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Attacking Military Environmental Cleanup on Foreign Soil: Should CERCLA Principles Apply?

Randon H. Draper

I. Introduction

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

While the *Arc Ecology* court correctly interpreted CERCLA's current scope to be limited to domestic or national applications, the court's ruling not to extend the statute extraterritorially begs the questions: *Should* the law be changed to embrace CERCLA

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2 294 F.Supp.2d 1152 (N.D.Cal. 2003).

3 *Id.* at 1155.

4 *Id.* at 1159.

5 *Id.* at 1160.
principles in the cleanup of overseas military bases? If so, what principles should apply? Is a compromise possible?

This article provides background to better help understand these questions, and suggests possible answers. In Section II, this article briefly explores the extent of the U.S. military's footprint or presence overseas, and the potential for environmental damage on foreign soil. Section III discusses the specific findings of Arc Ecology and addresses the Court’s holdings. Section IV reviews the current status of laws and policy that govern environmental operating standards and cleanup for overseas bases. Section V analyses the possible application of CERCLA principles in the context of cleaning up former U.S. military bases overseas. Specifically, this section reviews the appropriateness of requiring a uniform, comprehensive environmental assessment [hereinafter EA], public participation and liability under CERCLA. This article concludes in section VI that while CERCLA's joint and several liability scheme cannot function in the overseas context without infringing on sovereign rights of both nation states in negotiating a base's closure and cleanup, certain CERCLA principles should be applied. Specifically, an EA, standard in form and content for every base, should be required prior to negotiating closure and cleanup. Such an assessment can and should be used to encourage foreign and domestic public participation when appropriate, prior governmental negotiation for a base closure. Further, host nation law which does not impose judicially imposed joint and several liability should apply to the cleanup of U.S. military bases overseas. This proposal embodies principles of diplomacy, and fairness and helps to put the U.S. in a proper environmental leadership role without jeopardizing properly placed principles of sovereignty and fair economics.
II. The U.S. Military's "Bootprint" Overseas

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

The overall number of military bases or facilities the U.S. maintains overseas does not always reflect the number of bases or facilities which close as new bases and facilities open to take their place. The military, for example, continues to contemplate closing bases in Germany, and moving troops to countries such as Hungary, Romania, Poland and Bulgaria to accommodate changing mission requirements. Activity involving overseas bases is not shrinking. Senator Kay Hutchinson stated that, "The proposed overseas military construction budget for 2004 is over $1 billion. Over 70 percent is in Europe and Korea..." and that, "As

8 Id.
9 Id.
11 Id.
we approach a new round of [base] closures, overseas bases should be scrutinized as closely as those stateside...

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

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

12 Id.
14 Id.
15 Id.

In Arc Ecology, Filipino citizens who live and travel around the land once occupied and operated by the U.S. as Air Force and Navy bases – respectively, Clark A.F.B. and Subic Naval Base – brought claims against the U.S. to assess the alleged pollution on the former bases.\(^6\) Individual citizens were joined by Arc Ecology and the Filipino-American Coalition for Environmental Solutions, both non-profit NGOs ("Plaintiffs").\(^7\) The Plaintiffs, requested, pursuant to CERCLA, the court’s order compelling the U.S. Department of Air Force, the U.S. Department of Navy, the U.S. Department of Defense and U.S. Defense Secretary, Donald Rumsfeld, acting in his official capacity, ("Defendants") to conduct preliminary assessments of the properties of the two former U.S. military bases, and an order declaring that the provisions of CERCLA apply.\(^8\) In addition to their claims under CERCLA, the plaintiffs also sought an order indicating that Section 300.420(b)(5) of the National Contingency Plan [hereinafter NCP] applied to the former U.S. bases in the Philippines, and the same claim pursuant to the Administrative Procedures Act [hereinafter APA], 5 U.S.C. 701 et seq.\(^9\)

The Defendants moved to dismiss the complaints on the grounds that Plaintiff lacked standing, failed to state a claim on which relief could be granted, and that the venue was not proper.\(^20\) The Defendants asserted that CERCLA does not apply extraterritorially.\(^21\)

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\(^6\) Arc Ecology, 264 F.Supp.2d at 1153.
\(^7\) Id. at 1154.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
The Arc Ecology Court first turned to the issue of standing.\textsuperscript{22} The Court wrestled with this issue, specifically with the determination whether the plaintiffs suffered actual injuries. The Court stated that, “Whether Individually Named Plaintiffs have standing in this case is a close call.”\textsuperscript{23} The Court, however, ultimately found that the Plaintiffs had standing to bring their CERCLA claim.\textsuperscript{24} Even though the Court’s ultimate ruling dismisses the Plaintiffs’ claim, the Court’s finding for standing should not be taken for anything less than a significant victory to the plaintiffs. The Court’s ruling on standing indicates that at least this Court is willing to keep the door ajar after \textit{Lujan v. National Wildlife Federation},\textsuperscript{25} wherein the Supreme Court granted summary judgment, finding that plaintiffs did not have standing. As Commander Michael Waters notes, “In overseas base closure actions, plaintiffs may have a difficult time testing DOD closure decisions in the wake of the \textit{Lujon} precedents and the current ‘right’ leaning of the Supreme Court.”\textsuperscript{26}

What the Court gives to the plaintiffs on the standing issue, it takes away in its ruling on substantive matters by granting the Defendants’ motion to dismiss.\textsuperscript{27} The Court first addressed the purpose of CERCLA,\textsuperscript{28} then the heart of the Plaintiffs’ complaint.\textsuperscript{29} Finally, the Court concludes that CERCLA does not apply extraterritorially.\textsuperscript{30}

The Court notes that, “Enacted in 1980, CERCLA was designed to ‘Provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the

\begin{footnotesize}
\begin{itemize}
  \item[22] \textit{Id.}
  \item[23] \textit{Id.} at 1155.
  \item[24] \textit{Id.}
  \item[27] Arc Ecology, 294 F.Supp.2d at 1160.
  \item[28] \textit{Id.} at 1156.
  \item[29] \textit{Id.} at 1154.
  \item[30] \textit{Id.} at 1156–59.
\end{itemize}
\end{footnotesize}
environment and the cleanup of inactive hazardous waste disposal sites.' Pub. L. No. 96-510, 94 Stat. 2767 (1980).” Turning to the legislative history, the Court found that CERCLA “reflects a decidedly domestic focus.”

The Court addressed the thrust of the Plaintiff’s complaint:

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

The *Arc Ecology* Court ultimately and appropriately rested its ruling upon a U.S. Supreme Court’s holding “that it is a

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31 *Id.* at 1156.
32 *Id.*
33 *Id.* at 1157.
longstanding principle of American law’ that ‘legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’\textsuperscript{34} The Court further held that, ‘Courts must assume that Congress legislates against the backdrop of an underlying presumption against extraterritoriality and therefore must presume that a statute applies only within the United States unless it contains ‘the affirmative intention of the Congress clearly expressed’ that it applies abroad.’\textsuperscript{35} Beyond legislative history, The Court found ample ‘plain language’ in CERCLA to conclude that the statute does not apply extraterritorially to ‘cover properties located within another sovereign nation.’\textsuperscript{36}

Arc Ecology is consistent with other court holdings limiting the extension of domestically based legislation in an overseas context.\textsuperscript{37} Environmental Defense Fund v. Massey\textsuperscript{38} still provides the broadest extraterritorial application of domestic law. But even Massey did not stray too far. Massey held that the National Environmental Policy Act [hereinafter NEPA] could apply in sovereign-less Antarctica where policy decisions to use an incinerator at a scientific research center were made within the U.S.\textsuperscript{39}

Although there is a strong presumption against applying legislation extraterritorially. The Massey Court points out that the presumption can be overcome “where there is an ‘affirmative intention of the Congress clearly expressed’ to extend the scope of the statute to conduct occurring within other sovereign nations.”\textsuperscript{40}

\textsuperscript{34} Id. at 1157, citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d. 274 (1991) [hereinafter Aramco] (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949)).

\textsuperscript{35} Id. at 1157-58, citing Aramco, 499 U.S. at 248 (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147, 77 S.Ct 699, 1 L.Ed.2d 709 (1957)).

\textsuperscript{36} Id. at 1159.

\textsuperscript{37} See generally Aramco, supra note 34.

\textsuperscript{38} 986 F.2d 528 (1993).

\textsuperscript{39} Id.

\textsuperscript{40} Id. at 531 citing Aramco, 499 U.S. at 248 (in turn quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, (1957). See also James E.
In other words, it is clear that Congress can, if it chooses, extend its authority overseas. It clearly has authority to reach beyond the territory of the U.S. This reach, however, should also be tempered with the international law presumption against extraterritorial application of domestic laws. While *Arc Ecology* is solidly grounded, shutting out the extraterritorial application of CERCLA, it remains silent as to whether Congress should act to make CERCLA, or CERCLA principles, law for cleaning up U.S. military bases overseas in spite of presumptions to the contrary. Or, in the alternative, should the President act by executive order to apply such principles?

IV. Current Law and Policy Governing the Cleanup of U.S. Military Overseas Bases

A. Congressional Legislation

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


42 See *infra* note 85 (“States have... the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies...”).


44 *Id.* at 50.
However, statutory laws in the category of "general extraterritorial applicability" are "exceptional." Congress simply does not enact many laws with stated extraterritorial application, mainly for the reason that this exercise of power would encroach upon the President's warfighting role and capacity. This does not mean, though, that the U.S. military operates freely without the rule of law when it comes to environmental protection overseas.

B. Executive Orders, DoD Policy and Guidelines

Mostly as a reflection of the separation of powers, environmental protection at federal facilities is governed by Presidential Executive Orders [hereinafter E.O.]. In 1978, President Jimmy Carter signed E.O. 12088, the first E.O. to address environmental protection at U.S. facilities overseas. E.O. 12088 requires the head of executive agencies responsible for the construction and operation of federal facilities outside of the U.S. to ensure the facilities' construction and operation complies with "standards of general applicability in the host country or jurisdiction." President Carter later signed E.O. 12114, entitled Environmental Effects Abroad of Major Federal Actions, which had the effect of creating a NEPA-like requirement for Environmental Impact Analysis requirements for certain categories of "major Federal actions significantly affecting the quality of the

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45 Id.
46 DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1436 (Foundation Press 2d ed. 2002).
47 See generally Landis, supra note 40, at 123–24. For a counter point of view see generally, Mitchell F. Crusto, All that Glitters is not Gold: A Congressionally-Driven Global Environmental Policy, 11 GEO. INT'L. L. REV. 499, 528 (1999) (Crusto argues that congress has failed to "act proactively on global environmental issues").
49 See generally Phelps, supra note 43, at 52.
50 Id.
human environment..."52 outside the geographical borders of the United States, its territories and possessions.53 This executive order was implemented in 1979 by DoD Directive 6050.7.54 Later versions of this directive, lead to the development of the Overseas Environmental Baseline Guidance Document [hereinafter OEBGD]. This document essentially allows the Secretary of Defense to develop an overseas compliance policy.55

DoD policy evolved into the more recent DoD Directive 6050.16 and was later replaced by DoD Instruction 4715.5, Management of Environmental Compliance at Overseas Installations, in 1996. As James Landis explains, "In essence, these policy mandates require the overseas installations in each foreign country to compare the OEBGD with local environmental standards of general applicability in determining the appropriate standards for the U.S. military bases in that country."56 The result is the Final Governing Standards [hereinafter FGSs], which combines and blends the most restrictive requirements of the OEBGD, host national laws of general applicability, and applicable international agreements with the host country.57 The FGS is the yardstick the military ultimately uses to measure its environmental protection compliance for its operations on overseas installations.

The OEBGD was more recently rewritten and issued in March, 2000.58 Landis comments on this baseline guidance document, "lest anyone think that little time or effort has gone into compiling and assessing the applicability of U.S. environmental law, the OEBGD is 230 pages long, covering 22 ostensibly military references which in turn incorporate virtually every U.S.

55 Landis, supra note 40, at 117.
56 Id. at 117-18.
57 DoD Instructions No. 4715.5, § 4.1 and §§ 6.3.3.1 and 6.3.3.2 (Apr. 22, 1996).
58 Landis, supra note 40, at 118.
environmental regulation."\textsuperscript{59} Despite some diluting of the principles of the Endangered Species Act [hereinafter ESA],\textsuperscript{60} the list of environmental standards, requirements and procedures for the operation of military bases overseas is fairly comprehensive.\textsuperscript{61} However, strict guidance and requirements for overseas base environmental cleanup is conspicuously absent from any DoD guidance documents or policy. DoD's current policy for base closures requires mandatory cleanup of environmental contamination for two circumstances: 1) if contamination posed a "known imminent and substantial danger to human health and safety", and 2) if cleanup is necessary to "sustain current operations."\textsuperscript{62} Other than for reasons to comply with these two standards, it is DoD policy not to expend funds for environmental remediation when a base is being returned to the host country.\textsuperscript{63} Further, according to Phelps, "...policy drafters were purposefully ambiguous in not defining the phrase 'known imminent and substantial endangerment to human health and safety' to allow decision makers maximum flexibility."\textsuperscript{64} Essentially, the FGS will "not apply to remedial or cleanup actions to correct environmental problems caused by the DoD's past activities."\textsuperscript{65} The U.S. does not bind itself to local domestic laws, absent express agreement.

Cleanup of contamination for past activities is performed only "in accordance with applicable international agreements, Status of Forces Agreements, and U.S. government policy."\textsuperscript{66} Without an

\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{63} Id. \textit{See also} Secretary of Defense Message 131758Z Jan 92 (Jan. 13, 1992).
\textsuperscript{64} Phelps, \textit{supra} note 43, at 79.
\textsuperscript{65} OEBGD, \textit{supra} note 61, at 1-1.
\textsuperscript{66} Id. at 1-1.
international agreement or outside domestic or international political pressure, the military is not bound to any remediation obligation. Phelps comments:

Since the cleanup is conducted in cooperation with local authorities, that risk-based cleanup level would necessarily be determined in coordination with those authorities. However, absent some other international legal obligation or political imperative when local authorities demand a more protective level of cleanup than we believe is needed to adequately protect health and welfare, we are under no obligation to comply.67

U.S. policy requires defense agencies to gather and maintain existing information and allows them to gather additional information regarding environmental contamination at DoD bases. This information is delivered to the host nation upon request when the base is turned over.68 However, there is no consistency or specific requirement to gather more than existing information.

C. Status of Forces Agreements

The bedrock international agreement pertaining to U.S. military overseas bases is the Status of Forces Agreement [hereinafter SOFA]. The SOFA addresses issues such as the right of primary criminal jurisdiction over U.S. members of the force, claims, force protection and the use of deadly force, entry and exit requirements, customs and taxes, contracts, vehicle licensing and

67 Phelps, supra note 43, at 77.
68 Id. at 81, citing Memorandum from Deputy Secretary of Defense John P. White, Environmental Remediation Policy for DoD Activities Overseas (18 Oct 1995) at paras. 2.fa.(2), 2.b.(2), 2.c.(2), and 3.
registration, and communication support. The SOFA is often bilateral, but can also be multilateral, as in the case of the NATO SOFA drafted for all NATO countries after World War II. In the case of multilateral agreements, supplements are often added to address particular concerns of a country. Some SOFAs are classified.

If environmental remediation of a U.S. base overseas were to be addressed in an international agreement, it would most appropriately be addressed in a SOFA. However, environmental concerns and any reference to what might be made into an environmental cleanup requirement are absent in most SOFAs. This is largely the result of how long ago the agreements were made in relation to the more recent and increased awareness of the environment in general. As Waters observes, "Most military bases were built before 'environment' was a household word..."  

The majority of SOFAs, such as the NATO SOFA, only contain general references to the sending State (the state sending the armed forces to a host country) respecting the laws of the receiving State (the host country). A unique exception is the 1993 German supplementary agreement. With some limitations, this agreement requires sending State forces to apply German law in their use of an installation or facility during the operation of the

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71 OLH, supra note 69, at 12-4; see also Waters, supra note 26, at 19.

72 Waters, supra note 26, at 18; Phelps, supra note 43, at 58; Rodgers, supra note 70 at 26.

73 Waters, supra note 26, at note 1.

74 Phelps, supra note 43, at 58; Rogers, supra note 70 at 18–20.

75 Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany, 18 Mar. 1993 ("German Supplementary Agreement").
installation or facility. Even more relevant to this article, the German supplementary agreement requires the sending State to bear the costs of assessing, evaluating, and remediating environmental contamination which it caused. However, as stated above, the German Supplementary Agreement is an exception. The majority of SOFAs are silent to any obligation to remediate environmental damage. Such silence puts the sending and receiving States at opposite ends of the bargaining table when they negotiate a base closure. The results often depend upon, “practically speaking, who will blink first.”

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

A. A Double Standard?

The U.S. has been sharply criticized for clinging to a double standard when it comes to cleaning up its former military bases overseas. Generally, the view shared by its critics is that the U.S. does not “treat hazards created by the U.S. military outside of the

76 This obligation requires cooperation with the German government for seeking permits and the use of low-pollutant fuels and compliance emissions, and in the transportation of hazardous materials. See Phelps, supra note 43, at 58-59.

77 These requirements can be satisfied through SOFA claims, residual value off-sets, or directly, subject to “the availability of funds and the fiscal procedures of the Government of the sending State.” See generally Phelps, supra note 43, at 59.

78 Phelps, supra note 43, at 82.

79 Waters, supra note 26, at 6.

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

Applying CERCLA principles, whole-cloth, to the cleanup of overseas military bases is an overly simplistic approach to improving environmental conditions on U.S. military bases overseas. A better approach is dissecting CERCLA into basic components to find which of its underlying principles can be appropriately applied or transplanted into the overseas context. There are at least three basic phases of CERCLA cleanup relevant to this article: 1) assessing contamination through an

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81 Chanbonpin, supra note 80, at 274.
82 Id. at 267, Chanbonpin argues, “when the U.S. troops left the Philippines in the early 1990s, the DoD relinquished all responsibility for the huge environmental task that remained as a result of its presence at Subic and Clark. The U.S. military dumped millions of gallons of sewage on the ground and in its water, and chemicals have seeped into the soil and water table. The U.S. General Accounting Office (GAO) estimated the clean-up would cost more the $12–15 million per site.” However, Chanbonpin also notes at 268, “… there is a marked difference in the way the U.S. government has chosen to deal with its cleanup duties in the Philippines compared to the duties it has voluntarily shouldered in developed countries, such as Germany.”
83 Id. at 274–75, Chanbonpin generally observes, “Although DoD operations within the fifty states, the District of Columbia, and each of the fourteen U.S. territories and possessions are subject to the strict regulation of federal environmental laws, its overseas installations are not.”
environmental assessment; 2) public participation regarding the
plan for remediation; and 3) assessing liability for the cleanup cost.
The phase where contamination initially occurs is primarily
addressed by the Solid Waste Disposal Act, as amended by the
Resource Recovery and Conservation Act [hereinafter RCRA], 42
USCA 6901, et seq. domestically, and by executive order and by
DoD policy, as discussed above. This initial phase is largely
beyond the scope of the remainder of this article.

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

B. International Law and Diplomacy

The United Nations’ Stockholm Declaration [hereinafter
Stockholm] of 1972 and Rio Declaration on Environment and
Development [hereinafter Rio] of 1992 lay a primary
groundwork for assessing global cooperation and environmental
responsibility among sovereign States. Although the principles
outlined in these declarations are not of themselves binding, their
increased use in international arenas has launched many of their

I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].
85 See Report of the United Nations Conference on Environment and
(1992), reprinted in 31 I.L.M. 876 [hereinafter Rio Declaration] (containing the
declaration and its principles). But see A/CONF.151/26/Rev.1 (Vol. I-IV) for a
copy of the declaration, its principles, and the conference proceedings
[hereinafter Complete Proceedings of the Rio Conference].
86 See generally HUNTER ET. AL, supra note 46, at 173, 176 citing Louis B.
Sohn, The Stockholm Declaration on the Human Environment, 14 HARV. INT’L
87 Id. at 196.
principles into the emergence of customary law.\textsuperscript{88} It would be disingenuous for the U.S., as a signatory, to simply dismiss or ignore the principles contained in the declarations. The U.S. Restatement (Third) of the Law of Foreign Relations §601(1)(a) acknowledges a State's obligation to "conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction..."\textsuperscript{89} Further, the United Nations [hereinafter U.N.] Charter, Article 1.3, includes within the purposes of the U.N. "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character..." \textsuperscript{90}

Central to the Rio Declaration is the tug-of-war dichotomy between the developed and lesser developed countries.\textsuperscript{91} Principle 7 of the Rio Declaration, places greater responsibility on developed nations to achieve sustainable development:

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

\textsuperscript{88} Waters, \textit{supra} note 26, at 32.

\textsuperscript{89} \textit{See generally} HUNTER ET AL., \textit{supra} note 46, at 425.

\textsuperscript{90} \textit{Id.} at 428.

\textsuperscript{91} \textit{Id.} at 186-204.
resources they command. (emphasis added).\textsuperscript{92}

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

The United States understands and accepts that principle 7 highlights the special leadership role of the developed countries, based on our industrial development, our experiences with environmental protection policies and actions, and our wealth, technical expertise and capacities.

The United States does not accept any interpretation of principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries.\textsuperscript{93}

The U.S. military best accomplishes its missions when it can win over the hearts and minds of the foreign citizens in the countries with which they interact.\textsuperscript{94} Focused on this purpose and the continued desire to spread democracy, the U.S. military engages in military-to-military liaisons\textsuperscript{95} in foreign countries and

\textsuperscript{92} Rio Declaration, \textit{supra} note 85, at 877.
\textsuperscript{93} Complete Proceedings of the Rio Conference, \textit{supra} note 85, at 17.
embraces projects in the furtherance of the DoD's Humanitarian and Civic Assistance [hereinafter HCA] program. Under the design of this program, the U.S. military "engages in relief and development-type projects in developing countries in conjunction with the armies of host nations. Such projects include the construction of roads, wells, and schools, as well as the provision of medical, dental, and veterinary services." Military attachés are also assigned to embassies to assist in information exchange and to preserve the image of the U.S. military in foreign countries.

In winning over the hearts and minds of foreign citizens, the U.S. military can play a leading role in environmental leadership overseas. Coining the phrase, "environmental diplomacy" within the military context, Commander Margaret Carlson comments, "Although, members of the US Armed Forces have always been diplomats of a sort, trying to leave a good impression in every port visited, never did the task require so much intricacy and finesse as the current international environmental obligations." DoD proclaimed a leadership role in environmental compliance and The U.S. government


97 Id.


99 Carlson, supra note 80, at 63.

100 Phelps, supra note 43, at 88.
should at least set the pace. While Carlson claims there is "room for improvement" in the U.S. military's environmental policies overseas,\textsuperscript{101} the question remains as to how far should the U.S. go in extending U.S. environmental domestic law and policy to its overseas bases.

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

As a general proposition, environmental assessments [hereinafter EA's], participation in the cleanup process by affected citizens, and the public's right-to-know [hereinafter RTK] are interrelated and fundamental to environmental management and cleanup. It is simply difficult for the public to knowingly participate in the cleanup process if uniform assessments of environmental contamination are not performed and made available.

This concept is embraced by Principle 10 of the Rio Declaration:

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

\textsuperscript{101} OEBGD, \textit{supra} note 97, at 61.
access to judicial and administrative proceedings, including redress and remedy, shall be provided.\textsuperscript{102}

In addition to Principle 10, Principle 1 of the Rio Declaration states that human beings "are entitled to a healthy and productive life in harmony with nature."\textsuperscript{103} The human right to a healthy environment appears to be emerging as a customary law. In addition to the principles found in the Rio Declaration, the African and Inter-American human rights charters have adopted the human right to a healthy environment.\textsuperscript{104} More sophisticated in scope and enforcement, the European Human Rights Court [hereinafter EHRC] has interpreted the right to privacy as embracing the right to a healthy environment.\textsuperscript{105} In \textit{Lopez-Ostra v. Spain},\textsuperscript{106} for example, the EHRC held in favor of an applicant and her daughter for health problems caused by the operations of a tannery waste treatment plant located near their home. The court found that the environmental harm violated their right to a private and family

\textsuperscript{102} Stockholm Declaration, \textit{supra} note 84.
\textsuperscript{103} Rio Declaration, \textit{supra} note 85.
\textsuperscript{104} \textit{See} African Charter on Human and People's Rights 21 I.L.M. 58, 63 (1981) [hereinafter African Charter]. Article 21 of the African Charter grants that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development"; \textit{see} Additional Protocol to the American Convention on Human Rights (San Salvador Protocol); \textit{HUNTER ET. AL.}, \textit{supra} note 46, at 1298. Article 11(1) holds that, "[e]veryone shall have the right to live in a healthy environment..."
The EHRC later reconfirmed *Lopez-Ostra* in *Guerra & Others v. Italy*, holding for applicant citizens in Manfredonia, Italy who complained of pollution resulting from the operation of a chemical factory.

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

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

The RTK is a companion to the human right to a healthy environment. In 2003, environmental and human rights groups joined efforts in a publication addressing the need for international RTK. Although this report focuses primarily on the need for

[^107]: Id.
[^109]: Id.
[^112]: Id. 8, at 42.
[^113]: *See* AFL-CIO, Amnesty International USA, EarthRights International, Friends of the Earth, Global Exchange, Oxfam America, Sierra Club & Working Group on Community Right to Know, *International Right to Know:*
corporate transparency by U.S. companies operating overseas, it also encourages all nations to enact its own RTK laws. It urges, "[e]ventually, we hope that each country will pass its own right-to-know laws. Organizations such as the European Union and the Organization for Economic Cooperation and Development have already urged their member countries to do so." The movement toward empowering average citizens with information is on the march. The RTK also seems fundamental and consistent with continued U.S. efforts to spread democracy.

As discussed above, the petitioners in Arc Ecology sought a preliminary assessment of the hazards to public health under CERCLA §105 (d), 42 U.S.C. 9605(d). However, as also discussed above, the court found no extraterritorial extension of CERCLA, and since no existing executive order or policy requires the military to perform an EA, the military is under no obligation to comply with the plaintiffs’ demand. This article urges that a comprehensive and uniform EA be required by executive order prior to the closure of every U.S. military base overseas, and that the assessment be made publicly available to the extent that it does not compromise classified information or legitimate U.S. security interests. An EA of this nature should take into account alternative levels of cleanup, and possible uses of the base’s land.

Public participation prior to remediation is required under CERCLA §117(a); 42 U.S.C. 9617(a). This right, enjoyed by U.S. citizens for domestic cleanups, includes the “...opportunity for submission of written and oral comments and an opportunity for a


114 Id. at 22.
115 Arc Ecology, 294 F.Supp.2d at 1157.
116 Id. at 1157–58.
117 Phelps, supra note 43, at 77.
118 The use of the acronym “EA” for “environmental assessment” should not be confused with “EA” representing the phrase “environmental executive agent” provided for in DoD Directive 6050.16, paras. C.2. and D.1.b.
Without a comprehensive, uniform EA of the contamination, meaningful public participation cannot occur. Treatment of one base in one country will be, or will at least appear to be, inconsistent.\textsuperscript{123} While the actual cost born by the U.S. may differ from one base to another, as will be discussed in the next subsection, the playing field will be level from the onset of negotiations if a uniform, comprehensive EA is first performed. While the cost of uniform EAs can be costly to U.S. taxpayers, it should be considered part of the cost of doing business overseas and the military budget should be supplemented to accommodate for this requirement.

The Government Accounting Office [hereinafter GAO], serving as a type of landlord for the military, argues against the extraterritorial application of NEPA requirements for Environmental Impact Statements [hereinafter EIS].\textsuperscript{124} The arguments can also be applied to CERCLA. The GAO argues that extraterritorial application of an Environmental Impact Statement will infringe on sovereignty, increase lawsuits, disrupt U.S. relations with other countries, limit the President’s ability to act in foreign affairs, be cost prohibitive, and that public

\textsuperscript{122} DoD Directive 6050.7, § E1.4.7 (1979).
\textsuperscript{123} Chanbonpin, supra note 80.
\textsuperscript{124} Carlson, supra note 80, at 90-91.
participation in other countries would be politically and culturally difficult to accomplish due to translating documents.\textsuperscript{125} Carlson’s counter-arguments, though more relevant to NEPA than to CERCLA, are noteworthy. She states:

> These arguments against extraterritorial application of NEPA do not explain why U.S. assessment standards could not be used for U.S. overseas military activities that do not include the host-nation. The argument for extraterritorial application is that NEPA procedures would foster better decisions with regard to the environment. Surely, NEPA requirements would not infringe on sovereignty of the host-nation if the federal action was exclusive to U.S. personnel and operations.\textsuperscript{126}

Carlson’s response must be viewed in light of the differences between NEPA and CERCLA. While a NEPA or a NEPA-like EIS addresses major actions being undertaken by the federal government,\textsuperscript{127} CERCLA looks to cleanup. In the overseas context, this means that a federal activity is ending and that the base is being fully handed over to the host country. By the very nature of the event, it is rare that the host country is not involved in the negotiations to make this happen. With such interaction, there is a greater likelihood that the laws and policy of the two nations will conflict.\textsuperscript{128} However, if the U.S. remains focused on performing an EA for contamination cleanup, without unilaterally imposing subsequent requirements, there should be little threat to the concerns expressed by the GAO.

\textsuperscript{125} Id. at 91.
\textsuperscript{126} Id.
\textsuperscript{127} 42 U.S.C.A § 4332(2)(c) (2004).
\textsuperscript{128} Waters, supra note 26, at 42.
A comprehensive, uniform EA will advance the cause of consistency among closing overseas bases and help level the playing field at the negotiating table between two sovereign nations. Citizens of the host nation will be appropriately empowered with knowledge of the extent of contamination on the closing base and can petition their government for an appropriate response during the negotiations. This article does not suggest that citizens or NGOs become involved in the actual negotiations between the two sovereign States, but that they become fully informed and given a chance to communicate with their respective States prior to the negotiations. A uniform, comprehensive EA will not inappropriately tie the hands of the U.S. military in negotiating an overseas base closure. As discussed below, the EA will not be the only factor in the ultimate cleanup of the overseas base and the results of negotiations will vary.

D. CERCLA in Circles; Sovereign States as Potentially Responsible Parties

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

During the closure negotiations of U.S. military bases overseas, some host countries have argued that Principle 21 of the Stockholm Declaration applies to their environmental cleanup.\(^\text{129}\)

\(^{129}\) Id. at 29.
This principle, similar to Principle 2 of the Rio Declaration, provides:

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

Additionally, some critics of the U.S. military's environmental practices overseas, refer to Principle 16 of the Rio Declaration supporting the "polluter pays" principle:

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

In support of the "polluter pays" argument, critics refer to the 1941 Trail Smelter Arbitration [hereinafter Trail Smelter].

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130 See Principle 2, Rio Declaration, supra note 85, at 876 (includes the "sovereign right to exploit their own resources pursuant to their own environmental and developmental policies..." [emphasis added]).
131 Stockholm Declaration, supra note 84, at 1420.
132 Rio Declaration, supra note 85, at 879.
133 Id.
between the U.S. and Canada. In that case, the U.S. argued that Canada should be accountable for air pollution crossing the border into the U.S. from a private smelter located within the borders of Canada. The arbitral tribunal held for the U.S. and awarded damages for harm caused to crops, farm animals and private property. This case has influenced a number of International Court of Justice [hereinafter ICJ] opinions creating or acknowledging a general obligation not to cause harm to other states.

The application of Trail Smelter to the cleanup of overseas military bases is significantly flawed in the facts. In Trail Smelter, the U.S. was damaged by the effects of a private smelter while they received none of the benefits from the smelter operation. The U.S. did not mutually participate or negotiate for resources resulting from the operation of the smelter. This factually differs from a host nation which receives economic, political and national security benefits from the operation of a U.S. military base located within its territory. The host nation is the property owner and landlord of the property which the U.S. military leases by treaty. Often, U.S. military base operations are joint ventures with the host nation, such as with Royal Air Force bases in the United Kingdom which are overwhelmingly occupied by U.S. Forces.

Over years of military occupation, the military improves the infrastructure of its bases with buildings, roads, utilities and


135 See id at 281 (Trail Smelter Arbitration).
136 Id.
137 HUNTER ET. AL., supra note 46, at 420.
138 Waters, supra note 26, at 4; Chanbonpin, supra note 80, at 260.
139 Bayoneto, supra note 80, at 116.
140 Arguably, all domestic environmental laws impose liability and sanctions on the responsible party regardless of any benefits actually obtained from the contamination. However, as discussed in greater detail below, owners and operators, those venturing to gain from the property and activity, are those held responsible for cleanup costs.
runways. When the base is closed and turned over to its host, this infrastructure has what is called "residual value" and is usually put to use by the host government.\footnote{141} DoD’s policy is to have the residual value offset tax dollar investment to repair environmental damage.\footnote{142} Residual offsets then can become the subject of negotiations between sovereign nations.

Critics of the U.S. tend to gloss over years of benefits which a host nation receives from the presence of a U.S. military base within its territory. Instead, they advocate holding the U.S. solely or overwhelmingly responsible for the base’s environmental condition. Victoria Bayoneto, discusses how the “Philippines entered into the Military Bases Agreement in 1947 in recognition of a mutual interest in the defense of their respective territories, and the United State’s interest in providing for the defense of the Philippines and in developing an effective Philippine armed forces,”\footnote{143} and how “…the Philippines received millions of dollars in aid, in addition to military security.”\footnote{144} Yet, Bayoneto concludes that, “The United States enjoyed this benefit [use and control over U.S. facilities] for forty-five years. The aid given to the Philippines was independent of this right and benefit; the aid was thus not compensation or ‘rent’ for the use of the bases.”\footnote{145} While the collateral economic benefit to local communities is evident in how U.S. states and local U.S. communities scramble to keep military bases within their borders,\footnote{146} Bayoneto fails to

\footnote{141} This author, while stationed with the U.S. Air Force in Germany from 2001 to 2003, witnessed the success of a former U.S. Air Base in Hahn, Germany that had been converted into a flourishing inter-continental airport and secondary airport to the Frankfurt International Airport.

\footnote{142} Carlson, supra note 80, at 80; Waters, supra note 26, at 50.

\footnote{143} Bayenoto, supra note 80, at 124.

\footnote{144} Id. at 116.

\footnote{145} Id. at 154.

acknowledge these and other collateral benefits realized by the Philippines. Instead, Bayoneto argues that because there was a shared and mutual relationship, the U.S. should unilaterally pay for the entirety of environmental damage. She does not suggest the Philippines should bear any responsibility for the benefits it enjoyed from the U.S. bases. She states in conclusion, "In light of the long and propitious relations shared by the Philippines and the United States through politics, diplomacy, security, and economics, it is incumbent upon the United States to accept responsibility for the environmental damage it caused during its occupation of the bases in the Philippines." \[147\]

A comment by Kim David Chanbonpin that, "[i]n its treatment of former bases in the Philippines, the United States has utilized a double standard for the application of its environmental laws," \[148\] fails to recognize the joint benefits realized by both sovereign States, and the fact that the Philippines will have complete future use of the land and facilities of the former bases. Unlike a base in the U.S. where the U.S. government and its citizens retain the land for future enjoyment of alternative uses, the land and facilities on a base overseas returns to the host nation and its citizens. This article does not suggest that the U.S. can irresponsibly pollute in other countries simply because it provides jobs, supply contracts and other benefits to foreign nations. It simply argues that a host nation cannot claim that the U.S. polluted with unilateral and exclusive benefit. To assume that a host nation does not benefit in various economic, political and national security ways from U.S. presence is naïve. To make a blanket assumption that the host nation cannot negotiate initial base SOFAs and cleanup is patronizing. The host nation and the U.S. should shoulder some degree of joint responsibility to the environment.

\[147\] Bayoneto, \textit{supra} note 80, at 155.
\[148\] Chanbonpin, \textit{supra} note 80, at 349.
This view is supported by the principles underlying CERCLA. An application of CERCLA in the overseas context provides no relief to petitioners seeking to hold the U.S. exclusively liable for environmental damage to former overseas military bases. At the heart of CERCLA liability is the principle of strict joint and several liability by facility owners or operators where hazardous wastes are disposed, and upon contracted arrangers of such wastes.\textsuperscript{149} The CERCLA defense that a third person caused the environmental damage is not available if the third person is connected to the owner or operator by any contractual relationship.\textsuperscript{150} CERCLA liability is broad enough to ensure cleanup from any and all involved parties, and allows one potentially responsible party to seek compensation for cleanup from another potentially responsible party.\textsuperscript{151}

A host nation who owns the land on which the U.S. military operates can be compared to the CERCLA “owner” of the land and resources of a base, and the U.S. as the “operator” of the facilities. Extending the comparison, the SOFA binds the two parties with a contractual relationship. Under a CERCLA analysis, both the U.S. and the host nation are jointly and severally liable for the environmental harm. The significant difference between a domestic and an extraterritorial application of CERCLA is that contribution actions,\textsuperscript{152} cost allocations\textsuperscript{153} and settlements\textsuperscript{154} are not overseen by a court or an agency in an international relationship. Instead, the two parties are left to themselves to negotiate as sovereign nations.

\textsuperscript{149} CERCLA § 107(a); 42 USCA 9607(a).
\textsuperscript{150} CERCLA § 107 (b); 42 USCA 9607 (b); Perhaps the defense of “an act of war” under the same subparagraph could apply in some circumstances to overseas military bases. However, this article looks to only those circumstances where a base does not come under direct attack. It also assumes that regular operations in launching a war from an overseas base would not invoke the protections of the defense.
\textsuperscript{151} CERCLA §113(f); 42 USCA 9613(f).
\textsuperscript{152} CERCLA § 113 (f); 42 USCA 9613(f).
\textsuperscript{153} CERCLA §107; 42 USCA 9607.
\textsuperscript{154} CERCLA § 122; 42 USCA 9622.
Arc Ecology plaintiffs sought a preliminary assessment under CERCLA. Had the court been legally able to extend CERCLA extraterritorially, it could have arguably extended the principles of strict joint and several liability. According to the adage, picking up one end of the stick picks up the other end as well. This would leave the plaintiffs without recourse to compel the U.S. to bear any more cost than the U.S. was willing to bear — subject, of course, to international agreements.

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

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

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

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy

155 Arc Ecology, 294 F. Supp. 2d at 1157.
156 Phelps, supra note 43, at 77.
157 Rio Declaration, supra note 85, at 878.
measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. *Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.* Environmental problems should, as far as possible, be based on an international consensus. [emphasis added].

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

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

> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or

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158 Id.
159 DoD Instructions, supra note 57.
operated by a department, agency, or instrumentality of the United States or facilities that are the subject of a deferral under subsection (h)(3)(C) of this section when such facilities are not included in the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality. 160

While the U.S. will not sacrifice its sovereignty to enforcements measures of the host state, nor include overseas installations on the National Priorities List, it can secure an environmental leadership role by deferring to the stricter of its current standard of imposing mandatory cleanup of environmental contamination that pose “known imminent and substantial danger to human health and safety”161 and the environmental cleanup laws of the host nation. While disparate results will likely occur between host nations, the U.S. military will be promoting a policy that encourages its host to tighten its domestic environmental protections across the board. This policy respects the sovereignty of the host nation and Rio Principle 2 concerning “the sovereign right to exploit the [host nation’s] own resources pursuant to [its] own environmental and developmental policies…”162 Admittedly, however, the U.S. and its host are not likely to escape the negotiating table altogether. In situations where a host nation judicially imposes a joint and several liability cleanup scheme, such as CERCLA, issues of sovereign interference again surface. In these circumstances, the two nations may unavoidably find

160 CERCLA § 9620(a)(4); 42 U.S.C § 9620(A)(4) (2004).
161 Phelps, supra note 43, at 56.
162 Rio Declaration, supra note 85, at 876.
themselves at opposite ends of the table; unless, of course, the matter is adequately addressed in the SOFA.

VI. Conclusion

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

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