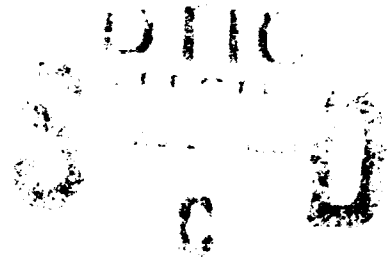

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Closing Overseas Military Installations: Environmental Issues, International Agreements and Department of Defense Policy

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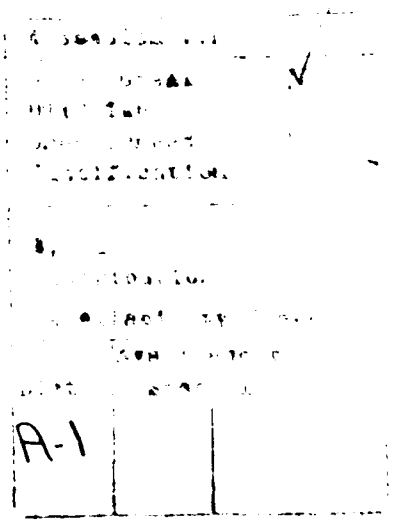

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Closing Overseas Military Installations: Environmental Issues, International Agreements and US Policy

I. INTRODUCTION

Several large and colorfully grafittied pieces of concrete from the Berlin Wall stand in a glass case in the halls of the Pentagon like a trophy for the victors of the Cold War. It is a monument to the end of an era, symbolizing the final dismantling of the vestiges of a half-century of conflict.[1] Communist governments in Poland, Hungary, Czechoslovakia, and East Germany have been removed and the Soviet Union is disintegrating as a credible threat to European and American interests. Maintaining a large and expensive military presence in Europe as a counter to the defunct Warsaw Pact no longer makes strategic sense and the dismantling of the US military in Europe is about to follow the example of the Berlin Wall.

A. Overseas Base Closings

By 1995, the US military is expected to have one-fourth fewer personnel than its present strength.[2] The Department of Defense (DOD) plans to close forty-three bases in the

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[1] Citizens of West Germany began knocking down portions of the Berlin Wall on November 9, 1989.

[2] Cheney Slates Closing of 43 Military Bases, Deepest Retrenchment Since World War II, Washington Post, April 13, 1991, at A1, col.1.

continental US (CONUS) and end operations or draw down forces at 198 sites in ten overseas countries. The US military will end its operations at 133 sites in Germany,[3] fourteen in Spain, nine in Korea, five in Greece, five in Italy, eleven in the U.K. and at least one site in Australia and Japan. Many other locations are also being considered.[4] Indeed, closures have already begun[5] and many overseas military installations, to a greater or lesser extent, will face challenges resolving environmental issues. The US Air Force has identified 93

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[3] The market value of all the buildings and grounds placed at the disposal of the allied stationed forces is roughly DM 40 billion. The annual rental value is DM 2 billion. Under the stationing agreements, the allies use these accommodations free of charge. The FRG places 131,866 dwelling units at the disposal of allied soldiers' families, 89,795 of them free of charge. The American forces alone use 67,200 dwelling units, 56,195 of them free of charge. Altogether, one of every hundred dwellings in the FRG is used by sending state personnel. Federal Minister of Defense, White Pater 1983, Security of the Federal Republic of Germany, 127.

[4] United States General Accounting Office (GAO), Report NSIAD-91-195, Overseas Basing, Air Force and Army Processes for Selecting Bases to Close in Europe, 10-12, April 24, 1991; Office of the Assistant Secretary of Defense (Public Affairs), News Release No. 459-90, September 18, 1990. Of the sites to be closed, some are large and some small with only one or two buildings; some are parcels of land with no buildings. Some will be fully returned to host governments and others partially returned or placed in standby status for future use. Base rights in the Philippines are currently under negotiation. Assuming the installations are not completely buried by ash and debris from the Mt. Pinatubo volcanic eruptions, these may also have to confront the issues addressed by this paper.

[5] As a result of the United States-Soviet Union Intermediate Nuclear Forces Treaty, the United States has already closed Ground-Launched Cruise Missile bases in England, Holland, Germany, Belgium, and Sicily. Aerospace World, Air Force Magazine, 25 (Oct. 1990).

sites of contamination at 39 overseas installations and has projected a conservative estimate of $100 million to pay for cleanup.[6] The actual extent of contamination is unknown because the practice has been to only count known sites of contamination and not to seek out others.[7] The US Army Europe (USAREUR) has identified 358 contaminated areas at its 848 European bases and properties and expects to find more as a result of a forthcoming survey. Cleanup is conservatively expected to cost at least $162 million.[8]

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[6] Hazardous waste contamination at U.S. military installations stem mainly from soil and groundwater contamination from spills, leaks and on-site landfills. The primary sources of contamination are petroleum products, solvents (mostly chlorinated hydrocarbons), heavy metals, and PCBs. Germany contains 25 Air Force sites at six installations at a total estimated clean up cost of about $50 million. Environmental Quality Division, Directorate of Engineering Services, Headquarters United States Air Force, Inventory of Contaminated Sites at United States Air Force Overseas Installations, August 1990.

[7] U.S. Army Audit Agency, Selected Environmental Programs U.S. Army, Europe and Seventh Army, Report of Audit EU91-4, January 17, 1991.

[8] France and O'Neill, Current International Developments, 3 Envtl. Claims J. 275, 277 (Winter 1990/91). For purposes of comparison, the German Environment Ministry has reported that the Soviets may have polluted 3,000 square kilometers of territory, almost 3 percent of the land area of the former East Germany. Improper handling of fuel, inadequate or nonexistent sewage treatment facilities, random disposal of solid and toxic waste, and training fields littered with ammunition are considered to pose the greatest threats. Although the German Ministry of Finance has ruled that Moscow is responsible for cleaning up the environmental damage caused by Soviet troops, few believe the Soviet government will do so. Germany is financing the Soviet troop withdrawal and has committed DM 29 billion to house returning soldiers and foster a market economy in the Soviet Union that can provide jobs. In return, the Soviets are demanding that Germany pay highly inflated prices for any "assets" left behind. Ministry Finds

In the US the course of action is clear: remediate to the standards of CERCLA in accordance with the National Contingency Plan. Under CERCLA, DOD is to clean up to a level that meets federal and state requirements. For overseas installations, the answer is not so clear. The countries in which the US operates vary significantly in environmental sophistication. The Germans[9] have gone on record that they expect all foreign forces to identify waste sites and clean them before departing their bases.[10] Germany's newly elected government proposed on January 16, 1991 major legislative

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Environmental Damage in Areas Occupied by Soviet Soldiers, 14 Int'l Env't Rep. (BNA) 314 (June 5, 1991).

[9] In this paper the terms Germany, Federal Republic and FRG will be used interchangeably.

[10] In response to increasing inquiries from its Parliament concerning troop reductions, the German Ministry of Finance (MOF) provided to legislators a legal explanation of how foreign forces are expected to comply with German environmental standards on the properties made available to them. (The land on which U.S. bases are located is owned by the FRG.) The document discussed principles of international law and the relevant portions of international agreements that address the responsibilities of foreign forces to keep their accommodations (bases) clean. It concluded with the statement: "If properties are released in connection with the troop reduction, they are returned by the foreign forces free from previously caused contamination in accordance with their responsibility." The MOF had the letter translated and sent to representatives of each NATO member with bases in country. Letter from Bundesmisterium der Finanzen to CINCUSAREUR Liaison Officer, Properties Made Available to the Foreign Forces; Ecological Damage; Compliance with the German Law on Protection of the Environment, November 29, 1990; USAREUR replied and the Ministry of Finance reiterated its position and arguments in a subsequent letter, Accommodations Consigned to the Foreign Forces for Use (Articles 48, 45 SA NATO SOFA); Environmental Damages; Compliance with German Environmental Protection Provisions, May 6, 1991 [hereinafter MOF Letters].

changes in the waste management, energy, transportation, nuclear power, and nature and landscapes sectors. In anticipation of base closures, it has proposed that land previously used for military purposes should be converted to nature reserves.[11] This provides an indication of how clean the sites are expected to be.

B. Congressional Involvement

On March 21, 1990, the Environmental Restoration Panel of the House Armed Services Committee held hearings on DOD overseas environmental activities to investigate the status of overseas military compliance with US and host nation environmental regulations and policy. The testimony from DOD witnesses stressed Secretary Cheney's commitment that DOD be a leader in federal facility environmental protection and department efforts to establish new policy, procedures and initiatives.[12] The Panel identified several problems with

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[11] In a document describing its policy for the next four years, the new government addressed everything from industrial plant safety to the ozone layer, but focused on the above 5 areas. One chapter of the document, "Coalition Agreement for the 12th Legislative Period of the German Parliament" is devoted to the environment. Government Proposes Legislative Changes in Waste Management, Energy, Other Sectors, 14 Int'l Env't Rep. (BNA) 74 (February 13, 1991).

[12] "This Administration wants the United States to be the world leader in addressing environmental problems and I want the Department of Defense to be the Federal leader in agency environmental compliance and protection.

Federal facilities, including military bases, must meet environmental standards. Congress has repeatedly expressed a similar sentiment. As the largest Federal agency, the Department of Defense has a great responsibility to meet this

DOD's overseas environmental activities: environmental activities possessed little consistency because of their highly decentralized and ad hoc nature; commanders were unaware of the environmental standards of their host nations; the Department had no inventory of its overseas hazardous waste sites; and, the Department had no internal mechanisms to review or oversee its environmental activities.[13] These findings resulted in a demand for action in the NDAA of FY1991.[14]

Congress directed DOD to develop a comprehensive overseas policy to address operational compliance with environmental

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challenge. It must be a command priority at all levels. We must demonstrate commitment with accountability for responding to the Nation's environmental agenda. I want every command to be an environmental standard by which Federal agencies are judged. . . .

We must be fully committed to do our part to meet the worldwide environmental challenge. . ." Memo to Secretaries of the Military Departments from Richard Cheney, Secretary of Defense, Environmental Management Policy, October 10, 1989.

[13] H.R. Rep. No. 665, 101st Cong., 2d Sess. 261 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 2931, 2986-88.

[14] National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485 (1990) [hereinafter NDAA FY91]. The chairman of the Environmental Restoration Panel, Congressman Richard Ray, had previously made a fact-finding visit to Europe regarding the subject and explained that the committee's motive for the hearings was a lack of independent review of DOD's professed policy of compliance "with all US standards and local standards." He further charged that "consistent environmental guidance among the various services did not appear to exist within the same host nation. The level of environmental awareness and command emphasis also appeared to differ from base to base, even within the same service." Overseas DOD Environmental Activities: Hearing Before the Environmental Restoration Panel of the House Comm. on Armed Services, H.A.S.C. Rep. No. 70, 101st Cong., 2d Sess. 1 (1990)[hereinafter H.A.S.C. 101-70].

law as well as cleanup of overseas installations.[15] Congress has also directed the Department of Defense to terminate its military operations at overseas bases at the earliest opportunity and negotiate the closures base-by-base to ensure the US will receive fair market value for the improvements it leaves behind.[16] Though they are completely separate demands, the issues they entail are thoroughly entwined. For more than a year the Department has been attempting to come to grips with this issue by developing a definitive overseas environmental policy.

The issue of how to determine applicable "environmental requirements" for overseas military installations has been a difficult one for DOD. Should the US standards and laws be considered extraterritorial? Should host nation laws apply? What should be the effect of foreign laws which are "on the books" but ignored in practice and never enforced? Should the US look to laws of the foreign nation alone or of its political subdivisions too? What effect should master stationing agreements like the North Atlantic Treaty Organization's Status of Forces Agreement (NATO SOFA) have? What are the impacts of established bilateral stationing

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[15] NDAA FY91, supra note 14, at 104 Stat. 1485, 1537 (1990), §342; see, infra note 21.

[16] NDAA FY91, supra note 14, at 104 Stat. 1485, 1819-20 (1990), § 2921.

agreements?[17] The procedures for selecting and conducting the closure of bases within the US do not apply to overseas bases.[18] Current directives do require that an "environmental review" be accomplished prior to returning a base to its host nation.[19] However, the degree of effort the US must commit itself to in cleaning installations prior to departure has yet to be determined. The Army's policy has been to "...prevent or correct situations where a member or employee of the US forces . . . could be held criminally or civilly liable for noncompliance with an environmental standard, where the deadline for compliance has passed."[20] But even this current

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[17] Hourcle', "Environmental Legislation" in the National Defense Authorization Act for 1991, Fed. Facilities Envtl. J. 117 (Spring 1991).

[18] Title 29 of the NDAA for FY91 requires the Secretary of Defense to identify the domestic bases to be closed or realigned to an independent commission by April 15, 1991. The commission reviews DOD's selection process and reports to the President by July 1, 1991. It may recommend changes to the proposed list but must explain and justify them. The President has until July 15 to approve or disapprove the commission's report. Upon approval it goes to the Congress; upon disapproval, in whole or part, the commission has 30 days to submit a revised report. The President then has until September 1, 1991 to review and report his approval to the Congress. The Secretary of Defense may not carry out any recommended closures or realignments if the Congress enacts a joint resolution disapproving the commission's recommendations within 45 days. NDAA FY91, supra note 14, at 104 Stat. 1485, 1808-19 (1990).

[19] DOD Directive 6050.7, Environmental Effects Abroad of Major Federal Actions, March 31, 1979, 32 C.F.R. § 197 (1990); see, note 75 infra and accompanying text.

[20] Letter from Chief of Staff, HQ USAREUR and 7th Army for distribution, Policy on Environmental Considerations and Actions Applicable to Installations Being Returned to Host Nation, 8 Dec. 1990.

statement is under review to keep pace with the rapid rate of change that is sweeping the Department. An international environmental ethic is growing within the Department and it is attempting to play catch-up with neglected overseas operations.

In paragraph (b) of section 342, Congress seeks to force answers to these questions by requiring the Department to formulate an overseas environmental policy with three elements:[21] a policy to determine requirements for overseas

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[21] "SEC. 342. REPORTING REQUIREMENTS ON ENVIRONMENTAL COMPLIANCE AT OVERSEAS MILITARY INSTALLATIONS. . . .
(b) POLICIES AND REPORT ON OVERSEAS ENVIRONMENTAL COMPLIANCE--
(1) The Secretary of Defense shall develop a policy for determining applicable environmental requirements for military installations located outside the United States. In developing the policy, the Secretary shall ensure that the policy gives consideration to adequately protecting the health and safety of military and civilian personnel assigned to such installations.
(2) The Secretary of Defense shall develop a policy for determining the responsibilities the Department of Defense with respect to cleaning up environmental contamination that may be present at military installations located outside the United States. In developing the policy, the Secretary shall take into account applicable international agreements (such as Status of Forces agreements), multinational or joint use and operation of such installations, relative share of the collective defense burden, and negotiated accommodations.
(3) The Secretary of Defense shall develop a policy and strategy to ensure adequate oversight of compliance with applicable environmental requirements and responsibilities of the Department of Defense determined under the policies developed under paragraphs (1) and (2). In developing the policy, the Secretary shall consider using the Inspector General of the Department of Defense to ensure active and forceful oversight.
(4) At the same time the President submits to Congress his budget for fiscal year 1993 pursuant to section 1105 of title 31, United States Code, the Secretary of Defense shall submit to Congress a report describing the policies developed under paragraphs (1), (2), and (3). The report also shall include a discussion of the role of the Inspector General of the

installations; a policy for cleanup of environmental contamination at overseas installations;[22] and an oversight process that considers use of the DOD Inspector General.

The issue of the United States' responsibility for "cleanup" at overseas installations is particularly complex. Section 342 commands the Department to consider applicable international agreements, multinational or joint use operation of the facility, and the "relative share of the collective defense burden and negotiated accommodation" in arriving at a policy to deal with environmental restoration at overseas bases. This will be a complicated formula at many European bases where many facilities predate World War II with portions built with NATO funding. Section 342 does not overtly recognize the distinction between the cleanup of bases to be closed and those that will remain open.

As in the United States, the issue of "cleanup" at an installation becomes even more acute when the base is scheduled for closure. One of the central issues in overseas base closures is the right of the United States to receive

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Department of Defense in overseeing environmental compliance at military installations outside the United States.
(5) For purposes of this subsection, the term "military installation" means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department which is located outside the United States and outside any territory, commonwealth, or possession of the United States." NDAA FY91, supra note 15.

[22] DOD has interpreted 10 U.S.C. § 2701 to preclude the use of the Defense Environmental Restoration Account for overseas activities. Hourcle', supra note 17, at note 5.

"residual value" for the permanent improvements that have been made to the facility. The congressional debate centered on the extent to which there should be linkage between residual value and overseas base closure cleanup costs. Congress addressed the issue in what became section 2921 which deals specifically with the closure of overseas installations.[23]

As passed, section 2921 allows any amounts of residual value received by the United States to go into a Defense Department account which can be used for facility maintenance and repair and environmental restoration at DOD's stateside facilities.[24] On the issue of restoring the facilities DOD occupies overseas, the Senate bill language provided that the cost the United States would pay for cleanup of overseas facilities was not to exceed the amount the United States would receive in residual value. That provision was eventually deleted from section 2921. The conference report explained the deletion saying the section contains no reference to environmental restoration costs "because the conferees believe that the environmental restoration of bases used by the United States in foreign countries is a host

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[23] It should be noted that section 2921 is in Division B of the NDAA FY91 which deals with military construction while section 342 is in Division A, the basic defense authorization section. In that regard the different divisions of NDAA91 tend to be husbanded by different congressional staff members. Hourcle' supra note 17, at 118.

[24] NDAA FY91, supra note 16, at para. c.

nation responsibility."[25]

While this may be the language used in many of the basing agreements for installations throughout the world it is not necessarily the position host nations will take when it comes time to exercise the clause. Germany, and other nations, may argue that the US has had a duty to maintain the environment all along; the right to leave a base "as is" does not negate the duty to have kept it clean. In spite of legal duties, the US must decide whether it will accept the moral responsibility for restoration of contaminated areas and the foreign policy position of environmental steward.

C. Applicable Law

The nations which host overseas installations vary widely in the sophistication of their environmental laws.[26] The legal environment in which US forces (USF) operate can be viewed as a series of layers, with each layer affecting those around it. For example, Germany imposes strict liability for environmental damage, administering its law in a federal system with substantial control being left to its states

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[25] H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 707, reprinted in 1990 U.S. Cong. & Admin. News 3110, 3259.

[26] For example, within NATO environmental laws vary from the rudimentary (Italy, Greece) to extensive and refined (Germany, the Netherlands). Lewis, Peirce and Davis, 1992: The European Community Prepares for Environmental Unification, HAZMAT World, 26-35 (Jan. 1990) [hereinafter HAZMAT World].

(Länder).[27] All of German environmental law is influenced by the regulations and directives of the European Community (EC), of which Germany is a member.[28] The degree to which the USF is subject to the host nation's laws and civil processes is largely governed by the NATO SOFA[29] as well as general principles of international law. A Supplementary Agreement exists for Germany (German SA), as well as for most other members of NATO, that creates unique legal requirements that are country specific. The drafters of the NATO SOFA did not address themselves to our modern environmental concerns, hence, the provisions of the agreement have been contorted into interpretations that leave much room for dispute. The process of dispute resolution always devolves to basic rights, duties and entitlements. Therefore, the interpretation and application of sovereign immunity doctrine plays an important

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[27] The federal government has full legislative authority under the constitution to control air and noise pollution, dangerous substances, nuclear energy and federal land use planning. Lander may legislate in these areas only if the federal government has not done so. In other areas, such as water pollution, protection of nature, and country planning, the federal government only has authority to establish general principles ("framework law"), which then are implemented by state legislation. Smith and Falzone, Foreign Legal Systems--A Brief Review, 11 Int'l Env't Rep. (BNA) 621, 625 (Nov. 1988).

[28] As of January, 1990, the European Community has issued 31 directives (and four draft directives) concerning environmental regulation. HAZMAT World, supra note 26.

[29] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

part in determining responsibility for environmental damage. An additional layer of law to be considered are obligations under US law that apply to the military extraterritorially or by Executive Order.

D. Direction of Analysis

The environmental issues facing overseas bases can be focused into three areas: 1) determining the degree of compliance with host nation environmental laws in ongoing operations that must be attained; 2) determining whether there is an obligation to conduct or pay for remediation, mitigation or restoration on or near installations (both those remaining open and those about to close); and 3) how to deal with contamination at installations scheduled for closure.[30] This paper, by analyzing base closure issues, will be directed at the latter issue, although the discussion is generally applicable to all three areas. It will attempt to outline the framework in which the issues must be analyzed by unpeeling the layers of applicable law. It will start with obligations under US law that the USF brings with it to host nations, consider concepts of sovereign immunity under which the

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[30] There are three operational areas of environmental concern in accomplishing the closure of an overseas installation. The first is the cleanup of areas of known environmental contamination, both on base and off. The second involves the disposition of stored hazardous wastes that remain on the property at closure. The third concerns the degree of effort required to search out unknown areas of contamination and document them.

applicable international agreements must be interpreted, identify the crucial provisions of SOFAs, briefly describe applicable European Community law, and finally, describe the direction into which DOD overseas environmental policy is developing. Hopefully, it will serve as a guide to those who will be called upon to do country-specific research.

The complexity of the issues is magnified by the variety of situations in which the US operates throughout the world. The issues are affected by many factors: the provisions of international agreements, some of which are bilateral and some multilateral; differing host nation requirements; ownership and command of most installations is by the host nation; the differing funding arrangements between countries; longstanding relationships and practices that have developed under the agreements; and the location and causal relationship of the US to damage for which it is blamed. For this reason, reference will be made to specific nations or agreements when possible, with an emphasis on NATO and Germany where experience has been greatest and that will have the largest number of closing installations.

II. US LEGAL OBLIGATIONS

A. Extraterritorial Application of US Law

Members of the US armed forces are subject to military jurisdiction under the Uniform Code of Military Justice (UCMJ) wherever they may be, including locations within the territory

and jurisdiction of another country.[31] Where international law recognizes more than one valid claim of jurisdiction, the matter is to be resolved between the two governments.[32] As it is done by agreement throughout the world, the UCMJ recognizes that the primary right to exercise jurisdiction may "expressly or impliedly" be allocated to the sending state.[33]

Does US environmental law operate outside the borders of the country to control the actions of federal agencies that occur in whole or in part on the territory of another sovereign power?[34] The domestic legislation of the US is generally interpreted by courts as enforceable "only within the territorial jurisdiction of the United States" unless there is congressional intent to the contrary.[35] The presumption against extraterritorial application of US law

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[31] 10 U.S.C. § 805 (1988); U.S. v. Newvine, 48 CMR 188 (ACMR 1974).

[32] United States ex rel. Demarois v. Farrell, 87 F.2d 957 (8th Cir. 1937).

[33] "Under international law, a friendly foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless it expressly or impliedly consents to surrender its jurisdiction to the visiting sovereign. The procedures and standards for determining which nation will exercise jurisdiction are normally established by treaty." Discussion note to R.C.M. 201(c), Manual for Courts-Martial (1987).

[34] The Constitution gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S Const., Art. I, § 8, cl. 3.

[35] Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). See also, Argentine Republic v. Amerada Hess Shipping Corp., 109 S.Ct. 683 (1989).

rests on a "respect for the right of nations to regulate conduct within their own borders . . ."[36] The presumption also rests upon the inherent authority of the Executive Branch to act alone in foreign policy matters[37] and assumes that interfering with the regulatory standards of another sovereign may unduly impede the U.S.'s foreign relations.[38] Furthermore, inquiry into foreign policy areas can raise nonjusticiable political questions.[39]

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[36] Boureslan v. ARAMCO, 892 F.2d 1271, 1272 (5th Cir. 1990).

[37] See, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) noting "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations--a power which does not require as a base for its exercise an act of Congress."

[38] Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm., 647 F.2d 1345 (D.C. Cir. 1981) [hereinafter NRDC v. NRC], involved the construction of a nuclear reactor in the Philippines on a volcanically active geological fault line that in 1976 produced an earthquake that killed 4000 people; above the site loomed Mt. Nabib, an active volcano; 12,000 Americans lived 12 miles away at the U.S. Subic Bay Naval Base; 18,000 American lived 42 miles away at Clark Air Base. The court expressed its concern about foreign relations with a quote from the Philippine government's amicus brief: "If the United States followed a policy of imposing its own regulatory standards and procedures on all host countries . . . such a policy would undoubtedly bode ill for the ability of the United States to maintain military facilities in as many locations around the world as it now does." Id. at 1356.

[39] See, Baker v. Carr, 369 U.S. 186 (1962) and Greenpeace USA v. Stone, 748 F.Supp. 749 (D. Haw. 1990), where Greenpeace alleged a NEPA violation when the Army prepared a segmented EIS for the removal and disposal of its German chemical munitions stockpile. Under an agreement between the president of the U.S. and chancellor of Germany, the U.S. and German armies undertook a plan to transport and destroy approx. 100,00 rounds of nerve gas at Johnston Atoll. EISs were prepared for transportation through the global commons to

But beyond the maxim that extraterritorial application can only occur with "the affirmative intention of Congress clearly expressed,"[40] courts have developed fundamentally different tests for determining extraterritorial jurisdiction and there has not yet developed a consistent canon of construction for interpreting ambiguous statutes. Although, they have consistently granted extraterritorial relief under "market statutes" like the antitrust and securities laws that are primarily intended to protect market interests, courts have generally denied extraterritorial application to "nonmarket statutes" that provide employment or environmental protections.[41]

One by one, the extraterritorial status of the environmental statutes is being resolved. Only the Endangered Species Act[42] has been judicially interpreted to have the Congressional intent sufficient to give it extraterritorial

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Johnston Atoll but not for transportation across Germany and its territorial waters. The court was not convinced that NEPA applied. "Such an application of NEPA to actions on foreign soil would result in grave foreign policy implications and would substantively interfere with a decision of the President and a foreign sovereign in a manner not intended or anticipated by Congress." Id. at 761. Appeal denied, Greenpeace USA v. Stone, 924 F.2d 175 (9th Cir. 1991).

[40] Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 146-147 (1957).

[41] Turley, "When In Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U.L. Rev. 598, 601 (1990).

[42] 16 U.S.C. §§ 1531-1544 (1988).

effect.[43] While the Clean Air Act expressly grants foreign nations a limited opportunity to participate in controlling transnational pollution,[44] the Marine Mammal Protection Act,[45] the Nuclear Non-Proliferation Act of 1978,[46] and the National Environmental Policy Act[47] do not have extraterritorial effect.

Congress ordinarily expresses an intent to have legislation apply outside the United States in one of two ways: 1) by referring to specific geographic areas-- such as Antarctica or the world's oceans; or 2) by expressly targeting US citizens, nationals or facilities wherever they are located in the world. Most US environmental laws are explicitly, by definition or statutory language, directed at controlling

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[43] Note 51, infra and accompanying text.

[44] Clean Air Act §115, 42 U.S.C. §7415 (1990). See also, Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d 1525 (D.C. Cir. 1990) (EPA not required to take action under §115 because it had not yet identified the U.S. sources of pollution of which Canada complained).

[45] Congressional intent, as expressed in the statute, specifically limited applicability of the Act to U.S. territorial waters and the high seas. United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977).

[46] NRDC v. NRC, supra note 38 (denying extraterritorial application of the Nuclear Non-Proliferation Act of 1978).

[47] NRDC v. NRC, Id. (no application of NEPA to impacts in Philippines of nuclear materials export); Greenpeace USA v. Stone, 748 F.Supp. 749 (D. Haw. 1990) (no application of NEPA to German and global commons portions of shipment of chemical munitions from Germany to Johnston Atoll); Alaska v. Carter, 462 F.Supp. 1155, 1160 (D. Alaska 1978); CEQ Regulations § 1508.12, 40 C.F.R. § 1508.12 (1990)(NEPA inapplicable to actions of the President).

activities or emissions within the States or United States and lack sufficient expressions of congressional intent to exceed those bounds.[48] In the absence of direct territorial impacts within the US from the extraterritorial activity,[49] courts are unwilling to apply US environmental law beyond its borders without clear guidance from Congress.[50]

1. **Endangered Species Act**

The Eighth Circuit found a clear expression of Congressional intent in both the plain language and legislative history of the Endangered Species Act (ESA) in the case of Defenders of Wildlife v. Lujan.[51] The Act was held to extend to all agency actions affecting endangered species, whether within the United States or abroad. Therefore, any agency action outside the territorial jurisdiction of the US,

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[48] Andersen and Rudolph, On Solid International Ground in Antarctica: A U.S. Strategy for Regulating Environmental Impact on the Continent, 26 Stan. J. Int'l L. 93 (1989)(a review of the lack of extraterritorial intent expressed in the major U.S. environmental statutes: CAA, CWA, RCRA, CERCLA, SDWA, FIFRA, TSCA and NEPA).

[49] See, National Org. for Reform of Marijuana Laws v. U.S. Dept. of State, 452 F.Supp. 1226 (D.D.C. 1978) (where NEPA was assumed to apply to herbicide spraying of marijuana fields in Mexico. The Department of State's admission that NEPA applied, due to U.S. impacts of spraying felt in the U.S. by marijuana users, allowed the court to assume extraterritorial application without actually deciding.

[50] Turley, supra note 41, at 642.

[51] Defenders of Wildlife, Fr[illegible]nds o[illegible]nimals v. Lujan, 911 F.2d 117 (8th Cir. 1990). Pet[illegible]tion [illegible] rehearing en banc denied December 10, 1990.

which the Secretary of the Interior certifies jeopardizes the existence or critical habitat of an endangered species, has been prohibited by Congress. The court avoided the sovereignty concerns of the Secretary of the Interior by focusing on the fact that the Act is directed at the actions of federal agencies, and not at the actions of sovereign nations.[52] The court did not address the constitutional implications of the Legislature directing the foreign policy activities of the Executive Branch.

The latest expression of the law of extraterritoriality is in EEOC v. ARAMCO,[53] where the Supreme Court reaffirmed that legislation of Congress is meant to apply only within the territorial jurisdiction of the US unless a contrary intent is clearly expressed. Congress has the authority to enforce its laws beyond the territorial boundaries of the US, but whether it exercises its prerogative to do so is a matter of statutory construction. The Court said it assumes that Congress legislates against the backdrop of the presumption against extraterritoriality, and it must therefore search legislative language for indications of congressional purpose to extend coverage beyond US boundaries.[54] The Court made it very

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[52] Id. at 125.

[53] Equal Employment Opportunity Commission v. Arabian American Oil Co., 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) [hereinafter EEOC v. ARAMCO].

[54] The EEOC's arguments that the statute's definition of "employer" and "commerce" were sufficiently broad, and that the "alien exemption" clause intended extraterritorial effect

clear that if Title VII is to be given extraterritorial effect, it will need Congressional amendment.

When EEOC v. ARAMCO is read in conjunction with Defenders of Wildlife v. Lujan, a clear position by the Court emerges that it does not want to be the one to thrust US environmental laws into other nations; Congress must do so. Therefore, since only the ESA applies overseas,[55] DOD need only keep a watchful eye on future legislation rather than the plethora of environmental laws that apply to continental US bases. One such item of forthcoming legislation is the enactments required to implement the Basel Convention.

2. Basel Convention

DOD's overseas installations generate hazardous wastes in the course of their operations. The wastes range from solvents and petroleum products to PCBs, waste oil and

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by implication fell short of demonstrating affirmative congressional intent. This case stands in contrast to Defenders of Wildlife where Congressional intent to have international effect could "be gleaned from the plain language of the Act." Supra note 51, at 123. The Court also expressed concern that extraterritorial application would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce. In addition to lack of overseas enforcement mechanisms and the presence of other elements in the statute suggesting a purely domestic focus, the statute failed to address the subject of conflicts with other foreign laws and procedures. EEOC v. ARAMCO, supra note 53.

[55] An issue beyond the scope of this paper is how the Fish and Wildlife Service will formulate its jeopardy opinions in conjunction with German conservation efforts. See, ESA §§ 4(b)(1) and (8).

household wastes. Some host nations have waste disposal facilities capable of providing environmentally sound management for these wastes. In some nations the US operates its own facilities. The lack of disposal facilities in other nations, however, requires DOD to dispose of wastes outside the host's boundaries, often shipping them back to the US or to other nations for ultimate disposal.[56] For example, the US ships wastes from Turkey, Greece, the Azores and Iceland to the U.K. for disposal.[57]

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[58] (Basel)

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[56] Disposal of PCBs used in Japan illustrates the complexity of the problem. In Japan, the U.S. purchased Japanese-manufactured equipment containing PCBs, which is now being removed from service. The Japanese government has not authorized any in-country disposal facilities for PCBs. The Toxic Substance Control Act (TSCA) prohibits the importation into the U.S. of non-U.S. origin PCBs for disposal. Other than Korea, no other Pacific theater nation has PCB disposal capability. But, Korea will not accept wastes from Japan. The DOD incinerator at Johnston Atoll, a U.S. territory, is not designed or permitted for PCBs. DOD must request a TSCA waiver from EPA to allow the PCBs to be imported for disposal. H.A.S.C. 101-70, supra note 14, at 12 (statement of David J. Berteau, Principal Deputy Assistant Secretary of Defense (Production and Logistics).

[57] Id. at 11.

[58] On March 22, 1989, representatives of 116 countries gathered at Basel, Switzerland and approved (34 signed immediately) the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, March 24, 1989, UNEP/IG.80/3 (reprinted in Int'l Envt. Rep. (BNA) Reference Materials, 21:3701). As of November 30, 1990, 54 countries had signed the Convention, and four had submitted instruments of ratification. For the US to adhere to the Convention's regime, several important changes to domestic law will have to be made. See generally, Walls, Disclosure Responsibilities for Exporters, 4 Nat. Resources & Envt. 10,

raises issues for overseas DOD facilities. The agreement recognizes the risk of damage to human health and the environment caused by hazardous wastes and transboundary movement and disposal, especially to developing countries. Its ultimate goal is to provide for transboundary shipment and disposal in an "environmentally sound manner."[59] Parties to the Basel are required to: 1) reduce transboundary movement of wastes to a minimum; 2) prohibit exports to parties not consenting to import; 3) prohibit export to or import from non-parties; 4) prevent import/export if a party has reason to believe wastes will not be managed in an environmentally sound manner; 5) require notice of and consent to transboundary movement of wastes; 6) prohibit export of wastes for disposal within the area south of 60 degrees latitude; 7) require packaging, labeling, etc., in accordance with international rules, standards and practice; 8) require wastes to be accompanied by a movement document; and 9) treat illegal traffic in wastes as criminal.[60]

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12 (1990).

[59] Basel Convention, supra note 58, at Art. 2, para. 8.

[60] The RCRA, 42 U.S.C. 6901, et seq., as amended by the HSWA of 1984, Pub. L. No. 98-616, 98 Stat. 3224, prohibits the exportation of hazardous wastes, subject to specified conditions in §3017 (42 U.S.C. 6938). The proposed exporter must notify the EPA. EPA goes through the Dept. of State to request the written consent of the receiving country. The written consent is attached to the manifest and the terms and conditions of the receiving country's consent must be met. There are presently no provisions regarding importation of hazardous wastes to the U.S.

The state in which wastes are generated has the obligation to require that the wastes be managed in an environmentally sound manner; this obligation cannot be delegated to states of import and transit. Under Basel, a "transboundary movement" is any movement of hazardous waste or other wastes from an area under the national jurisdiction of one state to or through an area under the national jurisdiction of another state, or to or through an area not under the jurisdiction of any state, provided at least two nations are involved in the movement.[61] "Area under the national jurisdiction of a State" means any land, marine area, or airspace within which a state exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health and the environment.[62] "State of transit" means any state, other than the state of export or import, through which a movement of hazardous waste or other wastes is planned or takes place.[63] Basel Article 6 mandates that

> [T]he State of export shall notify, or shall require the generator or exporter to notify, in writing... the competent authority of the States concerned of any proposed transboundary movement of hazardous waste... The State of import shall respond to the notifier in writing, consenting to the movement with or without conditions, denying permission... or requesting additional information. . . ." (emphasis added).

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[61] Basel, supra note 58, at Art. 2, para. 3.

[62] Id. at Art. 2, para. 9.

[63] Id. at Art. 2, para. 12.

While the US has signed the agreement, domestic implementing legislation is required to formally ratify its terms.[64] Numerous bills have been introduced in the 101st Congress.[65] In 1989 hearings were conducted on a new bill co-sponsored by Representatives Synar, Conyers, Porter and Wolpe.[66] These hearings led to the latest compromise, the Waste Export and Control Act (WECA).[67] Hearings were conducted on this bill as part of the yet-to-be completed Resource Conservation and Recovery Act re-authorization process.

The proposed bill firmly establishes that the transfer of wastes will be banned unless a bilateral agreement exists.[68] The treatment standards in the state of import would have to be no less strict than US standards and the current bilateral agreements with Mexico and Canada would have to be

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[64] Under its terms, the Convention enters into force "on the nineteenth day after the date of deposit of the twentieth instrument of ratification, acceptance, formal confirmation, approval or accession." Id. at Art. 25.

[65] See, H.R. 3736, 101st Cong., 1st Sess. (1989); H.R. 2525, 101st Cong., 1st Sess. (1989); S. 1113, 101st Cong., 1st Sess. (1989).

[66] Waste Export Control: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. (1989); U.S. Waste Exports: Hearings Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs, 101st Cong., 1st Sess. (1989).

[67] H.R. 3736, 101st Cong., 1st Sess. (1989); Resource Conservation and Recovery Act Reauthorization - Part 1: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy an Commerce, No. 153, 101st Cong., 2d Sess. (1990).

[68] H.R. 3736, id. at § 3(a).

renegotiated to include this standard. A permit system would be established. Cleanup liability would be imposed on exporters as well as financial assurance requirements. Exporters would have to describe waste minimization efforts on the part of the generator and EPA would need to be guaranteed access to foreign treatment facilities under any bilateral agreement negotiated.[69] At the RCRA reauthorization hearings, representatives of the Administration and industry objected to WECA because of concerns (1) regarding state sovereignty, (2) undue delays in the permitting process which are sure to be caused by EPA, and (3) over the illogical application of US standards to all countries.[70]

The questions regarding application to federal facilities overseas seem endless. Who will regulate overseas installations, the Executive by order, or Congress by legislation? Would Congress then be usurping the constitutional prerogative of the Executive to conduct foreign policy?[71] If a US military installation overseas generates

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[69] Id.

[70] See Mounteer, Codifying the Basel Convention into U.S. Law: The Waste Export Control Act, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10091, 10092, 10094 (February 1991).

[71] Query the constitutional propriety of congressionally imposed requirements on the overseas activities of federal Executive agencies which relate to environmental effects that occur solely outside the geographic boundaries of the U.S. This could result in an interference with the prerogatives of the chief executive with regard to foreign affairs. Abbott, Overseas DOD Facilities And the Basel Convention, 1 Federal Facilities Envt'l J. 485 at 486. A possible solution is to include in the legislation a Presidential option to exempt

hazardous waste for retrograde to the US for disposal, shou such wastes be considered imports, since the land on which the wastes were generated are owned by the host country?[72] Can the wastes be considered imports when the materials never left US control as they travelled about the world and back? The definitional sections of the new law will be of great interest to DOD.

Of particular interest will be the definition of "export." Can a US base export to a countr- n which it is located? Did the US export the waste when it s still a new supply item going to the base for original use? Is a waste, received in the US from a US installation overseas, an export from a foreign nation? Due to the various import/export provisions of the SOFAs the treatment of such wastes may vary from country to country. DOD currently sends about 11 percent of its total volume of overseas hazardous wastes back to the US. This amounts to approximately three million tons. However, if the new legislation were interpreted to require all solid waste to be returned to the US for disposal, the

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overseas activities so as to protect it from constitutional challenges. The President would then be able to insulate his foreign policy by exemption yet still order compliance with the legislation.

[72] If so, Article 6 literally requires the U.S., as the overseas generator in a state of export, to notify itself in its capacity as state of import.

total would grow to approximately 30 million tons.[73]

International agreements between US forces and their hosts complicate matters further. The host may deny permission to export on grounds that it desires to use the wastes for purposes which, in the judgment of US personnel would not constitute environmentally sound management; or, the host may desire to minimize exports by requiring treatment and disposal in country, at greatly increased US expense. In resolving such issues, who will hold regulatory primacy, the Department of State, EPA, or DOD?[74] The unique situation of overseas military facilities presents an arguable case for some level of exemption for DOD in the legislation because it is doubtful that the drafters of Basel contemplated such extraterritorial situations.

On the whole US environmental legislation lacks extraterritoriality, and DOD is technically free of its burdens. However, the standards embodied therein that are intended to force environmentally informed decisions and compliance with US standards of health and safety, as a matter of policy, are to be followed under the mandates of Executive Orders 12114 and 12088.

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[73] H.A.S.C. 101-70, supra note 14, at 82 (statement of Mr. Berteau, Principal Deputy Assistant Secretary of Defense (Production and Logistics)).

[74] Abbott, supra note 71.

B. Executive Orders

It is through Executive Orders that the environmental laws of the US are given application beyond US borders to federal agencies.

1. E.O. 12114: NEPA Overseas

Executive Order 12114, Environmental Effects Abroad of Major Federal Actions,[75] requires an environmental analysis for major federal actions having significant effects on the environment outside the geographical borders of the U.S., its territories and possessions. It was intended by President Carter to serve the dual purposes of establishing an environmental foreign policy and resolving the intergovernmental controversy over whether NEPA's scope included the extraterritorial activities of the federal government.[76] It is intended to further the purpose of NEPA by enabling responsible officials to be informed of pertinent environmental considerations and take them into account.[77]

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[75] Executive Order No. 12114, 3 C.F.R. § 865 (1990), reprinted in 42 U.S.C. § 4321 (1988)(signed January 4, 1979).

[76] Gaines, "Environmental Effects Abroad of Major Federal Actions": An Executive Order Ordains a National Policy, 3 Harv. Envtl. L. Rev. 136 (1979). See also, Note, Executive Order 12,114-- Environmental Effects Abroad: Does It Really Further the Purpose of NEPA?, 29 Clev. St. L. Rev. 109 (1980).

[77] The order disavows NEPA as the source of its authority relying solely on the president's authority as chief executive of the government. Otherwise, all of CEQ's NEPA procedures would have to be followed explicitly and agencies would not be permitted to develop their own. Its stated intention is to merely, "further the purposes of the National Environmental

It requires analysis and documentation for: actions affecting the global commons; actions affecting the environment of a foreign nation not participating with the US or otherwise involved in an action;[78] actions that provide a product or substance that is prohibited or strictly regulated by US law because its toxic effects on the environment create a serious public health risk;[79] actions that provide a project which, in the U.S., is prohibited or strictly regulated to protect the environment against radioactive substances; and for actions affecting natural or ecological resources of global importance designated for protection by the President, or in the case of a resource protected by international agreement binding on the US.[80]

The Order requires a NEPA analysis for actions doing significant harm to the environment even though, on balance, the action may be beneficial to the environment.[81] With respect to the environment outside the U.S., Executive Order

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Policy Act." Gaines, supra note 76, at 146.

[78] E.O. 12114, supra note 75, at § 2-3.

[79] The order requires an environmental assessment when the U.S. provides to the affected nation a substance, a facility to produce a substance, or a facility that emits or discharges a substance that is regulated in the U.S. because it creates "a serious public health risk." Id. at § 2-3(c)(2). Therefore, an environmental assessment is needed for every base leaving a regulated substance behind.

[80] Id. at § 2-3.

[81] Id. at § 3-4. "Environment" is defined as the natural and physical, but not social and economic.

12114 represents the procedural actions required of federal agencies to further the purpose of NEPA. It does not create a cause of action in the courts. It requires agencies to publish implementing procedures in consultation with CEQ and the Department of State.[82]

The Order exempts a number of federal actions, including votes in international conferences and organizations, intelligence activities, arms transfers, and actions taken in the interests of national security. Additionally, the Order grants agencies broad authority to modify the contents, timing, and availability of documents to other affected federal agencies and affected nations for such reasons as "to enable the agency to decide and act promptly when required," "to avoid adverse impacts on foreign relations or infringement in fact or appearance of other nations' sovereign responsibilities," and for "difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action," and other similar factors.[83]

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[82] DOD has done so in its Directive 6050.7, supra note 19.

[83] E.O. 12114, supra note 75 at § 2-5 states:

(b) Agency procedures under Section 2-1 implementing Section 2-4 may provide for appropriate modifications in the contents, timing and availability of documents to other affected Federal agencies and affected nations, where necessary to:
(i) enable the agency to decide and act promptly as and when required;
(ii) avoid adverse impacts on foreign relations or infringement in fact or appearance of other nations'

Executive Order 12114 has the effect of extending the applicability of NEPA to Europe. Does NEPA then apply to the proposed return of units from overseas bases to locations in CONUS for purposes of deactivation? Such action contemplates moving battalion-size units to US installations that will temporarily house the units pending reassignment or discharge of their soldiers. Many military units will be sent to other overseas bases as some close. NEPA would require an examination of the potential impacts to the environment at both the losing and gaining installations. However, the Order's exemptions may be interpreted to prevent application of its terms to the proposed closures and troop withdrawals.

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sovereign responsibilities, or
(iii) ensure appropriate reflection of:
(1) diplomatic factors;
(2) international commercial, competitive and export promotion factors;
(3) needs for governmental or commercial confidentiality;
(4) national security considerations;
(5) difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action; and
(6) the degree to which the agency is involved in or able to affect a decision to be made.

(c) Agency procedure under Section 2-1 may provide for categorical exclusions and for such exemptions in addition to those specified in subsection (a) of this Section as may be necessary to meet emergency circumstances, situations involving exceptional foreign policy and national security sensitivities and other such special circumstances. In utilizing such additional exemptions agencies shall, as soon as feasible, consult with the Department of State and the Council on Environmental Quality.

(d) The provisions of Section 2-5 do not apply to actions described in Section 2-3(a) unless permitted by law.

Except in limited circumstances, the Order does not apply to actions affecting the environment where the affected foreign nation participates or is otherwise involved in the action.[84] The closures will involve extensive consultation and negotiations with host nations. But are US actions nevertheless unilateral? The approval, acquiescence or disapproval of host nations will have little play in the U.S.'s withdrawal decision. Host nations will be informed, but they will not participate in the US decision process of whether to depart from a particular base. Hence, an environmental review should probably be performed.

Actions taken by the President, or actions undertaken pursuant to the direction of the President, or Cabinet officer when national security or interest is involved, are exempt

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[84] Id.:

(a) Notwithstanding Section 2-3, the following actions are exempt from this Order:
(i) actions not having a significant effect on the environment outside the United States as determined by the agency;
(ii) actions taken by the President;
(iii) actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict;
(iv) intelligence activities and arms transfers;
(v) export licenses or permits or export approvals, and actions relating to nuclear activities except actions providing to a foreign nation a nuclear production or utilization facility as defined in the Atomic Energy Acto of 1954, as amended, or a nuclear waste management facility;
(vi) votes and other actions in international conferences and organizations;
(vii) disaster and emergency relief action.

from the environmental review requirements imposed by the order.[85] Secretary Cheney's closure decisions are made in the national interest, but all actions taken overseas by federal agencies are presumably in the national interest. The Order must therefore refer to more limited or specific situations. DOD has delineated two situations when it will rely or the exemption: when the action is taken in the course of armed conflict;[86] and when the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) makes a written determination that a national security interest is involved.[87] This exemption, arguably, applies only to defense matters relating to conflict, national security, or the need for swift action when there is insufficient time to prepare an EIS. It would not appear that leaving environmental contaminants to despoil the property of an ally is the type of "national interest" that would motivate an exemption.

For purpose of the Order, the term "environment" is defined to include only the natural and physical environment. The social and economic environments are specifically excluded.[88] Harm to local economies from base closures is

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[85] Id. at para. (a)(iii).

[86] DOD Directive 6050.7, supra note 19, at Encl. 2, para. 3a(3).

[87] Id. at para. 3a(4).

[88] E.O. 12114, supra note 81.

easy to envisage, but not to the local environment. Without such harm there is little need for an environmental review. At many bases, the US shares the facility with the host armed forces and others and it is difficult to imagine how the departure of US forces from an accommodation will cause "significant harm" to its natural and physical environment, especially when it will continue to be used as a military installation by the host. One form of harm, however, is failure to prevent damage from occurring. Contaminants that a host is unaware of can cause such damage. An environmental review would be necessary to identify sources of potential future contamination so that the host may take appropriate action to prevent harm.

Whether an EIS for departure from host nations is necessary is open for debate, although on close analysis the exemptions from environmental review do not seem applicable. CONUS receiving installations may have sufficient impacts to their communities to require an EIS or EA depending on such factors as timing, unit size and alternative locations. A programmatic document may also be appropriate for overseas bases, especially if the bases selected are part of an overall program reached by agreement with Germany (for several bases) or the Soviet Union (regarding all of Europe). Units that are returning to the states that are not deactivating, but instead are going to be stationed in the CONUS, will require

individual documentation to support the siting decision.[89]

Executive Order 12114 accomplishes what NEPA and numerous NEPA lawsuits had failed to achieve: it mandates systematic consideration of environmental factors in important areas of foreign policy decision making. Moreover, after all the analytical gyrations are complete, it is important to remember two paramount facts: 1) for all its details, E.O. 12114 merely requires an environmental review be completed and considered; and 2) the quality, or even the existence of such a review, cannot be contested from without the federal government.[90]

2. E.O. 12088: Compliance With Local Standards[91]

On October 13, 1978, President Carter in response to growing concern that the federal government was lagging in its efforts to live up to the spirit and letter of the nation's environmental laws ordered federal facilities within the US to comply with the same Federal, State and local environmental

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[89] Memo for Executive Officer, OTJAG, from the Environmental Law Division, Response to Inquiry from Office of the Judge Advocate, U.S.A. Europe and Seventh Army, February 15, 1990.

[90] "This Order is solely for the purpose of establishing internal procedures for Federal agencies to consider the significant effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action." E.O. 12114, supra note 75 at § 3-1.

[91] Executive Order No. 12088, Federal Compliance With Pollution Control Standards, as amended by E.O. No. 12580, Jan. 23, 1987, 52 F.R. 2923, reprinted in 42 U.S.C. § 4321 (1988).

standards, procedural requirements, and schedules for cleanup that apply to individual citizens or corporations.[92] Nine US environmental statutes are specifically identified as the standards applicable to federal facilities, but the list is not exclusive.[93]

Almost appearing as an afterthought, one paragraph of the last section of the order made its prescriptions applicable to federal facilities outside the US.

> 1-801. The head of each Executive agency that is responsible for the construction or operation of Federal facilities outside the United States shall ensure that such construction or operation complies with the environmental pollution control standards of general applicability in the host country or jurisdiction.[94]

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[92] The President's statement of Oct. 13, 1978, on signing Executive Order 12088. Weekly Compilation of Presidential Documents, Vol. 14, No. 41, at 1770.

[93] E.O. 12088, supra note 91, at § 1-102:

> The head of each Executive agency is responsible for compliance with applicable pollution control standards, including those established pursuant to, but not limited to, the following:
> (a) Toxic Substances Control Act [citations omitted].
> (b) Federal Water Pollution Control Act, as amended [citations omitted].
> (c) Public Health Service Act, as amended by the Safe Drinking Water Act [citations omitted].
> (d) Clean Air Act, as amended [citations omitted].
> (e) Noise Control Act of 1972 [citations omitted].
> (f) Solid Waste Disposal Act, as amended [citations omitted].
> (g) Radiation guidance pursuant to Section 274(h) of the Atomic Energy Act of 1954, as amended [citations omitted].
> (h) Marine Protection, Research, and Sanctuaries Act of 1972, as amended [citations omitted].
> (i) Federal Insecticide, Fungicide, and Rodenticide Act, as amended [citations omitted].

[94] E.O. 12088, supra note 91.

The term "general applicability" is nowhere defined but the phrase, "applicable pollution control standards," is defined to mean "the same substantive, procedural, and other requirements that would apply to a private person.[95] Foreign pollution control standards may be added to the list if they are "of general applicability in the host country or jurisdiction." This provision is apparently intended to prevent the US from being singled out by a host nation for exceptionally stringent, and expensive, pollution control measures that are not required of other polluters similarly situated in the country. It exposes two issues regarding "general applicability." First, what if the host nation has standards of general applicability but is inconsistent, or selective, in its enforcement? Second, of what applicability are local ordinances in countries that delegate pollution control authority to lesser jurisdictions such as state, county, or municipal governments?[96] Current DOD Directives do not address these questions although new policy being developed requires consideration of such issues.

Section 1-201 directs each agency head to cooperate with EPA, State, interstate and local agencies in the prevention, control and abatement of environmental pollution. Whenever EPA, a state, interstate or local agency notifies the federal

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[95] Id. at § 1-103.

[96] See, Smith and Falzone, supra note 27, and note 101, infra and accompanying texts.

facility of a violation of an applicable pollution control standard, the facility is required to promptly consult and provide a plan to EPA for approval to achieve and maintain compliance with the standard.[97] EPA is charged with conducting oversight of federal facilities and their activities to monitor compliance with applicable pollution control standards.[98] This includes violations of standards described in section 1-801. However, EPA's Office of Federal Facilities Compliance has no mechanism or procedures in place to monitor overseas federal facilities.[99]

The Army and Air Force have interpreted "standards of general applicability in the host country or jurisdiction" in Germany as being laws of general applicability promulgated by the German federal government, but not those of the Länder.[100] This is a somewhat awkward position because in Germany the Länder are delegated and hold the constitutional authority to set such standards. The problem is that when

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[97] E.O. 12088, supra note 91, at § 1-601.

[98] Id. at § 1-302.

[99] Interview with Mr. Nick Morgan, Strategic Planning Coordinator, EPA Office of Federal Facilities Enforcement. In fact, EPA's guidance document for implementing E.O. 12088, "Federal Facilities Compliance Strategy, November 1988" (the Yellowbook), makes no reference whatsoever to overseas facilities.

[100] EUCOM Directive 61-6, 15 Jan 88, defines host nation standards of general applicability as those established directly or indirectly pursuant to legislation or regulation at the national level. However, this directive is also in a process of revision.

those standards are more stringent than US resources can reasonably bear compliance must be negotiated.[101]

Host nations cannot rely on E.O. 12088 as authority to enforce their environmental standards. As an order internal to the processes of the U.S., it creates a duty that is only enforceable from within. Like E.O. 12114, it does not waive immunity and grant a cause of action to affected parties.[102] Host nations, even though they are aware of the order, must rely on other sources of legal authority.

C. Current DOD Policy and Regulations

In spite of DOD's commitment to be the federal leader in environmental awareness and protection,[103] the Department has been operating under directives that are almost twenty years

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[101] Smith and Falzone, supra note 27. The German federal constitution divides legislative authority into three areas: exclusive federal, concurrent, and exclusive state. National security is an area of exclusive federal jurisdiction. Unless preempted by the federal government, Länder may legislate controls on air and noise pollution, drugs, dangerous substances, waste management, consumer protection and trade regulations. Nature protection, land use, and water law is the prerogative of the Länder, and the federal government may only pass broad "framework" laws, similar to European Community Directives that need implementing legislation. The Länder are primarily responsible for enforcement of both federal and state law. Int'l Envt. Rep. (BNA) (reference materials) 241:0101.

[102] "Nothing in this Order shall create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person." E.O. 12088, supra note 91, at § 1-802.

[103] Cheney policy letter, supra note 12.

old.[104] Unlike in the US where the Defense Environmental Restoration Act (DERA)[105] extends, tailors and funds the requirements of CERCLA[106] to DOD installations, there is no similar set of universal standards or responsibilities overseas. The requirements for environmental protection and remediation overseas, when imposed by a host nation, are applied through international agreements with the host government. They do not operate as a function of US legislation or other specific guidance.

The guidance under which DOD operates is contained in two Directives. DODD 5100.50, Protection and Enhancement of Environmental Quality, implements E.O. 12088 and pays overseas installations the same minimal attention as did the executive order. It requires that:

> Department of Defense Components shall, at locations outside the United States, conform at all times to the environmental quality standards of the host country, international agreements and Status of Forces Agreements. In addition, they shall conform to the extent practicable to the policies of paragraphs A and B.1. above [regarding

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[104] DOD Directive 5100.50, Protection and Enhancement of Environmental Quality, May 24, 1973; DOD Directive 6050.7, Environmental Effects Abroad of Major Federal Actions, March 31, 1979, supra note 19.

[105] 10 U.S.C.A §§ 2701-2707 (1988). DERA was enacted as §211 of the Superfund Amendments and Reauthorization Act (SARA) of 1986. The Installation Restoration Program it implements follows the National Contingency Plan process of allowing EPA to select from Federal, State and local law the most environmentally stringent law that is legally applicable or relevant and appropriate.

[106] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A §§ 9601-9657 (1988).

locations inside the U.S.].[107]

DOD Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions, implements Executive Order 12114. It declares that the Department "acts with care within the jurisdiction of a foreign nation. Treaty obligations and the sovereignty of other nations must be respected, and restraint must be exercised in applying United States laws within foreign nations unless Congress has expressly provided otherwise."[108] It establishes procedures for the preparation of environmental impact statements to enable responsible decision-making officials to be informed of pertinent environmental considerations when a major federal action will significantly harm the environment of the global commons, a nation not involved in the action, a nation receiving a product, emission or effluent of a toxic or radioactive substance strictly regulated in the US, or the environment of a natural or ecological resource of global importance.

An EIS is prepared for actions that do significant harm to the global commons.[109] An environmental study is conducted when the US is involved in the action with one or

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[107] DOD Directive 5100.50, supra note 104, at para. B.2. Each of the military departments have promulgated this policy into their own regulations (AR 200-1, OPNAVINST 5090.1 and AFR 19-1).

[108] DOD Directive 6050.7, supra note 19, at para. D.3.

[109] Id. at Enclosure 1.

more foreign nations or an international body or organization in which the US is a member. An environmental review is performed when the US is acting unilaterally.[110]

An environmental study analyzes the environmental consequences of a proposed action by considering the affected environment, actions taken to avoid harm, and actions taken by participating nations or groups.[111] It is a cooperative undertaking; the Department of State directs the coordination between the interested governments or organizations.[112] The completed study is made available to the Department of State, CEQ, interested federal agencies, and, on request to the US public. No distribution is required prior to the final version of the study.[113]

In contrast, an environmental review is simply a survey of the important environmental issues associated with the proposed action. It does not include all possible environmental issues, and it does not include the detailed evaluation required of an EIS.[114]They are shared with the Department of State, CEQ, interested federal agencies, and the US public on request.

An EIS is prepared in two stages-- as a draft and final.

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[110] Id. at Enclosure 2.

[111] Id. at para. D.1.a.

[112] Id. at para. D.3.

[113] Id. at para. D.5.

[114] Id.

The draft is made available in the US for public comment for no less than 45 days. The Department of State, CEQ, and other federal agencies are given an opportunity to comment. The process and content are similar to CEQ's NEPA regulations. The final decision must await publication of the EIS in the Federal Register and undergo a specific waiting period.[115]

As demonstrated by the findings of the Government Accounting Office,[116] the DOD Inspector General,[117] the Army Audit Agency,[118] and the House Armed Services Committee,[119] the policy has received much lip service but little emphasis.

In response to Congress' demand, a new compliance policy has been developed and is being fashioned into a DOD Directive. It provides a process and guidance for determining environmental compliance requirements at all overseas

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[115] Id. at para. D.

[116] "DOD and the Services have not adequately monitored hazardous waste management." GAO Report, Management Problems Continue at Overseas Bases, 17 Sep 90; GAO Confidential Report No. C-NSIAD-86-24, Hazardous Waste Management Problems at DOD Overseas Installations, September 1986.

[117] "HW policies, procedures, and standards sufficient to protect human health and the environment have not been implemented." Department of Defense Inspector General, Draft Report, Results of the Inspections of Hazardous Waste Disposal Worldwide, 26 Oct 90.

[118] Report of Audit EU91-4, Jan. 17, 1991, supra note 7.

[119] Notes 13 and 14 and accompanying text. See also, the trip report of Representative Richard Ray, Chairman, Environmental Restoration Panel, to Les Aspin, Chairman, House Armed Services Committee regarding his findings on a trip, December 6-19, 1990 to military installations in the Pacific (April 11, 1991).

installations, using a nation-specific approach. The policy will attempt to apply consistent protocols and procedures intended to protect the health and safety of US personnel, their families and host nation citizens as well as protection of the environment at all DOD overseas facilities. It requires that a baseline guidance document be developed to specify the minimum environmental standards to be applied when host nation standards do not exist, are not legally applicable to the U.S., or are less stringent than the baseline standard. In developing the baseline guidance, similar US approaches, management practices and procedures are to be considered. The details of the policy will be discussed in Part IV.

III. INTERNATIONAL LEGAL OBLIGATIONS

A. International Law

International environmental law is not exclusively or even primarily a field of legal practice. There are of course, international lawyers and litigants, but lawsuits primarily pertaining to environmental issues have been infrequent. In the perspective of international policy, environmental law is perhaps best understood as the collective body of agreements among states regarding mutual rights and obligations affecting the environment. It is embodied in conventions among states, treaties and to lesser effect, in international declarations, collective principles, opinions of jurists, and generally accepted practices among states.

Enforcement of its provisions, customary or specified by treaty, are usually sought through negotiation (e.g., diplomacy) rather than through adjudication.[120] The law is, however, founded on some very basic principles.

States have a sovereign right to manage, develop, allocate, distribute and otherwise control their own resources, but they also have the responsibility not to injure interests beyond their own borders.[121] In order to protect itself from environmental damage, a state may invoke such traditional international law doctrines as those of "self-defense,""self-preservation," and "security," as well as the somewhat less-defined principle of "good neighborliness."[122]

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[120] Caldwell, Emergent Structures of Environmental Policy, Law, and Cooperation, International Environmental Policy, Duke Univ. Press, 101 (1984).

[121] "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." Declaration of the United Nations Conference on the Human Environment, done at Stockholm, June 16, 1972, in Report, U.N. Doc. A/Conf. 48/14/Rev. 1 (1972), at 2, Principle 21 (reprinted in 11 I.L.M. 1416 (1972). Sic utere tuo ut alienum non laedas (use your property so as not to injure that of another) has been described as one of those "general principles of law recognized by civilized nations" which the International Court of Justice is to apply by virtue of Article 38 of its Statute. See, 1 Oppenheim, International Law 346-347 (8th ed. Lauterpacht, 1955).

[122] See, Note, New Perspectives on International Environmental Law, 82 Yale Law Journal 1659 (1973) note 23 at 1664 discussing the Torrey Canyon catastrophe where the Royal Air Force bombed the stranded and damaged tanker in international waters in an attempt to halt further spills from

Under these varied doctrines of "self-help," a state confronted with a major threat to its exclusive resource interests is permitted to exert the "necessary and proportional" force to avert the danger or to abate its effects.[123] Until an International Court for the Environment is established, if ever, national legislation and international agreements will fill gaps in enforcement and the creation of liability.[124]

The principle of strict liability for environmental harm has been recognized even by governments which least support international action for the protection of the environment. There seems to be no doubt about the liability of states for damages which they may cause (e.g., as through negligence) to the environment of other states.[125] Principle 21 of the

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damaging the English coast [hereinafter New Perspectives]; Brown, The Lessons of the Torrey Canyon, 21 Current Legal Problems 113 (1968).

[123] Id.

[124] See, Postiglione, A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations, 20 Envtl. L. 321 (1990).

[125] New Perspectives, supra note 122, at 1665-66; the Trail Smelter arbitration, 3 U.N.R.I.A.A. 1938 (1941), 35 Am. J. Int'l L. 684 (1941)(an international tribunal found Canada liable for fumes emanating from a smelter located in British Columbia and doing damage in the state of Washington); the Corfu Channel case, [1949] I.C.J. 4, Albania held responsible under international law for damage to British ships from mine explosions in Albanian territorial waters); the Lac Lannoux arbitration, 12 U.N.R.I.A.A. 281 (1957), 53 Am. J. Int'l L. 156 (1959)(France would be held strictly liable to Spain for damage to waters from hydroelectric project).

Stockholm Declaration speaks not only to this kind of damage, but also to the common spaces, to the environment of areas beyond the limits of national jurisdiction (e.g., the upper atmosphere, the oceans and deep sea bed, outer space, and Antarctica), and the same principle is embodied in many marine pollution conventions including the U.N. Law of the Sea (1982).[126] But in that the US is not affecting its hosts' resources from without, the law surrounding liability for transboundary pollution is of limited utility.

It is important to remember that other than specific treaties which require adjudication, there is no forum for international disputes regarding environmental damage.[127] The actual work of environmental protection is done at the local level with the involvement or cooperation of national governments. Nearly every nation now has a stated policy for the environment, and by treaty or statute, some national policies extend to international commitments. Governments have developed bilateral or regional agreements to deal cooperatively with matters they cannot effectively manage separately.[128] When nations engage in their consultations, especially as between DOD and its hosts, and where agreements do not address environmental concerns, the negotiating positions of the parties can swiftly return to basic

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[126] Caldwell, supra note 120, at 104.

[127] Id. at 106.

[128] Id. at 111.

principles.

B. Sovereign Immunity

Sovereign states are not subject to the rules of other sovereign states except to the extent they so agree.[129] Consequently, the US is not subject to host nation environmental laws except to the extent provided by agreement. Other than those with Panama and Spain, the international agreements between the United States and its foreign hosts do not specifically address environmental issues. Therefore, such questions must be constantly negotiated under competing interpretations of the agreements; the concept of sovereign immunity is ever-present at such negotiations.[130]

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[129] 6 Whiteman, Digest of International Law 553 (1963). Restatement (Third) of Foreign Relations Law of the United States §§ 451-460.

[130] That the question was present in the minds of the drafters is shown by the following quotation from the Summary Record of the Working Group of the NATO SOFA:

> 14. THE ITALIAN REPRESENTATIVE considered that it would be preferable to present the case of the exclusive jurisdiction of the sending State as an exception to the rule of the right of jurisdiction of the receiving State.
> 15. THE NETHERLANDS REPRESENTATIVE did not agree with the Italian view. He regarded the rule of the right of jurisdiction of the receiving State to be an exception to the principle of the right of jurisdiction of the sending State; military acts fell normally within the competence of the military authorities. In his opinion, this was the rule adopted by international law.
> 16. THE BELGIAN REPRESENTATIVE did not consider this rule of international law to be applicable in the present case. There was no doubt a proviso which recognized that sending State exercised exclusive jurisdiction over the members of its armed forces stationed abroad, but as that proviso implied the possibility of conflicting sovereignty, it could not apply to the present case, in

Historically, two conflicting theories of international law have governed the relations between a sovereign state and the forces of another sovereign stationed upon its soil. The doctrine of absolute immunity, or law of the flag, is essentially that an army in transit or which has been invited onto foreign territory is entirely removed from the control of the territorial sovereign and possesses an exclusive jurisdiction over its members. Its opposite, the principle of territorial sovereignty, means that the jurisdiction of the territorial sovereign over all persons within its territory is exclusive and plenary.[131] The United States long subscribed to an absolute view of sovereign immunity. Beginning with Chief Justice Marshall's opinion in The Schooner Exchange,[132]

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which twelve countries, by international agreement, were committed to respect common rules.

17. THE UNITED STATES REPRESENTATIVE considered that this was a difficulty of principle which was more apparent than real: The agreement on a common status would enable these difficulties arising out of international law to be overcome.

NATO, Summary Record of Minutes of the Juridical Subcommittee of the Working Group on the Military Status of the Armed Forces, MS(J) R(51)2, paras. 14-17 (1951).

[131] Mullins, The International Responsibility of a State for Torts of Its Military Forces, 34 Mil. L. Rev. 59, 65 (1966).

[132] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). The case involved an attempt by Americans, claiming to be the former owners of a U.S. ship seized by French military forces on the high seas and commandeered into the French navy, to have the U.S. courts restore the ship to them when it was forced into the port of Philadelphia for repairs. Although the case involved the passage of a foreign military vessel through U.S. territory, the decision is often cited to apply more broadly to the status of foreign military forces in transit or even stationed on the territory of

in 1812, the United States assumed a "perfect equality and absolute independence of sovereigns."[133] Essentially, a sovereign nation was beyond the jurisdictional reach of the laws of another sovereign regardless of the circumstances. Over time, a more restrictive view of sovereign immunity came to be adopted[134] and embraced by the United States.[135]

When sharing the same soil, the inherent conflict between the rights of two sovereigns can be resolved only by finding an implied consent by the territorial state to an infringement on its sovereignty by the visiting state. This means that the sovereign interests of the territorial state must under customary international law yield to those of the sending

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another state. I. Brownlie, Principles of Public International Law 368 (3d ed. 1976).

[133] Id. at 136.

[134] By 1953, some of the national courts which had rejected The Schooner Exchange view of absolute sovereign immunity included the Supreme Court of Canada, the Supreme Court of New South Wales, the British High Court of Criminal Appeal, and the French Cour de Cassation. Schwartz, International Law and the NATO Status of Forces Agreement, 53 Colum. L. Rev. 1091, 1107-09 (1953).

[135] Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1330, §§ 1602-1611 (1988). The United States Foreign Sovereign Immunity Act codifies the restrictive theory of sovereign immunity with specified exceptions. "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and the States except as provided in sections 1605 to 1607 of this chapter." Sections 1605, 1606, and 1607 contain eight major exceptions to immunity.

state.[136]

The theory of absolute immunity assumes that the states involved have entered their relationship on an equal footing in both the legal and political senses. But this assumption does not necessarily apply to the situation of NATO forces in the the Federal Republic of Germany or to US forces in many other nations. Also, the theory was not built upon modern circumstances where foreign forces are permanently stationed in the territory of the receiving state, a situation that may require reconsideration of which sovereign interest must yield to the other.[137] Clear choices of which interest should prevail in each case is very difficult, hence the reliance on treaties in setting priorities among the conflicting sovereign interests.[138]

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[136] Welton, The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics, 122 Mil. L. Rev. 77, 84 (1988).

[137] Id. at 84-85.

[138] Visiting forces should be entitled to immunity in some areas (such as local taxes) but not for others (such as civil actions for harm to local citizens), depending on the nature of the territorial sovereign interest and that of the force involved. Id. at 85-86. Some commentators, including German, argue the area is too complex for customary international law principles to resolve and hence the right of foreign military forces to transit or remain on foreign territory can only be granted and regulated by treaty. Id. at 87 citing I. Brownlie, Principles of Public International Law (3d ed. 1976); Lazareff, Status of Military Forces Under International Law (1971); O. Kimminich, Einfuchrung in das Voelkerrecht 160-161 (1983); and Sennekamp, Die volkerrechtliche Stellung der auslandischen Streitkrafte in der Bundesrepublik Deutschland, 48 Neue Juristiche Wochenshrift (NJW) 2731 (1983) at 2732-33.

When the US engages in treaty interpretation, its tendency is to stand firmly on the principle of absolute immunity explicated in The Schooner Exchange. One manifestation of this position is that the US does not apply to the FRG for licenses or permits to operate facilities that generate pollution. This position on sovereignty has been uniformly adopted by the other sending states and has been acknowledged by the Germans.[139]

As pertaining to civil litigation, the traditional doctrine of sovereign immunity holds that a sovereign cannot be sued without its consent, either expressed or implied. Numerous exceptions to this rule have come to be recognized that reduce the range of its applicability or effect. Even states with a strong tradition of honoring claims of sovereign immunity now routinely find an implied waiver of immunity when a state agency engages in commercial activity within another state. This is an example of the "restrictive theory" of

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[139] A dispute over the licensing process can arise when Länder officials insist that the sending states conform their practices to meet the requirements necessary to obtain a pollution control license. Only at that point will federal officials, who apply for permits on behalf of the sending states, exert influence to compel the processing of permits for operation of existing facilities. At times, this philosophical dispute results in a standoff where the U.S. refuses to spend the needed funds to "meet" a licensing requirement, and federal officials refuse to pursue a license on the sending state's behalf until substantive compliance is achieved. The problem is then negotiated to resolution. Letter to the Assistant Judge Advocate General of the Army from HQ USAREUR, US Forces Responsibilities for Environmental Compliance and Restoration in USAREUR, 29 September 1988, Tab B [hereinafter HQ USAREUR Letter].

sovereign immunity. There is wide acceptance that a foreign sovereign is entitled to immunity only for governmental acts (de jure imperii) and not for commercial acts (de jure gestionis).[140] German courts follow the restrictive theory of sovereign immunity, distinguishing between public acts and the private or commercial acts of states, and looking to the "nature of the act" as a guide to making this distinction.[141] Sovereign immunity is applied to the activities of foreign military forces as public acts.[142] Therefore, the US enjoys relative freedom from German courts and administrative agencies.[143] Given that most contaminations are made by and

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[140] See generally, Restatement (Third) of the Foreign Relations Law of the United States, Part IV, Chp. 5. In Victory Transport, Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965), the court catalogued those acts that should be considered public, with the qualification that the list could be changed by the executive department. The list of public acts and the qualifications consisted of: 1) internal administrative acts, such as expulsion of an alien; 2) legislative acts, such as nationalization; 3) acts concerning the armed forces; 4) acts concerning diplomatic immunity; and 5) public loans.

[141] Seidl-Hohenveldern, State Immunity: Federal Republic of Germany, 10 Netherlands Yearbook of International Law 55 (1979). German law does allow immunity for "sovereign" acts as defined by international law. Specific acts which are generally seen as "sovereign" under international law include acts necessary to administer justice, to promulgate and enforce legislative acts, to effectively exert the police power, and to carry out foreign and military policy. Germany Law Digest, 8 Martindale-Hubbell Law Directory 8 (1989).

[142] Welton, supra note 136, at note 11.

[143] However, the U.S. is not totally free of distraction. For example, all new construction must use equipment (boilers, underground storage tanks, etc.) and designs that meet German standards. German SA, infra note 165, at Art. 49. The process of design and construction can inhibit USF activity

for the benefit of the Department of Defense, its officers, agents, contractors, etc. who are serving the force, the vast majority of environmental damage that DOD must address from closing bases will fall within the realm of acts de jure emperii.

International law has developed tests for determining which acts are immune as those of the state and which are not. But, between the US and its several hosts international agreements exist that preempt the customary analysis of the law of nations. It is important to be mindful of the political and legal power of sovereigns because when the controlling international agreements between them do not address a subject, such as the environment, the parties must distinguish very carefully between the rights and privileges under the stationing agreements that are essential to each's activities and those under national law which should remain paramount.

C. International Agreements

In stationing its forces overseas, the US has waived its sovereign immunity in a variety of ways to further its foreign and defense policies. In almost every foreign jurisdiction in which it finds itself, the responsibility of the US toward the environment is at best only alluded to in the agreements with

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through construction delays, inspections, local prosecutor investigations and other judicial or administrative interventions into the German agency conducting the project.

each host nation. Rarely is the environment even mentioned. Though international law is evolving protections from transboundary pollutions, the activities of a foreign nation within the boundaries of its host are still governed by the agreements executed between the parties before entry was permitted. Therefore, beyond the constraints the President places upon the Department of Defense by Executive Order, the substantive law governing the activities of the DOD in foreign nations is contained in the agreements negotiated with those nations.

The United States has entered into mutual defense agreements with more than forty nations since World War II. One multilateral treaty, the North Atlantic Treaty, accounts for fifteen nations.[144] Separate important bilateral treaties exist with Japan, the Philippines, the Republic of Korea, and the Republic of Panama. The basic format of each is largely the same. Each contains a pledge that all contracting parties will regard an armed attack on one or more of the others as an attack against all, and that each will thereupon take such action in accordance with its constitutional processes as may be necessary to restore or maintain the security of the group. Of the mutual defense

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[144] Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Turkey and the United Kingdom.

treaties, only the Panama Canal Treaty (PCT),[145] executed during the Carter administration, requires the US to take environmental matters into consideration in its activities.

Many of these defense treaties specifically or implicitly contemplated the negotiation of status of forces agreements to govern in detail the status, rights, and obligations of US forces.[146] In the SOFAs, the receiving states agree to make "suitable arrangements" to provide facilities to the US.[147] The NATO SOFA is a very broad document intended to cover many different nations; there are no specific provisions within it

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[145] Panama Canal Treaty Between the United States of America and the Republic of Panama with Annex and Agreed Minute, September 7, 1977, 33 U.S.T. 47, T.I.A.S. No. 10030.

[146] E.g., Treaty of Mutual Cooperation and Security Between the United States of America and Japan With Agreed Minute and Exchange of Notes, January 19, 1960, 11 U.S.T. 1632, T.I.A.S. No. 4509, 373 U.N.T.S. 186, Article VI; Mutual Defense Treaty Between the United States of America and the Republic of Korea With U.S. Understanding, October 1, 1953, 5 U.S.T. 2368, T.I.A.S. No. 3097, 238 U.N.T.S. 199, Article IV; and the Panama Canal Treaty, supra note 145, at Article IV.

[147] See, Article IX, para. 3, of the NATO Status of Forces Agreement, supra note 29 which provides:

> 3. Subject to agreements already in force or which may hereafter be made between the authorized representatives of the sending and receiving States, the authorities of the receiving State shall assume sole responsibility for making suitable arrangements to make available to a force or a civilian component the buildings and grounds which it requires, as well as facilities and services connected therewith. These agreements and arrangements shall be, as far as possible, in accordance with the regulations governing the accommodation and billeting of similar personnel of the receiving State. In the absence of a specific contract to the contrary, the laws of the receiving State shall determine the rights and obligations arising out of the occupation or use of the buildings, grounds, facilities or services.

that address the issues of environmental compliance, restoration or residual value of facilities. Instead, these issues are addressed in bilateral supplementary agreements which the United States has negotiated at different times with each NATO nation where US military members are stationed. In general, these supplementary agreements take two forms: a) broad, very general agreements which apply to all US facilities in a host nation, or b) site-specific agreements which are limited to one or a few identified facilities.[148]

Although the wording of the SOFAs and supplementary agreements vary, they are relatively uniform in the subject matters with which they deal. Provisions governing entry and exit from the country, customs, taxation, criminal jurisdiction, and claims are some of the more important provisions found in them.[149] With the exception of the Spanish Defense Cooperation Agreement (DCA),[150] none of the

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[148] Classified agreements exist with the countries of Belgium, Denmark, Italy, Luxembourg, and the United Kingdom which contain provisions that directly address the issues of base closure, residual value and the duty of the U.S. to restore properties made available to it. Even though these agreements are classified there exists among unclassified agreements sufficient variety to adequately demonstrate the issues addressed by this paper.

[149] Air Force Pamphlet 110-20, Selected International Agreements, 27 July 1981, paragraph 2-1.

[150] Agreement of Defense Cooperation Between the United States of America and the Kingdom of Spain with Annexes and Related Letters, signed December 1, 1988, entered into force May 4, 1989; see, note 153, infra and accompanying text.

agreements specifically address "the environment" as it has come to be understood in the US. Environmental matters, as they have arisen, have been dealt with through provisions dealing with claims, health and safety standards, compliance with local law, and criminal jurisdiction.

The need for, and success of, the NATO SOFA was recognized early by most nations having sizable military forces stationed within their borders. Consequently, the NATO SOFA has served as a model for those that followed. The analysis of the international agreements affecting DOD in this paper will focus on the provisions of agreements that have affected or could affect environmental decisions of the DOD overseas. The primary focus will be on NATO, and the Federal Republic of Germany, where many closures are expected, environmental awareness is significant, and practical experience with environmental issues is greatest.

1. Environmental Provisions

Though there are provisions that require consultation regarding environmental matters, there are no substantive requirements to protect the environment in any agreements. The concept of environmental protection as a separate and distinct area of the law was not yet in its infancy when most were negotiated. The provisions that come closest to addressing environmental concerns speak to respect for local law, health and safety matters, utilities and services to be

provided to the US and the duty to maintain and repair the supplied accommodations. These clauses stand as the focal point and final word on the issues of environmental responsibilities.

a. References to the Environment

Only two international agreements, directly applicable to DOD, even make mention of the environment: those with Panama and Spain.

Article VI of the Panama Canal Treaty (PCT) makes special provision for environmental protection. The two governments commit themselves to "consult and cooperate with each other in all appropriate ways to ensure that they shall give due regard to the protection and conservation of the environment."[151]

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[151] PROTECTION OF THE ENVIRONMENT

1. The United States of America and the Republic of Panama commit themselves to implement this Treaty in a manner consistent with the protection of the natural environment of the Republic of Panama. To this end, they shall consult and cooperate with each other in all appropriate ways to ensure that they shall give due regard to the protection and conservation of the environment.
2. A Joint Commission on the Environment shall be established with equal representation from the United States of America and the Republic of Panama, which shall periodically review the implementation of this Treaty and shall recommend as appropriate to the two Governments ways to avoid or, should this not be possible, to mitigate the adverse environmental impacts which might result from their respective actions pursuant to the Treaty.
3. The United States of America and the Republic of Panama shall furnish the Joint Commission on the Environment complete information on any action taken in accordance with this Treaty which, in the judgment of

This is to be accomplished through a Joint Environmental Commission, established to review implementation of the Treaty and make recommendations to the parties on ways to avoid or mitigate adverse environmental impacts of actions. The Commission is to be provided with full information on treaty actions which may have significant environmental impacts, so that Commission studies and recommendations can be considered before decisions are implemented.

Article VI does not create substantive protections for the Panamanian environment or a requirement to comply with Panamanian environmental laws. It is similar to NEPA in that it only requires a process of review to insure consultation, cooperation, due regard and consideration of the environment. The Joint Commission is obligated to periodically review Treaty implementation and provide environmental review and recommendations for projects; the parties are required to furnish complete information in a timely fashion. The futility of using this provision to impose substantive standards or prevent an environmentally unsound project is apparent in the final sentence which merely requires "consideration of the recommendation of the Commission before

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> both, might have a significant effect on the environment. Such information shall be made available to the Commission as far in advance of the contemplated action as possible to facilitate the study by the Commission of any potential environmental problems and to allow for consideration of the recommendation of the Commission before the contemplated action is carried out.

Panama Canal Treaty, supra note 145, at Article VI.

the contemplated action is carried out."[152]

The Spanish DCA makes specific reference to the environment in its Article 20, regarding the US entitlement to receive services and supplies essential to the operation of the installation. The Spanish Commander of the installation is responsible to make the services available but the US may operate and maintain those services that are used exclusively by its forces.

> To ensure adequate protection for the environment and public health, the military authorities of both countries shall collaborate with a view toward meeting the legal standards applicable to bases and establishments of the Spanish armed forces, in particular those relating to hazardous, pollutant, and toxic substances. . . .[153]

The Spanish Commander is required to inform his US counterpart of such standards. The US is required to supply information on "significant impacts on the health environment, if any, as well as corrective measures, and contingency measures for accidents"[154] for any significant new base, activity or modification to those now existing.

Similar to the Panama SOFA, the DCA only mandates collaboration requiring that the parties "collaborate with a view toward meeting" the legal standards applicable to the Spanish armed forces. It does not compel adherence, nor does it require collaboration until agreement is reached; the

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[152] Id.

[153] Spanish DCA, supra note 150, at Art. 20, para. 4.

[154] Id.

threshold the US must meet is simply "adequate protection for the environment." It is interesting to note the contrast between DOD's intention to meet standards of general applicability that are "generally enforced,"[155] and the U.S.'s promise to meet the standards applicable to Spanish armed forces, without reference to whether such standards are actually enforced against the Spanish military.

In spite of their specificity, these environmental protections are minimal. Though some nations, particularly Panama, have additional and stronger environmental protections in the base termination provisions that will be discussed later, most nations must exert environmental control over DOD through a variety of other clauses. A common and overarching provision is that addressing observance of local law.

b. Compliance with Local Law

Specific reference to environmental responsibilities in agreements affecting DOD is rare. The issue must usually be resolved by reference to provisions mandating regard for local law, which would necessarily include local environmental laws even though such laws did not usually exist at the inception of the agreement. The provision of primary importance, which is shared by the SOFAs for NATO,[156] Japan,[157] Korea[158] and

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[155] See note 98 supra and accompanying text.

[156] "It is the duty of a force . . . as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the

Panama[159] is the obligation to "respect the law of the receiving State." Whether "respect" means "obey," as increasingly argued by German authorities, or something less (e.g., to "take into consideration") as argued by the sending states, is a sovereignty issue for both sides.[160] "Respect,"

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present Agreement. . . . It is also the duty of the sending State to take necessary measures to that end." NATO SOFA, supra note 29, at Art. II. With regard to the accommodations host nations are expected to supply to the sending state forces, paragraph 3 of Article IX states: "In the absence of a specific contract to the contrary, the laws of the receiving State shall determine the rights and obligations arising out of the occupation or use of the buildings, grounds, facilities or services."

[157] Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, with Agreed Minutes and Exchange of Notes, January 19, 1960, 11 U.S.T. 1652, T.I.A.S. No. 4510, 373 U.N.T.S. 248 [hereinafter Japan SOFA], Article XVI.

[158] Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea with Agreed Minutes, Agreed Understandings, Exchange of Letters and other Implementing Agreements, July 9, 1966, 17 U.S.T. 1677, T.I.A.S. No. 6127, 674 U.N.T.S. 163 [hereinafter Korean SOFA], Article VII.

[159] Agreement in Implementation of Article IV of the Panama Canal Treaty between the United States of America and the Republic of Panama, September 7, 1977, entered into force October 1, 1979, 33 U.S.T. 307, T.I.A.S. No. 10032, 16 I.L.M. 1068 (1977) [hereinafter Panama SOFA], Article II.

[160] Under Article XX, the English and French texts of the agreement are equally authentic. In Article II, the term "to respect" the law of the receiving state reads "respecter" in the French text meaning "to respect, to revere." Cassell's French Dictionary, D. Girard, G. Dulong, O. Van Oss, C. Guinness, eds., MacMillan Publishing Co., NY (1962). at 646. The German translation uses the word "achten" meaning "to esteem or to heed." Collins German Gem Dictionary, by J.M.

implying something less than full immunity from compliance with receiving state law, is not restricted to criminal law or jurisdiction, and may therefore constitute a retreat from the principle of absolute immunity.[161] The sending states of NATO attempt to avoid the sovereignty issue by their practice of compliance with the substantive provisions of German law, including environmental law and regulations, but not necessarily with the procedural requirements of those provisions.[162]

The Panama SOFA, negotiated as a supplementary agreement to the PCT, also includes a provision to respect local law. Its authority is enhanced by the Treaty's language that "the law of the Republic of Panama shall apply in the areas made available for the use of the United States of America pursuant to this Treaty."[163] However, paragraph 8 of the same Article

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Clark, Collins, London and Glasgow (1970) at 13.

[161] Welton, supra note 136, at 95-96. Lazareff argues that the preeminent location of Article II in the SOFA demonstrates its importance and emphasizes its purpose to very clearly and generally affirm the principle of territorial sovereignty by subjecting members, dependents and civilians of a force to the laws of the receiving state, the only possible derogations resulting either from the agreement itself or from bilateral agreements. Lazareff, Status of Military Forces Under Current International Law, 100, (1971).

[162] "Procedural" requirements include, for example, the obtaining of permits, keeping of specific records, etc. Memo for the Office of the Deputy Assistant Secretary of Defense (Environment) from HQ USAREUR, Congressional Hearings on Overseas Environmental Issues-- Questions for the Record, June 6, 1990 [hereinafter Questions for the Record].

[163] PCT, supra note 145, at Article IX, para. 1.

dilutes the language by preventing Panama from passing any law purporting to regulate or otherwise interfere with any US right granted under the treaty.[164]

It is reasonable to conclude that DOD has not been obligated to comply with its hosts' environmental laws. Nevertheless, respect for the law of our hosts and allies is usually given substantive application whenever practicable and/or insisted upon by the host and appropriate under other SOFA provisions. For purposes of analysis for base closures, the issue of compliance with local law for ongoing operations arises when determining DOD's responsibility to keep its accommodations environmentally clean. The argument is, that if the US is obligated to keep the accommodation clean throughout its use, there should be nothing to clean up at its termination.[165] The obligation to follow local law is usually issue specific and contained in more focused provisions of the agreements such as compliance with health and safety standards.

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[164] "The Republic of Panama shall not issue, adopt or enforce any law, decree, regulation, or international agreement or take any other action which purports to regulate or would otherwise interfere with the exercise on the part of the United States of America of any right granted under this Treaty or related agreements." Id. at Art. IX, para. 8.

[165] The Germans have taken this position. Their goal is to get sending states to pay for cleanups prior to departure and avoid the cost to themselves. MOF Letters, supra note 10.

c. **Health and Safety Standards**

Accommodations are generally provided to the US free of charge but with authority to take measures to protect the health, safety and sanitation of people and facilities on the installation. These provisions have the practical effect of establishing a standard of cleanliness and safety that can be applied to environmental issues.

Of the many articles of the German Supplementary Agreement (SA)[166] which both in theory and practice affect important German interests on a frequent basis perhaps the most significant is Article 53.[167] It requires the U.S in the fields of public safety and order to apply its own regulations when they prescribe standards equal to or higher than those prescribed in German law. Thus, German law must be taken into account as a minimum standard. Moreover, allied forces must ensure that German authorities are allowed to take

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[166] 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, with Protocol of Signature, Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262 [hereinafter German SA].

[167] "1. Within accommodation made available for its exclusive use, a force or a civilian component may take all the measures necessary for the satisfactory fulfillment of its defense responsibilities. Within such accommodation, the force may apply its own regulations in the fields of public safety and order where such regulations prescribe standards equal to or higher than those prescribed in German Law. . . . 3. In carrying out the measures referred to in paragraph 1 of this Article, the force or the civilian component shall ensure that the German authorities are enabled to take, within the accommodation, such measures as are necessary to safeguard German interests." Id. at Article 53.

measures within the accommodation as "necessary to safeguard German interests."[168] Measures include the right of access when based on justified requests of the German authorities. In practice, the US decides whose standards it will apply. An issue is whether risk to German "interests" is a mandatory precursor to applying German standards and at what point those "interests" are considered affected.[169]

The German SA is the most explicit agreement regarding these standards. Indeed, because it is so clear, and the US presence in Germany is so extensive, it may well be the source of a pervasive assumption that, worldwide, the US must meet the more stringent of its own or host nation laws.[170] Other SOFAs and supplementary agreements make no references to the comparison of standards. It is usually presumed that control over such standards is ceded to the US with control over the land areas of the base.[171] But for most nations the matter

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[168] Paragraph 4, in conjunction with the Signature Protocol to Article 53, paragraphs 5-7, regulates the details. Id.

[169] A simple rule is to say that German "interests" are considered affected when contamination is at risk of migrating off the installation, but this may not be sufficient when considering a base about to close.

[170] H.A.S.C. 101-70, supra note 14 at 1, and 69 (statement of Representative Ray) and at 4 (statement of Mr. Berteau).

[171] Some agreements make US control explicit. For example, in the Japan SOFA, supra note 157, at Art. III, para. 4, the U.S. is granted the authority to control facilities as may be required by military necessity for the efficient operation and safety of the facilities. The Panama SOFA, supra note 159, at Art. XVIII, para. 3, expressly allows the U.S. to apply its own health and sanitary regulations. And under Annex B, para.

is made an effort of mutual cooperation and consultation.[172] Even Germany, despite its insistence that SA Article 53 mandates compliance with environmental law, prides itself on its cooperative attitude.[173]

3(i), Panama authorizes the U.S. to apply its own regulations concerning fire prevention, safety, and sanitation in the Military Areas of Coordination.

[172] E.g., Korean SOFA, supra note 158, at Art. XXVI:

> Health and Sanitation
>
> Consistent with the right of the United States to furnish medical support for its armed forces, civilian component and their dependents, matters of mutual concern pertaining to the control and prevention of diseases and the coordination of other public health, medical, sanitation, and veterinary services shall be resolved by the authorities of the two Governments in the Joint Committee established under Article XXVIII.

[173] "According to the international agreements, the forces of the sending States are responsible for the condition of the accommodations consigned to them [citations to SA omitted]. This means they must see to it that the accommodations satisfy at least the requirements of the German environmental law. Under the aspect of public safety and order, the forces eliminate dangers and environmental damages which may have arisen as a result of their use and fulfil the safeguard traffic obligation required by German law. This obligation to ward off dangers is related to all accommodations. This means the responsibility in principles [sic] applies also to facilities which were not built by the forces of the sending States but date back to war and prewar days.

This responsibility also implies that the forces remove, for example, residual warfare agents from the time preceding the use of the accommodation by the forces under the aspect of public safety and order in the same manner and extent in which the German authorities would arrange for this in comparable cases on non-consigned accommodations in accordance with German law. The German authorities and the authorities of the forces cooperate also here to ensure the smooth implementation of the required measures [citations to the German SA omitted]. The forces of the sending States surely know that we have cooperated in this very field in the past and - irrespective of the question of legal responsibility - always managed to find solutions with regard to the measures to be taken as well as cost bearing in the individual case which satisfied both

d. Free Services

Generally, the US does not own the property on which its bases are located. The land is "made available" by the host nation along with access to local goods, utilities and services. Article IX of the NATO SOFA embodies the principle:

> 3. Subject to agreements already in force or which may hereafter be made between the authorized representatives of the sending and receiving states, the authorities of the receiving State shall assume sole responsibility for making suitable arrangements to make available to a force or a civilian component the buildings and grounds which it requires, as well as facilities and services connected therewith. These agreements and arrangements shall be, as far as possible, in accordance with regulations governing the accommodation and billeting of similar personnel of the receiving State. In the absence of a specific contract to the contrary, the laws of the receiving State shall determine the rights and obligations arising out of the occupation or use of the buildings, grounds, facilities or services.

This clause serves to maintain the territorial sovereignty of the host and to prevent economic interference by overbidding of prices by the sending state.[174]

In every locality, the US has a form of this entitlement. In Panama, the terms, conditions and prices of such services "shall not be unfavorable in relation to those charged other

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sides. Should such cases of old contaminations dating back to the time preceding the use of the accommodation by the forces become known now or when the accommodations are returned at a later date within the framework of force reduction, I am certain that together we will be able also in the future to find a solution for the particular case involved." MOF Letter, May 6, 1991, supra note 10.

[174] Lazareff, supra note 161, at 367.

users."[175] In the Netherlands, the charges "will be no higher than those paid by the Netherlands armed services."[176] In the Philippines, all public services may be employed by the US "under conditions no less favorable than those that may be applicable from time to time to the military forces of the Philippines."[177] And in Japan,:

> The United States armed forces shall have the use of all public utilities and services belonging to, or controlled or regulated by the Government of Japan, and shall enjoy priorities in such use, under conditions no less favorable than those that may be applicable from time to time to the ministries and agencies of the Government of Japan.[178]

These provisions may be significant in reducing the US cost to close bases. Because environmental awareness and controls are still new to many nations, the local governments may yet be providing environmental review, planning and remediation services to its citizens, agencies or armed forces. Thus, a factor in closing bases will be determining the amount the host armed forces would have to pay to close

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[175] Panama SOFA, supra note 159, at Art. XIV, para. 1. Preferential charges are granted to the U.S. under paragraph 2 when the services are made available through a plant or equipment furnished by the U.S. and transferred to Panama.

[176] Agreement With Annex Between the United States of America and the Netherlands Regarding Stationing of United States Armed Forces in the Netherlands, August 13, 1954, 6 U.S.T. 103, T.I.A.S. No. 3174, 251 U.N.T.S. 91 [hereinafter Netherlands SA], Paragraph 2.

[177] Agreement Between the United States of America and the Republic of the Philippines Concerning Military Bases, March 14, 1947, 61 Stat. 4019, T.I.A.S. No. 1775, 43 U.N.T.S. 271 [hereinafter Philippine SOFA], Article VII.

[178] Japan SOFA, supra note 157, at Art. VII.

and clean up one of its bases. A host nation with a relatively small force may not require remedial environmental work to be paid out of its armed force's budget, as is the case for the US. If so, the US may be entitled to such services.[179]

e. Maintenance, Repair and Restoration

Most agreements require the U.S to maintain and repair the property at its own expense. A typical provision is at Article 48 of the German SA:

> A force or a civilian component shall be responsible for carrying out such repairs and maintenance as are required to keep the accommodation made available to it in a proper state of preservation, . . .

The agreements with Turkey,[180] Japan,[181] and Korea[182] put the duty in monetary terms, requiring the US to bear all costs incident to the maintenance of the US forces in accommodations provided for their exclusive use. Shared

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[179] Article 63 of the German SA, supra note 166, provides that the U.S. shall enjoy "free of charge" the administrative services and assistance of various German public authorities to the same extent as the German armed forces. However, "[e]xemption from payment for the use of property or services . . . shall not . . . extend to (i) cost of repairs and maintenance; . . ." Paragraph 4(d).

[180] Supplementary Agreement Number 3 Between the Governments of the United States of America and the Republic of Turkey on Installations, March 29, 1980, 32 U.S.T. 3338, T.I.A.S. No. 9901 [hereinafter Turkish SA], Article VIII, para. 1.

[181] Japan SOFA, supra note 157, at Article XXIV.

[182] Korean SOFA, supra note 158, at Article V, para. 1.

accommodations usually provide for shared expenses.

The interpretation of "maintenance" or "proper state of preservation" is extremely important because if the US has a duty to maintain the "environment" on its bases, it cannot hide behind the shield of sovereign immunity and the general claims waiver.[183] The base is presumed to be kept clean so that any effort necessary to make it so prior to departure would be considered a US responsibility.

Some agreements do not make maintenance a duty, but a right. In the Philippines, the applicable provision does not oblige the US but grants it "the right, power and authority: (a) to construct (including dredging and filling), operate, maintain, utilize, occupy, garrison and control the bases."[184]

The dispute over the years has centered around whether the phrase, "proper state of preservation," and its variations, means the pristine condition the US received the accommodation in, (which, in the case of older, World War II era European bases, was far less than pristine)[185] or whether

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[183] See note 196 infra and accompanying text.

[184] Philippine SOFA, supra note 177, at Art. III, para. 2.

[185] In most cases, there is no baseline to establish the environmental condition upon U.S. receipt. The issue of shared responsibility is present at every base. Consider RAF Bentwaters, a base that during WWII had been set aside for crash landings of aircraft returning from raids in Germany. On one day during the war, 174 crash landings occurred. H.A.S.C. 101-70, supra note 14, at 48. Under the city of Mannheim, Germany, lies a lake of aircraft fuel floating on the water table. The military airfield has been in use there

it includes more than routine restoration and upgrade of facilities and infrastructure. Does the routine use of an unpaved motor pool area include the spills and leaks attendant to vehicle maintenance even though contaminants may drift toward groundwater supplies? Does "proper state of preservation" require technologically new environmental protections as they become available?[186]

Article 49 of the German SA operates to effect compliance with German environmental standards insofar as construction of new facilities or modification of existing facilities is

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since before WWII by several nations. Studies by a local German university and the US Army Environmental Hygiene Agency confirmed that a US degreasing facility contributed to the groundwater pollution with carcinogenic chlorinated hydrocarbons during approximately 1974-78. The city of Mannheim and various water authorities filed a claim. The US and FRG are sharing the costs of cleanup. The US Army anticipates spending $20 million with contributions of $5 million from the FRG. France and O'Neill, supra note 8.

[186] An unresolved question is to what extent the German SA requires the U.S. to fund pollution abatement projects to upgrade existing facilities of the USF. New construction is not a problem because pollution abatement features are built into the specifications provided to the contractor (by the German government). Article 63, para. 6(b) provides:

> If installations and facilities serving . . . sewage disposal [needs] are established, modified, reinforced, or extended at the instance of the [U.S. and] serve also to satisfy German needs, the expenditure, including the cost of repair and maintenance, on such installations and facilities shall be apportioned in a manner which corresponds to the extent of the German interest as compared with the [U.S.] interest.

There is no provision regarding modifications required by Germany to enhance pollution control that only inure to the benefit of the U.S. HQ USAREUR Letter, supra note 139.

concerned.[187] Except for "minor" construction which may be done by the USF with troop labor or by direct contract, all other construction must be accomplished under a method of indirect construction, i.e., by an agency of the FRG. As a practical matter, the German agency responsible for such construction (Staatsbauamt), will not approve construction plans which do not meet German environmental standards.[188] This provision, in conjunction with Article 53 discussed above, forms the basis for the German presumption that bases have been built and run to the minimum German standards and therefore any contamination is the result of some discrepancy for which the occupier is responsible.[189] Other nations may make the same argument if the words "maintain and repair" have come to mean "keep environmentally clean."

The duty to maintain the installation may enter through the back door of the facility termination clauses; i.e., the US need not maintain the base, but it may have to clean it before departure. For example, the Panama SOFA requires the US to take all practicable measures to remove every hazard to

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[187] "Construction works [and repairs and maintenance work that is not minor, Para. 4] shall normally be carried out by the German authorities competent for Federal building in accordance with German legal provisions and administrative regulations in force, and in accordance with special administrative agreements." German SA, supra note 166, at Art. 49, para. 2.

[188] Questions for the Record, supra note 162.

[189] MOF Letters, supra notes 10 and 173.

human life, health and safety prior to departure.[190] What means are considered "practical" in removing "every" hazard is open to serious debate. Notice that even this strongly worded clause does not demand protection for the environment as a whole-- only human health and safety, a standard requiring less effort to meet. The point, however, is that the only practical way to ensure that "every" hazard is removed by the time of departure is to prevent contaminations from occurring at all. The Spanish DCA requires that properties be relinquished in "serviceable condition," but releases the US from any obligation to spend additional sums for fix-up at termination.[191]

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[190] Panama SOFA, supra note 159, at Art. IV, para. 4:

> At the termination of any activities or operations under this Agreement, the United States shall be obligated to take all measures to ensure insofar as may be practicable that every hazard to human life, health and safety is removed from any defense site or a military area of coordination or any portion thereof, on the date the United States Forces are no longer authorized to use such site. Prior to the transfer of any installation, the two Governments will consult concerning: (a) its conditions, including removal of hazards to human life, health and safety; and (b) compensation for its residual value, if any exists.

[191] Spanish DCA, supra note 150, at Art. 19, para. 3.1 states:

> Permanent constructions or buildings shall be returned in serviceable condition, including the energy and water production and distribution systems and heating and air conditioning systems that are an integral part of the buildings, as well as the fuel pipes and tanks that are a part of said systems, provided the government of the United States shall incur no additional expense thereby.

See also, Technical Agreement in Implementation of the Defense

When the US leaves some countries, it is entitled to receive a payment for the residual value for the improvements it leaves behind. When calculation and payment of residual value includes an offset for damages, there is, arguably, neither an obligation nor a need to restore the property. The cost of restoration is included in the offset.[192] The Greek

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Agreement between the United States of America and Portugal (signed 18 May 1984) which applies to the Air Force presence in the Azores which provides:

> 1. All buildings, structures and utilities connected to the soil, including respective wiring, piping of any nature and sanitary and heating installations, are upon construction the property of Portugal, although they may be used fully by the United States Forces while the Agreement is in force and in accordance with its terms. Upon termination of this Agreement, such property shall be left in place in serviceable condition. No compensation will be owed by the Government of Portugal.

[192] German SA, supra note 166, at Art. 52, paras. 1 and 2:

> 1. Where a sending state intends to release in whole or in part accommodation or other property legally owned by the Federation or a Land and made available to the force or to the civilian component for use, agreement shall be reached between the authorities of the force or of the civilian component and the German authorities concerning the residual value, if any, remaining at the time of release in improvements which were financed by the sending State out of its own funds. The State shall be reimbursed by the Federal Republic for such agreed residual value.
> 2. Payment under paragraph 1 of this Article shall not be made to the extent that compensation for damage caused to accommodation or other property by the sending State is payable under Article 41 of the present Agreement or would have been payable if the claim had not been waived or the sending State had not been relieved of liability for such claims under that Article.

DECA,[193] Netherlands SA and Turkish SA contain no language creating a US obligation to restore property upon transfer. Japan, Korea, and the Philippines explicitly do not require restoration and do not pay residual value.[194] These countries, which do not require restoration, must link their environmental concerns to the weaker clauses requiring maintenance or health and safety measures.

The NATO SOFA contains no general provisions respecting repair, maintenance, or restoration.[195] As illustrated

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[193] Agreement on Defense and Economic Cooperation [DECA] Between the United States of America and the Hellenic Republic With Annex, September 8, 1983, T.I.A.S. No. 10814; Agreement Between the United States of America and the Kingdom of Greece Concerning Military Facilities [hereinafter Greek MFA], October 12, 1953, 4 U.S.T. 2189, T.I.A.S. No. 2868, 191 U.N.T.S. 319; Mutual Defense Cooperation Agreement Between the Government of the United States of America and the Government of the Hellenic Republic, signed July 8, 1990, entered into force November 6, 1990.

[194] Japan SOFA, supra note 157, at Article IV; Philippine SOFA, supra note 177, at Article XVII; Korean SOFA, supra note 158, at Article IV.

[195] Although paragraph 3 of Article IX does state:

> Subject to agreements already in force or which may hereafter be made between the authorized representatives of the sending and receiving States, the authorities of the receiving State shall assume sole responsibility for making suitable arrangements to make available to a force or a civilian component the buildings and grounds which it requires, as well as facilities and services connected therewith. These agreements and arrangements shall be, as far as possible, in accordance with regulations governing the accommodation and billeting of similar personnel of the receiving State. In the absence of a specific contract to the contrary, the laws of the receiving State shall determine the rights and obligations arising out of the occupation or use of the buildings, grounds, facilities or services.

above, these matters are expressed, if at all, in country or site-specific supplementary agreements. If one interprets an agreement to not require environmental maintenance or restoration then liability for on-base damage will be avoidable. This is because in nearly every stationing agreement the host nation has waived claims for damage to certain categories of its own property. This is referred to as the general claims waiver.

2. Claims for Environmental Damage

a. Damage on the Installation (Government Claims)

The general claims waiver of the NATO SOFA states:

> 1. Each Contracting Party waives all its claims against any other Contracting Party for damage to any property owned by it and used by its land, sea or air armed services, if such damage--
> (a) was caused by a member or an employee of the armed service of the other Contracting Party in the execution of his duties in connection with the operation of the North Atlantic Treaty;[196]

Similar language exists in the agreements for Pacific bases.

The property on which US bases are located is always owned by the host nation, and many bases are accommodations shared by the US with host nation armed forces. Damages to the host's military property are clearly waived. Claims for

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According to Lazareff, this paragraph subjects the sending state to the territorial sovereignty of the receiving state. Lazareff, supra note 161, at 367. This may mean that when a supplementary agreement does not address closure, the law of the host, as applied to its own forces, will apply to the US.

[196] NATO SOFA, supra note 29, at Article VIII.

less than $1400 to nonmilitary property are also waived. Damage costs to nonmilitary above $1400 (or the equivalent in foreign currency) are shared 75 percent to the US and 25 percent paid by the host.[197]

The tricky issue is determining at what point the particular damaged area of a base is to be considered "used by its" host's armed forces and thereby subject to waiver. At one extreme one can say that whenever a host nation aircraft lands at Ramstein Air Force Base, the Germans have "used" the base; at the other extreme, one can say that unless a host nation aircraft has been serviced in a particular maintenance hangar, the hangar has not been used by the host's armed forces. A simple rule would be to look to the actual ownership of the damaged property; has the host placed the legal title in its Ministry of Defense (or equivalent)? Such a rule would be convenient but is clearly not the basis of the distinction.[198] The property need only be owned by the host nation government regardless of where the title is held. Therefore, if contaminated property can be considered to have been "used by" the host forces then the waiver applies.

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[197] Id. at Article VIII, para. 2(f).

[198] Lazareff states that the waiver does not require that the damaged property be "owned by" the host's armed forces. "It would appear that the waiver applies to any property of a State, even those owned by a civil administration, provided it is "used" by the armed Forces. For example, a truck belonging to a Ministry of Post and Communications and "used" by the armed Forces would come under the waiver provision." Lazareff, supra note 161, at 283.

Property owned by the host but not used by its forces is referred in the SOFA as "other property."[199] In the case of damage caused to "other property," unless the parties agree otherwise, an arbitrator is to decide upon the liability and the amount of the damage.[200] The SOFA is completely silent as to the law to be applied or the procedure to be followed by the arbitrator.[201] Once the amount of damage and the liable parties are identified, the arbitrator is obliged to distribute the costs among the parties using the same formula as for third party claims.[202] When the US alone is responsible for the damage, it pays 75 percent of the award and the host 25 percent.[203] When the US shares responsibility with another nation, other than the host, the amount of the award is shared equally among them, but the host's "contribution shall be half that of each of the sending

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[199] "In the case of damage caused or arising as stated in paragraph 1 to other property owned by a Contracting Party and located in its territory, the issue of the liability of another Contracting Party shall be determined and the amount of damage shall be assessed, unless the Contracting Parties concerned agree otherwise, by a sole arbitrator selected in accordance with sub-paragraph (b) of this paragraph. The arbitrator shall also decide any counter-claims arising out of the same incident." NATO SOFA, supra note 29, at Art. VIII, para. 2(a).

[200] Lazareff, supra note 161, at 285.

[201] Id. at 287. Lazareff opines that the determination of liability should be based on the laws of the receiving state.

[202] NATO SOFA, supra note 29, at Art. VIII, para. 2(d).

[203] Id. at para. 5(e)(i).

States."[204] When it is not possible to attribute the damage specifically to one or more of the nations, the amount awarded is distributed equally among the nations concerned, unless the host is not one of the causing parties in which case its share is half of each of the others.[205] These rules, simple in appearance but awkward in application, provide great incentive for the parties concerned to "agree otherwise."

Therefore, the general rule for bases used exclusively by the US where the US is the sole cause of contamination, is that the US will be liable for 75 percent of the damage. If the US is one of several causative parties, the parties of lesser responsibility will seek negotiations to avoid having to pay a share equal to those of greater responsibility. From a practical standpoint, however, on bases used exclusively by the US, unless contamination begins to migrate off an installation, the host, relying on the US to police itself, will have limited knowledge or interest in asserting a claim to pay for its cleanup. But once a contamination reaches the perimeter of private land or the aquifer of a public water supply a cognizable third party claim is possible and the host will become aware of the problem, and the US must address the concerns of the host.

Assuming a host nation is not aware of or concerned with on-base contamination, it will have cause for concern if the

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[204] Id. at para. 5(e)(ii).

[205] Id. at para. 5(e)(iii).

base is terminated and it regains full possession of the property. At that point the host may wish to assert a claim. Can it now claim damage to its "other property"? When the host has agreed to receipt of the vacated property without restoration this would imply that there is no longer an opportunity to assert claims for past damages. If there are residual value offset provisions one might argue that the opportunity to assert such claims does not exist because the parties agreed at the outset that they would settle up at closure. Some agreements do not address restoration or offset-- the host simply gets all the improvements upon US departure[206]-- does "all improvements" include the hazardous

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[206] E.g., the Greek MFA, supra note 193, at Art. II, paras. 2 and 3 states:

> 2. All removable facilities erected or constructed by or on behalf of the Government of the United States of America at its sole expense and all equipment, materials and supplies brought into Greece or purchased in Greece by or on behalf of the Government of the United States of America in connection with the construction, development, operation and maintenance of agreed installations and facilities will remain the property of the Government of the United States of America and may be removed from Greece. No such removal or disposition will be undertaken which will prejudice the mission of the NATO.
> 3. The United States of America will be compensated by the Greek Government for the residual value, if any, of the facilities acquired, developed and constructed at United States expense under the present Agreement not removed or otherwise disposed of in accordance with paragraph 2 of this Article, including those facilities developed or constructed jointly by the United States. The amount and manner of compensation shall be in accordance with agreements to be made between the appropriate authorities of the contracting parties. Negotiations as to the method for treating the residual value of these facilities will be without prejudice to agreements within the NATO.

waste sites, or does "all improvements" include the value the US would pay for a damage claim to clean them up. These issues will obviously be negotiated one country at a time and the variety of agreements makes it impossible to generalize.

Germany is unique in that it has granted the US immunity for any damages to its property, unless caused by willful action or gross negligence, when the property is used exclusively by the US, or jointly with the Germans.[207] This generous waiver fully protects the US from liability for environmental damage that remains on the installation. It does not however, apply to damage arising from a failure to repair and maintain the facility in a proper state of preservation.[208] This waiver does not exist with any other nation hosting US forces. Other nations are only subject to some form of the NATO general claims waiver. To address its contamination concerns, Germany's recourse is to await offset

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[207] "The Federal Republic shall waive all its claims against a sending State in respect of loss of, or damage to, property owned by the Federal Republic and made available for the exclusive use of the force or of the civilian component. This shall apply equally if such property is made available for use by the forces of several sending States or is used by the force of one or more sending states jointly with the German Armed Forces. This waiver shall not apply to damage caused willfully or by gross negligence, nor to damage to the property of the German Federal Railways or German Federal Post." German SA, supra note 166, at Art. 41, para. 3(a).

[208] "The waiver given by the Federal Republic in sub-paragraph (a) of paragraph 3 of Article 41 shall not apply to damage arising from non-fulfillment of the accepted responsibility for repair and maintenance. . . ." Protocol of Signature to the Supplementary Agreement, supra note 166, at Re Article 41, para. 4.

at termination, and in the meantime, emphasize to the US its duty to repair or maintain.

The general waiver does not usually apply to damages off the installation or to claimants other than the host nation itself. The next section of this paper will discuss how claims for environmental damage are paid and whether the US can leave contamination behind.

b. Damage off the Installation (Third Party Claims)

Environmental claims may arise overseas in several situations: on base; off base, pursuant to a military exercise or activity; and contamination that occurs on base but migrates off base. This section will address the civil liability of the US to parties other than the host nation for damage to property or health.

US citizens take for granted their ability to sue their government. But in an international context, one cannot assume the same ability for the citizens of foreign nations. Absent an international agreement to the contrary, no state can exercise jurisdiction over the armed forces of another, and though states can sue in foreign courts generally they cannot be sued there unless they voluntarily submit to the jurisdiction of the foreign court.[209]

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[209] However, the rule of absolute immunity has been modified or abandoned by most states in regard to acts of a private law nature such as ordinary commercial transactions. See, note 129 and accompanying text; 1 Oppenheim, International Law 264 (8th ed. Lauterpacht 1955).

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[210]

Thus the classical rule of international law considers the liability of a state for damages to another state or its inhabitants to rest upon a "state to state" basis with settlement being accomplished through the diplomatic process.[211]

The US has agreed to pay foreign claims for damage under one of two regimes: pursuant to international agreement under the authority of the International Agreement Claims Act (IACA);[212] or under the Foreign Claims Act (FCA).[213]

c. Foreign Claims Act

The necessity for the FCA grew out of problems created for the US in the application of traditional principles of sovereign immunity to its forces abroad. In many cases no remedy was available to the inhabitants of a foreign country for damage caused by US military members because of the absence of state responsibility for acts of misconduct by soldiers who are not in the performance of their official

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[210] Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

[211] 1 Hyde, International Law §§ 270-71 (1st ed. 1922).

[212] 10 U.S.C. § 2734a and b (1988).

[213] 10 U.S.C. § 2734 (1942).

duties and where there is no evidence of dereliction of duty by an officer or NCO in charge.[214] Prior to World War II the US attempted to correct the deficiencies in the application of international law remedies by providing ex gratia payments[215] in individual cases paid through special acts of Congress, such as the Act of 18 April 1918 for payment of claims caused by its troops in France during World War I.[216] However, early in World War II it was realized that an ad hoc approach did not meet the needs brought on by the widespread stationing of great numbers of US troops throughout the world. Consequently the Foreign Claims Act of 1942, which provided an administrative method for paying both scope (line of duty) and non-scope (outside line of duty) claims arising out of the acts or omissions of US personnel, was passed by the Congress.[217]

Under the Foreign Claims Act the duty status of a soldier whose misconduct gives rise to a claim has no bearing upon the determination of liability or amount. The avowed purpose of the act is to promote "friendly relations," an object which can only be realized by disregarding the duty status of our

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[214] Mullins, supra note 131, at 63.

[215] Ex gratia payments are those for which the obligation to pay is merely moral, there being no legal obligation under international or domestic law upon the state making such payments.

[216] Act of 18 April 1918, ch. 57, 40 Stat. 532.

[217] 10 U.S.C. § 2734 (1988).

personnel abroad.[218] In countries such as Panama and the Philippines, where there is no specialized agreement regarding the shared payment of claims, both scope and non-scope claims are paid under the authority of the FCA.[219]

The FCA allows payment of claims against the U.S. for property damage, personal injury or death caused by military and civilian members of US forces in foreign countries or resulting from noncombat activities. It differs from the NATO SOFA in two significant effects. First, scope of employment is irrelevant. The US accepts responsibility for almost all damage caused by the members and employees of its forces whether they are negligent, willful, wrongful, criminal or mere mistakes of judgment. Proof of fault is required only to the extent necessary to show that the claim is meritorious. Claims are payable to inhabitants of foreign countries and foreign business entities and governments (including state and

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[218] Mullins, supra note 131, at 64.

[219] E.g., the Philippine SOFA, supra note 177, at Article XXIII states:

> For the purpose of promoting and maintaining friendly relations by the prompt settlement of meritorious claims, the United States shall pay just and reasonable compensation, when accepted by claimants in full satisfaction and in final settlement, for claims . . . on account of damage to or loss or destruction of private property, both real and personal, or personal injury or death of inhabitants of the Philippines, when such damage, loss, destruction or injury is caused by the armed forces of the United States, or individual members thereof, including military or civilian employees thereof, or otherwise incident to non-combat activities of such forces; . . .

municipal).[220]

Second, the amount of liability is wholly within the discretion of the U.S., as it interprets liability under the law and standards in effect in the country where the incident occurred. Therefore, though an offer of payment for damages is practically guaranteed to the claimant under the FCA, the US exercises full control over the amount of the award. This is contrary to most SOFAs which allow the host nation to adjudicate liability.

When the US has entered a claims cost-sharing agreement with another nation, the FCA is superseded by the IACA.[221] The next section will discuss how such shared claims are adjudicated, using the NATO SOFA and experience with German practice as a guide.

d. International Agreement Claims Act

Almost all claims against the DOD, throughout the world, are addressed by an agreement with each host nation. These agreements contain no reference to environmental damage but there are potentially two categories of liability which can arise. First, damage to host government property, and second, damage to the person or property of third parties. Third

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[220] Claims by U.S. citizens for damages from torts and noncombat activities committed by the military overseas are adjudicated under the Military Claims Act, 10 U.S.C. § 2733 (1988).

[221] 10 U.S.C. §§ 2734a(a) (1988).

party claims can further be broken down into official duty claims or, in the alternative, claims based on actions performed outside the scope of duty. It would be very rare to have an environmental claim which is not the result of an action performed in the course of official duty.

The model for the adjudication and settlement of international agreement claims is Article VIII of the NATO SOFA. This comprehensive Article covers damages caused either on duty or outside the performance of duty; damages can be caused to property belonging to one of the States party to the Treaty or to property belonging to third parties; it includes damages caused on land, on the sea, or in the air and has been used successfully for over forty years. Nearly identical provisions exist in the SOFAs with Australia, Japan, and Korea.

Official duty claims include acts or omissions of members of a force or civilian component done in the performance of official duty or any other acts for which the member or civilian is legally responsible and causes damage;[222] i.e., liability is established by concepts of scope of employment or local law. Once a claim is certified as payable, a German

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[222] NATO SOFA, supra note 29, at Art. VIII, para. 5. The U.S. Army Claims Service, Europe (USACSEUR), is responsible for the payment of all claims and will normally certify all environmental claims as being "in scope" and payable if US causation can be established. Letter to Office of the Judge Advocate, HQ USAREUR from the Office of the Judge Advocate General, HQ, Dept. of the Army, 22 Dec. 1988 (establishing the policy to adjudicate environmental claims under NATO SOFA like all other damage claims).

agency adjudicates liability and damages under FRG law and prorates payment of the award 25% to Germany and the remaining 75% to the US.[223] US refusal to certify involvement can be appealed to an arbitrator, who would be a FRG high judicial official.[224] FRG law provides for strict liability in environmental damage cases with joint and several liability.[225] Relying on principles of sovereign immunity, the US position has been that it will only pay for the proportionate share of damage it caused.[226]

If the US feels its share of liability is significantly less than the full 75%, it will only "scope" the claim for an amount the US agrees to be liable; i.e., before certifying the claim as being within the scope of NATO activities and turning the claim over for adjudication by the Germans, the US will negotiate an agreement from the Germans as to the maximum amount the US will be assessed. Otherwise, the claim will go to arbitration.[227] Because of the attitude of cooperation

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[223] NATO SOFA, id. at para. 5(b). In cases where more than one sending states' forces are involved, damages are distributed equally among them, with the receiving state's share (if not one of the responsible states) half that of the liable sending states. Id. at para. 5(e)(ii).

[224] Id. at Art. VIII, para. 2(b). This provision of the NATO SOFA has never been invoked.

[225] G. Hager, Waste Control Under German Law: Liability and Preventative Measures, 25 Hous. L. Rev. 963, 967 (1988) (Dr. Hager is professor of law at the Institute for Comparative Law, Philipps Univ., Marburg, FRG).

[226] HQ USAREUR Letter, supra note 139.

[227] NATO SOFA, supra note 29, at Art. VIII, para. 8.

between the US and Germany, no claim has ever gone to arbitration.

When a claim is declared to be "out-of-scope" the duty to pay is similar to the Foreign Claims Act ex gratia payment. Under the NATO SOFA the host nation has the right to investigate and assesses compensation leaving the US the decision whether it will pay and in what amount.[228] In practice, most hosts allow the US to undertake the entire process alone. When a claim is declared "out of scope" there is no pro rata cost sharing, the US pays 100% of its liability under local law. These claims usually concern damages arising out of tortious acts or omissions which have not occurred in

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[228] Id. at Article VIII:

> 6. Claims against members of a force or civilian component arising out of tortious acts or omissions in the receiving State not done in the performance of official duty shall be dealt with in the following manner:--
> (a) The authorities of the receiving State shall consider the claim and assess compensation to the claimant in a fair and just manner, taking into account all the circumstances of the case, including the conduct of the injured person, and shall prepare a report on the matter.
> (b) The report shall be delivered to the sending State, who shall then decide without delay whether they will offer an ex gratia payment, and if so, of what amount.
> (c) If an offer of ex gratia payment is made, and accepted by the claimant in full satisfaction of his claim, the authorities of the sending State shall make the payment themselves and inform the authorities of the receiving State of their decision and of the sum paid.
> (d) Nothing in this paragraph shall affect the jurisdiction of the courts of the receiving State to entertain an action against a member of a force or of a civilian component unless and until there has been payment in full satisfaction of the claim.

the performance of official duty.

The vast majority of claims are found to be "in scope." For expensive environmental claims this allows the US to take advantage of cost-sharing, and help insulate its personnel from civil[229] and criminal liability. Should the US declare an environmental claim to be "out of scope" it would exercise total control over the amount to be paid. However, it would damage the long-standing policy of cooperation in adjudicating such claims and possibly subject members of its force or civilian component to criminal prosecution.

e. Federal Tort Claims Act

Another avenue, albeit a narrow one, is available to environmental claimants through the Federal Tort Claims Act (FTCA).[230] Under the F the federal government has consented to waive its immunity from suit for certain types of tort damages. Specifically, it may be sued "for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act

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[229] USF members are insulated from civil liability for acts committed in the course of official duty. Id. at para. 5(g). But for acts "out of scope," payment of a recommended award does not, however, extinguish an injured party's right to seek redress in court for all or part of his damages. Id. at para. 6(d).

[230] 28 U.S.C. § 1346, 2671-2680 (1988).

or omission occurred."[231] Some torts, however, are excluded from coverage. The FTCA states that the government is not liable in tort for damages for "any claim arising in a foreign country."[232] The purpose of the exemption is to prevent the US from being subject to "liabilities depending on the laws of a foreign power."[233]

On its face, it would appear that the FTCA does not apply to foreign environmental damage claims. However, claims by foreign individuals for damages received outside the US have been allowed under the FTCA when the actionable wrong committed by US officials is alleged to have occurred inside the US.[234] These are referred to as "headquarters claims" and

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[231] Id. at § 1346(b).

[232] Id. at § 2680(k).

[233] United States v. Spelar, 338 U.S. 217, 221, 70 S.Ct. 10, 12, 94 L.Ed. 3 (1949).

[234] Price v. United States, 707 F.Supp. 1465 (S.D.Tex. 1989)(foreign acts exception did not bar claim of German nationals for loss of photographic archives and watercolors painted by Adolph Hitler which were seized by the US Army in May 1945 in Germany. Wrongful act was not the seizure of the property but the denial by US officials of owner's demand for return); Orlikow v. United States, 682 F.Supp. 77 (D.D.C. 1988)(foreign acts exception did not bar claim against CIA for negligent funding and inadequate supervision of employees during research experiments in Canada resulting in injuries to unwitting human subjects); Vogelaar v. United States, 665 F.Supp. 1295 (E.D.Mich. 1987)(foreign country exclusion did not bar claims based on government's failure to identify remains of servicemember killed in Vietnam, to extent alleged acts or omissions occurred in US); In Re "Agent Orange" Product Liability Litigation, 580 F.Supp. 1242 (E.D.N.Y. 1984), aff'd, 745 F.2d 161 (2d Cir. 1984)(government motions to dismiss the claims of spouses and children of Vietnam servicemen based on the foreign country exception were denied because facts were insufficient to determine where the

typically involve allegations of negligent guidance, by an office within the US, to employees who cause damage while in a foreign country.[235] They, therefore, "arise" in the US and not in a foreign country.

They can be difficult to prove because the plaintiff "must establish some plausible proximate relationship between the negligence in the United States and the resulting damage in the foreign country."[236] Another hurdle for the claimant to overcome is the discretionary function exception. The FTCA

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decisions relating to the misuse of herbicide spraying took place); Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979)(Sami sued the US under the FTCA for false arrest, false imprisonment, abuse of process, assault, battery, etc. when he was wrongfully detained in Germany by German officials acting on the misguided request of the Chief, US National Central Bureau, the US liaison with Interpol.

[235] Eaglin v. United States, Dept. of the Army, 794 F.2d 981 (5th Cir. 1986)(claim that officials in US failed to warn plaintiff of ice hazards in Germany); Beattie v. United States, 756 F.2d 91 (D.C.Cir. 1984)(air traffic controllers in Antarctica were negligently trained and supervised by officials in Washington, D.C.); Sami v. United States, supra note 234; Leaf v. United States, 588 F.2d 733 (9th Cir. 1978)(drug investigation negligently planned and executed by officials in US caused plane to crash in Mexico); In Re Paris Air Crash of March 3, 1974, 399 F.Supp. 732 (C.D.Cal. 1975)(negligent control over design, manufacture and maintenance of McDonnell Douglas and General Dynamics activities in California).

[236] Cominotto v. United States, 802 F.2d 1127, 1130 (9th Cir. 1986)(Secret Service activities in Thailand on undercover drug operation insufficient to support "headquarters claim" for injury to plaintiff who was shot in leg when he met with suspects contrary to Secret Service instructions); Eaglin v. United States, Dept. of the Army, supra note 235 (court could find no nexus between slip and fall on black ice in Germany and a failure to warn in the US); Grunch v. United States, 538 F.Supp. 534 (E.D.Mich. 1982)(US negligence was "relatively minor in proportion" to acts which occurred in Germany).

excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[237] A claimant must prove the official owed him a duty that was not within the official's discretion to disregard.[238] But, assuming an environmental damage claimant can trace a negligent decision back into offices within the US, it may not be difficult to find a US law that created an actionable duty-- especially as pertaining to the environment. Liability is determined by the law of the place where the negligent act or omission occurs, and not necessarily at the site of the injury or the place where the negligence has its

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[237] 28 U.S.C. § 2680(a) (1988).

[238] Under section 2680(a) of the FTCA, the federal government retains its sovereign immunity for discretionary acts. The success of a suit may thus depend on the characterization of the government activity that caused the injury. For example, in United states v. S.A. Empresa De Viacao Aerea Rio Grandense, 467 U.S. 797 (1984), reh'g denied, 468 U.S. 1226 (1984), the plaintiffs alleged that the Civil Aeronautics Agency (which became the FAA) had been negligent in failing to adequately inspect a Boeing 707 for fire hazards in the course of certification for commercial use. On July 8, 1978 a mid-flight fire caused 124 of the 135 people on board to die of asphyxiation or the effects of the toxic smoke produced by the fire. The Court held that the FAA's regulatory authority was discretionary and denied recovery under the FTCA. In certifying the air-worthiness of the plane, FAA had conducted a "spot check" of the manufacturer's work. The Court reasoned that the practice of spot checking was not to ensure the aircraft was safe for commercial use, but to motivate the manufacturer to comply with established minimum standards. The government had placed the duty of upholding air safety standards on the manufacturer and not on the FAA. The FAA retained only the duty to police compliance by methods within its discretion.

"operative effect."[239] This means that US officials can be held to US standards of care as to liability.

Claimants must assert the headquarters theory from the outset of their claim to maintain the FTCA as an avenue of recovery. Foreign claims are adjudicated under the IACA or FCA by the government agency responsible for the damage in the foreign country.[240] A denial of the claim without asserting FTCA allegations would preclude the claimant from later raising it as a theory of recovery in US district court. This is a very narrow theory of recovery, but nevertheless available to foreign plaintiffs as well as US civilian employees and military dependents.

In summary, environmental claims may be presented by host nations or their inhabitants against the US for damage to property outside the military installations provided to the US. The claims procedures agreed to under the SOFAs are the avenue through which they are settled. The processing of claims by parties other than the host nation (third parties) are clearly set forth in the agreements. For countries where US bases are owned and used by the host's military forces, and environmental damage arises in connection with the functioning of the applicable treaty, the US is generally relieved of liability to the host. Damage to host nation property not

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[239] Sami v. United States, supra note 234 at 762. See also, Richards v. United States, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962).

[240] 28 U.S.C. § 2675 (1988).

used by its armed forces however, is subject to the same cost-sharing formula as for third parties. It is impossible to generalize as to the degree of US liability for damage to its exclusive use bases-- in many cases it will be shard with other nations and subject to complex negotiations. Liability to the host upon departure, however, is usually addressed separately in provisions regarding termination, residual value and offset.

f. Residual Value and Offset

Because of the massive investments in facilities and infrastructure that would be made the US negotiated with each of its hosts the disposition of property that would remain upon its departure. The value that a facility is presumed to have after the US has no further use for it is referred to as residual value. Congress made very clear that it expects to receive reimbursement from host nations. It demanded a report from DOD estimating the worldwide inventory of residual values and directed DOD to negotiate for maximum residual values where possible.[241]

Some agreements completely waive payment for residual

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[241] NDAA FY91, supra note 16, at § 2921. The money received from such negotiations will go into a fund dedicated to environmental maintenance, repair and environmental restoration of CONUS military bases. Id. at para. c.

value and claims for offsetting damages;[242] some only mention it, leaving details open to future negotiation;[243] and some do not even recognize the concept.[244] Closely related to the negotiation of offsets is the duty to restore discussed above. Residual value is compensation paid by the host to the US that

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[242] See, the Technical Agreement in Implementation of the Defense Agreement between the United States of America and Portugal, signed May 18, 1984, supra note 191. The SOFA for Korea, which has language similar to that of Japan's, states:

> Facilities and Areas - Return of Facilities
> 1. The Government of the United States is not obliged, when it returns facilities and areas to the Government of the Republic of Korea on the expiration of this Agreement or at an earlier date, to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate the Government of the Republic of Korea in lieu of such restoration.
> 2. The Government of the Republic of Korea is not obliged to make any compensation to the Government of the United States for any improvements made in facilities and areas or for the buildings and structures left thereon on the expiration of this Agreement or the earlier return of the facilities and areas.
> 3. The foregoing provisions shall not apply to any construction which the Government of the United States may undertake under special arrangements with the Government of the Republic of Korea.

Korean SOFA, supra note 158, at Article IV.

[243] "At the termination of any operation under this agreement, the United States will be compensated by the Netherlands Government for the residual value, if any, of installations developed at the expense of the United States under this agreement. The amount and manner of compensation shall be determined between the appropriate authorities of the two Governments." Netherlands SA, supra note 176, at para. 3. Similar provisions exist in the agreements with Turkey, Panama and Greece.

[244] The Spanish DCA makes no reference to residual value. The U.S. is to leave its permanent improvements in Spain "in serviceable condition" provided the U.S. incurs "no additional expense thereby." Supra note 150, at Art. 19, para. 3.1.

may or may not be reduced by an offset for damages. Restoration costs are paid (or performed) by the US to the host at departure. Research has not disclosed any agreements including both concepts. Some agreements tersely state that the US will be paid for "residual value, if any."[245] This phrase is not an explicit reference to offsets for damage, but it does contemplate a negotiation over whether the facility has a reduced or zero residual value. Age and deterioration are the obvious causes of such a reduction, but the language of the agreements is not so limited and does not discount offsets for environmental deterioration.

Prior to engaging in negotiation the US must ascertain its initial bargaining position on the value of the property. It must then affect an adjustment in that value, either internally or through negotiation, for environmental damage and/or failure to maintain and repair. This process brings to light major judgment calls to be made by policy-makers. With what degree of vigor should the US search out sites with contamination? Who should pay for such a search? How much information should be disclosed to the host prior to negotiations? Should the US assess the cost of damages and reduce its residual value demand? Or, should the US calculate and assert residual value without reductions allowing the host to calculate the setoff? Can off-installation claims be set off against residual value? What about claims for damage to

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[245] See, note 243.

other installations? Should setoffs occur for each individual base or be accumulated for all bases in country?

Environmental cleanup is expensive, even for minor contaminations. Therefore, environmental damage will play a major role in most closure negotiations. Reference to Germany provides an example of how environmental claims and residual offset work in tandem-- especially with regard to Germany's unique damage waiver.

Article 52 of the German SA provides that when the US releases an accommodation that was made available for its use by Germany, the US shall be reimbursed for the agreed residual value of its improvements. However, Germany may set off the value of such improvements against its claims for damage.[246] So long as the US continues to use an accommodation provided by Germany, it cannot be required to pay for an on-base cleanup.[247] This is because under Article 41, the FRG waives all of its claims against the sending state for damage to property it owns and makes available to the sending state, except for damage caused willfully or by gross negligence. However, once the accommodation is closed and released to Germany, the waiver of liability, in effect, no longer applies and residual value may be decreased by the amount of all

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[246] German SA, supra note 166, at Art. 52, para. 2.

[247] Subject to one's interpretation of the U.S. duty of "repair and maintenance" under Article 48, the applicable German safety standards under Article 53, and that the contamination does not migrate off-installation to impact German "interests."

damages to the property.[248]

The Protocol of Signature to the Supplementary Agreement, regarding Article 52, provides that the German authorities, in reaching agreement on residual value, shall base their position on "the military or economic use which the improvements have for these authorities, or on the net proceeds of sale, if any." Congress has directed DOD to negotiate residual value based on "highest use."[249] The determination of reimbursement for residual value will involve a complex mix of valuation, apportionment for mixed funding improvements, and damage assessment, with setoff against setoff.[250] The process of calculation of residual value is beyond the scope of this paper.

At this point, it is helpful to summarize the different categories of environmental claims that the US may face at closing bases. Throughout the world hosts have waived claims for damage to property they own which is used by their armed forces. They have not waived claims for damage to property not used by their armed forces-- "other property." The US has promised to share payment of these claims. Where the US has

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[248] Until closure, the U.S. has the options of inaction, cleaning at its own expense out of O&M funds, finding other responsible parties to share costs, negotiating a German cleanup, or waiting for closure and offset.

[249] NDAA FY91, supra note 16, at § 2921(b)(2)(A).

[250] Memo for the Office of the Judge Advocate General, Headquarters, Dept. of the Army from the Office of the Judge Advocate, HQ USAREUR, Residual Value, 14 May 1990.

the right to return a property 'as is,' there is limited basis for claims or offset at termination. However, there may be a duty to restore the property, which would create a basis for claims. Setoff provisions do not create a legal basis for claims, they simply identify the fund of money-- agreed residual value-- from which damages can be recovered. Environmental damage to property outside the accommodation, such as to an adjoining farm or village water supply, would constitute a third party claim. Under the FCA, the US adjudicates and pays 100 percent of the claim, under local law. Under the IACA, the US pays 75 percent of the amount adjudicated by the host. Residual value setoff would not be involved in off-installation damage to third parties but may be involved in damage to host nation property.

3. Criminal Liability

Assuming for the moment that no host nation civil environmental laws applied to the US, DOD personnel must still be wary to avoid violation of environmental crimes statutes. For example, the Federal Republic of Germany amended its penal code in 1980 to redefine noncompliance with environmental laws as a serious crime and not a petty offense. The move reflected changes in social attitudes and sharpening of public consciousness.[251] Today a person accused of creating a

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[251] Not only were sanctions stiffened, but improved methods of detection led to an increase in filed complaints from zero in 1973 to over 16,000 in 1987. 45% of all the

serious hazard to the environment and a substantial endangerment to human life or the common water supply faces up to 15 years in prison.[252]

The application of international law, as it ranges between the principal of territorial sovereignty and the law of the flag, recognizes both the duty of a host state to protect the persons and property of its nationals and the duty of the sending state to maintain discipline over its force. Where international law recognizes more than one valid claim of jurisdiction the accused has no personal right to be tried by one sovereign rather than the other. This is a matter for the two governments to determine between themselves.[253] As pertaining to US forces stationed overseas, the US position is that "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its

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complaints were filed by common citizens. Laws to Discourage Polluters Generally Viewed As Satisfactory in 12 Countries Surveyed, But Enforcement Remains Source of Concern, 11 Int'l Env't Rep. (BNA) 242, 256 (April 13, 1988).

[252] Only 1,536 crimes against the environment were prosecuted in 1986, although 14,853 criminal complaints were registered. Most cases brought before the courts are for dumping waste water without a license or disposing of solid waste. Id.

[253] United States ex rel. Demarois v. Farrell, 87 F.2d 957, 962 (8th Cir. 1937), "When a person has violated the criminal statutes of two different sovereigns, it is for the interested sovereigns and not the criminal to settle which shall first inflict punishment."

jurisdiction."[254] To apportion criminal jurisdiction, a formula has been negotiated which is nearly uniform in every SOFA. The formula provides for a dual system distinguishing cases as being either exclusive jurisdiction or concurrent jurisdiction.

SOFAs grant to one party exclusive jurisdiction over offenses committed solely against its own laws. Where jurisdiction is concurrent because laws of both states have been violated, the question of primary right to exercise jurisdiction is sometimes delicate and may lead to disputes between the local authorities and military commanders. Accordingly, status of forces agreements normally allocate the primary right to exercise jurisdiction in categories of concurrent jurisdiction offenses. The allocation formula in general use grants the primary right to the receiving state in all concurrent jurisdiction cases except inter se[255] cases and official duty cases.[256] Flexibility is retained by using provisions which assume that a state may be willing to forego

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[254] Wilson v. Girard, 354 U.S. 524, 529, 77 S.Ct. 1409, 1412 (1957).

[255] Offenses committed by members of the visiting force against their own government, other members, or accompanying dependents or civilians.

[256] Throughout the negotiation of the SOFA, the U.S. representative strongly reiterated the U.S. view that only the sending state is in a position to determine whether a particular alleged offense arose out of an act done in the performance of official duty. In practice the U.S. has consistently adhered to this position. Air Force Pamphlet 110-3, Civil Law, 11 December 1987, paragraph 19-19(d).

its primary right to exercise its concurrent jurisdiction in a particular case or class of cases. Most SOFAs contain more or less formal procedures for processing requests for these waivers of jurisdiction.[257] Each state is required to give "sympathetic consideration"[258] to waiving its primary right to exercise concurrent jurisdiction, if so requested by the other state. In some agreements, this waiver concept has been institutionalized further; the host nation agrees in advance to give a more or less blanket waiver of its jurisdiction over all concurrent jurisdiction offenses with the right to recall its waiver if a specific offense is of particular concern to it. Only a few countries have agreed to advance waiver formulas; consequently, in most countries, a waiver must be requested from the host for each individual offense. The FRG has agreed to an advance waiver, subject to recall in cases where "major interests of German administration of justice" are involved.[259] Because of very close cooperation between the forces and the justice ministries at the federal and state levels, however, the Germans rarely exercise their right to

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[257] See, NATO SOFA, supra note 29, at Art. VII.

[258] "The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance." NATO SOFA, id. at Art. VII, para. 3.

[259] German SA, supra note 166, at Art.19, para. 3.

recall.[260]

Jurisdiction over offenses committed in the performance of official duty is retained in SOFAs because of the strong interest of the US in maintaining control over the official acts of the force for which the US and its commanders are responsible. There is also a strong interest in ensuring that the performance of military duty is reviewed and judged according to standards which do not vary from country to country. Host country agreements on this question have historically been regarded as a condition precedent to the assignment of US forces in substantial numbers to a foreign country.[261]

Standard SOFA provisions permit US law enforcement personnel to act on base in support of the commander's responsibility for the safety and security of US personnel and property and in connection with the exercise of criminal jurisdiction over US military personnel. In cooperation with local authorities, visiting forces military police also may be authorized to exercise police authority over US military personnel off base.[262] Agreements regarding the manner in which US military law enforcement efforts will be carried out are normally viewed as expressions of host country permission

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[260] Parkerson, The Stationing Agreements and Their Impact at the Federal German Level: A Bonn Perspective, The Army Lawyer, February 1986, at 13.

[261] AFP 110-3, supra note 256, at para. 19-19(a).

[262] See NATO SOFA, supra note 29, at Art. VII, para. 10.

for certain activities and not as independent US legal authority for the actions in question.[263] Cooperation by US military police and investigative agencies with local police authorities is both common and required by the terms of most SOFAs.[264]

USF personnel therefore have limited personal immunity from prosecution for violations of host nation criminal laws. This generates concern for how to protect civilian employees and especially local national employees. Under the NATO SOFA, the US has the primary right to exercise jurisdiction over the offenses of its military members and civilian employees where the act or omission complained of arises in the performance of official duty. The host has primary jurisdiction over all other offenses. If prosecution is initiated against a member of the USF for an alleged criminal violation which occurred in the performance of official duty, the US may assert its primary right of jurisdiction thereby insulating the individual from local criminal law. Civilian employees, and

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[263] AFP 110-3, supra note 256, at para. 19-24(d).

[264] See NATO SOFA, supra note 29, at Art. VII, para. 6 (authorities shall assist each other in investigating offenses and collecting evidence), Panama SOFA, supra note 159, at Art. VI, para. 7 (authorities shall assist each other in conducting all investigations), Japan SOFA, Agreed Minutes Regarding Facilities, supra note 157, at Art. XVII, para. 2 (Japanese may not search, seize or inspect without US consent), Minutes to Korean SOFA, supra note 158, at Art. XXII, Re para. 10(a) and 10(b), at paragraph 2 (Korean authorities will not "normally" exercise their right to search, seize and inspect without US consent and the US will undertake the inspection), Turkish SA, supra note 180, at Art. XI (US installations subject to inspection by the appropriate Turkish authorities).

especially local national employees, who violate local environmental laws can not be so shielded.[265] Violators of environmental statutes are also subject to administrative fines. Title 10 U.S.C. 1037 authorizes the Secretaries concerned to employ counsel to represent US military personnel (including dependents and certain civilian employees) before foreign judicial tribunals and administrative agencies.[266]

It is DOD policy to maximize US jurisdiction by certifying, to the extent permitted by the agreements, that alleged offenses are committed in the performance of official duty.[267] The basis for this policy is the desire to assure US constitutional standards in the trials of USF members and to maintain morale and discipline in the force. For Europe, E.O. 12088 has been interpreted to require compliance with the

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[265] Although SOFAs allow the US to exercise court-martial jurisdiction over its dependents and civilian employees, the US Supreme Court has removed this authority except in the case of declared war. Reid v. Covert, 354 U.S. 1 (1957); Grisham v. Hagan, 361 U.S. 278 (1960). Thus the US cannot exercise jurisdiction over its civilians in concurrent jurisdiction cases.

[266] Military members or civilian employees (including local national employees) who are prosecuted by host nation authorities or subjected to proceedings for collection or enforcement of an administrative fine for environmental violation arising out of the performance of their official duties, may request that local legal counsel be made available to them at US government expense. The US cannot, however, pay or reimburse any fines imposed by the violation.

[267] Memorandum to three Judge Advocates General from Assistant General Counsel, OSD, SOFA Waiver Policy, 5 Feb. 1973. See also, Resolution of Ratification, with Reservations, as agreed by the Senate on July 15, 1953, included in DOD Directive 5525.1, Status of Forces Policies and Information, August 7, 1979; 32 C.F.R. § 151 (1990).

environmental pollution control standards of general applicability in the host country or jurisdiction promulgated at the national level.[268] The US government will take all available measures to protect its personnel from host country action resulting from acts or omissions occurring in the performance of official duty, but personnel who violate host nation environmental law outside the scope of their official duty will not be protected. In the long run, the interests of the US and the host community are best served only if the policy of maximizing jurisdiction is accompanied by a consistent US policy of ensuring satisfaction and compensation to aggrieved local parties.[269]

In Germany, lack of funds to remedy environmental deficiency is not a defense to prosecution. However, under the German laws, an individual cannot be prosecuted if he does not have the authority or power to prevent the environmental damage and he has notified his supervisor of the deficiency.[270] Programs that keep base commanders fully

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[268] EUCOM Directive 61-6, 15 Jan 88.

[269] AFP 110-3, supra note 256, at para. 19-17(b).

[270] Criminal offenses against the environment have been codified in Chapter 28 of the German Criminal Code (BFBl.I S. 373). This chapter proscribes conduct which is generally described by the title of each section as follows:

Section 324, Contamination of Waters
325, Air Pollution and Noise
326, Removal of Waste Endangering the Environment
327, Unauthorized operation of Installations
328, Unauthorized Handling of Nuclear Fuel
329, Endangering Areas in Need of Protection

informed of environmental misadventures focus responsibility and provide a means to defend all parties. The installation commander then bears responsibility to ensure the base is taking reasonable action to prevent criminal endangerments.[271] This provides alleged offenders in Germany with a legal defense and only requires the US to rely on an official duty waiver for one individual, the installation commander, thereby placing environmental cases straight into diplomatic channels. Such an approach, regardless of the defenses provided by local law, would bring effective control to environmental problems worldwide.

C. EC Hazardous Waste Law

European Community (EC) law controls within its member states. For purposes of Executive Order 12088, the EC

330, (Causing) Severe Ecological Hazard
330A, (Causing) Severe Hazard by Release of Poison
[A translation is contained in Annex A, USAREUR Pamphlet 550-19, 7 March 1985 and The American Series of Foreign Penal Codes, Vol. 28: The Penal Code of The Federal Republic of Germany, 232-39 (J. Darby trans. 1987).] In addition to these statutes of general applicability, all German Länder and many communities have legislation and ordinances proscribing conduct injurious to the environment. They are too numerous to list but generally deal with waste disposal and water and noise pollution. Violations of these proscriptions may also subject the offender to sizeable administrative fines. Unclassified electronic message 290800Z JUN 89 from CINCUSAREUR, Heidelberg, GE to (distribution) AIG 7530, Subj: Environmental Liability (Jun. 29, 1989).

[271] The recently passed Act on Liability for Environmental Damage, BGBl.I, No. 67, page 2634-43, § 1, December 10, 1990, also places civil liability on the shoulders of the installation commander as the "operator of the installation."

supplies another layer of standards to be factored into the analysis of what is the law of the "host country or jurisdiction." Its effect on base closures will be minimal, but worth mentioning, especially as the Community moves toward 1992 and its goal of consolidation of environmental standards.[272]

The favored form of EC action, the directive, is binding as to result while allowing member states to promulgate specific regulations adapted to local peculiarities.[273] Although some member states have a rather checkered history of enforcement,[274] directives are enforceable against

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[272] HAZMAT World, supra note 26; Haigh, The Environmental Policy of the European Community and 1992, 12 Int'l Env't Rep. (BNA) 617 (December 13, 1989).

[273] Haigh, Impact of the EC Environmental Programme: The British Example, 4 Conn. J. Int'l. L. 453, 456 (1989). The Treaty grants concurrent jurisdiction between the EC and the member states in environmental protection and regulation. Essentially, concurrence under the Treaty is similar to the federal-state relationship in the United States, retaining sovereignty over matters not relinquished. As long as the Community has not preempted the field in a specific substantive area (authorized by the treaties), the member states may legislate as they see fit, assuming that the local regulation is not contrary to the spirit of the treaties. Smith and Falzone, supra note 27.

[274] Note, The Environmental Policy of the European Economic Community to Control Transnational Pollution-- Time to Make Critical Choices, 12 Loy. L.A. Int'l & Comp L.J. 579, 596-99 (1990). Directives set forth requirements that member states must adopt and implement. They are binding on member states as to the results to be achieved, but allow member states to choose the methods of implementation. Enforcement is left to the bureaucracies of the member states. The result is that Community environmental law has tended to be an elaborate facade, with few teeth to concern the actual polluters. Smith and Falzone, supra note 27.

recalcitrant governments before the European Court of Justice.[275] The two main pillars of EC hazardous waste regulation are the 1975 Directive on General Principles of Waste Disposal[276] and the 1978 Directive on Toxic and Dangerous Waste.[277] The EC has also adopted a directive specifically outlawing the dumping of waste oils into surface or groundwater or onto soil.[278]

Germany implemented the EC's 1975 and 1978 Directives

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[275] Treaty of Rome, Articles 169-188, 298 U.N.T.S. 3 (1958).

[276] Council Directive on Waste, Art. 4, O.J. Eur. Comm. (No. L194) 39 (1975). The 1975 Directive obligates members to ensure that waste is disposed of without injury to health or risk to air, water or soil; without causing a nuisance; and without adversely affecting the countryside. To meet this obligation, the directive requires members to formulate disposal plans, establish permitting systems for TSDs, and prevent uncontrolled disposal of wastes. It requires them to monitor and supervise installations and enterprises that produce, hold or dispose of toxic and dangerous wastes, and to establish records regarding disposal and carriage of special wastes. O'Connor, Issues Involved in Draft Proposal for Directive on Civil Liability for Damage Caused by Waste Examined, 10 Int'l Envt. Rep. (BNA) 540 (October 14, 1987).

[277] Council Directive on Toxic Waste, O.J. Eur. Comm, (No. L84) 43 (1978). The 1978 Directive specifies 27 generic types of wastes and requires members to enact regulations to ensure their proper transportation, treatment and disposal. Members may decide on their own hazardous waste definitions, manifesting procedures and determine the quantities and concentrations of the listed substances that will make them toxic or dangerous. They must ensure that hazardous wastes are disposed of only through licensed disposers whose disposal facilities are supervised by the national authorities. O'Connor, supra note 276.

[278] Council Directive on Disposal of Waste Oils, O.J. Eur. Comm. (No. L194) 31 (1975). Much of the volume of hazardous waste contamination on or around military installations is in the form of petroleum products in soil and groundwater.

through the Abfallbeseitigungsgesetz (AbfG).[279] The AbfG provides technical definition of hazardous wastes; wastes coming within that definition are listed in a statutory ordinance, which contains 86 waste types. The Länder can enlarge the list and some have done so. An administrative order stipulates manifest procedures, recordkeeping, and other control measures. The AbfG imposes special licensing requirements on transporters and disposers, including reliability of the applicant, appointment of works supervisors for wastes, and closure of sites.[280]

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[279] Waste Avoidance and Management Act of 27 August 1986 (BGBl.I S.41). Although not covered in any provision of the SOFA or SA, the disposal of hazardous waste in Germany can, as a practical matter, only be effected by strict compliance with the AbfG. Hazardous waste can only be disposed of by delivery to special hazardous waste depositories. Unlike the US system, the German system does not have a quantity threshold to trigger the point at which an activity is regulated. All generators are regulated and there is no provision for relaxed permit requirements for accumulation versus storage. Martino, Wentz, and Kavianian, Hazardous Waste Management-- A Comparison of the Federal Republic of Germany and U.S. Systems, 12 Int'l Env't Rep. (BNA) 562, 565 (Nov. 1989) [hereinafter Comparison]. Neither German firms transporting such hazardous wastes nor the depositories themselves will accept the waste without full compliance with German environmental laws and requirements, including the maintenance of detailed records for providing an audit trail. Questions for the Record, supra note 162.

[280] M.A. Prabhu, Toxic Chemicals and Hazardous Wastes: An Overview of National and International Regulatory Programs, 11 Int'l Env't Rep. (BNA) 687, 692 (December 1988). The German federal government relies on the Lander for the implementation and enforcement of hazardous waste regulations. In the US, the EPA implements and enforces the RCRA regulations until a state is delegated that authority. Comparison, supra note 279, at 570. Unlike the United States, however, there is no significant private right of action to compel compliance with hazardous waste disposal laws, but the federal and state governmental authorities do have recourse to the courts for

What may be of more importance to American installations in EC nations is the Commission's draft directive on civil liability for damage caused by waste.[281] The directive will not impact the US as an immune sovereign but could significantly change the present atmosphere of cooperation as host nations come under pressure from a larger community of plaintiffs.

The draft directive on civil liability for damage caused by waste was submitted by the Commission on 1 September 1989.[282] Article 2 of the proposal defines waste very

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enforcement. Rubinstein and Wittebort, Environmental Law and Foreign Investment in the U.S. and the E.E.C.: A Practitioner's Guide, 69 Mich. L.J. 644 (July 1990). The cleanup of abandoned waste sites is more decentralized than in the US where EPA manages the Superfund. Under the AbfG, the Länder are required to take the lead in the cleanup of abandoned sites and must bear the costs of cleanup if the polluter cannot be traced or if liability cannot be established. Comparison, supra note 279, at 570.

[281] Draft Directive on Civil Liability for Damage Caused by Waste, O.J. Eur. Comm. (No.C251) 3 (1989) [hereinafter Draft Directive]. In Germany, private actions for personal injury and property damage resulting from hazardous waste disposal are possible. A kind of negligence action is available, particularly for injury to property interests. Hager, supra, note 225, at note 11. Strict liability can be applied to polluters if injury results from ground water contamination. Damages for prevention of contamination as well as for personal injury are recoverable. Id. at 967-68. However, these are actions that fall within Article VIII of the SOFA and U.S. liability is limited to 75 percent.

[282] The executive organ of the EC, the European Commission, proposes directives to the Council of Ministers, which disposes of directives with formalized consultation from the European Parliament. A draft directive then is a directive from the Commission, proffered for approval by the Council. The drafting of a proposal by the Commission does not guarantee acceptance by the Council, but once it has been accepted it has the force of law.

broadly as "any substance or object which the producer disposes of or is required to dispose of pursuant to the provisions of national law in force." It excludes nuclear wastes and oil polluting wastes covered by other international conventions to which all the member states are signatories.[283] Article 1 provides that the "the producer of waste shall bear civil liability for damage caused from waste from the moment it arises" until it is handed over to an authorized disposal facility or a recycling plant.[284]

Liability is independent from fault,[285] joint and several.[286] The standard of proof is somewhat ambiguous, requiring a showing of "overwhelming probability of a causal relationship between the producer's waste and the damage..."[287] "Damage" includes death and/or injury, damage to property, and all environmental damage, including the cost of cleanup measures.[288] No contractual "hold harmless" agreements are allowed.[289] Private plaintiffs are given a

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[283] Draft Directive, supra note 281, at Art. 3.

[284] Id. at Art. 4.

[285] Id. at Art. 3 ("the producer of waste shall be liable under civil law for damage . . . irrespective of fault on his part.").

[286] Id. at Art. 5.

[287] Id. at Art. 4 para. 6.

[288] Id. at Art. 1, para. c.

[289] Id. at Art. 8.

civil cause of action and may enjoin dumping[290] as well as recover for mitigation,[291] compensation,[292] restoration,[293] and indemnification.[294] For example, under one reading of the proposed directive, a homeowner in Germany who finds toxic substances buried near his land could sue for lost property value, rashes on his body, and to enforce a cleanup. By granting a right of action to individuals, public interest groups and member states, the effect of the proposal would be to place a citizen in the position to act as a private attorney general.[295] At present, German law does not contain the citizen suit provisions common to US environmental law that grant public interest groups standing to sue.[296]

Defenses under the proposal would be limited to war and contributory negligence. Regulatory compliance would not constitute a defense. The proposed directive contains no

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[290] Id. at Art. 4, para. 1(a).

[291] Id. at para. 1(b).

[292] Id. at para. 1(c).

[293] Id. at para. 1(d).

[294] Id. at para. 1(e).

[295] The concept of strict liability for pollution damage has become part of the domestic laws of France, Germany, and Spain and is being considered in the Netherlands. EC Waste Liability Proposal Could Pave Way for Private Enforcement System, 14 Int'l Env't Rep.(BNA) 134 (March 13, 1991).

[296] Greve, The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law, 22 Cornell Int'l L.J. 197 (1989).

damage ceiling[297] but does not allow punitive damages.[298] Other terms adopt uniform limitations periods, opting for three years from when a party "became aware or should have become aware of damage or injury"[299] and an absolute extinction of the right to legal remedy after thirty years.[300]

As has been previously discussed, the claims liability of the US is assessed under local law through the provisions of the NATO SOFA. The proposed Directive will initiate revisions of the law of all EC members that could have a direct impact on the claims funds of the US. Whether the proposal ever becomes enacted is open to doubt, but if it does, it could magnify the legal complexity and political sensitivity of US environmental activities.

IV. POLICY DEVELOPMENT

Worldwide, the DOD has a very limited legal duty to restore its facilities prior to departure. The environmental pressure on the US is more political than legal. International law is of limited application because it is restrained and defined by our agreements. Other than for Panama, the international agreements expressly provide for

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[297] Id.

[298] Draft Directive, supra note 281, at Art. 1, para. c.

[299] Id. at Art. 9, para. 1.

[300] Id. at Art. 10.

little restoration. Other than for Panama and Germany, local environmental standards are not a mandatory consideration. Provisions regarding residual value calculation and offsets for damage alleviate the necessity for immediate cleanup. Off-installation damage is covered by claims provisions. On-installation damage for installations owned and used by the host is usually waived. On-installation damage claims, if asserted, are subject to sharing if the parties do not agree otherwise. On-installation damage claims are, arguably, not even assertable at closure if the parties have agreed to calculate residual value. Only at an installation where the US has had exclusive use, a duty to restore, and there is no calculation of residual value, is the host in a strong position to assert claims for damages. The obligation of the US to leave behind a clean installation is therefore mostly moral. The policies being generated to address the issues are in response to Presidential Executive Orders, the interest and concerns of the Defense Department secretaries involved, and the Congress.

To hide behind technical legal arguments to avoid responsibility for environmental damage would be both naive and shortsighted. Environmental management overseas is technically complex and politically sensitive. To be effective, the US approach must be both clear and consistent worldwide while adapting to the unique circumstances existent within each country in which US forces are stationed. This

mandates a country-by-country approach to be applied worldwide. Attempts to simply apply US standards to all US overseas bases could contradict local laws and display US arrogance to host nation officials and laws. But the variety of standards imposed on the DOD by international agreement for environmental protection varies from none, to 'adequate,'[301] to 'at least as stringent as local law,'[302] to 'all practicable measures to remove every hazard.'[303] The reasons to establish a baseline guidance, applicable everywhere, are compelling, and many corporations with worldwide operations are undertaking such an effort.[304] The DOD policy attempts to balance a guiding set of worldwide environmental standards with country-by-country adjustments.

A. Compliance

An environmental compliance policy has been developed and approved and is presently being formatted into a DOD Directive.[305] It requires that a "baseline guidance" be

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[301] Spanish DCA, supra note 150, at Art. 20, para. 4.

[302] German SA, supra note 166, at Art. 53.

[303] Panama SOFA, supra note 159, at Art. IV, para. 4.

[304] Rappaport and Flaherty, Multinational Corporations and the Environment: Context and Challenges, 14 Int'l Env't Rep. (BNA) 261 (May 8, 1991).

[305] Rather than sign and distribute a policy letter, Mr. David Addington, Special Assistant to the Secretary and Deputy Secretary of Defense, directed that the policy be placed in a DOD Directive [hereinafter Draft Policy]. Interview with L. Hourlce', Colonel, USAF, the senior attorney in charge of base

developed to be applied worldwide "when local environmental standards do not exist, are not applicable, or provide less protection to human health and the natural environment than the baseline guidance."[306] The baseline guidance will be developed in accordance with generally accepted environmental standards for similar installations, facilities and operations in the U.S., and the requirements of US law that have extraterritorial application.[307] It will apply to all of DOD's overseas operations.[308]

A Military Department or Subordinate Unified Command will then be designated as the Executive Agent for each foreign country where DOD has installations or facilities.[309] The Executive Agent will implement the policy and tailor the baseline guidance to the circumstances of each foreign nation. The Executive Agent is required to identify the host nation's national environmental standards, including those specifically delegated to regional or local governments, and determine

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closures and environmental matters in the Office of the Assistant General Counsel (Logistics), Dept. of Defense. The policy was presented and explained by Mr. Thomas E. Baca, Deputy Assistant Secretary of Defense (Environment) before a hearing of the House Armed Services Committee, Defense Readiness Subcommittee, Defense Environmental Restoration Panel on April 17, 1991.

[306] Draft Policy, para. C.1.b. (a copy of the Draft Policy is reproduced at Appendix A).

[307] Id. at para. C.1.a.

[308] Id. at para. B.2.

[309] Id. at para. D.2.

their applicability to DOD operations at installations and facilities in that country. In determining the applicability of particular host-nation environmental standards the Executive Agent is to take into account host-nation law, the provisions of base rights and status of forces agreements, and other relevant international agreements and principles of customary international law.[310]

The Executive Agent for each host nation must also consider the extent to which the host-nation environmental standards are adequately defined and generally in effect or enforced against host-nation government and private sector facilities. This determination will also take into account whether responsibility for construction, maintenance, and operation of a facility rests with the US or with the host nation. After evaluating all these factors, the Agent will then choose the applicable host-nation standard or the DOD baseline guidance as the governing standard for a particular environmental media or program.[311]

In selecting the final governing standard, the Executive Agent is to consult with the US diplomatic mission and coordinate with the geographic unified command and appropriate in-country or theater representatives of other DOD components operating in that country.[312] Executive Agents are also to

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[310] Id. at para. C.2.b.

[311] Id. at para. C.2.c.

[312] Id. at para. C.2.d.

consult with host-nation authorities on environmental issues "as required to maintain effective cooperation and support on environmental matters."[313] Finally, the selected standards must be revalidated on a periodic basis.[314] Once the governing standards have been issued by an Executive Agent, all DOD components conducting operations in that country must comply with them. The Unified Commander of the geographic area of responsibility in which the country is located is responsible for oversight of the Executive Agent.[315]

The greatest advantage to this policy is that it is country specific. In addition to having a decision authority who is well informed of local concerns and legalities, it avoids an otherwise excessive burden of keeping track of too many countries and legal systems at once.

The most glaring problem is that the policy allows the Executive Agent for any given country total discretion to select between the host's standard and the DOD baseline guidance and provides a somewhat confusing standard by which to weigh the competing interests involved.

> Unless inconsistent with applicable host-nation law, base rights and/or status of forces agreements (SOFAs), or other international agreement, the baseline guidance shall be applied by the DoD Components stationed in foreign countries when host-nation environmental standards do not exist, are not applicable, or provide less protection to human health and the natural

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[313] Id. at para. C.5.

[314] Id. at para. C.2.e.

[315] Id. at para. D.2.

environment than the baseline guidance.[316]

If applicable host nation law exists and is inconsistent with US guidelines, the Agent must apparently choose the standard it considers most applicable and/or legally required, and/or generally enforced by the host and/or most environmentally protective. Indeed, the Agent is required to consider the national, regional and local law of the host, base rights and status of forces agreements, other international agreements, customary international law, the vigor with which the host enforces its environmental laws, and who is responsible for construction, maintenance and operation of the facilities. If the host nation standard is deficient in any way, the Agent must presumptively fall back upon the US guideline. Simultaneously, the language seems to indicate that local law will take precedence when the US guideline is inconsistent with the local standard.

As an example which may not be unusual, consider a case where international requirements and agreements are not clear and the host makes an adequate effort to enforce an environmentally weak standard,[317] the policy directs the

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[316] Id. at para. C.1.b.

[317] When do host nation standards provide less protection to the environment than US standards? "The following questions illustrate the difficulty of this type of assessment. Are groundwater monitoring requirements which require monitoring of fewer constituents but require more frequent testing "as strict as" RCRA? Is use of a different model for assessing risks, or use of different statistical protocols or analytical methods "as strict as" RCRA? In the regulation of emissions from the incineration of hazardous

Agent to apply the US guideline unless it is inconsistent with local law. In this example, the guideline is inconsistent with an applicable local standard by virtue of the fact it is different. Must the Agent disregard its safer standard? The directive language that the US guideline "shall be applied" is quite firm and the policy would not be effected if US personnel were not protected by application of the safer US standard.

The semantic problem involves the meaning of the word "inconsistent." Does inconsistent mean 'in violation of' or 'different from'? As has been shown, the legal authorities and agreements involved will definitely not lead to a clear assessment of legal duty for the US in most nations. In fact, since US standards are some of the most stringent in the world to apply them would rarely if ever 'violate' the intended goal of a host's local law, but they might frequently be 'different than' a standard used by another nation. For these reasons, the policy is more clearly understood if "inconsistent" is read as 'in violation of.' In other words, the US will always apply its more protective standards unless they clearly

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wastes, we place emissions limits on indicator pollutants so as to control the release of several constituents. Is a system which places instead a control on different indicators, or on, for example, one metal as a means to control other metals, "as strict as" RCRA?" Waste Export Control: Hearings on H.R. 2525 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, No. 76, 101st Cong., 1st Sess. 50 (July 27, 1989)(statement of Scott A. Hajost, Associate Administrator for International Activities, Environmental Protection Agency).

violate local law, rights or agreements. Conversely, if baseline standards are not more protective, they are not to be applied. The presumption of greater environmental protection will serve the goal of protecting US personnel overseas, albeit at greater cost and effort than has been expended in the past.

B. Restoration

At bases that will remain open but have sites of historical contamination that are not migrating off-installation, what should the US do? Especially when the US does not own the property and is not required to restore the property upon departure. An Environmental Restoration Policy Overseas (ERPO) is being developed to address this question.[318] The gist of the policy is to create a simplified version of the Installation Restoration Program that has been instituted in the CONUS.[319]

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[318] Memo for the Deputy Assistant Secretary (Environment), Office of the Assistant Secretary of Defense (Production and Logistics) from Mr. Gary D. Vest, Dep. Asst. Sec. of the Air Force (Environment, Safety and Occupational Health), Environmental Restoration Policies for Overseas Installations - Action Memorandum, May 15, 1991, Attachment 1 [hereinafter Vest Letter, it is reproduced at Appendix B].

[319] The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) and the Superfund Amendments and Reauthorization Act of 1986 (SARA) established a series of programs to clean up hazardous waste disposal and spill sites nationwide. One of those programs, the Defense Environmental Restoration Program (DERP), became law as SARA § 211 and was codified at 10 U.S.C. §2701 et seq. The Installation Restoration Program (IRP), a subcomponent of DERP, is a DOD-wide program to identify, investigate and clean

Because it is not driven by US statute, ERPO professes to be "results oriented," focusing on correcting environmental contamination prudently, without unnecessary study and document preparation. Its intention is to systematically identify, evaluate, and correct, as appropriate, environmental contamination resulting from present and past practices in the storage, handling and disposal of hazardous materials and wastes. When cleanup is necessary, it will be to "the most economical and best technically achievable levels which protect human health and the environment, or which have general applicability within the host nation concerned, whichever are more protective of human health and the environment."[320] The Executive Agent for each country is charged with developing a baseline restoration standard.[321]

ERPO will have three key phases: Identification/ Assessment; Prioritization/Consultation; and Characterization/ Remediation. In the first phase, each installation will identify its sites which may contain contaminants posing a threat to human health or the environment. This is a very broad search that encompasses a systematic collection of all

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up past disposal sites within the U.S. It operates consistent with the National Oil and Hazardous Substances Pollution Contingency Plan, the NCP. It is funded by defense appropriations to a special transfer account, the Defense Environmental Restoration Account (DERA). 10 U.S.C. § 2703 (1988).

[320] Vest Letter, supra note 318, para. B.

[321] Id. at para. D.4. and 6.

available data.[322] If sites presenting an "imminent and substantial threat to public health or the environment" are discovered, immediate action must be taken to eliminate the threat. If a site presents "no significant threat," presently or to the future, it is to be closed. All other sites are to be documented for action under the next phase.[323]

The Prioritization/Consultation phase is one of negotiation. Using procedures developed by the Executive Agent, the host nation will be consulted to help determine the responsible parties, the appropriate cleanup actions (e.g., no cleanup required, removal, mitigation, full or partial cleanup, joint cleanup, or referral to the host government for its action), funding responsibilities and sources (US, host, NATO, third party, or joint), and who will perform the cleanup (US, host contract, etc.).[324] This process assumes that the US will be very candid with the information it develops in the Identification/Assessment phase, else how could the host effectively contribute to the cleanup decisions. The provisions of international agreements governing the duty to "maintain" each base do not address maintenance of the

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[322] An assessment team is to be assembled to review records and documents, interview knowledgeable personnel, conduct field inspections, collect information about past and present disposal practices, hydrogeology, local operating agreements, and soil and groundwater samples. Id. at para. C.1.

[323] Id. at para. C.1.

[324] Id. at para. C.2.

environment. This restoration policy establishes a partnership between the US and its hosts to work together to solve problems, compelling the Department to search out problem areas and then talk them through with is hosts.

The consultation will also address the establishment of mutually acceptable site specific cleanup standards. Imminent threats will be cleaned to a level meeting "a recognized consensus standard for protection of human health."[325] This is a more simplified standard and will facilitate swift action. All other cleanups, where DOD is partially or fully responsible, will be to the most economical and best technically achievable level which protects human health and the environment, or which have general applicability within the host nation concerned, whichever is more protective of human health and the environment.[326] The overriding goal of consultation is to arrive at a cleanup standard with agreement on who will pay and who will perform the action. The decision on baseline cleanup standards and the priority of cleanups to be performed remains with the Executive Agent.[327]

The last phase, Characterization/Remediation, will study the site for a focused confirmation of the extent and characteristics of the contamination. The appropriate cleanup

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[325] Id.

[326] Id.

[327] Id. at para. C.2.

technology will then be implemented.[328]

The most interesting aspect of this still-evolving policy is its acknowledgement of a concern for the expense of remedial action. "When cleanup is necessary it will be to the most economical and best technically achievable levels which protect human health and the environment, or which have general applicability within the host nation concerned, whichever are more protective of human health and the environment."[329] Also, "[n]othing in this policy requires or authorizes DoD Components to expend funds or use other resources to meet requirements that are the responsibility of host nations as stipulated in Status of Forces Agreements or in other U.S. and host nation agreements."[330]

The approach taken here is fiscally more cautious but overall more progressive than the past. It is possible for hosts to come on base, conduct a cleanup, and then dun the US for the expense as damage to "other property." This proactive approach of searching out and economically cleaning areas of contamination maintains control over the cleanup effort, the costs, and local political relations.

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[328] Id. at para. C.3.

[329] Id. at para. B.

[330] Id. at para. D.5.

C. Closure

In regard to closing bases, current practice is to avoid searching out previously unidentified contamination and only remediate sites that are known to pose an imminent threat to health and safety.[331] Such a policy sounds calloused but is the legally correct position. In many countries the US has obligated itself to very little in the way of environmental responsibilities. The FRG is one of few countries that obligates the US to maintain and repair its accommodations to German standards, which arguably includes environmental cleanliness.[332] The varying standards of cleanliness for closing bases provide little incentive to clean. Besides, all values and conditions of departure are negotiable. What is the U.S.'s bottom line? How much should it spend to clean property it does not own and will no longer need? Should

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[331] E.g., Memorandum from HQ USAREUR for Distribution, Environmental Considerations and Actions Applicable to Installations Being Returned to Host Nation, 10 Dec. 90, para. 3e(5):

> Do not spend time looking for new problems. In general, it is not USAREUR policy to investigate merely for "informational" purposes. Additionally, do not execute abatement or mitigation actions that are not Class I solely for the purpose of returning the facility to the host nation or increasing residual value. [emphasis in original]

Also, "Our policy for closing bases, concurred in by USAREUR and EUCOM, is to avoid searching out previously unidentified contamination and to remediate only that contamination that poses an imminent threat to health and safety." Letter from JAS (Special Assistant for NATO Legal Affairs) to HQ USAFE/DEPVE, Proposed Air Force Environmental Restoration Program for Overseas Installations (ERPO), Oct. 23, 1990.

[332] Id.

investment be made to reduce offsets and increase residual value? What is the US's duty as a responsible global citizen and steward of its properties? How much arrogance can it afford by imposing US standards on other nations or embarrassing local governments with higher standards? How should nations share the last burden of a mutual defense?[333]

A closure policy is also being developed and, as yet, has not been married with the restoration policy with which it shares great similarity. The significant difference between the two is that the closure policy, like ERPO, requires an exhaustive search for contamination but stops short of requiring cleanups to be implemented.

The baseline guidance standards, to be developed for ongoing military operations, are intended to protect US personnel as well as the environment of the host nation. The most basic motivation behind the compliance policy is the protection of US personnel and their families;[334] if US

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[333] In addition to the DM 29 billion Germany is spending to remove the Soviets from east German territory, supra note 8, it has identified over DM 20 billion of expenses needed to build or renovate 62 sewage treatment plants, 54 industrial waste water plants, 10 large coal-fired plants, 142 industrial power plants, 126 large heating facilities, 500 water purification plants and stabilize 196 of the 12,250 old waste sites discovered to date. Investment In Former East Germany Being Stymied by Pollution Problems, 14 Int'l Env't Rep. (BNA) 102 (February 27, 1991). On July 1, 1991, in order to help pay for the expenses of unification, Germany raised its income tax 7.5 percent and the price of gasoline by 55 cents pushing the average German's tax burden to nearly 45 percent of annual income. Germany Groans Under Huge Cost of Unification, Washington Post, July 2, 1991, at A11, col.1.

[334] See, NDAA FY91, supra note 15, at § 342, para. (b)(1).

personnel are entitled to minimum standards of environmental protection at home, there is no reason to deny them the same overseas. But with the departure of its personnel at base closure, so departs the largest incentive to invest the sums needed to maintain a safe environment. Nevertheless, the environmental movement has created an environmental conscience among US leaders that is aided by the desire to maintain positive relationships with world friends and neighbors by not leaving poisons in their respective backyards. But even for the most appreciated of houseguests, who strips the sheets from his bed and throws them in the washer before departure, one does not expect him to also vacuum the house and polish the furniture.

The policy being developed within the Pentagon regarding the pending closures has seven basic elements:[335]

1) Plan early to have hazardous material and waste removed from the base, or moving into disposal channels, before the departure date.[336]

2) Conduct a thorough search of all available data to identify locations which may contain contaminants that pose a threat to human health or the environment.[337] "Threat" has not yet been defined. It is the responsibility of the installation commander to determine if a threat exists.

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[335] Vest Letter, supra note 318, at Attachment 2.

[336] Id. at para. 7.

[337] Id. at para. 5.a.

3) It is the responsibility of the commander to take immediate action to eliminate imminent and substantial threats to public health or the environment.[338] He must also take immediate action to prevent the violation of any law or the creation of legal liability.[339]

4) All other threats are only to be identified and documented.[340] A site is not a threat and need only be documented when "there is no significant threat to human health or the environment."[341] Presumptively, the Executive Agent will here also decide which environmental standards determine the significance of a threat.

5) Prepare an estimate of cleanup costs for use by US negotiators.[342] The information will be kept confidential.[343]

6) Pursuant to E.O. 12114, prepare an environmental study or review to analyze environmental impacts to closing bases and to bases gaining realigned units. Socio-economic impacts are not to be addressed.[344]

7) Prepare for the host nation an Environmental Status Report summarizing the information identified above (except

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[338] Id. at para. 5.c.

[339] Id. at para. 6.e.

[340] Id. at para. 5.e.

[341] Id. at para. 5.d.(2).

[342] Id. at para. 9.b.(1).

[343] Id. at para. 5.f.(3).

[344] Id. at para. 8.

step 5) and remedial actions taken. The host is to be provided a summary of the environmental condition of the installation along with its environmentally related records.[345]

Unresolved but important is the issue of defining the "threat" to the environment. How much risk does it take to make a threat? This is a never-ending issue in the US. From an ecological perspective every human modification of nature harms the environment (or a portion of an ecosystem) to some degree. A decision-maker's definition of "threat" may range from aesthetically undesirable to socially detrimental.

Under both the restoration and closure policies, as they are developing, a vigorous search for any site that "may contain contaminants posing a threat to human health or the environment" must be conducted. For purposes of base closure, such a search is not legally required and is too broad. Hosts

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[345] Id. at para. 9.a. The environmental records to be provided to the host include: hazardous waste and material inventories; asbestos surveys and abatement records; radon surveys and mitigation records; water rights approvals; PCB surveys, retrofit, and disposal records; noise complaint logs and actions; spill response actions; underground storage tank inventories and testing records; appropriate sections of the Community Spill Control and Countermeasure Plan; landfill use, closure records, and monitoring data; air pollution emission testing and records; wastewater discharge permits and historical discharge monitoring reports; contaminated sites studies, and remedial action records; historical Environmental Compliance funding, Asbestos Abatement Fund, Hazardous Waste Disposal Fund, 1383 Report records; appropriate sections of the Hazardous Waste Management Plan; environmentally related audit reports from any source; host nation inspection reports and regulatory agency correspondence; results of physical inspections. Id. at para. 9.a.(2).

will be provided all accumulated environmental data on bases which have had imminent and substantial threats removed. They will have time to undertake their own review and decisions regarding land use planning for the sites. Therefore, the US could reduce its effort by narrowing the scope of its search to only those sites which present an imminent threat to human health and safety. The base will then be in a sufficiently safe condition for the host to undertake any actions it deems desirable.

Very specific criteria should be used to direct such searches on closing bases. Otherwise US policy will gravitate by default to spend whatever it takes to appease local communities with whom base commanders have worked hard to maintain a positive relationship. For example, threat should be defined in terms of exceeding quantitative contaminant standards established by the Executive Agent, or perhaps, exposure to quantities of contaminants beyond limits set by local or US law. Searching for any "threat to the environment" encompasses unnecessary effort.

This closure policy correctly assumes that the US is not legally responsible (as opposed to morally obligated or factually at fault) for cleanup in most nations in which its bases are located. Although at exclusive use bases hosts may rightfully argue that the US promise to share the cost (or at least negotiate) of damage to "other property" is not hollow. In many cases, residual value will be offset for environmental

damage, providing a form of compensation. It is indeed true that the host has been foisted upon by agreeing to keep American troops upon its soil. But it has also benefitted through having its own defense expenditures reduced, having often large amounts of US currency flow into its economy, and in some cases, having increased regional stability. This closure policy will send DOD out to comb its installations for problems, make the bases safe, and then inform the host of all pertinent findings. The host will be provided all historical records of possible contamination. If the US then did nothing more the host would be no worse off for the US presence than if it had maintained its own base on the same location.

IV. CONCLUSION

Just as the Berlin Wall was taken down and its rubble dispatched, so too will the US dismantle its operations at overseas bases. The legal interpretations and cooperative processes that have been erected over time to deal with environmental issues will be strained as closures bring rising cleanup costs and increasing public awareness of what the US is leaving behind. Other than guidelines self-imposed by Executive Order and congressional pressure, the only legal constraints of substance the US faces, are contained in the Status of Forces agreements.

The point of this paper has been to break down the environmental complexities of closing overseas bases into a

manageable framework and allow the reader to see 1) how environmental concerns are addressed in the various basing agreements the US operates under, 2) that they do not generally impose strict environmental burdens on the U.S., and 3) the direction in which the Department of Defense is headed in developing its policies for operating and closing bases. It is very difficult to generalize about what liability the US faces worldwide. The circumstances of each base must be analyzed from the perspective of international law down to its own site-specific agreements. The negotiations to be held with host nations will be extremely complex. US liability will turn on many factors, such as:

1) Conditions prior to US presence;
2) Contribution of other nations to contamination;
3) Residual value of US improvements (if applicable);
4) Interpretation of international agreements;
5) Congressional concerns and direction; and
6) Political circumstances.

Completely unmentioned has been a discussion of how overseas environmental projects are funded. The Department of Defense and its budget are shrinking. Millions of dollars are already spent annually on CONUS environmental programs. Will defense appropriations be increased to pay a growing overseas expense in a shrinking overseas mission? Environmental awareness may motivate a general American willingness to pay

more for a cleaner environment, but does that include the environments of other nations?

In most areas of the world, the US is not obliged to leave a clean base. For those nations that must pay the US a residual value and the value of improvements will be adequate to offset the cost of cleanup the US may be leaving an ally holding the proverbial bag. The Department is moving quickly to have its policies developed by the time its FY 93 report is due to Congress. The lawyers, engineers, and bureaucrats will then be able to step back and allow the politicians to decide how the environmental burdens of a mutual defense should be shared.

APPENDIX A

DRAFT COMPLIANCE POLICY

Department of Defense
DIRECTIVE

NUMBER

SUBJECT: DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations

References:
(a) Section 165 of Title 10, United States Code
(b) Executive Order 12344, "Naval Nuclear Propulsion Program," February 1, 1982
(c) Public Law 89-487, "Administrative Procedures Act," July 4, 1966
(d) Public Law 87-258, "Federal Tort Claims Act," September 21, 1961
(e) Public Law 91-190, "National Environmental Policy Act of 1969," January 1, 1970 as amended (42 USC 4321 et seq.)

A. PURPOSE

This Directive:

1. Establishes policy, assigns responsibilities, and prescribes procedures for establishing the implementing environmental guidance and standards to ensure environmental protection at DoD installations and facilities in foreign countries.

2. Designates the DoD Executive Agents in accordance with subsection D.1.b. and c., below.

B. APPLICABILITY AND SCOPE

This Directive:

1. Applies to the Office of the Secretary of Defense (OSD), the Military Department, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, and the Defense Agencies (hereafter referred to collectively as "the DoD Components").

2. Applies to the operations of the DoD Components at installations and facilities outside the territory of the United States.

3. Does not apply to the operations of U.S. Naval vessels or U.S. military aircraft, which shall be operated in accordance with other DoD policies and Directives and applicable international agreements.

4. Does not apply to environmental issues associated with the Naval Nuclear Propulsion Program under the jurisdiction of the Director, Naval Nuclear Propulsion Program under E.O. 12344 (reference (b)).

5. Does not apply to the determination or conduct of remedial or cleanup actions to correct environmental problems caused by the Department of Defense's past activities. Such actions shall be determined and conducted in accordance with applicable international agreements and U.S. Government policy.

C. POLICY

It is DoD policy that:

1. The Department of Defense shall establish and maintain a baseline guidance document for the protection of the environment at DoD installations and facilities outside U.S. territory.

a. That guidance shall include management practices and procedures designed to protect the environment, and shall consider generally accepted environmental standards for similar installations, facilities, and operations in the United States and requirements of U.S. law that have extraterritorial application.

b. Unless inconsistent with applicable host-nation law, base rights and/or status of forces agreements (SOFAs), or other international agreement, the baseline guidance shall be applied by the DoD Components stationed in foreign countries when host-nation environmental standards do not exist, are not applicable, or provide less protection to human health and the natural environment than the baseline guidance.

2. The DoD Executive Agent for a host nation, designated in accordance with subsection D.2., below, shall:

a. Be appointed by the Assistant Secretary of Defense (Production and Logistics) (ASD(P&L)), in coordination with the Military Departments and other appropriate elements of OSD and Defense Agencies.

b. Identify host-nation national environmental standards, including those specifically delegated to regional or local governments for implementation, and determine their applicability to DoD operations at installations and facilities in that country. In determining the applicability of particular host-nation environmental standards, the DoD Executive Agent shall consider host-nation law, base rights agreements and/or the SOFAs, and other relevant international agreements and principles of customary international law. Then, consider the extent to which the host-nation environmental standards are adequately defined and generally in effect

or enforced against host-government and private sector activities. Also consider whether responsibility for construction, maintenance, and operation of the facilities rests with the United States or the host-nation.

c. Evaluate and determine whether the applicable host-nation standard or the DoD baseline guidance is the governing standard for a particular environmental medium or program.

d. Issue the final governing standard in consultation with the U.S. Diplomatic Mission and the geographic Unified Command and the appropriate in-country or theater representatives of the other DoD Components operating in the country.

e. Revalidate the governing standard on a periodic basis.

3. On final development and distribution by the DoD Executive Agent of the governing environmental standards applicable to the DoD operations at installations and facilities in that country, the DoD Components conducting such operations are responsible for complying with those standards. (See subsection E., below, for procedures and criteria for seeking waivers or deviations from compliance with the governing environmental standards.)

4. The DoD Components should ensure that wastes generated by their operations and considered hazardous under either U.S. law or host-nation standards are not disposed of in the host nation, unless the disposal complies with the baseline guidance established under subsection C.1., above, and is in accordance with any applicable international agreement, or has otherwise received explicit or implicit concurrence of the appropriate host-nation authorities.

a. When those conditions cannot be met, the hazardous waste shall be disposed of in the United States or in other foreign territory where the conditions can be met, unless other disposal arrangements are approved by the Department of Defense.

b. The determination of whether particular DoD-generated hazardous waste may be disposed of in a host nation shall be made by the DoD Executive Agent, in coordination with representatives of the Defense Logistics Agency (DLA), and the other relevant DoD Components and the U.S. Diplomatic Mission.

c. In the event of a disagreement at the U.S. Country Team level, the issue shall be addressed using the procedures in paragraph E.1.b., below.

5. The DoD Executive Agent shall consult with host-nation authorities on environmental issues, as required to maintain effective cooperation on environmental matters.

6. The DoD Executive Agent shall also consult with the U.S. Diplomatic Mission in the host nation and the geographic Unified Command on all significant or controversial aspects of DoD environmental policy in that country.

D. RESPONSIBILITIES

1. The Assistant Secretary of Defense (Production and Logistics) (ASD(P&L)), in coordination with the Assistant Secretary of Defense (International Security Affairs), the Assistant Secretary of Defense (International Security Policy), and the Chairman of the Joint Chiefs of Staff, shall:

a. Coordinate (or consult when appropriate) DoD environmental policy for overseas installations with the Department of State, the U.S. Environmental Protection Agency, the Office of Management and Budget, and the DoD Components, as appropriate in particular circumstances.

b. After receiving the recommendations of the Unified Commanders and coordinating with the Military Departments and other appropriate elements of the OSD and the Defense Agencies, designate one of the Secretaries of the Military Departments or the appropriate Commander of a Unified Command as the DoD Executive Agent for environmental matters in each foreign country where DoD operations are conducted at installations or facilities.

c. Designate a Secretary of a Military Department that shall have lead responsibility for development and maintenance of the DoD environmental baseline guidance required by subsection C.1., above.

(1) That designated Military Department shall develop the baseline guidance as soon as possible, but not later than 18 months, after designation.

(2) In accomplishing its responsibility, the designated Military Department shall appoint an Overseas Environmental Policy Chair (OEPC) who shall then constitute a Joint Committee on Overseas Environmental Policy (JCOEP) consisting of, at a minimum, representatives of the Military Departments and the DLA.

(3) The JCOEP shall be a working committee for providing technical input and review to the designated Military Department and for coordinating policy issues among the DoD Components.

(4) The OEPC shall ensure that the JCOEP is multi-disciplinary, provides for input from, and periodic review of, its efforts by the ASD(P&L) and the Commanders of the Unified and Specified Commands, and that the baseline guidance is distributed to the host-nation DoD Executive Agents for their action under subsection C.2., above.

2. The Commander of each Unified Command with a geographic area of responsibility encompassing foreign countries where DoD operations are conducted at installations or facilities shall as soon as possible, but not later than 180 days of issuance of this Directive, recommend to the ASD(P&L), through the Chairman of the Joint Chiefs of Staff, the Military Department or the appropriate Subordinate Unified Command to be designated as the DoD Executive Agent for environmental matters in each such foreign country. The Unified Commanders shall coordinate and maintain oversight of the implementation of the baseline guidance by the DoD Executive Agents in their geographic areas of responsibility.

3. The Secretaries of the Military Departments or the Commanders of the appropriate Subordinate Unified Commands designated as the DoD Executive Agent for environmental matters in a foreign country, shall:

a. Take appropriate action to implement this Directive in such foreign country.

b. Include delegation of authority to the appropriate overseas major command or activity of the Military Department adequate to ensure the timely and effective implementation of this Directive at installations and facilities used by the DoD Components in the foreign county.

4. The Heads of the DoD Components shall ensure that their operations at installations and facilities in foreign countries including their administration and support under 10 U.S.C. 165 (reference (a)) of forces assigned to the Commanders in Chief comply with the governing environmental standards determined by the DoD Executive Agents.

a. If compliance with those standards at particular installations or facilities would seriously impair their operations, adversely affect relations with the host nation, or require substantial expenditure of funds not available for such purpose, a DoD Component may request the DoD Executive Agent to process a waiver or deviation to the particular standards, guidelines, installations, and facilities.

b. For such a request, the DoD Executive Agent shall consult with the relevant DoD Components and the Commanders of the Unified Command with geographic responsibility. Where the waiver or deviation is to a host-nation standard, the DoD Executive Agent shall consult through the appropriate U.S. Diplomatic Mission with the responsible host-nation authority.

c. If as a result of this consultation, it is determined that the waiver cannot be approved by the DoD Executive Agent, the DoD Executive Agent or the Head of the DoD Component requesting the waiver may forward the request along with a complete report to the ASD(P&L). The ASD(P&L) should consult with appropriate

officials (see subsection D.1, above) in an effort to resolve the issue. The DoD Executive Agents shall maintain written record of all waivers and deviations granted. Pending action by the DoD Executive Agent, the Commanders of the Unified Commands may, consistent with the applicable international agreements, authorize temporary emergency waivers and deviations in countries in their geographic area where they determine that such a waiver or deviation is essential to the accomplishment of an operational mission directed by the National Command Authorities.

5. Planning, programing, and budgeting of funds and other resources required for compliance with this Directive shall be accomplished in accordance with established DoD procedures. This Directive does not require or authorize the DoD Components to expend funds or use other resources to meet requirements that are the responsibility of host nations, as stipulated in the SOFAs or in other U.S. and host-nation agreements.

E. PROCEDURES

1. The following procedures shall apply to the resolution of disputes on overseas environmental standards:

a. DoD Baseline Guidance. If a DoD Component disagrees with a determination made by the designated Military Department responsible for the development of the baseline guidance, the Military Department or Defense Agency senior environmental policy principal may refer the matter to the ASD(P&L) who shall make a determination.

b. Host-Nation Environmental Standards. If a DoD Component disagrees with the standards and determinations developed by the DoD Executive Agent, the DoD Component may seek resolution of the disagreement directly with the DoD Executive Agent who shall issue a decision after consultation with the Commanders of the Unified Commands.

(1) If necessary, the senior environmental policy principal of the Military Departments or an appropriate representative of the other DoD Components may refer the matter to the ASD(P&L) for a determination.

(2) This Directive is not intended to create rights or obligations enforceable against the Department of Defense under references (c), (d), and (e); and United States pollution control statues and regulations, or similar statutes and regulations. This Directive is not intended to alter or affect policies in any established DoD Directive or Instruction, except as specified, stated, and referenced.

F. EFFECTIVE DATE

This Directive is effective immediately. All deadlines shall be based on the date of issuance.

APPENDIX B

DRAFT RESTORATION AND CLOSURE POLICIES

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330-1000

OFFICE OF THE ASSISTANT SECRETARY

MAY 15 1991

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY (ENVIRONMENT)
OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
(PRODUCTION AND LOGISTICS)

SUBJECT: Environmental Restoration Policies for Overseas Installations - ACTION MEMORANDUM

As you requested, I am forwarding the attached proposed DOD policies for active facilities and for installations to be turned back to the host nation. The Environmental Restoration Policy Overseas was drafted by the Air Force and includes the comments of all services and the Defense Logistics Agency. The policy dealing with restoration actions at facilities to be turned over to the host nation was drafted by the Air Force and Army.

GARY D. VEST
Deputy Assistant Secretary of the Air Force
(Environment, Safety and Occupational Health)

2 Attachments
1. ERPO
2. Restoration at Overseas Closure Bases

ENVIRONMENTAL RESTORATION PROGRAM OVERSEAS (ERPO)

PREFACE

The basic assumptions being made in the development of ERPO are:

- DoD will have an environmental restoration program consisting of at least the identification and assessment of potential contaminated sites at all installations.

- The overall policy for this program will apply equally to all overseas installations and facilities, except those identified for closure.

- The scope of ERPO activities beyond the identification and assessment phase will be determined by consultation with the host nation.

- DoD components will be responsible for the identification and assessment of potential contaminated sites, consultation with the host nation on site specific cleanup requirements and for the execution of the actual cleanup efforts when required.

- DoD Executive Agent will be responsible for developing and maintaining the DoD host nation consultation procedures and the baseline host nation restoration requirements.

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ENVIRONMENTAL RESTORATION PROGRAM OVERSEAS (ERPO)

A. PURPOSE:

The Environmental Restoration Program Overseas provides the basic policy and guidance to develop and execute a systematic program for identifying, evaluating, and correcting, where necessary, environmental contamination on DoD installations overseas used by U.S. Department of Defense forces and to fulfill the mandate of 10 USC Section 2706 (b) as amended by the National Defense Authorization Act of FY91, Section 342.

B. POLICY:

This policy statement institutes the Environmental Restoration Program Overseas (ERPO). ERPO will be sensitive to host nation requirements, applicable international agreements (such as Status of Forces Agreements), and multinational or joint use operations on military installations located outside the United States. The restoration program will be "results-oriented" and will focus on correcting environmental contamination prudently, without unnecessary study and document preparation.

ERPO will systematically identify, evaluate, and correct, as appropriate, environmental contamination resulting from present and past practices in the storage, handling and disposal of hazardous materials and wastes by DoD at installations operated outside the United States and its territories. When cleanup is necessary, it will be to the most economical and best technically achievable levels which protect human health and the environment, or which have general applicability within the host nation concerned, whichever are more protective of human health and the environment.

C. PROGRAM PLAN: ERPO will have three key phases: Identification/ Assessment phase; Prioritization/Consultation phase; and Characterization/Remediation phase.

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1. Identification/Assessment Phase: During this phase each DoD component will identify locations on the installation which may contain contaminants posing a threat to human health or the environment. The assessment consists of the systematic collection and evaluation of all available data to determine whether environmental contamination may exist due to past disposal practices, inappropriate current disposal practices, or accidental releases.

Initially, an assessment team should be assembled on the installation or activity to acquire information from pertinent records and documents, interview knowledgeable personnel and conduct field inspections of potentially contaminated sites. Information about past and present hazardous material/waste disposal practices, general information about known hydrogeology, operating agreements, installation joint-use agreements, and geographic location and description of surrounding communities will be collected and evaluated. Sampling of soil and surface/groundwater, as appropriate, will also be conducted during this visit to determine the existence or non-existence of contaminants. The assessment team will normally consist of four to five experts in such technical fields as environmental engineering, hydrogeology, biology, health and bio-environmental engineering, environmental/international law, and ordnance.

If during the identification and assessment phase a site is discovered that poses an imminent and substantial threat to public health or the environment, the DoD component should take action immediately to eliminate the threat. Fire hazards, explosion hazards and possible human contact with toxic contaminants are examples of imminent threats to public health.

When sites are identified which are not a threat to public health and the environment and require no further action, then the DoD component should document and close out the sites. Conditions that can justify site close out are:

- Evidence collected during this phase clearly indicates the site was not used for hazardous material or waste disposal.

- An assessment of the risks posed by the site concludes that there is no significant threat to human health or the environment.

- After a removal action, the available evidence indicates the threat has been removed.

When sites are identified which are not an immediate threat to public health and the environment but which may require further action at some later date, the DoD component should document these sites for action under the Prioritization/Consultation phase of this program. Conditions that can justify this are:

- There is no imminent and substantial threat to public health or the environment but available evidence; which may include soil, sediment, water or air samples; show that hazardous substances are present and could potentially migrate from the site or present a future threat to public health or the environment.

2. Prioritization/Consultation Phase: After the identification/assessment phase the appropriate DoD component will consult with the host government in accordance with the procedures developed by the DoD Executive Agent (see paragraph D-6) to determine how to proceed with sites requiring further action. The consultation will be used to determine the responsible parties, the appropriate cleanup actions (e.g. no cleanup required, removal, mitigation, full or partial cleanup, joint cleanup, or referral to the host government for its action), funding responsibilities and sources (US, host, NATO, third party, or joint), and who will perform the cleanup (US, host, contract, etc.). Sites will be prioritized by their relative adverse impacts on human health and the environment. Executive Agents are responsible for development of prioritization guidelines for their respective host nations.

This consultation will also address the establishment of mutually acceptable site specific cleanup standards. Where the contamination poses an imminent and substantial threat to the health of personnel on the installation, the cleanup will be to a level meeting a recognized consensus standard for protection of human health. In all other cases where it is determined that cleanup is required and the DoD Component is a partially or fully responsible party, cleanup will be to the most economical and best technically achievable levels which protect human health and the environment, or which have general applicability within the host nation concerned, whichever are more protective of human health and the environment.

3. The Characterization/Remediation Phase: Once sites are identified, determined to require cleanup, prioritized, and arrangements are negotiated with the host nation, the DoD component will complete a focused characterization of the site and appropriate cleanup. This characterization will provide a focused confirmation of the extent and characteristics of the contamination followed by the implementation of applicable cleanup technologies. Investigation of contaminated sites will be tailored to the nature and extent of contamination. The use of focused investigations will be limited to documenting and properly defining the contamination problem for the appropriate design and implementation of cleanup measures. The standard for cleanup will be established based on the consultation on specific site cleanup standards during the prioritization/consultation phase.

D. RESPONSIBILITIES

1. The DASD(E), after receiving the recommendations of Unified Commanders and coordinating with the Military Departments and other appropriate elements of OSD and Defense Agencies, will designate one of the Military Departments as the DoD Executive Agent for environmental restoration program overseas in each foreign country where DoD operations are conducted at installations or facilities.

2. The Commander of each Unified Command with a geographic area of responsibility encompassing foreign countries where DoD operations are conducted at installations or facilities will, within 180 days of issuance of this policy, recommend to the DASD(E), through the Joint Staff, the Military Department or sub-unified command to be designated as DoD Executive Agent for environmental restoration program overseas in each such foreign country. Unified Commanders will coordinate and maintain oversight of the implementation of this policy by the DoD Executive Agents and other DoD Components in foreign countries within their geographic areas of responsibility.

3. Each Military Department or sub-unified command designated as the DoD Executive Agent for environmental restoration program overseas in a foreign country will take appropriate action to implement this policy in such foreign country. Such action will include delegation of authority to execute the environmental restoration program to each of the military departments with presence in the country and ensure the timely and effective implementation of this policy at installations and facilities used by them in the foreign country.

4. DoD Components will ensure that their environmental restoration programs at installations and facilities in foreign countries (including their administration and support pursuant to Title 10 U.S. Code, Section 165 of forces assigned to the CINCs) comply with the governing environmental restoration standards or requirements determined by DoD Executive Agents. If compliance with those standards at particular installations or facilities would seriously impair operations, adversely affect relations with the host nation, or require substantial expenditure of funds not available for such purpose, a DoD Component may request the Executive Agent to process a temporary waiver or deviation with respect to the particular standards, requirements, guidelines, installations and facilities. In considering such a request, the Executive Agent will consult with affected DoD Components and the Unified Command with geographic responsibility. In cases where the waiver or deviation is to a host

nation requirement, the Executive Agent will consult through the appropriate U.S. Diplomatic Mission with the host nation authority responsible for the area in which the waiver would be implemented. If, as a result of this consultation, it is determined that the waiver cannot be approved by the Executive Agent, the Executive Agent or the DoD Component requesting a waiver may forward the request along with a complete report on the matter to the DASD(E). The DASD(E) will consult with appropriate officials (see paragraph D.1) in a effort to resolve the issue. Executive Agents will maintain written record of all waivers and deviations granted.

5. Planning, programming, and budgeting of funds and other resources required for compliance with this policy will be accomplished in accordance with established DoD procedures. Nothing in this policy requires or authorizes DoD Components to expend funds or use other resources to meet requirements that are the responsibility of host nations as stipulated in Status of Forces Agreements or in other U.S. and host nation agreements.

6. Within one hundred and twenty (120) days of issuance of this policy, each DoD component will initiate the identification/assessment phase required by subparagraph C.1. Within sixty (60) days of issuance of this policy, the DASD(E) will designate a Military Department that will have lead responsibility for development and maintenance of the DoD host nation consultation procedures and host nation base line restoration requirements required by subparagraph C.2. The designated Military Department will then have eighteen (18) months to develop the consultation procedures, prioritization guidelines, and base line restoration requirements. In accomplishing its responsibility, the designated Military Department will appoint an Overseas Environmental Restoration Policy Chairman (OERPC) who will then constitute a Joint Committee on Overseas Environmental Restoration Policy (JCOERP) consisting of, as a minimum, representatives of the Military Departments and the Defense Logistics

Agency (DLA). The JCOERP will be a working committee for providing technical input and review to the designated Military Department and for coordinating policy issues among DoD Components. The OERPC will ensure that the Joint Committee is multi-disciplinary, provides for input from and periodic review of the efforts by the Unified Commanders, and that the host nation consultation procedures and host nation base line restoration requirements are distributed to the DoD Components within the host nation for their action.

E. EFFECTIVE DATE AND IMPLEMENTATION

1. This policy is effective upon issuance. All deadlines will be based on that date.

2. If a Military Department or Defense Agency disagrees with a determination made by the designated Military Department responsible for the development of the host nation consultation procedures or host nation base line restoration requirements, the Department or Agency senior environmental policy principal may appeal to DASD(E) who will make the final determination.

3. Nothing in this policy is intended to create rights or obligations enforceable against the Department of Defense under the Administrative Procedures Act, the Federal Tort Claims Act, the National Environmental Policy Act, United States pollution control statutes and regulations, or similar statutes and regulations.

ENVIRONMENTAL CONSIDERATIONS AND ACTIONS APPLICABLE TO INSTALLATIONS BEING RETURNED TO HOST NATION

1. Roles and Responsibilities:

The supporting MAJOR COMMAND is responsible for implementing this policy. The installation commander shall execute the action required within this policy.

2. References:

a. Executive Order 12088, "Federal Compliance with Pollution Control Standards"
b. Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions"
c. DoD Directive 5100.50, "Protection and Enhancement of Environmental Quality"
d. DoD Directive 6050.7, "Environmental Policy at Overseas Installations"
e. DoD Compliance Policy for Overseas
f. Draft DoD Environmental Restoration Program Overseas (DERPO)
g. Service specific regulations related to the Environmental Impact Analysis Process (EIAP) Overseas (as required by EO 12114)
h. Service specific environmental assessment programs for overseas (i.e. ECAMP, ECAS, etc)

3. Definitions.

a. Overseas Level I projects are needed to meet the requirements of a government to government agreement or actions which are necessary to avoid imminent and significant risk to human health and the environment.

b. Overseas Level II projects are necessary to correct situations which are currently in compliance with established agreements but which are required to be accomplished by some specific date in the future to meet new or tightened requirements under an existing government to government agreement. Additionally, projects to meet DoD or service mandated minimum standards for overseas areas are considered an Overseas Level II project.

c. Overseas Level III projects are important projects which do not face an imminent deadline in an established government to government agreement such as waste minimization or recycling projects.

4. Purpose.

a. This policy provides guidance for environmental considerations and actions applicable to installations being returned to the host nation.

b. Five specific topics connected with facilities being returned to the host nation are addressed in this policy guidance: (1) identification and assessment of potentially contaminated sites; (2) documentation of current compliance status; (3) hazardous materials/hazardous waste disposition; (4) Environmental Impact Analysis; and (5) documentation of environmental status of the facility.

5. Identification/Assessment Phase of Potentially Contaminated Sites:

a. Each installation will identify locations which may contain contaminants posing a threat to human health or the environment. The assessment consists of the systematic collection and evaluation of all available data to determine whether environmental contamination may exist due to past disposal practices, inappropriate ongoing disposal practices, or accidental releases. To the extent practical, the assessment should also seek to determine responsible parties (i.e. U.S. Forces, Host Forces, Previous users of the site, NATO, or war remnants).

b. An assessment team should be assembled on the installation or activity to acquire information from pertinent records and documents, interview knowledgeable personnel and, if warranted, conduct field inspections of potentially contaminated sites. Information about past and present hazardous material/waste disposal practices, general information about known geo-hydrology, operating agreements, installation joint-use agreements, and geographic location and description of surrounding communities should be collected during this visit. Sampling of soil and surface/ groundwater, as appropriate, may also be conducted during this visit to determine or confirm the existence or nonexistence of contaminants. This assessment team should generally consist of four to five experts in such technical fields as environmental engineering, hydrogeology, biology, health and bio-environmental engineering, environmental/international law, and ordnance.

c. If during the identification and assessment process a site is discovered that poses an imminent and substantial threat to public health or the environment, the installation commander should take action immediately to eliminate the threat. Fire hazards, explosion hazards and possible human contact with toxic contaminants are examples of imminent threats to public health.

d. When sites are identified which are not a threat to public health and the environment and require no further action, then the installation commander should document and close out the sites. Conditions that can justify site close out are:

(1) Evidence collected during this phase clearly indicates the site was not used for hazardous material or waste disposal.

(2) An assessment of the risks posed by the site concludes that there is no significant threat to human health or the environment.

(3) After a removal action, the available evidence indicates the threat has been removed.

e. When sites are identified which are not an immediate threat to public health and the environment but which may require further action at some later date, the installation commander should document these sites for use in negotiations. These are sites at which, due to closure actions, the DoD component intends to take no further action. Conditions that can justify this are:

(1) There is no imminent and substantial threat to public health or the environment but available evidence; which may include soil, sediment, water or air samples; show that hazardous substances are present and could potentially migrate from the site or present a future threat to public health or the environment.

(2) There are current long term cleanup operations which the U.S. will turn over to the host at closure, such as on-going air stripping operations at a contaminated groundwater site.

f. After the identification/assessment phase, the installation commander shall document:

(1) Sites closed out under paragraph e above;

(2) Open sites which could not be closed out; and

(3) the total estimated clean-up costs and the portion of the total for which the United States is responsible. This information is FOUO for use in subsequent negotiations with the Host Nation.

6. Current Compliance Status:

When an installation is being prepared for turnover to the Host Nation the installation commander will take the following specific actions to document the installations current compliance status:

a. Use the RCS DD-P&L(SA) 1383 (Environmental Pollution, Prevention, Control, and Abatement at DoD Facilities) report to review and update Overseas Level I actions for each facility to be turned over to host nation.

(1) Determine whether all previously reported Overseas Level I actions in fact fit the Level I definition. Also ensure that all actions that fit the Overseas Level I definition are included in the RCS 1383 report.

(2) Ensure any actions necessary to avoid imminent and significant risk to human health and the environmental are included in Overseas Level I.

b. Review each action with advice from the Staff Judge Advocate (SJA), Installation Environmental Coordinator and other information

sources, as appropriate, to develop a course of action that will best ensure that no person in the command is placed in either civil or criminal legal jeopardy as a result of that course of action.

c. Proceed with any Overseas Level I actions or portion of such actions necessary to avoid imminent or significant risk to human health and the environment. Ensure that all necessary information and documentation are included in turnover procedures so that the host nation can proceed with such actions if necessary without any break in continuity that could threaten human health or the environment.

d. Determine which Overseas Level I actions are intended to remedy violations that will cease with installation closure. For such actions, consult with Staff Judge Advocate to determine whether a change in operations removes the legal liability--and halts the violation--that gives rise to the Overseas Level I action. A change in operations may involve not using, or shifting some operations from, a particular facility. Where possible, attempt to eliminate Overseas Level I violations through such operational changes.

e. For remaining Overseas Level I actions, take appropriate steps to eliminate legal liability and imminent health and safety risks. The installation commander and key senior staff or, if available, the installation Environment Protection Committee will review each Overseas Level I action in order to determine the operational, technical and legal implications of doing, not doing, or modifying the action. The goal is to remove the violation, the potential liability, and the risk to health or safety. Do not execute abatement or mitigation actions that are not Overseas Level I solely for the purpose of returning the facility to the host nation or increasing residual value. Further advice and assistance, as necessary, can be provided by the DoD Component's Major Command and/or Headquarters counterparts.

7. Disposition of Hazardous Materials and Hazardous Wastes (HM/HW):

a. Hazardous waste at facilities being returned to host nation must be properly disposed of prior to joint U.S./host nation inspection. In addition, the return of hazardous materials to the LOG/Supply system must also be completed by that time.

b. The installation commander will take and document the following specific actions:

(1) Plan early for the turn-in/disposal of HM/HW.

(2) Installation commanders along with key senior staff will coordinate HM/HW issues. They will be responsible for the review and update of the Hazardous Waste Management Plan. An Environmental Protection Committee, if available, is a good forum for these actions.

(3) Using DRMO or Service specific guidance for identifying, packaging, marking, labeling, and transporting of HM/HW, establish specific guidance and responsibilities and provide such guidance to the appropriate activities/units. In the absence of DRMO or service specific guidance, use EPA and DoT rules as a guide in developing local guidance.

(4) Emphasize turn-in to supply of usable materials that can be reissued for use by other activities/units. These actions will minimize costs within the supply system and the amounts of hazardous wastes generated.

(5) Coordinate early with the servicing logistics/supply and DRMO activity to provide them tentative inventories and to identify and discuss any requirements they may have for the associated HM/HW turn-in/disposal.

(6) Prepare an updated inventory of the types of hazardous materials used and hazardous waste generated, their locations, quantities, and turn-in/disposal requirements. Be sure to include those facilities that support the military activities/units and that, subsequently, will also generate a quantity of HM/HW.

(7) Establish procedures for transfer of accountability and custody of HW from the generating activity to the DRMO for disposal. Include identification of personnel eligible to certify hazardous waste disposal turn-in documents.

(8) Conduct inspection(s) as necessary to ensure removal of HM/HW prior to joint U.S./host nation inspection.

8. Environmental Impact Analysis:

a. Consideration of turning over part or all of a facility to the host nation constitutes a significant action which requires an environmental study (for cooperative actions) or an environmental review (for unilateral actions). Therefore, actions undertaken as described herein result in, as a minimum, an environmental review be conducted according to the service specific guidance developed under EO 12114. Turnover may result in socio-economic impacts (e.g. employment levels in the local community), but those impacts do not need to be analyzed in the Environmental Review.

b. Installations that are gaining units or increasing operations as a result of turnover of other installations may generate significant environmental impacts. Each installation gaining units and increasing operations will analyze the impacts of such changes in accordance with applicable service specific guidance.

9. Environmental Documentation:

a. Preparation of Environmental Status Report.

(1) An Environmental Status Report (ESR) will be prepared for each installation that is to be turned over to the host nation. The ESR will document the environmental conditions at the installation.

(2) The ESR will document the results of action taken in paragraphs 3, 4, 5, and 6 above. It should be a concise, useful summary of environmental condition at the installation, supported by, as a minimum, the detailed backup documents listed below:

- hazardous waste and material inventories
- asbestos surveys and abatement records
- radon surveys and mitigation records
- water rights approvals
- PCB surveys, retrofit, and disposal records
- noise complaint logs and actions
- spill response actions
- underground storage tank inventories and testing records
- Community Spill Control and Countermeasure Plan (appropriate sections)
- landfill use, closure records, and monitoring data
- air pollution emission testing and records
- wastewater discharge permits and historical discharge monitoring reports
- contaminated sites studies, and remedial action records
- historical Environmental Compliance funding, Asbestos Abatement Fund, Hazardous Waste Disposal Fund, 1383 Report records
- Hazardous Waste Management Plan (applicable sections)
- environmentally related audit reports from any source
- host nation inspection reports and regulatory agency correspondence
- results of physical inspections

(3) The ESR must also identify all existing local or regional legal agreements that define environmental actions or projects that must continue after transfer regardless of end user. The installation commander will initiate modification of any such agreements, where necessary.

b. Disposition of Environmental Status Report.

(1) Installation commander will provide a copy of the ESR to U.S. negotiators for their use during residual value negotiations with the host nation. The ESR shall contain a one-to-two page execution summary and a separable appendix documenting known and estimated clean-up costs for the use of negotiators. This information should provide negotiators with a best estimate of the costs to complete Overseas Level I actions remaining after turnover, as well as other environmental restoration requirements.

(2) The ESR should be retained by the Environmental Management Office of the supporting DoD Component's Major Command.