongoing operations of its bases,[160] it should apply a similar standard in the cleanup of *past* operations. Domestically, the cleanup of federal facilities is subject to US state laws of general applicability. CERCLA § 120(a)(4) State Laws[161] provides:

> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States or facilities that are the subject of a deferral under subsection (h)(3)(C) of this section when such facilities are not included in the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

While the US will not sacrifice its sovereignty to enforcements measures of the host state, nor include overseas installations on the National Priorities List, it can secure an environmental leadership role by deferring to the stricter of its current standard of imposing mandatory cleanup of environmental contamination that pose "known imminent and substantial danger to human health and safety"[162] and the environmental cleanup laws of the host nation. While disparate results will likely occur between host nations, the US military will be promoting a policy that encourages its host to tighten its domestic environmental protections across the board. This policy respects the sovereignty of the host nation and Rio Principle 2 concerning "the sovereign right to exploit the [host nation's] own resources pursuant to [its] own environmental and developmental policies."[163] Admittedly, however, the US and its host are not likely to escape the negotiating table altogether. In situations where a host nation judicially imposes a joint and several liability cleanup scheme, such as CERCLA, issues of

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[160] DODI 4715.5, Sec. 4.1 at 3; Sec. 6.3.3.1; and Sec. 6.3.3.2.

[161] CERCLA § 9620(a)(4).

[162] See generally, Phelps, *op. cit. supra* note 44 at 77; Message of the Secretary of Defense, SECDEF MSG 142159Z DEC 93, DoD *Policy and Procedures for the Realignment of Overseas Sites*; also, Memorandum from Deputy Secretary of Defense John P. White, *Environmental Remediation Policy for DoD Activities Overseas* (18 Oct 1995).

[163] *Supra* note 85.

sovereign interference again surface. In these circumstances, the two nations may unavoidably find themselves at opposite ends of the table; unless, of course, the matter is adequately addressed in the SOFA.

Conclusion

Arc Ecology appropriately held that CERCLA, as it is now written, does not apply in the cleanup of US military bases overseas. The plaintiffs in *Arc Ecology* failed to prove that Congress intended the extraterritorial application of CERCLA, and the Court denied the plaintiffs' request for a preliminary assessment on former US bases in the Philippines.

Addressing whether CERCLA principles should be expressly adopted by statute or executive order, this article proposed that a uniform, comprehensive Environmental Assessment (EA) should be required by executive order prior to base closure negotiations overseas, and that it should be made available, when appropriate, to the international public. The opportunity for public participation should be required when it would not interfere with the laws or policies of a host national government. While negotiations for the terms of base closure and environmental cleanup should remain within the purview of sovereign nations, the onset of negotiations should be conducted on a level playing field with other US base closures, and with consideration for providing information to host national citizens when possible. The application of CERCLA's liability scheme extraterritorially would invade solid principles of sovereignty and should not be adopted. However, the US should adopt a policy of complying with its current cleanup standard or with local host national environmental cleanup, whichever is strictest. In cases where the host nation adopts a CERCLA joint and several liability scheme, the US and its host are left to resolve cleanup issues under their Status of Forces Agreement (SOFA) and through negotiation.

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