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## The Former U.S. Bases in the Philippines: An Argument for the Application of U.S. Environmental Standards to Overseas Military Bases

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**THE FORMER U.S. BASES IN THE PHILIPPINES: AN  
ARGUMENT FOR THE APPLICATION OF U.S.  
ENVIRONMENTAL STANDARDS TO  
OVERSEAS MILITARY BASES**

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INTRODUCTION

“**G**ood morning. The US naval base at Subic Bay was formally handed over to the Philippine government today. . . . Today is Wednesday, September 30th, and this is NPR’s ‘Morning Edition.’ ”<sup>1</sup> The American flag was lowered at Subic Bay Naval Station on November 24, 1992, with the last remaining forces withdrawing in December 1992, ending ninety-four years of American military presence in the Philippines.<sup>2</sup> In November 1991, the U.S. Air Force pulled out of Clark Air Force Base, three months after it was buried in ashes, rocks and mud from the eruption of Mt. Pinatubo.<sup>3</sup> The military withdrawal from the Philippines resulted from the September 1991 rejection by the Philippine Senate, under the administration of President Corazon Aquino, of a base treaty which would have renewed the military bases agreement for another ten years, in exchange for more than \$2 billion in aid.<sup>4</sup>

The departure of the American military, however, left behind a substantial quantity of toxic waste.<sup>5</sup> Proof of hazardous waste contamination left at the bases was recorded by the U.S. General Accounting Office (“GAO”) in a January 1992 report.<sup>6</sup> In that report, the GAO

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1. *Morning Edition* (NPR radio broadcast, Sept. 30, 1992), available in LEXIS, News Library, Arcnws File.

2. William Branigin, *U.S. Military Ends Role in Philippines; After 94 Years, Navy Leaves with Parade, Tears, Questions*, WASH. POST, Nov. 24, 1992, at A1; *International Relationships*, Political Risk Services, Dec. 1, 1993, available in LEXIS, Asiapc Library, Phil File.

3. Branigin, *supra* note 2; *Philippines: U.S. Leaves Toxic Legacy at Military Bases*, Inter Press Service, Nov. 23, 1992, available in LEXIS, News Library, Arcnws File [hereinafter *Toxic Legacy*].

4. Branigin, *supra* note 2; *Subic Naval Base to Be Turned Over in Good Order: U.S. Envoy*, Xinhua General Overseas News Service, Mar. 5, 1992, available in LEXIS, News Library, Arcnws File.

5. Ramon Isberto, *Philippines: Toxic Waste Issue Heats up as U.S. Quits Bases*, Inter Press Service, Mar. 3, 1992, available in LEXIS, News Library, Arcnws File; *Toxic Legacy*, *supra* note 3 (“The United States will leave behind a frightening legacy of environmental damage when it ends nearly a century of military presence in the Philippines this week.”). *But see* Branigin, *supra* note 2 (noting that these allegations were brought up by critics of the U.S. presence, and that the U.S. Embassy disputed the charges, claiming that the Navy had spent \$5.5 million in recent months to remove and transport the remaining hazardous wastes and leftover munitions to the United States).

6. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-92-51 *MILITARY BASE CLOSURES: U.S. FINANCIAL OBLIGATIONS IN THE PHILIPPINES* (1992) [hereinafter 1992

found that untreated chemical and heavy metal wastes were discharged into the air, the ground, and Subic Bay, from Subic Bay Naval and Clark Air Force Bases.<sup>7</sup> While the GAO had not ascertained the full extent of the environmental damage caused by the military, it estimated that the cleanup would cost approximately \$12-15 million for each site.<sup>8</sup> In addition to the GAO report, an on-site investigation by Filipino scientists and the Philippine Center for Investigative Journalism ("PCIJ") reported that, for over forty years, the U.S. Navy and Air Force had stored and improperly disposed of tons of military and industrial wastes, including asbestos and polychlorinated biphenyls ("PCBs"), in and around Subic Bay and Clark Air Force Bases.<sup>9</sup> Similarly, a May 1993 report by the World Health Organization found potential risk of pollution at Subic Bay.<sup>10</sup>

United States Ambassador to the Philippines, Richard Solomon, denied the various reports, contending that hazardous waste had been transported back to the United States at a cost of \$3 million.<sup>11</sup> Likewise, the U.S. Assistant Secretary of Defense for Security Affairs, James Lilley, assured President Aquino that there were no toxic waste problems at the bases.<sup>12</sup> Significantly, although the military may have provided for the transportation of hazardous chemicals back to the United States, the military made no provision for the cleanup of toxic wastes that had seeped into the soil and water.<sup>13</sup> The GAO report

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GAO REPORT]. The report was made in response to the request of the U.S. Senate Committee on Appropriations, Subcommittee on Defense. *Id.* at 1 (cover letter from Assistant Comptroller General Frank C. Conahan to Senators Daniel K. Inouye and Ted Stevens (Jan. 22, 1992)). The GAO, an independent legislative agency, audits other government agencies and reports its findings to Congress to assist Congress's oversight function. Joseph A. Wellington, *A Primer on Environmental Law for the Naval Services*, 38 NAVAL L. REV. 5, 21 (1989).

7. 1992 GAO REPORT, *supra* note 6, at 27-28. See also Isberto, *supra* note 5 (citing the GAO report to confirm fears of "significant" toxic waste pollution at the bases). Subic Bay Naval Base is located approximately 60 miles from the country's capital, Manila. *Subic Bay Cleanup Study Sought*, DEFENSE CLEANUP, Nov. 12, 1993, available in LEXIS, News Library, Curnws File.

8. 1992 GAO REPORT, *supra* note 6, at 28.

9. *Toxic Legacy*, *supra* note 3.

10. See *Subic Bay Cleanup Study Sought*, *supra* note 7. For a more detailed discussion of the WHO report, see *infra* text accompanying notes 59-61.

11. *U.S. Denies Leaving Behind Polluted Bases*, AGENCE FRANCE PRESSE, Nov. 23, 1992, available in LEXIS, News Library, Arcnws File. Prior to the departure of the military, then-U.S. Ambassador to the Philippines, Frank Wisner, assured reporters that there were no recorded health hazards resulting from environmental contamination at Subic Bay Naval Base during American occupation. Wisner said that the United States took pride in the way the Navy had protected the environment at Subic, which includes thousands of acres of virgin forests, pristine watersheds and the bay. *Subic Naval Base to Be Turned Over in Good Order: U.S. Envoy*, *supra* note 4.

12. Isberto, *supra* note 5.

13. See Michael Satchell, *The Mess We've Left Behind*, U.S. NEWS & WORLD REP., Nov. 30, 1992, at 28 (reporting claims by Pentagon officials at the time of the withdrawal that hazardous wastes were being removed by the military from Subic, but that "there will be no cleanup of the badly contaminated soil and water" by the military).

found that the basing agreement in effect at the time “[did] not impose any well-defined environmental responsibility on the United States for environmental cleanup and restoration.”<sup>14</sup> Furthermore, while the official overseas policy of the U.S. Department of Defense (“DOD”) calls for strict adherence to either U.S. or host-nation environmental laws, whichever are more stringent, this policy is in reality rarely followed.<sup>15</sup> According to the GAO Report, if the United States were to clean up these bases in compliance with U.S. standards, the costs for the cleanup and restoration would near Superfund proportions.<sup>16</sup>

This Note argues that the United States should be responsible for remedying the environmental damage caused at its military bases abroad, focusing particularly on the former U.S. military bases in the Philippines. The Note asserts that the U.S. activities at those bases failed to comply with environmental regulations and standards, and therefore concludes that the United States should share responsibility for cleaning up the ecological harm it caused. Part I provides a brief history of relations between the United States and the Philippines during the past century. This Part also examines environmental damage and potential risks resulting from the U.S. military activities at Subic Bay Naval Base and Clark Air Force Base. Part II discusses the rights and responsibilities under the U.S.-Philippines military bases agreements and amendments, and concludes that although no provisions explicitly spell out the United States’s environmental responsibility, the agreements did not preempt any such obligations.

Part III thus examines the DOD’s statutory environmental obligations under the Resource Conservation and Recovery Act (“RCRA”),<sup>17</sup> as amended by the Federal Facility Compliance Act of 1992 (“FFCA”).<sup>18</sup> RCRA was enacted by Congress to effect a “cra-

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14. 1992 GAO REPORT, *supra* note 6, at 27.

15. See Satchell, *supra* note 13.

16. 1992 GAO REPORT, *supra* note 6, at 27. The GAO considered prior estimates reported by environmental officers at both bases for proposed environmental cleanup projects that were never funded, and thus never undertaken. Projects proposed to correct environmental hazards and remedy health threats at Subic Bay Navy Facility were estimated to cost approximately \$15 million, \$12.7 million of which would provide a new sanitary waste water system, because the system then in place did not comply with U.S. standards. Projects at Clark Air Base that were proposed prior to the eruption of Mt. Pinatubo, which included PCB removal, asbestos abatement, and hazardous waste removal, were estimated at the time to cost \$8.4 million. *Id.* at 28.

17. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6986 (1988 & Supp. V 1993) [hereinafter RCRA] (amending the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993)).

18. Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (codified at 42 U.S.C. §§ 6901 note, 6903, 6908, 6924, 6927, 6939c, 6939c note, 6939d, 6939e, 6961, 6961 note, 6965 (Supp. V 1993)) [hereinafter FFCA].

dle-to-grave" regulation of all solid and hazardous waste.<sup>19</sup> The FFCA mandates federal agency compliance with RCRA and explicitly waives sovereign immunity for all federal agencies with respect to substantive and procedural requirements of Section 6001 of the Solid Waste Disposal Act.<sup>20</sup> Since the FFCA subjects U.S. military bases to compliance with RCRA, Part III suggests that RCRA, as amended by the FFCA, similarly applies to military bases abroad.<sup>21</sup> Arguably, RCRA, as amended by the FFCA, did not apply to federal facilities until the FFCA's enactment in October 1992. However, this Note contends that the legislative intent in enacting RCRA, as reaffirmed by the FFCA, had always required substantive and procedural federal facility compliance.

Additionally, Part III examines the DOD's policies governing environmental protection, cleanup and restoration of military bases, as well as compliance with RCRA in overseas operations. In particular, this section analyzes the inconsistency of DOD policy with regard to environmental cleanup of its military bases abroad. The DOD requested and received funding from Congress for overseas environmental cleanup to comply with either host nation or U.S. environmental laws, whichever are more stringent.<sup>22</sup> Indeed, the DOD has taken responsibility in the past for environmental compliance, yet it has refused to do so in the Philippines.

Part IV then provides a brief discussion of pertinent international law principles. Although international law may not bind the United States, it provides significant policy reasons supporting the application of U.S. laws to the bases in the Philippines. Finally, this Note concludes that requiring overseas U.S. military installations to comply with federal environmental laws is not only consistent with international law, but is also mandated by statute, the DOD's policies and, most importantly, by public policy.

## I. BACKGROUND

### A. *The Long Road to Independence*

The Philippines was discovered in 1521 by Ferdinand Magellan, but it was not until more than forty years later that Spanish colonists set-

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19. Mr. Anders, *Waiver of Sovereign Immunity Under RCRA: Evolving Controversy*, *ARMY LAW.*, Sept. 1991, at 44, 44 (analyzing the application of RCRA regulations to federal facilities).

20. 42 U.S.C. § 6961 (1988 & Supp. V 1993), as amended by RCRA, *supra* note 17, and the FFCA, *supra* note 18.

21. This Note focuses on RCRA and the FFCA. A discussion of possible obligations and liabilities by the United States for activities at overseas facilities under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4347 (1988 & Supp. V 1993), and possible cleanup obligations under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993), is beyond the scope of this Note.

22. See discussion *infra* part III.C.

tled there with the aim of converting the Malay natives to Catholicism.<sup>23</sup> In 1896, a Filipino rebellion broke out and continued until 1898, when the United States, having declared war on Spain, intervened. As a result of the United States's success in the Spanish-American War, Spain, which had reigned over the Philippines for almost four centuries, surrendered the country in 1898.<sup>24</sup> The Americans helped return Emilio Aguinaldo, exiled leader of the Filipino rebellion, who then proclaimed Philippine independence on June 12, 1898. However, the Filipinos soon realized that, in reality, their country had been ceded by Spain, not to them, but to the United States.<sup>25</sup> Having lost hope of a grant of independence from the United States, the Filipinos resisted the American forces in 1899. The Filipino-American War lasted until 1902, ending with the capture of President Aguinaldo, who then swore allegiance to the United States.<sup>26</sup> The Philippines became a self-governing commonwealth in 1934, with full independence scheduled for 1946.<sup>27</sup> However, the road to independence was interrupted when Japan invaded the Philippines in December 1941.<sup>28</sup> The Hukbalahap, a guerilla group that had sought land reforms since the 1930s, resisted the Japanese,<sup>29</sup> and paved the way for U.S. forces to reoccupy the islands and battle the Japanese until World War II ended in 1945.<sup>30</sup> The Philippines finally gained independence on July 4, 1946.<sup>31</sup>

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23. See *Political Background: Historical Background*, COUNTRY PROFILE (Bus. Int'l), July 1, 1993, available in LEXIS, Asiapc Library, Phil File [hereinafter *Historical Background*]. Magellan was later killed by Lapu-Lapu, the Philippines's first national hero, a native who resisted Spanish colonial settlement. Catholicism has been the prevalent religion in the Philippines.

24. See *id.*; *Political Background*, COUNTRY PROFILE (Bus. Int'l), July 1, 1992, available in LEXIS, Asiapc Library, Phil File [hereinafter *Political Background*].

25. See *Historical Background*, *supra* note 23 (attributing the surrender of the Philippines to the Americans to the "collusion between the U.S. armed forces and the Spanish colonial authorities").

26. See *id.*; *Political Background*, *supra* note 24 (stating that the Filipino-American War "ended with the imposition of US rule").

27. See *Historical Background*, *supra* note 23. During that period, U.S. colonial rule introduced democratic institutions and English-language education throughout the country, but made little change to the social and economic structure, which favored the *mestizo* elite (descendants of Spanish settlers) and the highly exploitive system of land tenancy in the countryside, as introduced by the Spanish colonial rule. *Id.*

28. *Id.*

29. During that time, the elite remained in power by cooperating with the Japanese. *Historical Background*, *supra* note 23.

30. In the meantime, the Philippines was declared an independent republic within the Greater Asia Co-Prosperty Sphere in 1943. *Id.*

31. See *id.* Today, the Philippines celebrates Independence Day on June 12th, the day that President Aguinaldo first proclaimed independence from Spain in 1898.

## B. U.S.-Philippines Relations

Since 1946, the United States and the Philippines have generally enjoyed close and auspicious relations.<sup>32</sup> Under a trade agreement, the Philippines was given preferential economic status by the United States that allowed duty-free entry of Philippine goods until 1954.<sup>33</sup> In return, U.S. citizens were conferred parity with Filipinos in the exploitation of the Philippines's natural resources until 1954.<sup>34</sup> These rights were extended by agreement to 1955,<sup>35</sup> and then extended again until 1974.<sup>36</sup> Importantly, in 1947, the two nations entered into an agreement granting the United States the right to use twenty-three military bases in the Philippines, including Clark Air Force Base and Subic Bay Naval Base, for ninety-nine years.<sup>37</sup> In return for the use of the military bases, the Philippines received millions of dollars in aid, in addition to military security. The strength and nature of the U.S. presence in the Philippines led to increasing hostility by a growing number of Filipinos, who believed that the alliance of the two countries perpetuated colonialism and hindered complete Philippine sovereignty.<sup>38</sup>

In 1966, the two countries agreed to shorten the term of the 1947 Agreement, originally ninety-nine years from 1947, to twenty-five

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32. Auspicious relations between the two countries actually date back to the U.S. suzerainty, when there existed free trade between them, preferential treatment for Philippine agricultural exports, and growing U.S. investment in the Philippines. *Political Background*, *supra* note 24.

33. Agreement Concerning Trade and Related Matters During a Transitional Period Following Philippine Independence, July 4, 1946, amended on Oct. 22, 1946, U.S.-Phil., 61 Stat. 2611 (entered into force Jan. 2, 1947).

34. *Id.* at 2618; *see also Historical Background*, *supra* note 23.

35. Extension of Duty-Free Period From July 4, 1954, Through Dec. 31, 1955, July 7, 1954, U.S.-Phil., 5 U.S.T. 1629.

36. Agreement to Extend Duty-Free Period, Sept. 6, 1955, U.S.-Phil., 6 U.S.T. 2981. The two nations also agreed that:

the Philippine Government will hold the United States harmless for any claims for personal injury or death or damage to property which are attributable to any activities in connection with the exploitation of natural resources within the base area, with the exception of those meritorious claims paid by the United States in accordance with its claims legislation arising out of activities of any official, employee, or agent of the United States.

Military Bases in the Philippines: Exploitation of Natural Resources, Apr. 8, 1957, U.S.-Phil., 9 U.S.T. 309, 311.

37. Agreement Concerning Military Bases, Mar. 14, 1947, U.S.-Phil., 61 Stat. 4019, 4031-32 [hereinafter 1947 Military Bases Agreement or 1947 Agreement].

38. *See generally* Peter Stephens, *Philippines: US Loses Subic Bay Military Base in Close Senate Vote*, THE AGE (Melbourne), Sept. 21, 1991, at 14, available in LEXIS, Asiatic Library, Phil File. Stephens recalled that the Filipino liberation from Japan in 1945 was a result of the U.S. military intervention, as memorialized by the fulfillment of U.S. General Douglas MacArthur's promise when he left Bataan to set up a temporary base in Australia: "I came through and I shall return." On the other hand, Stephens stated that liberation in 1991 for the Filipinos meant something else: liberation from the long-standing link with the U.S. military. *Id.*

years from 1966.<sup>39</sup> When the agreement approached expiration in 1991, the U.S. and Philippine governments engaged in negotiations for more than a year to determine how long to extend the agreement.<sup>40</sup> The two countries finally agreed, *inter alia*,<sup>41</sup> to extend U.S. presence at Subic Bay Naval Base for ten years in exchange for at least \$203 million in annual aid to the Philippines for each year the United States remained.<sup>42</sup> The United States agreed to relinquish Clark Air Force Base, which was heavily damaged by the eruption of Mt. Pinatubo, to the Philippine military by September 1992.<sup>43</sup> The U.S.-Philippine Treaty of Friendship, Cooperation and Security was signed by both countries on August 27, 1991,<sup>44</sup> subject to ratification by the Philippine Senate as required by the Philippine Constitution.<sup>45</sup>

On September 16, 1991, the day the existing lease was scheduled to expire, the Philippine Senate rejected the U.S.-Philippine Treaty of

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39. Agreement Amending the Agreement of Mar. 14, 1947, as Amended, Sept. 16, 1966, U.S.-Phil., 17 U.S.T. 1212 [hereinafter Ramos-Rusk Exchange of Notes]. The agreement was thus set to expire by 1991, unless terminated by agreement at an earlier date. *Id.*

40. Michael Bociurkiw, *Philippines: Manila and US Forge New Military Bases Agreement*, S. CHINA MORNING POST, July 18, 1991, at 9, available in LEXIS, Asiapc Library, Phil File [hereinafter Bociurkiw I].

41. The United States also contemplated other terms, including free or discounted provision of surplus U.S. military equipment to the Philippines, a procurement program to promote the purchase of Philippine-made goods by U.S. forces in the Pacific, and U.S. assistance in establishing a fund for the rehabilitation of areas damaged by the eruption of Mt. Pinatubo. *Id.*; see *US-Philippine Joint Statement*, DEP'T ST. DISPATCH, July 29, 1991, available in LEXIS, Intlaw Library, Dstate File (highlighting the terms of the proposed agreement).

42. See Bociurkiw I, *supra* note 40. The treaty was forged by U.S. Special Negotiator, Richard Armitage, and Philippine Foreign Secretary, Raul Manglapus, in July 1991. It was agreed that for 1992, the Philippines would receive \$550 million, and that after the ninth year of the lease, a bilateral committee would arrange for an orderly American withdrawal when the lease expired, unless the Philippines requested an extension. *Id.*

43. *Id.* During negotiations before the eruption of Mt. Pinatubo, the Philippine government had sought a seven-year lease in return for \$825 million annual compensation, while the American government had sought a ten-year lease for \$360 million annual compensation. *Id.* The final terms reflected the loss of the Philippines's bargaining power as a result of the eruption of Mt. Pinatubo. Bociurkiw reports that U.S. panel spokesperson, Stanley Schrager, stated that extensive studies of the damaged Clark Air Base led the American government to conclude that rehabilitation was too costly and that the facility had been rendered inoperable. *Id.* Another report, however, states that the Philippines, valuing the agreement at \$773 million, claimed a victory over the agreed treaty. *Executive Watchlist*, BUS. ASIA (Bus. Int'l), July 22, 1991, available in LEXIS, Asiapc Library, Phil File.

44. *Update on the Philippines: Kenneth M. Quinn, Deputy Assistant Secretary for East Asian and Pacific Affairs*, DEP'T ST. DISPATCH, Sept. 30, 1991, available in LEXIS, Intlaw Library, Dstate File [hereinafter *Quinn Statement*].

45. See Bociurkiw I, *supra* note 40; *Executive Watchlist*, *supra* note 43. In contrast, the United States had planned to bring the treaty into legal force by way of an executive agreement with due notice to Congress. *US-Philippine Treaty*, DEP'T ST. DISPATCH, Sept. 2, 1991, available in LEXIS, Intlaw Library, Dstate File (statement by the Office of the Assistant Secretary/Spokesman on Aug. 27, 1991).

Friendship, Cooperation and Security by a narrow vote of twelve to eleven.<sup>46</sup> The Philippine Senate's decision amounted to a termination notice of the 1947 Agreement.<sup>47</sup> To delay the eviction of the American forces, President Aquino rescinded the termination notice for Subic Bay Naval Base, enabling the U.S. forces to remain at the base until one year after service of a new notice of termination of the 1947 Military Base Agreement.<sup>48</sup> President Aquino planned to hold a national referendum that would have allowed the Filipino people to vote to override the Senate decision.<sup>49</sup> However, faced with political pressure just half a year before the next election, President Aquino withdrew her proposal for a national referendum, and instead decided on an executive agreement calling for a three-year phased withdrawal by the U.S. military.<sup>50</sup>

This executive agreement, which required ratification by two-thirds of the Philippine Senate, met strong opposition from the "anti-bases" bloc of senators.<sup>51</sup> In challenging Aquino's compromise, the opposition claimed that she violated the Philippine Constitution, which prohibited foreign troops from occupying Philippine soil absent a treaty ratified by a two-thirds Senate majority.<sup>52</sup> Finally, in December 1991,

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46. *Quinn Statement*, *supra* note 44. A two-thirds vote of the Philippine Senate, amounting to 16 of the 23 Philippine Senators, was required by the Philippine Constitution to ratify the treaty. *Id.*

47. *See* Stephens, *supra* note 38.

48. *Id.* Despite President Aquino's attempts to, in effect, overrule the Philippine Senate's rejection of the treaty and to promote a renegotiation for a new lease, the United States, which had already been cutting its forces in the Pacific, indicated that it would abide by the decision of the Philippine Senate and respect the Philippine constitutional process. *See generally id.* (quoting Senators Simon and Lugar, both members of the U.S. Senate Foreign Relations Committee).

49. *See id.*; Manny Benitez, *Philippines: Secret Surveys Made Aquino Change Her Stance*, S. CHINA MORNING POST, Oct. 4, 1991, at 23, available in LEXIS, Asiapc Library, Phil File. Many believed that the Senate's decision was costly, resulting in the loss of aid by way of defense security and hundreds of millions of dollars, as well as the loss of the Philippines's second-largest employer, the U.S. military. Stephens, *supra* note 38. Forty thousand Filipino workers were employed at Subic Bay Naval Base. Michael Bociurkiw, *Philippines: Air Bases Deal Cannot Prolong Aquino Farewell*, S. CHINA MORNING POST, Oct. 6, 1991, at 7, available in LEXIS, Asiapc Library, Phil File [hereinafter Bociurkiw II].

50. *See* Benitez, *supra* note 49. Benitez attributed three secret public opinion surveys to the change in President Aquino's mind. These surveys revealed a negative response to a plebiscite that would override the Senate decision. A prior survey conducted in 1987 by the Social Weather Station of the Ateneo University of Manila had indicated that at least 60% of Filipinos were in favor of the continued presence of the American military at the bases. *Id.* Due to the change in public opinion, the national referendum proposal was considered "farfetched" and unpopular. President Aquino's decision to allow the U.S. military to remain rent-free during the three-year withdrawal period, in exchange for "any and all assistance" from the United States toward the rehabilitation of the areas affected by the eruption of Mt. Pinatubo, was considered an eleventh-hour compromise to revive her political reputation. Bociurkiw II, *supra* note 49.

51. Bociurkiw II, *supra* note 49.

52. *Id.*

due to disagreements on the conditions of the pullout, the Philippine government served the United States a one-year notice to withdraw completely by the end of 1992.<sup>53</sup>

C. *Environmental Damage Caused by U.S. Military Activities at the Bases*

As the U.S. military systematically withdrew from its bases in the Philippines, controversy regarding, and investigations of, serious toxic waste problems at and around the bases surfaced and grew.<sup>54</sup> The toxic waste issue was first raised in 1990, in a study conducted by Jorge Emmanuel, a U.S.-based environmental analyst.<sup>55</sup> Although the study was not conducted at Subic or Clark, it was based on the activities at other military installations in the United States, activities which were similar to those undertaken at Subic and Clark. Emmanuel concluded that activities at Subic and Clark “were probably producing a noxious brew of acids, ammunition wastes, organic solvents, chemical warfare agents, industrial sludge, pesticides, waste oils, radioactive wastes and polychlorinated biphenyl[s] (PCBs).”<sup>56</sup>

Subsequently, the Emmanuel study was confirmed by the 1992 U.S. GAO report, which characterized the environmental damage to the Subic Bay Naval Base as “significant,” and found that the U.S. practice at the bases “would not be in compliance with U.S. environmental standards,” and “pose[s] serious health and safety threats.”<sup>57</sup> Specifically, the GAO reported that the Subic Bay Facility had no complete sanitary sewer system or treatment facility, causing sewage and process waste waters to be discharged directly into Subic Bay. Only twenty-five percent of the five million gallons of sewage generated daily was treated. Furthermore, the report indicated that lead and

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53. *International Relations and Defence, COUNTRY PROFILE (Bus. Int'l)*, July 1, 1992, available in LEXIS, Asiapc Library, Phil File.

54. See, e.g., *Subic Naval Base to Be Turned Over in Good Order: U.S. Envoy*, *supra* note 4 (reporting allegations that nuclear material and waste existed at Subic Bay Base and that lead and heavy metal either drained into the Bay or were buried in landfill); Isberto, *supra* note 5 (citing concerns expressed by Green Forum, one of the Philippines's largest environmental umbrella organizations, and the results of the 1992 GAO report and a 1990 study by Jorge Emmanuel, a U.S.-based environmental analyst); *Toxic Legacy*, *supra* note 3 (quoting former Rear Admiral Eugene Carroll, now deputy director of the Center for Defense Information: “[w]e were endlessly producing industrial toxic chemicals and discarding them without due regard for the pollution”).

55. *Toxic Legacy*, *supra* note 3. Dr. Emmanuel, a Philippine-born environmental scientist, is president of Environmental Engineering Research Group, a California consulting firm. Teresa Albor, *As U.S. Vacates Philippines Bases, Toxic Wastes Remain*, SAN DIEGO UNION-TRIB., Nov. 29, 1992, at A-46 [hereinafter Albor I].

56. Isberto, *supra* note 5. The Emmanuel study prompted the Philippine Senate to recommend to the Philippine government that it provide for an environmental program in the proposed new treaty. This entire treaty, however, was subsequently rejected by the Philippine Senate. *Id.*

57. 1992 GAO REPORT, *supra* note 6, at 3, 27, 28.

other heavy metals from the ship repair facility's sandblasting site either drained directly into the bay or were buried in the landfill. The GAO declared that neither of these procedures complied with U.S. standards, which require that lead and heavy metals be handled and disposed of as hazardous waste. The report also indicated that the power plant at Subic Bay contained unknown amounts of PCBs and emitted untreated pollutants directly into the air. Although the content of the emissions had not been tested, officials told the GAO that the emissions would not meet U.S. clean air standards.<sup>58</sup>

In addition, a World Health Organization ("WHO") investigation of Subic Bay Naval Base, based on visual inspection and data on past Navy activities, found no visual or flagrant pollution, but identified areas within Subic where there were potential risks of pollution.<sup>59</sup> The May 1993 report suggested potential risks in the following areas: the Ship Repair Facility, in which pesticides, herbicides, PCBs, chlorinated solvents, and explosives were used or stored; landfills located near groundwater supplies that were suspected of containing hydrocarbons, radioactive wastes, pesticides, asbestos, and heavy metals; fuel storage and distribution facilities at the electrical power generating plant that posed a risk to the groundwater supply by potential release of diesel fuel and oil; and several aboveground and thirty-year-old corroded underground tanks and pump stations that had allowed leakage of jet fuel, diesel petrol oils, tank sludges, and heavy metals.<sup>60</sup> According to the WHO report, base records indicated that industrial waste waters, untreated sewage, and polluted storm water runoff were discharged into Subic Bay, mostly without treatment. Therefore, WHO suspected that these effluents had settled on the seabed, and may have adversely affected coral reefs and other marine life.<sup>61</sup>

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58. *Id.* at 27-28 (Navy officials pointed out the hazards to the GAO.). In a separate 1991 report on hazardous waste management in overseas U.S. military installations, the GAO reported:

Department of Defense (DOD) bases in their normal operations generate hazardous waste such as solvents, paints, contaminated sludges, contaminated fuel and oil, and phenols (poisonous acidic compounds). These wastes are generated by motorpools, paint shops, fire departments, hospitals, medical clinics, and laundries. Hazardous waste is usually generated as a by-product of activities such as cleaning, degreasing, stripping, painting, or metal plating. Hazardous waste, if improperly controlled or disposed of, *can endanger humans and the environment by polluting ground and surface waters, contaminating soil, and jeopardizing air quality.* Hazardous waste can be solids, liquids, sludges, or contained gases and may be ignitable, corrosive, reactive, and/or toxic.

U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-91-231, HAZARDOUS WASTE: MANAGEMENT PROBLEMS CONTINUE AT OVERSEAS MILITARY BASES 8 (1991) [hereinafter 1991 GAO REPORT] (emphasis added).

59. See *Subic Bay Cleanup Study Sought*, *supra* note 7.

60. *Id.*

61. *Id.*

An on-site investigation by Filipino scientists and the Philippine Center for Investigative Journalism revealed that the Navy and Air Force in fact stored and improperly disposed of tons of military and industrial wastes, and stored and used hazardous materials such as asbestos and PCBs.<sup>62</sup> The investigation also revealed that the eleven-mile pipeline linking Subic Bay and Clark Air Force Bases contained large volumes of highly corrosive aviation fuel, and that live bombs and ammunition were left at firing ranges at both bases.<sup>63</sup> A former Filipino worker at Subic Bay's Ship Repair Facility stated that he and other workers were not warned until just before the closing of the base about the risks of inhaling asbestos and other toxic wastes while repairing and cleaning Navy ships.<sup>64</sup> Another former worker indicated that ground soiled by PCB-contaminated fuel was excavated and isolated by workers wearing protective clothing and respirators, but that this procedure was only implemented during the last year of U.S. presence at Subic Bay.<sup>65</sup> A former Filipino worker at the dump at Subic Bay claimed that he had observed the American military bury leaking barrels of cyanide.<sup>66</sup> There are also reports that unexploded bombs and ammunition left at firing ranges had exploded, killing and wounding children.<sup>67</sup>

Moreover, Philippine Representative Ferdinand Marcos II claimed that the U.S. military improperly stored PCBs and other toxic and hazardous wastes, abandoned thousands of gallons of unused aviation fuel in the underground pipeline connecting Clark Air Force Base with Subic Bay Naval Base, and left behind thousands of unexploded bombs and live ammunition at firing ranges at both bases.<sup>68</sup> However, three teams, including a team from the Philippine Environment and Natural Resources Department and a Philippine congressional delegation team, conducted two visual investigations of the bases and found no evidence of toxic waste.<sup>69</sup> The teams did find aviation fuel leakage

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62. See *Toxic Legacy*, *supra* note 3. The U.S. Embassy in Manila denied these charges, and claimed that these studies were "reporting hearsay evidence." *Id.* (quoting U.S. Embassy spokesman Morton Smith).

63. *Id.*

64. *Id.*

65. *Id.*

66. See Larry LaMotte, *Military Mess Part 4: Third World Peoples Suffer* (CNN Specials television broadcast, Nov. 7, 1993), available in LEXIS, News Library, Curnws File [hereinafter CNN Special].

67. See *Toxic Legacy*, *supra* note 3.

68. *Subic Bay Cleanup Study Sought*, *supra* note 7.

69. *Id.* The Deputy Administrator of Subic Bay's Metropolitan Authority, Inky Reyes, similarly claimed that no toxic wastes were found upon inspection of the site, stating, "I doubt very much if the Americans would have dumped toxic waste in an area where they had their wives, and children going to schools. Why bury toxic waste in the area?" *Id.* To the contrary, the 1992 GAO report found, for example, that only 25% of the five million gallons of daily sewage discharged directly into Subic Bay was treated, that lead and other heavy metal drained directly into Subic Bay or were buried in the landfill; and that the facility's power plant, which contained PCBs, emit-

into the groundwater supply from some underground storage tanks.<sup>70</sup> In 1993, Filipino scientists, at the direction of Dr. Roger Dawson at the University of Maryland, analyzed samples of soil, water and air from Clark Air Force Base and detected traces of PCBs, PAHs, heavy metals, and high concentrations of a pesticide.<sup>71</sup>

The potential health risks of soil and groundwater contamination include disturbance of the central nervous system, high blood pressure, and, in extreme cases, retardation of development in newborns.<sup>72</sup> PCBs, which are used in transformers, cause cancer, and may cause severe skin diseases.<sup>73</sup> According to one source, empty toxic waste barrels were taken from Subic after the U.S. withdrawal and sold at small shops outside the base. The barrels were used by poor villagers, unaware of the health hazards, to store water for washing and drinking.<sup>74</sup>

Not surprisingly, American officials disputed the various findings.<sup>75</sup> Asserting that the military base agreements between the two nations made no provision for compliance with any environmental standards or for the cleanup of the bases, the DOD denied any responsibility. However, as discussed below, while the agreements may not have explicitly and clearly addressed each country's environmental responsibilities regarding the bases, neither did they absolve the United States of any of its then-existing, independent obligations, including the DOD's duty to comply with its own environmental policies and RCRA. Given the nature and the closeness of the U.S. relationship with the Philippines, there is a heightened expectation that the United States would justly acknowledge its environmental responsibilities for damage done at the bases.

Prior to the U.S. pullout from Subic Bay Naval Base in 1992, the American Ambassador, Frank Wisner, gave assurance that the base would be returned in good order. He expressly promised: "[i]t is important that we do so, we stand by our commitment as a government

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ted untreated pollutants directly into the air. 1992 GAO REPORT, *supra* note 6, at 27-28. Furthermore, the military's toxic legacy is not just a foreign one; such problems are also prevalent at military bases located within U.S. boundaries. See generally Kyle Bettigole, Comment, *Defending Against Defense: Civil Resistance, Necessity and the United States Military's Toxic Legacy*, 21 B.C. ENVTL. AFF. L. REV. 667 (1994).

70. *Subic Bay Cleanup Study Sought*, *supra* note 7.

71. See CNN Special, *supra* note 66.

72. *Id.*; Isberto, *supra* note 5.

73. See *Toxic Legacy*, *supra* note 3; Teresa Albor, *US Hands Back Toxic Cocktail*, S. CHINA MORNING POST, Nov. 22, 1992, available in LEXIS, Asiapac Library, Schina File [hereinafter Albor II].

74. CNN Special, *supra* note 66.

75. The U.S. Embassy in the Philippines stated that the Navy had spent \$5.5 million to remove and transport the remaining hazardous wastes and leftover munitions to the United States. Branigin, *supra* note 2. On the other hand, a former Filipino worker at Subic doubted that the Americans would have undertaken the dangerous operation of digging up the barrels of cyanide he says he saw the military bury. CNN Special, *supra* note 66 (statement by Rolando Lagadon).

to a safe environment and we place great stock in our cooperation with the Philippines in the field of environmental protection.”<sup>76</sup> Despite this purported commitment, a legacy of toxic wastes was left in and around the bases.<sup>77</sup> A DOD spokesperson contended that the U.S. facility’s disposal of hazardous wastes at the Philippine bases complied with DOD standards.<sup>78</sup> The spokesperson added that the practices at the bases “exceed[ed] local environmental standards.”<sup>79</sup>

In response, Louis Zanardi of the GAO replied: “in a less developed country, which doesn’t have the wherewithal to protect the environment, you basically have a license to pollute . . . . To say that the host country doesn’t [control pollution] should not let us off the hook.”<sup>80</sup> Moreover, Mr. Zanardi claimed that U.S. bases in developed countries, particularly in Germany, followed stricter environmental practices because those countries paid residual value for the bases when they were turned over.<sup>81</sup> There were no such incentives for the United States in connection with the bases in the Philippines because the agreement in effect at the time of the U.S. withdrawal provided that the Philippines would pay no compensation for non-removable structures when the bases were turned over.<sup>82</sup> Furthermore, while the United States will pay some of the cleanup costs of installations in Europe as agreed upon through the North Atlantic Treaty Organization, the DOD pays less attention to cleanup costs in developing countries such as Korea, the Philippines, and Turkey.<sup>83</sup> Thus, it is even more unfair that the DOD has been following its policy arbitrarily.

Characterized more appropriately, the DOD has applied its policy more favorably to developed nations, and undeniably less favorably to developing nations—the very nations which are less capable of detecting, preventing, and remediating harm to their environments and are clearly dependent upon assistance from, and involvement with developed nations. The reality that environmental laws of the host country are not enforced does not excuse the United States from adhering to either the host country laws or the U.S. laws, whichever are stricter, as called for by DOD policy.<sup>84</sup> In fact, the GAO reported that

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76. *Subic Naval Base to be Turned Over in Good Order: U.S. Envoy*, *supra* note 4.

77. *See supra* text accompanying notes 54-74.

78. *See* Ben Barber, *Philippines: Yankees Go Home, but Their Memory Lingers*, *SUNDAY AGE* (Melbourne), Mar. 29, 1992, at 12 available in LEXIS, Asiapc Library, Phil File (quoting a U.S. Defense spokesperson: “US facility disposal of hazardous wastes is done in compliance with Department of Defence standards. Hazardous waste that cannot be safely treated or disposed of in the Philippines is returned to the US.”).

79. *Id.*

80. *Id.*

81. *Id.*; *see also* Albor I, *supra* note 55.

82. *See infra* note 104.

83. Satchell, *supra* note 13.

84. The GAO stated in its 1991 report to Congress:

the problems of compliance at the overseas bases "may be jeopardizing political and defense relationships."<sup>85</sup>

## II. ENVIRONMENTAL OBLIGATIONS UNDER THE MILITARY BASE AGREEMENTS

Although the military base agreements "[did] not impose any well-defined environmental responsibility on the United States for environmental cleanup and restoration,"<sup>86</sup> the agreements did not exonerate the United States from such responsibilities either. Rather, the agreements only provided the particular instances in which the United States was not obligated to make repairs, or restore the occupied sites. Such provisions also did not preclude any other obligations of the United States. The following section provides an historical background of the military base agreements, with an emphasis on the substantial control given to the United States over the bases. With this control and with the benefits derived from the use of the bases, come corresponding responsibilities, including a responsibility to comply with environmental standards.

### A. *Military Bases Agreement of 1947*

The United States and 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 States's interest in providing for the defense of the Philippines and in developing an effective Philippine armed forces.<sup>87</sup> In Article I, the Philippine government granted the United States government the right to retain the use of certain bases in the Philippines.<sup>88</sup> The 1947 Agreement lease was to remain in force for ninety-nine years, subject to any agreed extensions.<sup>89</sup> As evidenced by the language within its various articles, the 1947 Agreement clearly gave the United States control over the bases for the duration of the lease.

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[W]e do not agree that enforcing U.S. laws and regulations on the parts of the base where U.S. operations, such as the maintenance of U.S. aircraft, are taking place would cause political or diplomatic problems. We agree that problems would result if DOD tried to enforce U.S. laws on host country operations on other parts of the base. We believe it is essential that U.S. regulations be used in places where U.S. operations take place in order to protect U.S. personnel. *Not protecting U.S. personnel and the environment just because a host country does not enforce its environmental laws does not appear to be prudent.*

1991 GAO REPORT, *supra* note 58, at 25-26 (emphasis added).

85. *Id.* at 45.

86. 1992 GAO REPORT, *supra* note 6, at 27.

87. 1947 Military Bases Agreement, *supra* note 37, at 4019.

88. *Id.* art. I, at 4020.

89. *Id.* art. XXIX, at 4031. In 1966, the countries agreed to reduce the term of the agreement from 99 years to 25 years, thereby advancing the expiration to September 16, 1991. Ramos-Rusk Exchange of Notes, *supra* note 39.

Arguably, the 1947 Agreement contemplated that environmental responsibilities would accompany this control over the bases since Article III granted the United States "the rights, power and authority within the bases which are necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof."<sup>90</sup> Even more specifically, Article VIII allowed the United States "to take such steps as may be mutually agreed upon to be necessary to improve health and sanitation in areas contiguous to the bases," and provided that the United States pay just compensation for any personal injuries or property damage resulting from any action taken pursuant to Article VIII.<sup>91</sup> Clearly, the 1947 Agreement contemplated that the United States would help improve health and sanitation around the bases, even providing redress should the United States act improperly. More importantly, Article XXIII exposed the United States to civil liability 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."<sup>92</sup> Thus, it is evident that under the agreement the United States controlled bases to which certain legal and environmental responsibilities attached.

While the 1947 Agreement contained a "no repair clause" in Article XVII which explicitly stated that the United States was not obligated to return the bases to the condition they were in at the time of occupation,<sup>93</sup> the clause referred only to buildings and structures and did not give the United States carte blanche to return the land contaminated with toxic wastes. Additionally, Article XVII granted the United States ownership and control of buildings and structures it erected at the bases, and freed the United States and the Philippines from any obligation to repair any damage to the structures.<sup>94</sup> Yet, nothing in

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90. 1947 Military Bases Agreement, *supra* note 37, art. III, para. 1, at 4021.

91. *Id.* art. VIII, at 4023 (emphasis added).

92. *Id.* art. XXIII, at 4029-30. The statute of limitations for such claims was one year "after the occurrence of the accident or incident out of which such claim[s] arose." *Id.* at 4030.

93. *Id.* art. XVII, para. 2, at 4027.

94. *Id.* Article XVII, paragraph 2 of the 1947 Agreement states:

*All buildings and structures which are erected by the United States in the bases shall be the property of the United States and may be removed by it before the expiration of this Agreement or the earlier relinquishment of the base on which the structures are situated. There shall be no obligation on the part of the United States or of the Philippines to rebuild or repair any destruction or damage inflicted from any cause whatsoever on any of the said buildings or structures owned or used by the United States in the bases. The United States is not obligated to turn over the bases to the Philippines at the expiration of this Agreement or the earlier relinquishment of any bases in the condition in which they were at the time of their occupation, nor is the Philippines obliged to make any compensation to the United States for the improvements made in the bases or for the buildings or structures left thereon, all of*

that Article excused the United States from any obligation to repair damage to the land and the environment.

### B. 1979 Amendment

In 1979, the 1947 Military Bases Agreement was substantially amended to reflect Philippine sovereignty over the U.S. lease of Philippine military bases.<sup>95</sup> The amendment by Exchange of Notes ("1979 Amendment") clarified that the military bases covered by the agreement were Philippine military bases under the command of Philippine Base Commanders.<sup>96</sup> Nevertheless, U.S. Commanders were given command and control over the facility, U.S. military personnel, civilian personnel employed by the military, U.S. equipment and material, and any military operations involving U.S. forces.<sup>97</sup> The agreement directed both the Philippine Base Commanders and the U.S. Commanders to perform their duties with full respect for Philippine sovereignty, while assuring unhampered U.S. military operations.<sup>98</sup> It further required that both countries' base commanders cooperate, and coordinate, in matters affecting U.S. facilities at the bases.<sup>99</sup> And, although the Philippine Base Commander served as the first point of contact concerning the administration, security, operations and control of the bases, the U.S. Commander served as the initial point of contact on matters relating to, among other things, the U.S. facilities, U.S. equipment and material.<sup>100</sup> The countries also agreed to conduct a thorough review and reassessment of the agreement every five years to assure that the agreement continued to serve the mutual interests of both countries.<sup>101</sup> Thus, while the Philippines won sovereignty over the bases under the 1979 Amendment, the United States retained and exercised considerable control over the facilities.

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*which shall become the property of the Philippines upon the termination of the Agreement or the earlier relinquishment by the United States of the bases where the structures have been built.*

*Id.* (emphasis added).

95. Agreement Amending the Agreement of Mar. 14, 1947, as Amended, Jan. 7, 1979, U.S.-Phil., 30 U.S.T. 863 [hereinafter 1979 Amendment]. The 1947 Agreement was amended 14 times prior to 1979. However, these changes are irrelevant to this Note's discussion. On the other hand, the 1979 Amendment was a substantial change to the original agreement, reflecting the shift of sovereignty of the bases to the Philippines. For this reason, this Note only addresses the original agreement, the 1979 amendment, the 1988 amendment (which embodied the latest agreement in force up to the time of the U.S. withdrawal from the Philippines), and the 1992 proposed agreement (which never went into force).

96. *Id.* annex III, para. 1, at 879.

97. *Id.* para. 2.

98. *Id.* para. 3.

99. *Id.* para. 4.

100. *Id.* para. 7, at 880.

101. *Id.* at 864.

### C. 1988 Amendment

A 1988 review of the military bases agreement made pursuant to the 1979 Amendment produced an agreement ("1988 Amendment"),<sup>102</sup> which, among other things, amended Article XVII of the 1947 Military Bases Agreement to address ownership of, and responsibilities for, non-removable buildings and structures on the bases.<sup>103</sup> Article VII of the 1988 Amendment (amending Article XVII of the 1947 Agreement) addressed Philippine possession of, and sovereignty over, the bases, but limited it merely to non-removable structures, which nonetheless remained under U.S. possession and control during U.S. occupation.<sup>104</sup> Article VII specifically stated that the "right of use of [non-removable buildings or structures on the bases] shall revert to the Philippines upon the termination of this Agreement,"<sup>105</sup> whereas originally, the 1947 Agreement simply stated that "all [build-

102. Military Bases Agreement Review, Oct. 17, 1988, U.S.-Phil., DEP'T ST. BULL., Dec. 1988, at 24 [hereinafter 1988 Amendment].

103. *Id.* art. VII, para. 2, at 25. "Non-removable buildings and structures" were defined as:

buildings, structures, and other improvements permanently affixed to the ground, and such equipment that is essential to the habitability and general use of such improvements and is permanently attached to or integrated into the property [including] roads, runways, buildings with basements, permanently installed plumbing, heating, and cooling systems required for normal habitation purposes, and generators for basic electric power requirements of such buildings.

*Id.* Agreed Minute, at 26 [hereinafter Minute I]. In contrast, "removable property" was defined as:

demountable structures . . . , communications equipment, navigational aids, vehicles, furniture, portable air conditioners, aircraft, weapons, ammunition, office equipment, data processing equipment, special heating and cooling equipment not related to habitability of a structure, generators for special power requirements exceeding habitability and general use requirements, and other types of military or special use equipment.

*Id.* "Removable property" was considered property of the United States. *Id.* art. VII, para. 1, at 25.

104. 1988 Amendment, *supra* note 102, art. VII, para. 2, at 25. Paragraph 2 states, in pertinent part:

Non-removable buildings and structures within the bases, including essential utility systems such as energy and water production and distribution systems and heating and air conditioning systems that are an integral part of such buildings and structures, are the property of the Government of the Philippines, and shall be so registered. *The United States shall, however, have the right of full use, in accordance with this Agreement, of such non-removable buildings and structures within the United States Facilities at the bases, including the right to repair, alter or, when necessary for reasons of safety or new construction, to demolish them.*

*Id.* (emphasis added). Compare this language with the original text of Article XVII, paragraph 2 of the 1947 Agreement, *supra* note 37 (referring only to "buildings and structures") as opposed to the 1988 Amendment language, which distinguished between "removable property" and "non-removable buildings and structures," the latter of which was designated as Philippine property. 1988 Amendment, *supra* note 102, art. VII, para. 2, at 25.

105. 1988 Amendment, *supra* note 102, art. VII, para. 2, at 25.

ings or structures] shall become the property of the Philippines upon the termination of the Agreement."<sup>106</sup> Therefore, Philippine ownership was limited to such non-removable structures and equipment, which were to revert to the Philippines *only* upon termination of the agreement. Prior to that time and during U.S. use and occupation, these non-removable structures remained under the control and possession of the United States.

Furthermore, although Article VII contained a "no repair" clause,<sup>107</sup> it referred only to repair of damage inflicted on any of the non-removable buildings or structures used by the United States<sup>108</sup> — not to damage to the air, water and land. In addition, although Article VII retained the clause that exonerated the United States from turning over the bases in the condition they were in at the time of occupation,<sup>109</sup> the 1988 Amendment did not preclude the United States from rehabilitating the damaged land and environment.

The 1988 Amendment also added a third paragraph to Article XVII of the 1947 Agreement, directing the United States and the Philippines "to ensure a smooth transition" upon termination of the agreement.<sup>110</sup> Under Article VI of the Memorandum of Agreement, "the storage or installation of nuclear or non-conventional weapons or their components in Philippine territory shall be subject to the agreement of the Government of the Philippines,"<sup>111</sup> since the Philippine Constitution banned nuclear weapons on its bases.<sup>112</sup> Yet, the DOD, pursuant to its policies, refused to disclose the existence of any nuclear weapons at the bases.<sup>113</sup>

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106. 1947 Military Bases Agreement, *supra* note 37, art. XVII, para. 2, at 4027.

107. 1988 Amendment, *supra* note 102, art. VII, para. 2, at 25. Paragraph 2 continues as follows: "There shall be no obligation on the part of the United States or of the Philippines to rebuild or repair any destruction or damage inflicted from any cause whatsoever on any of the non-removable buildings or structures used by the United States in the bases." *Id.*

108. *Id.*

109. *Id.* See *supra* text accompanying notes 93-94.

110. 1988 Amendment, *supra* note 102, art. VII, para. 3, at 25. Paragraph 3 states in full:

Upon final termination of the use by the Government of the United States of the Facilities or earlier relinquishment, the United States and the Republic of the Philippines will take appropriate measures as they shall jointly determine to ensure a smooth transition with respect to custody and control of the Facilities and in order to minimize any disruptive effects of such termination.

*Id.*

111. *Id.* art. VI, para. 1, at 25. The parties referred to chemical and biological weapons as "non-conventional weapons." *Id.* Agreed Minute, at 26 [hereinafter Minute II].

112. See Malou Mangahas, *Philippines: President Aquino Names Her Price for US Military Bases*, *GUARDIAN*, Feb. 18, 1991, at 12, available in LEXIS, Asiapc Library, Phil File.

113. See Michael Bociurkiw, *Philippines: Eruption Puts Defence Base Treaty Back in Melting Pot*, *S. CHINA MORNING POST*, June 16, 1991, at 9, available in LEXIS,

## D. 1992 Proposed Treaty

In May 1990, pursuant to the 1966 Ramos-Rusk Exchange of Notes, the Philippine government served the United States with a diplomatic note terminating the 1947 Military Bases Agreement, effective September 16, 1991.<sup>114</sup> Thereafter, the two nations engaged in the Philippine-American Cooperation Talks ("PACT") for over a year, producing an agreement extending the Subic Bay Naval Base lease for another ten years, and providing for U.S. turnover of the smaller facilities by September 16, 1991, and the heavily damaged Clark Air Force Base by September 16, 1992.<sup>115</sup> Importantly, the treaty also included an explicit environmental protection provision requiring compliance with Philippine laws of general applicability regarding hazardous and toxic waste.<sup>116</sup> The Treaty of Friendship, Cooperation and Security, which included supplementary agreements on Status of Forces and Installations and Military Operating Procedures, was signed by both nations on August 27, 1991, subject to ratification by the Philippine Senate.<sup>117</sup>

In the meantime, on September 16, 1991, the Philippine Foreign Ministry rescinded the previous termination notice, leaving the 1947 Agreement in force until service of another termination notice, which was required to be served one year in advance.<sup>118</sup> Subsequently, however, the Philippine Senate rejected the treaty, and the Philippines served a new notice of termination in December 1991, requiring complete withdrawal of the U.S. forces by the end of 1992.<sup>119</sup> Although the environmental provision in the proposed treaty never came into effect, this Note asserts that the United States was nonetheless re-

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Asiapc Library, Phil File (quoting statement by Stanley Schrager, spokesperson for the U.S. Embassy in Manila, made in response to public concern of a possible nuclear disaster after the eruption of Mt. Pinatubo: "[w]e neither confirm nor deny that we have nuclear weapons but we can assure you that no nuclear weapons system is in danger.") [hereinafter Bociurkiw III]; *Subic Bay Cleanup Study Sought*, *supra* note 7 (stating that the World Health Organization report "noted that the Navy [had] steadfastly refused to confirm or deny reports that it [had] stored chemical and nuclear weapons in ammunition storage bunkers and open ammunition storage facilities."). Later, it was reported that after the eruption of Mt. Pinatubo, 36 nuclear warheads from cruise missiles at Clark were shipped aboard the cruiser U.S.S. Arkansas to another U.S. base in Cebu, located in central Philippines, to be later shipped and unloaded in Guam. Paul Brown, *Philippines: US Ships Nuclear Warheads Out of Base Near Volcano*, *GUARDIAN*, June 18, 1991, at 8, available in LEXIS, Asiapc Library, Phil File. The missiles were reported to have been left behind at Clark. *Id.*

114. *Quinn Statement*, *supra* note 44. The Ramos-Rusk Exchange of Notes advanced the expiration of the termination of the agreement to 1991, unless terminated by agreement at an earlier date. See Ramos-Rusk Exchange of Notes, *supra* note 39.

115. *Quinn Statement*, *supra* note 44; *US-Philippine Joint Statement*, *supra* note 41. The proposed agreement also addressed issues involving economic, scientific, technological, cultural, educational, health and Filipino war veterans' concerns. *Id.*

116. See 1992 GAO REPORT, *supra* note 6, at 30.

117. See *US-Philippine Treaty*, *supra* note 45.

118. *Quinn Statement*, *supra* note 44.

119. See *International Relations and Defence*, *supra* note 53.

quired to comply with environmental standards regarding activities at the U.S. base facilities pursuant to DOD policies and RCRA.

### III. THE DOD'S RCRA AND FFCA OBLIGATIONS FOR MILITARY INSTALLATIONS

Notwithstanding the United States's contractual rights and obligations under the base agreements with the Philippines, the U.S. military was bound, both by statute and its own policy, to comply with certain environmental standards, particularly RCRA, at its installations.<sup>120</sup> While the judiciary has hesitated to find a clear waiver of federal sovereign immunity in RCRA, Part III.B argues that it was clear that Congress intended at the time of RCRA's enactment that its procedural and substantive requirements apply to federal facilities.<sup>121</sup> This intent was reaffirmed when Congress enacted the FFCA.<sup>122</sup> Part III.B also cites an Executive Order directing executive agencies to ensure compliance with RCRA at their facilities.<sup>123</sup>

Part III.C then provides an analysis of the application of RCRA to federal facilities, specifically military installations, located abroad.<sup>124</sup> While RCRA does not explicitly state that it applies overseas, DOD policy regarding environmental compliance at overseas bases calls for adherence to environmental laws of either the host country or the United States.<sup>125</sup> In practice, the DOD has attempted to abide by this policy, though not uniformly.<sup>126</sup> In fact, the DOD has been providing annual reports to Congress in which it has declared its policy of adhering to U.S. legal requirements at all bases—including those located overseas.<sup>127</sup> Moreover, the DOD annually requests funding from Congress to meet environmental compliance requirements, including those under RCRA, in its overseas operations.<sup>128</sup>

A discussion of the application of U.S. law to overseas bases raises the issue of extraterritoriality. Part III.D traces the history of the judiciary's presumption that U.S. laws will not have extraterritorial application unless the relevant statute clearly expresses congressional

120. See discussion *infra* parts III.B, III.C.

121. See discussion *infra* note 155 and text accompanying notes 160-64. The pertinent requirements under RCRA are set forth in part III.A.

122. See *id.*

123. See *infra* note 143.

124. See discussion *infra* part III.C.

125. See discussion *infra* part III.C.1. The GAO found activities that would constitute violations of RCRA by the American military at overseas bases, but its report was made under the presumption that RCRA did not apply to them. 1991 GAO REPORT, *supra* note 58, at 2-4. The GAO reported, however, that hazardous waste management plans for six of the bases studied call for using U.S. environmental laws and implementing regulations as the primary guidance in carrying out the hazardous waste management program at each base. *Id.* at 13.

126. See *infra* text accompanying note 168.

127. See *infra* text accompanying notes 186-88.

128. See *infra* text accompanying notes 194-205.

intent of such application.<sup>129</sup> Part III.D then argues that because the United States had considerable control and latitude over the bases located in the Philippines, the bases were, in effect, "quasi-territories" of the United States subject to U.S. laws. Thus, the concern of extra-territorial application is inapplicable in this situation. Lastly, Part III.E discusses the enforcement mechanisms and remedies available under RCRA.

A. *The Standards Set Forth by the Resource Conservation and Recovery Act*

The Resource Conservation and Recovery Act ("RCRA")<sup>130</sup> was enacted in 1976 as an amendment of the Solid Waste Disposal Act<sup>131</sup> to implement federal control over hazardous waste management and "encourage the conservation and recovery of valuable materials and energy."<sup>132</sup> The Hazardous and Solid Waste Amendments of 1984<sup>133</sup> amended and modified RCRA "to assure adequate protection of public health and the environment."<sup>134</sup> The stated objectives of RCRA are:

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129. See discussion *infra* part III.D.

130. 42 U.S.C. §§ 6901-6986 (1988 & Supp. V 1993).

131. 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

132. H.R. REP. NO. 198, 98th Cong., 2d Sess., pt. 1, at 19 (1984) *reprinted in* 1984 U.S.C.C.A.N. 5576, 5577. See also Wellington, *supra* note 6, at 9-10. Congress found that "the problems of waste disposal . . . necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." 42 U.S.C. § 6901(a)(4) (1988). Congress further found with respect to the environment and health that:

- (1) . . . most solid waste is disposed of on land in open dumps and sanitary landfills;
- (2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;
- (3) . . . inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;
- (4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;
- (5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(7) . . . to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes . . . .

*Id.* § 6901(b).

133. Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended in scattered sections of 42 U.S.C.).

134. H.R. REP. NO. 198, *supra* note 132, at 18, *reprinted in* 1984 U.S.C.C.A.N. at 5576.

to promote the protection of health and the environment and to conserve valuable material and energy resources by—

....  
 (3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment . . .

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date . . . .<sup>135</sup>

Congress thus declared the national policy of the United States: "wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment."<sup>136</sup>

To meet its objectives, RCRA prohibits "the placement of bulk or noncontainerized liquid hazardous waste or free liquids contained in hazardous waste . . . in any landfill."<sup>137</sup> The statute further prohibits the land disposal of:

- liquid hazardous wastes containing free cyanides at concentrations greater than or equal to 1000 mg/l;
- liquid hazardous wastes containing certain concentrations of arsenic, cadmium, chromium, lead, mercury, nickel, selenium, or thallium;
- liquid hazardous wastes having a pH less than or equal to two;
- liquid hazardous wastes containing a concentration of at least fifty ppm of PCBs; and
- hazardous wastes containing halogenated organic compounds in total concentrations greater than or equal to 1000 mg/kg.<sup>138</sup>

135. 42 U.S.C. § 6902(a) (1988).

136. 42 U.S.C. § 6902(b).

137. 42 U.S.C. § 6924(c)(1) (1988). RCRA defines "hazardous waste" to mean: a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—  
 (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or  
 (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1988).

138. 42 U.S.C. § 6924(d)(2)(A)-(E). "Land disposal" is defined to include "any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." *Id.* § 6924(k).

RCRA also prohibits the land disposal of certain hazardous wastes containing solvents or dioxins identified by the Environmental Protection Agency ("EPA").<sup>139</sup> Storage of hazardous waste is permitted only when such storage "is solely for the purpose of the accumulation of such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment or disposal."<sup>140</sup> Furthermore, RCRA requires groundwater monitoring for surface impoundments, waste piles, land treatment units, and landfills.<sup>141</sup> Clearly, then the practices of the American military at the Philippine bases<sup>142</sup> fell under RCRA's prohibitions.

### B. *The Application of RCRA to Federal Facilities*

In 1978, in response to the failure of federal agencies to comply with environmental laws, President Jimmy Carter issued an Executive Order<sup>143</sup> directing the head of each executive agency to ensure compliance with pollution control standards, including RCRA, for federal facilities and activities under the agency's control. Nevertheless, the Order was for the most part ignored, and federal facilities continued to pose the worst RCRA compliance problems.<sup>144</sup> For instance, of the 348 federal facilities regulated by the EPA, only forty-two percent were in compliance with RCRA, with the noncomplying facilities failing either to disclose the release of hazardous wastes into the environment or conduct adequate groundwater monitoring.<sup>145</sup> Federal facilities proved to be among the worst violators of environmental laws,<sup>146</sup> with the DOD and the Department of Energy ("DOE") leading the pack by together producing twenty million tons of hazardous or mixed hazardous wastes annually.<sup>147</sup> Estimates of cleanup costs for

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139. 42 U.S.C. § 6924(e).

140. 42 U.S.C. § 6924(j).

141. 42 U.S.C. § 6924(p).

142. See discussion *supra* part I.C.

143. Exec. Order No. 12,088, § 1-102(f), 3 C.F.R. § 243 (1979), *reprinted as amended in* 42 U.S.C. § 4321 note (1988). President Carter declared: "The head of each Executive agency is responsible for ensuring that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to Federal facilities and activities under the control of the agency." *Id.* § 1-101.

144. H.R. REP. No. 111, 102d Cong., 2d Sess., 2-3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1287, 1288-89 (quoting President George Bush, Statement made in Seattle, Washington prior to his election (May 16, 1988): "Unfortunately, some of the worst offenders are our own federal facilities. As President, I will insist that in the future federal agencies meet or exceed environmental standards: The government should live within the laws it imposes on others."").

145. *Federal Facilities Compliance Act of 1991: Hearing on S. 596 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102d Cong., 1st Sess. 38 (1991) (statement of Christian R. Holmes, Assistant Administrator for Federal Facilities Enforcement, Office of Enforcement, EPA).

146. H.R. REP. No. 111, *supra* note 144, at 7, *reprinted in* 1992 U.S.C.C.A.N. at 1293.

147. Andrea Gross, *A Critique of the Federal Facilities Compliance Act of 1992*, 12 VA. ENVTL. L.J. 691, 692 & n.15 (1993) (citing MOLLIE QUASEBARTH, CONGRES-

DOD and DOE facilities reach \$150 billion over the next thirty years.<sup>148</sup>

Significantly, starting with *Hancock v. Train*,<sup>149</sup> courts have narrowly construed waivers of sovereign immunity in environmental laws,<sup>150</sup> thereby allowing federal facilities to disregard regulations. In *United States Department of Energy v. Ohio*, the Supreme Court held that the sovereign immunity waiver contained in RCRA does not include punitive measures.<sup>151</sup> The Court thus determined that, since Congress failed to unambiguously and unequivocally express a waiver of federal sovereign immunity for past violations of RCRA, sovereign immunity for punitive measures was not waived.<sup>152</sup> A minority view

SIGNAL BUDGET OFFICE, FEDERAL LIABILITIES UNDER HAZARDOUS WASTE LAWS xvi (1990); 135 CONG. REC. 15,107 (1989) (statement of Rep. Eckart).

148. *Id.*

149. 426 U.S. 167, 180 (1976) (requiring "clear and unambiguous" waiver of sovereign immunity in the language of the Clean Air Act).

150. *Id.* See also *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 214, 227 (1976) (finding no clear waiver in the Federal Water Pollution Act Amendments of 1972 based upon analogy to a similar provision in the 1970 Clean Air Act); *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1637, 1639 (1992) (finding no waiver in the Clean Water Act because "sanction" in 33 U.S.C. § 1323(a) referred only to coercive, and not punitive penalties and because the phrase "liable . . . for . . . civil penalties arising under federal law" was too ambiguous).

The doctrine of sovereign immunity was adopted by American courts in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Based on English common law that "the King can do no wrong," the doctrine protects the federal government from punishment or injunction for noncompliance with state or federal law absent a waiver of immunity. Gross, *supra* note 147, at 694; Gregory J. May, Casenote, *United States Department of Energy v. Ohio & the Federal Facility Compliance Act of 1992: The Supreme Court Forces a Hazardous Compromise in CWA and RCRA Enforcement Against Federal Agencies*, 4 VILL. ENVTL. L.J. 363, 368 (1993).

151. *DOE v. Ohio*, 112 S. Ct. at 1640. Requirements that were held to be enforceable against the United States include licensing and reporting requirements. *Id.*; see also Michael Donnelly & James G. Van Ness, *The Warrior and the Druid—The DOD and Environmental Law*, 33 FED. B. NEWS & J. 37, 39 (1986) (stating that "[w]hile [RCRA] § 6001 clearly subjects federal facilities to state and local" requirements, the only enforceable sanction is injunctive relief since § 6001 makes no provision for administrative fines or civil penalties).

Prior to the enactment of the FFCA, the failed waiver in RCRA stated:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements . . .

42 U.S.C. § 6961 (1988) (amended by 42 U.S.C. § 6961(a) (Supp. V 1993)).

152. *DOE v. Ohio*, 112 S. Ct. at 1640. *But see* *Maine v. Department of Navy*, 702 F. Supp. 322 (D. Me. 1988) (holding that RCRA clearly permitted civil penalties against the federal government), *vacated*, 973 F.2d 1007 (1st Cir. 1992) (vacating due to the then recently decided Supreme Court decision in *DOE v. Ohio*). See generally May, *supra* note 150 (discussing how federal facilities had been protected from compliance with environmental regulations by sovereign immunity before the enactment of the

finds this line of decisions harsh, contending that the construction of the environmental statutes should be "fair," with the waiver of sovereign immunity broadly construed, as intended by Congress.<sup>153</sup> Indeed, both President Carter's Executive Order and the congressional intent regarding the applicability of RCRA on federal facilities show that federal facilities were not exempt under RCRA.

Consequently, Congress enacted the Federal Facility Compliance Act of 1992 ("FFCA")<sup>154</sup> to explicitly state its intent to make RCRA applicable to "all actions of the federal government, past and present, which are subject to solid or hazardous waste laws."<sup>155</sup> The FFCA, in response to court decisions holding that the word "person" under RCRA does not include the federal government, expressly added to the definition "and shall include each department, agency, and instru-

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FFCA). May argues that the Supreme Court, in finding no waiver under RCRA, merely construed the provision strictly in favor of the sovereign without considering any legislative history or intent behind RCRA. *Id.* at 372 & n.47 (comparing *DOE v. Ohio* with *Maine v. Department of Navy*, noting that in the latter the district court took into consideration the legislative history of RCRA).

153. May, *supra* note 150, at 368-69 & nn.31, 32 (citing *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1019-21 (1992) (Stevens, J., dissenting) (stating that the Court's "love affair" with sovereign immunity has led to tragic results for litigating citizens, the legislature, and the public at large); *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984) (positing that the Court, in interpreting waivers of sovereign immunity, should seek to effectuate congressional intent); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 90 (1990); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) ("[W]e should not take it upon ourselves to extend the waiver beyond that which Congress intended. . . . Neither, however, should we assume the authority to narrow the waiver that Congress intended.") (citations omitted); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955); *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945) (declaring that waivers should not be "thwarted by an unduly restrictive interpretation"); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 409-10 (1991); Elizabeth K. Hocking, Survey, *Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 *ADMIN. L.J.* 203, 229 (1991)) & 377-78 nn.81, 82 (citing *DOE v. Ohio*, 112 S. Ct. at 1642 (White, J., dissenting); *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) ("[O]nce Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.'" (citations omitted); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (stating that the waiver should be construed within the fair reading the statute requires)).

154. Pub. L. No. 102-386, 106 Stat. 1505 (codified at 42 U.S.C. §§ 6901 note, 6903, 6908, 6924, 6927, 6939c, 6939c note, 6939d, 6939e, 6961, 6961 note, 6965 (Supp. V 1993)).

155. H.R. REP. NO. 111, *supra* note 144, at 5, reprinted in 1992 U.S.C.C.A.N. at 1291. The House Report stated:

The amendments to Section 6001 contained in this bill simply reaffirm in more explicit language the original intent of Congress that federal facilities be subject to all of the same substantive and procedural requirements, including enforcement requirements and sanctions, such as civil penalties, that state and local governments and private companies are subject to. The Committee intends for this legislation to overturn any court decisions which have restricted in any fashion the waiver of sovereign immunity provided in Section 6001.

*Id.* at 5-6, reprinted in 1992 U.S.C.C.A.N. at 1291-92 (emphasis added).

mentality of the United States."<sup>156</sup> Importantly, the FFCA amended the Solid Waste Disposal Act to provide:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).<sup>157</sup>

Accordingly, the FFCA subjects non-compliant federal facilities to administrative orders, civil penalties, and EPA fines.<sup>158</sup> The FFCA was signed into law by President George Bush and went into effect in October 1992.<sup>159</sup>

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156. 42 U.S.C. § 6903(15) (Supp. V 1993).

157. 42 U.S.C. § 6961(a). Compare this to the previous language of the sovereign immunity waiver of RCRA, see *supra* note 151.

158. See Gross, *supra* note 147, at 699-701. Federal employees, however, are exempt from any civil penalty, but not from criminal sanction. 42 U.S.C. § 6961(a). Federal departments, agencies, and instrumentalities are exempt from criminal sanction. *Id.*

Gross doubts that fines alone will increase federal facility compliance given the current poor compliance rates by the facilities and considering other constraints such as technological restraints, institutional barriers (meaning that agencies, especially the DOD, may perceive environmental regulations as antithetical to their missions), difficulties in obtaining appropriations to fund compliance, and the lack of monetary incentives to avoid fines. Gross, *supra* note 147, at 701-05.

159. See May, *supra* note 150, at 382. 42 U.S.C. § 6961 note. Arguably, since the FFCA did not go into effect until October 1992, it did not apply to the U.S. military bases overseas at, or prior to, that time. However, in enacting the FFCA, Congress reaffirmed its original intent that RCRA apply to federal facilities. See *infra* text accompanying notes 161-64. Congress reiterated that federal facilities were not intended to be exempt at the time of the original passage of RCRA. Thus, this author contends that RCRA was meant to apply to U.S. bases at the time of U.S. occupation of the bases, at least since the passage of RCRA.

Congress clarified that the FFCA's waiver of sovereign immunity, amending Section 6001 of the Solid Waste Disposal Act,<sup>160</sup> merely added to the *already existing* waiver of sovereign immunity under that regulation.<sup>161</sup> As such, Congress intended RCRA to mandate compliance by federal agencies.<sup>162</sup> By enacting the FFCA, Congress reiterated that RCRA and its waiver of sovereign immunity applied to the federal government even before the enactment of the FFCA,<sup>163</sup> thereby subjecting federal agencies to any type of civil penalty under RCRA.<sup>164</sup>

### C. Application of RCRA to Overseas Federal Facilities

#### 1. DOD Policy on Environmental Compliance at Overseas Bases

Officially, DOD overseas bases policy calls for strict adherence to environmental laws of host countries and, to the extent practicable, U.S. laws, whichever are more stringent, as well as with international agreements and Status of Forces Agreements.<sup>165</sup> The DOD's general policy also requires its components to comply "with the spirit as well as the letter of federal environmental laws, executive orders, and regulations."<sup>166</sup> The DOD has revealed that it could not always abide by the policy, claiming that if the host country had no existing, or less stringent, environmental laws, application of U.S. laws to the overseas base could pose political and diplomatic problems.<sup>167</sup>

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160. RCRA, 42 U.S.C. § 6961.

161. H.R. CONF. REP. NO. 886, 102d Cong., 2d Sess., 20-22 (1992), *reprinted in* 1992 U.S.C.A.N. 1317, 1320-22.

162. *See* May, *supra* note 150, at 378 ("In light of Congress'[s] plausible intent to expand the sovereign immunity waivers by amending the CWA and RCRA, the initial inclusion of the United States could represent a strong indication of Congress'[s] desire to subject the federal government to all civil penalties language in the entire section.").

163. For a discussion of the problems of applying environmental laws to federal facilities prior to the FFCA, see Donnelly & Van Ness, *supra* note 151. For a discussion of how the FFCA is unlikely to improve compliance rates at federal facilities, see Gross, *supra* note 145, at 701-05 (suggesting that federal agency non-compliance with federal standards does not stem from sovereignty, but rather, from other restraints such as technical, institutional and budgetary constraints).

164. *See* May, *supra* note 150, at 383-84 (stating, "[i]n effect, FFCA permits EPA, states, and any citizen to sue the federal government for noncompliance with RCRA requirements and to expect courts to impose punitive penalties").

165. *See* 1991 GAO REPORT, *supra* note 58, at 12-13; Department of Defense Directive No. 5100.50 (May 24, 1973, as amended), *cited in* William R. Shaw, *The Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards*, 5 *Envtl. L. Rep. (Envtl. L. Inst.)* 50,211, 50,211 n.5 (Nov. 1975); Satchell, *supra* note 13.

166. 1991 GAO REPORT, *supra* note 58, at 13. Many argue that this policy only applies to components located in the United States.

167. *See id.* at 12. The GAO disputes this claim, arguing that no political or diplomatic problems could possibly arise if the U.S. regulations are used only in places where U.S. operations take place, and not where the military would be impinging on the host country's sovereignty. *Id.* at 25-26.

For the most part, DOD policy has not been followed, with each branch of the armed services concluding that it is not compelled to meet the requirements of U.S. laws and implementing regulations, even when host country laws do not exist or are not as stringent as U.S. laws.<sup>168</sup> However, in a study of seven overseas bases from 1989 to 1990, the GAO found that the hazardous waste management plans of six bases called for using U.S. environmental laws and implementing regulations as the primary guidance in carrying out the program at each base.<sup>169</sup> The Navy's Environmental and Natural Resources Program Manual specifically states that "activities on overseas bases dealing with hazardous materials handling and waste disposal should go beyond host country environmental standards to ensure reasonable protection to the environment and human health."<sup>170</sup>

In the 1978 Executive Order previously discussed, President Jimmy Carter declared that "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."<sup>171</sup> Although the Order created no right or benefit enforceable at law against the United States or its agencies,<sup>172</sup> it established a standard overseas federal agency operations should follow. Philippine environmental laws are comprehensive, and modeled on U.S. laws.<sup>173</sup> Philippine air and water safety laws were enacted in 1976, and hazardous waste regulations were enacted in 1990.<sup>174</sup> The DOD's failure to comply with Philippine environmental laws concerning pollution control amounted to a violation of the Executive Order. Moreover, the DOD violated its own policy by failing to adhere to the stricter of Philippine or U.S. environmental standards.

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168. See generally *id.* at 13-14, and discussion in this section, *infra* (regarding the various interpretations of the policy at overseas bases, with bases violating the policy). But see discussion *infra* part III.C.2 (discussing how the DOD and each of the services have acknowledged that they are compelled to conform with U.S. laws and regulations in their overseas activities, and actually have done so). Even if the DOD and the services claim that they are only required to conform with host country environmental laws, the 1991 GAO study found that hazardous waste management officials at the bases visited were unfamiliar with host country laws. 1991 GAO REPORT, *supra* note 58, at 15.

169. 1991 GAO REPORT, *supra* note 58, at 13.

170. *Id.* at 14.

171. Exec. Order No. 12,088, *supra* note 143, § 1-801.

172. *Id.* § 1-802.

173. See Albor I, *supra* note 55.

174. See *id.*

## 2. The DOD's Practice Regarding Compliance with Federal Environmental Laws at Overseas Bases

In a 1986 Report to the Secretary of Defense, the GAO found that the DOD was inadequately managing hazardous waste at domestic bases, thereby posing harm to humans and the environment.<sup>175</sup> Subsequently, the DOD Inspector General conducted two inspections of hazardous waste management at overseas and domestic bases. The Inspector General found that the DOD was not in compliance with environmental laws and that the DOD's overall management of hazardous materials and waste was unsatisfactory.<sup>176</sup> The Assistant Secretary of Defense agreed with most of the report and undertook corrective action to implement the Inspector General's recommendations.<sup>177</sup> The House Committee on Government Operations, Subcommittee on Environment, Energy and Natural Resources, thereafter requested that the GAO evaluate the DOD's efforts to improve hazardous waste management.<sup>178</sup>

In response, the GAO investigated hazardous waste management at seven bases in Pacific and European countries, encompassing nations with strong and weak environmental programs, and produced a report in 1991.<sup>179</sup> The report originally submitted to the Secretary of Defense was classified, but the report released to Congress was an unclassified version, with all references, names of installations, and countries where they are located, deleted.<sup>180</sup> One news account, however, reported the locations of these bases to include Japan, Korea, the Philippines, Germany, England and Italy.<sup>181</sup>

In essence, the 1991 Report concluded that the DOD had made "limited progress in implementing [the] GAO's 1986 recommendations and in improving its management of hazardous waste overseas";

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175. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-86-60, HAZARDOUS WASTE: DOD'S EFFORTS TO IMPROVE MANAGEMENT OF GENERATION, STORAGE, AND DISPOSAL 2 (1986) [hereinafter 1986 GAO REPORT].

176. See 1991 GAO REPORT, *supra* note 58, at 16-17. The GAO report recounted the DOD Inspector General's conclusions:

- (1) DOD was not in compliance with environmental laws;
- (2) DOD's overall management of hazardous materials and waste was unsatisfactory;
- (3) minimization programs were fragmented and ineffective;
- (4) management of the program to construct hazardous waste storage facilities was unsatisfactory;
- (5) hazardous waste disposal contracting was inefficient, ineffective, and costly;
- (6) the Hazardous Material Information System was antiquated, ineffective, and duplicative of other systems; and
- (7) training and education of hazardous material handlers, supervisors, and commanders were inadequate.

*Id.*

177. *Id.* at 17.

178. *Id.* at 2.

179. *Id.* at 9-10.

180. *Id.* at 1 (cover letter from Nancy R. Kingsbury, Director, GAO Air Force Issues, to Mike Synar, Chairman, Subcommittee on Environment, Energy and Natural Resources, House Committee on Government Operations (Aug. 28, 1991)).

181. Satchell, *supra* note 13.

the DOD had not given guidance to clarify applicability of U.S. laws when host country hazardous waste laws either did not exist or were not as stringent as U.S. laws; most of the overseas bases had inadequate hazardous waste management plans, which did not meet RCRA requirements; hazardous waste management training did not meet DOD and RCRA requirements; and the DOD's oversight of activities that generated hazardous waste "was still minimal."<sup>182</sup> The GAO

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182. 1991 GAO REPORT, *supra* note 58, at 2-4. During its work at the Defense Reutilization and Marketing Regional Office in Europe, the GAO learned of an instance where a military base turned in a drum of hazardous waste that was mislabeled "automotive grease." When Marketing Office personnel opened the drum, it was learned that it contained a 5-gallon can of hydrochloric acid (a corrosive substance), a 1-gallon can of photo chemicals (a toxic material), 2.5 pounds of calcium hypochlorite (an oxidizer), and automotive grease (an ignitable substance). The combination of the items was considered "extremely dangerous." Fortunately, when the drum was opened and the pressure inside released, "only the workers' eyes and skin were irritated." *Id.* at 23.

The GAO also found many storage problems. On one base, for instance, hazardous waste was stored near drainage ditches, posing a risk that spills and leaks could enter the ditches and flow into a nearby river, which supplied the base with drinking water. *Id.* at 30-31. At another base, the GAO found that an unmarked hazardous waste storage area was located next to an open field that had no spill containment. *Id.* at 31. At yet another base, items were stored in cardboard boxes, unprotected from rain, and were spilled when storage containers toppled over in a storm. *Id.*

The GAO reported inspection by other entities that found, in one facility, that hazardous waste was stored without adequate protection from fire or spillage, which could cause a "major catastrophe." *Id.* at 32. Another inspection at the same base found that the hazardous drum storage area was not covered, there was no spill containment, the pavement surface on which the waste was stored was inadequate to prevent leaking into the ground, and that some chemicals were stored in deteriorating containers. *Id.* There was a risk the conditions could contaminate a nearby farmer's field and the groundwater. *Id.* Further, the GAO found soil or water contamination at five of the seven bases, ranging from minor spills to possible contamination of drinking water supplies. *Id.* at 33.

Overall, the GAO reported the following improper hazardous waste disposal at the overseas bases visited:

- At two bases, runoff flowed from maintenance areas directly into an off-base watershed;
- At one base, rinseate from the electroplating shop was discharged directly into nearby waters with no treatment;
- At the same base, chromate paint and other pollutants were discharged into a drainage ditch;
- At the same base, waste freon, a halogenated solvent, was mixed with other petroleum wastes and sent to the power plant to be burned as fuel, causing emissions of toxic fumes;
- At one base, dirt, used for absorbing oil spills, was buried;
- At the same base, an unauthorized dump site contained miscellaneous refuse including oily water evidently from a burn pit;
- At the same base, rinseate from cleaning pesticide containers was dumped on the ground;
- At two bases, improperly marked drums containing waste oil were left sitting on ground that had turned dark from oil contamination;
- At three bases, hazardous waste was dumped in regular trash containers; and
- At three bases, absorbent material used to clean up hazardous waste spills was disposed of with regular trash. *Id.* at 40.

found that the DOD's attitude toward hazardous waste management was not uniform at all bases. For instance, the DOD used many different definitions for hazardous waste.<sup>183</sup> Furthermore, the GAO concluded that because the 1973 DOD guidance<sup>184</sup> on whether to follow U.S. or host country environmental laws at overseas bases was unclear and vague, each of the services and installations had its own varying interpretation.<sup>185</sup>

In its 1994 Annual Report to the President and Congress, the DOD conceded that it is subject to the same environmental laws as private industry, and any additional requirements imposed upon federal facilities.<sup>186</sup> Regarding overseas facilities, the DOD declared that its goal is "to achieve full and sustained compliance with all U.S. legal requirements."<sup>187</sup> To achieve this end, the DOD annually obtains numerous air emission permits, permits for water discharge from sewage, industrial, and waste-water treatment plants, and storm water permits for

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183. *Id.* at 10. For the purposes of the evaluation, the GAO defined hazardous materials to mean "any expended material that is ignitable, corrosive, reactive, and/or toxic[ , including] used petroleum, oil, and lubricant products . . . , although RCRA does not include them in its definition, because the countries . . . visited considered these items to be a special or regulated waste." *Id.*

184. See Department of Defense Directive No. 5100.50, *supra* note 165.

185. 1991 GAO REPORT, *supra* note 58, at 12. For instance, at two bases the hazardous waste management plans called for adherence to certain requirements of RCRA (physical handling, labeling, and storage of hazardous wastes) but not to the administrative requirements (obtaining a license and permit, and making reports to the EPA). *Id.* at 13.

The DOD's failure to clarify its policy is a violation of Section 342 of the National Defense Authorization Act for Fiscal Year 1991, entitled "Reporting Requirements on Environmental Compliance at Overseas Military Installations," which provides in part:

(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 of 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.

10 U.S.C. § 2701 note.

186. DEP'T OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 85 (1994) [hereinafter ANNUAL REPORT].

187. *Id.*

every base. According to the DOD's report to the President and Congress, the DOD also annually manages permits to treat, store, and dispose of hazardous waste under RCRA, manages numerous regulated underground storage tanks, and prepares spill prevention and response plans at every base.<sup>188</sup>

The Defense Authorization Amendments and Base Closure Realignment Act<sup>189</sup> provides that in closing a military installation, the Secretary of Defense,

subject to the availability of funds authorized for and appropriated to the Department of Defense for environmental restoration and the availability of funds in the [Department of Defense Base Closure] Account, may carry out activities for the purpose of environmental restoration, including reducing, removing, and recycling hazardous wastes and removing unsafe buildings and debris.<sup>190</sup>

In the 1994 Annual Report, the DOD claimed that it has been cleaning up approximately 1800 military installations and more than 8000 formerly used sites.<sup>191</sup> To conduct this remedial action, the DOD uses funding from the Defense Environmental Restoration Account ("DERA") created by Congress in 1984.<sup>192</sup> Further, the DOD established an office of International Activities under the Deputy Under Secretary of Defense for Environmental Security ("DUSD(ES)"), which developed a policy of consultation and burdensharing with host nations for the return of bases.<sup>193</sup> Unfortunately, the office was not set up until after the closing of the bases in the Philippines, and therefore the consultation and burdensharing policy is inapplicable to the U.S. pullout from the Philippines.

In addition, the DOD submitted a report to Congress entitled, the "Report on Environmental Compliance," to itemize its environmental compliance funding requirements, including those for overseas operations, for fiscal years 1994 to 1999.<sup>194</sup> The DOD claimed in the report that it employed more than 7200 military and civilian personnel "to

188. *Id.*

189. Pub. L. No. 100-526, 102 Stat. 2623 (1988) (codified as amended at 10 U.S.C. §§ 154 note, 1095a, 2306 note, 2324, 2324 notes, 2683, 2687 notes, 4415).

190. *Id.* § 204(a)(3), 10 U.S.C. § 2687 note (1988). The Act defines "military installation" as "a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Secretary of a military department." *Id.* § 209(6), 10 U.S.C. § 2687 note. The Act did not distinguish between those military installations located in the United States and those overseas. Arguably, the provision applies to military installations abroad.

191. ANNUAL REPORT, *supra* note 186, at 83.

192. *Id.*

193. *Id.* at 88.

194. DEP'T OF DEFENSE REPORT ON ENVIRONMENTAL COMPLIANCE 1-1 (1993). The Report was submitted pursuant to section 2706(b) of Title 10 of the United States Code, which requires the DOD to submit an annual report containing, inter alia, a statement of the funding levels and full-time personnel required by the DOD and each military installation to comply with applicable environmental laws during the fiscal year, and an analysis of the effect that compliance with such environmental laws

ensure that environmental concerns are properly carried out at installations *worldwide*.<sup>195</sup>

For example, the Army, which contends that it practices "environmental stewardship abroad as well as in the U.S.,"<sup>196</sup> reported that, for fiscal year 1994, it expected to require 150 personnel, and approximately \$106.6 million in funding, for environmental compliance in major commands outside the United States.<sup>197</sup> The Army reported that more than half of the Notices of Violations it received were violations of RCRA,<sup>198</sup> and that many of the findings by its Environmental Compliance Assessment System occurred under the hazardous waste disposal and hazardous materials management provisions of RCRA.<sup>199</sup>

Similarly, the Department of the Navy purportedly "accepts the environmental responsibilities that accompany its global operations on land, at sea, and in the air."<sup>200</sup> The Navy estimated that in fiscal year 1994, it would need approximately \$14.9 million and 89 personnel, and the Marine Corps would need approximately \$5.4 million and 4 personnel, for environmental compliance for major commands outside the United States.<sup>201</sup> The Navy pointed out that "impending issues such as environmental compliance and clean up at overseas installations, will further challenge the Navy to more effectively plan and manage scarce resources to comply with legal requirements while preserving mission capability."<sup>202</sup> Thus, the Navy clearly acknowledges compliance with environmental regulations for its overseas operations.

Likewise, the Air Force claims that it is compelled to obey environmental laws, proclaiming that "environmental compliance is an issue of paramount importance."<sup>203</sup> For fiscal year 1994, the Air Force estimated funding of \$38.8 million and 60 personnel for environmental compliance at installations outside the United States.<sup>204</sup> The Air Force recognizes that compliance with legal regulations and the federal government's policy to protect and enhance the environment may constrain or prohibit Air Force operations and missions, which are its top priority. However, the Air Force believes that its mission "is not

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may have on the operations and mission capabilities of the DOD and of each military installation. 10 U.S.C. § 2706(b) (1988 & Supp. V 1993).

195. *Id.* at 1-2 (emphasis added).

196. *Id.* at 2-1.

197. *Id.* tbls. 2-1, -3, at 2-2, -8.

198. *Id.* at 2-13.

199. *Id.* at 2-14.

200. *Id.* at 3-1.

201. *Id.* tbls. 3-1, -4, at 3-2, -3, -13.

202. *Id.* at 3-20. For a more detailed discussion of the Department of the Navy's policy regarding environmental protection, land use, and resource conservation, see Wellington, *supra* note 6, at 29-33.

203. REPORT ON ENVIRONMENTAL COMPLIANCE, *supra* note 194, at 4-1.

204. *Id.* tbls. 4-3, -4, at 4-9, -10.

mutually exclusive from [sic] achieving and maintaining a commitment to environmental quality."<sup>205</sup>

The military's reported funding requirements, both past and future, further support the assertion that the DOD had RCRA obligations at its bases in the Philippines. By their own practice, the DOD and its branches have been using funds to meet federal requirements in at least some of the overseas installations. In fact, the DOD and its branches have acknowledged that they are statutorily compelled to obey U.S. environmental laws, including RCRA, regarding their overseas operations. As the DOD has complied with RCRA requirements at some of the overseas bases, it should have complied with RCRA requirements at bases located in the Philippines.

D. *Application of RCRA to Overseas Facilities:  
Is It Extraterritorial?*

Traditionally, there has been a presumption against the extraterritorial application of U.S. laws.<sup>206</sup> This presumption is rooted in the territorial jurisdiction principle of international law,<sup>207</sup> and was first followed by the Supreme Court in *American Banana Co. v. United Fruit Co.*,<sup>208</sup> which held that the acts of the defendant in Panama and Costa Rica were not within the scope of the Sherman Act. In that case, Justice Holmes declared that: "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."<sup>209</sup> The Court also determined that "[a]ll legislation is prima facie territorial."<sup>210</sup>

However, in *The Over the Top*,<sup>211</sup> the district court declared that "unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it."<sup>212</sup> In other words, even though statutes are presumed to conform with international comity, Congress can violate international law if it so intends. *The Over the Top* thus established the test for applying U.S. laws to

205. *Id.* at 4-18.

206. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965) ("Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States . . ."). See also R. David Kitchen, Case Comment, *NEPA's Overseas Myopia: Real or Imagined?*, 71 GEO. L.J. 1201, 1214-23 (1983) (discussing cases following the presumption, to explain how NEPA has been held not to apply extraterritorially).

207. See generally J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 201-03 (10th ed. 1989).

208. 213 U.S. 347 (1909).

209. *Id.* at 356.

210. *Id.* at 357 (citations omitted).

211. 5 F.2d 838 (D. Conn. 1925).

212. *Id.* at 842.

conduct outside the United States: whether congressional intent to disregard international law and to have the statute have extraterritorial application is clearly expressed in the language of the statute.<sup>213</sup>

However, in the 1930s, courts established an exception to this rule for antitrust laws, which do not clearly express congressional intent of extraterritorial application.<sup>214</sup> The courts declined to use the congressional intent test, but rather used the "effects" test, which inquires whether the relevant conduct has consequences within the U.S. territory.<sup>215</sup>

Yet, for "non-market" statutes, such as labor and environmental laws, where congressional intent is often unclear, courts have declined to use the liberal effects test and have continued instead to use the rigid intent test.<sup>216</sup> These courts have treated the presumption as a rule, requiring clear expression of congressional intent of extraterritorial application in the language of the statutes,<sup>217</sup> rather than *The Over the Top* theory that congressional acts are presumed to comply with international law, unless the language of the statute clearly expresses otherwise.<sup>218</sup> Even where congressional intent is clear in such laws, the courts have required another test, thereby reverting to the "effects and conduct" test, which inquires whether: (1) the conduct occurred

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213. *Id.* at 843.

214. See Jonathan Turley, *Legal Theory: "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. REV. 598, 604-05 (1990).

215. *E.g.*, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (Judge Hand declaring: "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends"). In *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1977), *remanded*, 574 F. Supp. 1453 (N.D. Cal. 1983) (applying the Ninth Circuit's tripartite analysis), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985), the Ninth Circuit used a tripartite analysis to determine whether the Sherman Act should have extraterritorial application to the facts of that case:

[1] Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?

[2] Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?

[3] As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?

*Id.* at 615.

216. *E.g.*, *Boureslan v. Aramco*, 892 F.2d 1271, 1274 (5th Cir. 1990) (Title VII claim), *aff'd sub nom.* *Equal Employment Opportunity Comm'n v. Aramco*, 499 U.S. 244, 248 (1991); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285-86 (1949) (Eight Hour Law claim). See also Turley, *supra* note 214, at 601, 627.

217. *Accord Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 146-47 (1957) (requiring "the affirmative intention of the Congress [be] clearly expressed" to apply statute extraterritorially); *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1357 (D.C. Cir. 1981) (requiring an "unequivocal mandate from Congress" to extraterritorially apply the provision in NEPA that required federal agencies to submit an environmental impact statement prior to any federal actions).

218. 5 F.2d at 842-43. See also Turley, *supra* note 214, at 602.

within or outside the territory of the United States, (2) had any effects, or was intended to have any effects, within the United States, or (3) involved any conduct of nationals of the United States.<sup>219</sup> The courts have thus bifurcated the test in determining the extraterritorial application, requiring first as a threshold issue a clear mandate of Congress, and, if such a mandate is found, inquiring into the effects and conduct test.

Recently, in *Amlon Metals, Inc. v. FMC Corp.*,<sup>220</sup> the Southern District of New York declined to apply the effects and conduct test because it construed RCRA to have a "domestic focus," and therefore found that the language of RCRA failed to express a clear intent by Congress for the citizen suit and venue provisions to have extraterritorial application.<sup>221</sup> In *Amlon*, plaintiff Amlon, a U.S. corporation, acquired metal residues and shipped them via FMC, another U.S. corporation, to Leeds, England, to be sent to Wath, a U.K. corporation, for drying and other processing. On June 9, 1989, twenty containers of Amlon's metals were delivered to Leeds, England, thirteen of which were shipped to Wath's premises, whereupon Wath's personnel detected a strong odor emanating from the containers.<sup>222</sup>

Thereafter, FMC informed Amlon that the odor was probably due to xylene, which FMC stated was in concentrations of 0 to 100 parts per million.<sup>223</sup> Because xylene was listed as a hazardous substance by the EPA, Amlon rejected the seven containers still left at Leeds. Wath then notified the British government. Wath's own test of the material revealed concentrations of xylene up to ten times higher than FMC had claimed, as well as "7-hydrogen (an allegedly carcinogenic pesticide intermediary) and chlorinated phenols (which may form dioxin when exposed to heat and a catalyst)."<sup>224</sup> The Health and Safety Executive of the United Kingdom then required Wath to enclose the material in drums.<sup>225</sup> The plaintiffs then brought suit against FMC, seeking injunctive relief and damages for, among other things, defendant's violation of RCRA, on the grounds that the materials may present an imminent and substantial danger to human health and the environment.<sup>226</sup>

The *Amlon* court admitted that the extraterritorial application of RCRA was a case of first impression.<sup>227</sup> As a threshold question, the court inquired whether Congress intended RCRA to have extraterri-

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219. See Turley, *supra* note 214, at 630-31 (citing the test used in *NRDC v. NRC*, 647 F.2d at 1357).

220. 775 F. Supp. 668 (S.D.N.Y. 1991).

221. *Id.* at 673, 674-75.

222. *Id.* at 669-70.

223. *Id.* at 669.

224. *Id.* at 670.

225. *Id.*

226. *Id.* at 670, 672.

227. *Id.* at 670.

torial application.<sup>228</sup> Having found no such intent, the court saw no reason to reach the effects and conduct test.<sup>229</sup> Taking into consideration RCRA's language and legislative history, the court held that RCRA's concern is domestic in nature, and therefore no clear intent of extraterritorial application was expressed.<sup>230</sup>

Undoubtedly, *Amlon* is distinguishable from the overseas military bases because *Amlon* did not involve a federal agency or the FFCA, which was enacted after the *Amlon* decision. The FFCA clearly mandated federal agency compliance with RCRA,<sup>231</sup> and, in fact, was enacted by Congress specifically to combat judicial decisions holding that federal agencies were immunized from RCRA.<sup>232</sup> In particular, Congress enacted the FFCA because federal agencies, specifically the DOE and the DOD, were among the worst violators of RCRA.<sup>233</sup> Congress intended to address such violations under the FFCA. The FFCA also reiterated that RCRA, as originally enacted, was clearly intended to apply to federal facilities.<sup>234</sup> Therefore, under the threshold congressional intent test, RCRA, and as amended by the FFCA, was intended to apply to all activities by, and facilities of, the DOD—arguably including those overseas. Even the DOD itself recognizes and practices compliance with U.S. environmental laws in its overseas operations, since it annually submits to Congress its funding requirements for environmental compliance in overseas operations.<sup>235</sup>

Notwithstanding, the application of RCRA, as amended by the FFCA, to overseas military bases is in effect *not* extraterritorial. Rather, it is an application of U.S. laws to facilities, activities and operations that are under U.S. control. According to the U.S.-Philippine military base agreements, although the Philippines had sovereignty over the bases, the United States had control and command over the U.S. facilities and forces on the bases.<sup>236</sup> It was the activities of the U.S. forces at the U.S. facilities in the Philippines over the years that violated RCRA,<sup>237</sup> and consequently caused the environmental damage to the air, water, and land in and surrounding the bases in the Philippines. This particular situation, when scrutinized under the effects and conduct test, would satisfy the test for applying RCRA to

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228. *Id.* at 673.

229. *Id.* at 676.

230. *Id.* at 674-76.

231. See discussion *supra* part III.B.

232. See *id.*

233. See *id.*

234. See *infra* note 155.

235. See *supra* text accompanying notes 194-205.

236. See discussion *supra* part II.

237. Cf. 1991 GAO REPORT, *supra* note 58, at 27-28 (finding that the hazardous waste management at the seven bases visited, allegedly including Subic Bay, would have been violations of RCRA and its implementing regulations, and that the hazardous waste management plans of all seven bases did not encompass all RCRA requirements).

the U.S. bases in the Philippines, because the conduct involved U.S. nationals, and affected facilities under U.S. control.<sup>238</sup> Therefore, the situation would satisfy the two-part test for extraterritorial application, even though, in effect, the application of RCRA to overseas bases, particularly in the case of the Philippines, is a territorial issue.

### E. Enforcement

The Solid Waste Disposal Act, as amended by RCRA and the FFCA, can be enforced several ways, but a more viable remedy in the case of the former U.S. military bases in the Philippines is to impose a civil penalty on the DOD.<sup>239</sup> Section 6928(a)(1) of Title 42 of the United States Code, "Compliance orders," authorizes the Administrator of the EPA to either "issue an order assessing a civil penalty for any *past or current violation*, requir[e] compliance immediately or within a specified time period, or both."<sup>240</sup> In this situation, compliance is a moot issue, and as such an order would be ineffectual.

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238. See *supra* text accompanying note 219 (discussion of the effects and conduct test).

239. One enforcement mechanism enables the Administrator of the EPA, upon a finding of a violation of the requirements of the Act by a person, to either issue a compliance order or an order assessing a civil penalty for any past or current violations or both. 42 U.S.C. § 6928(a)(1) (1988). The FFCA explicitly reaffirmed that a "person" for the purposes of the Solid Waste Disposal Act, includes "each department, agency, and instrumentality of the United States." 42 U.S.C. § 6903(15) (Supp. V 1993).

Under RCRA, the Administrator can also seek a temporary or permanent injunction, or other appropriate relief, from a U.S. district court in the district in which the violation occurred. 42 U.S.C. § 6928(a)(1). The law also provides: "[n]either the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief." 42 U.S.C. § 6961(a) (1988 & Supp. V 1993). However, since the subject violation occurred outside the United States, it is questionable whether federal courts can exercise jurisdiction over such a suit.

For this same reason, it is doubtful that a citizen suit is applicable to the topic of this Note. 42 U.S.C. § 6972(a)(1)(B) allows any person to commence a civil action

against any person, including the United States and any other governmental instrumentality or agency, . . . and including any *past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility*, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B) (1988) (emphasis added). "Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district *in which the alleged violation occurred or the alleged endangerment may occur.*" 42 U.S.C. § 6972(a) (1988) (emphasis added).

Furthermore, the courts have held that this citizen suit provision only allows prospective relief. See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 & n.2 (1987). In the case of the Philippines military bases, the violations occurred in the past, and are not continuing. Therefore, a citizen would not have standing to bring suit under 42 U.S.C. § 6972(a).

240. 42 U.S.C. § 6928(a)(1) (1988) (emphasis added).

On the other hand, civil penalties could serve as reimbursement for cleanup costs. According to the statute, the maximum penalty is \$25,000 per day of noncompliance for each violation of a RCRA requirement.<sup>241</sup> Since the violation at the bases occurred over an extended period of time, this penalty could add up to a prodigious amount. One should be cognizant, however, that in assessing the penalty, the Administrator can take into account the seriousness of the violation and the DOD's good faith efforts to comply with applicable requirements.<sup>242</sup>

Nonetheless, the United States might still face a large penalty under this standard. First, the violation is serious because the 1992 GAO Report on the military base closures in the Philippines indicated that there had been "significant environmental damage to [the] facilities in the Philippines" that would be in violation of federal standards.<sup>243</sup> Second, concerning the good faith effort to comply, the GAO Report indicated that Navy and Air Force environmental officials had previously identified these violations,<sup>244</sup> and officials had proposed projects to bring the facilities into compliance with the regulations.<sup>245</sup> Yet, the projects were left unfunded,<sup>246</sup> and the United States failed to implement projects to enable compliance with the regulations. Furthermore, the GAO first made a report to the Secretary of Defense in 1986, identifying problems with hazardous waste management at military facilities.<sup>247</sup> Further reviews, specifically including the bases in the Philippines, were submitted by the GAO in 1991 and 1992.<sup>248</sup> Accordingly, under this analysis, the Administrator might likely find that a large penalty would be appropriate.

However, some have argued that the section of RCRA, as amended by the FFCA, which authorizes the EPA to issue administrative orders and fine a noncomplying federal agency, may be constitutionally suspect.<sup>249</sup> The Department of Justice asserts that the EPA, itself an executive agency, cannot sue the DOD because an intrabranched dispute raises the question of whether the parties are adverse.<sup>250</sup> Article III of

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241. 42 U.S.C. § 6928(a)(3) (1988).

242. *Id.*

243. 1992 GAO REPORT, *supra* note 6, at 3, 27.

244. *Id.* at 27.

245. *Id.* at 28.

246. *Id.*

247. 1986 GAO REPORT, *supra* note 175.

248. 1991 GAO REPORT, *supra* note 58; 1992 GAO REPORT, *supra* note 6.

249. See generally Bettigole, *supra* note 69, at 701-04, 706; May, *supra* note 150, at 370 n.36 (stating that the Justice Department prohibits the EPA from suing federal agencies because of the "unitary executive" theory).

250. Bettigole, *supra* note 69, at 701-03; *Environmental Compliance by Federal Agencies: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 208-11 (1987) (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, Department of Justice); Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 *ECOLOGY L.Q.* 317, 325 (1990).

the United States Constitution requires that a suit be a "case or controversy" to be justiciable.<sup>251</sup> The constitutionality of this RCRA section, however, has yet to be challenged. Also, the EPA need not sue the federal agencies; administrative orders or penalties are enforced in judicial proceedings.<sup>252</sup>

Another possibility is criminal penalties. To impose criminal penalties, RCRA requires that the "person," in this instance the agency, violating the requirements of the statute knew that either it placed another person in imminent danger of death or serious bodily harm, or it was acting in violation of the license requirements of the statute.<sup>253</sup> As discussed above, the damage caused by practices at the bases are serious, including a high likelihood of groundwater contamination.<sup>254</sup> Further, in a country where rain and monsoons are common, leakage and burial of hazardous materials pose a great danger of serious bodily harm.

Other than remedies under RCRA, claims may also be brought against the United States under host country laws.<sup>255</sup> The 1991 GAO Report indicated that, as of October 1990, the Claims Center, which handles claims against U.S. forces, had received 1259 claims totaling \$25.8 million for damage caused by the military's poor environmental practices. Eighteen of these claims, totaling \$21.8 million, arose as a result of the military's improper handling, storage, or disposal of hazardous waste.<sup>256</sup> The DOD accepted responsibility for certain claims, and has reimbursed some of the claimants a total of approximately \$50,000,<sup>257</sup> a small sum considering the nature and extent of the damage done.

In light of the past auspicious relations with the Philippines, and considering the Philippines's lower bargaining power in negotiating the military base agreements, it is both fair and reasonable to utilize these penalties to compensate for the damage done by the DOD to the environment in and around the Philippine bases, or at least, to assist in the cleanup effort. At a minimum, the imposition of civil penalties on the United States might encourage other nations, in negotiating agreements with the DOD, to include better-defined envi-

251. U.S. Const. art. III, § 2, cl. 1.

252. See Wellington, *supra* note 6, at 27, tbl. 7 n.9.

253. 42 U.S.C. § 6928(d) & (e).

254. See discussion *supra* part I.C. See also Bettigole, *supra* note 69, at 689-91. Bettigole states, "the military's harm has been visibly evident, immediate, and profound," and argues that, "just as the court in *People v. Gray* suggested that New York's failure to comply with EPA air pollution standards created an imminent harm, the military's failure to comply with hazardous waste laws also suggests that an imminent harm has occurred." *Id.* at 690 (citing *People v. Gray*, 571 N.Y.S.2d 851, 856 n.2 (Crim. Ct. N.Y. County 1991)).

255. 1991 GAO REPORT, *supra* note 58, at 4, 46. This author does not know if Philippine law allows for such claims.

256. *Id.*

257. *Id.*

ronmental standards and compliance obligations. Perhaps more importantly, the imposition of fines might encourage the U.S. military to change its practices at overseas bases to ensure proper compliance with applicable environmental laws.

#### IV. INTERNATIONAL LAW

An analysis of international law reveals that a number of well-settled principles are pertinent to the operation of U.S. military bases in the Philippines. Perhaps the best known of these principles is the territoriality and sovereignty theory embodied in Principle 21 of the Stockholm Declaration, which provides that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities *within their jurisdiction or control* do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>258</sup>

Just as requiring military bases to follow U.S. law does not violate extraterritorial principles of U.S. case law, mandating that the DOD comply with U.S. environmental regulations is consistent with Principle 21. Such a mandate would respect Philippine sovereignty over their own lands, and would impose upon the United States the responsibility to ensure that the activities within the U.S.-controlled facilities do not damage the Philippine environment.

In addition, Principle 6 of the Stockholm Declaration states that: "the discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems."<sup>259</sup> As revealed by several reports previously discussed,<sup>260</sup> activities by the DOD at the Philippine bases undoubtedly violated Principle 6.

Further, Principle 22 of the Stockholm Declaration, which stresses the necessity for comprehensive liability and victim compensation schemes, undeniably applies to the U.S.-Philippine military base situation. Principle 22 expressly declares that: "[s]tates shall cooperate to develop further the international law regarding liability and compen-

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258. *Report of the United Nations Conference on the Human Environment*, Principle 21, U.N. Doc. A/Conf 48/14 and Corr. 1 (1972) [hereinafter *Stockholm Declaration*] (emphasis added). See also *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, Principle 2, at 9 in U.N. DEP'T OF PUBLIC INFORMATION, AGENDA 21: THE UNITED NATIONS PROGRAMME OF ACTION FROM RIO, U.N. Doc. DPI/1344, U.N. Sales No. E.93.1.11 (1993) (restating Principle 21 of the Stockholm Declaration).

259. *Stockholm Declaration*, *supra* note 258, at Principle 6.

260. See discussion *supra* part I.C.

sation for the victims of pollution and other environmental damage caused by activities *within the jurisdiction or control* of such states to areas beyond their jurisdiction."<sup>261</sup> Therefore, this principle encourages the development in international law of compensation to victims for the precise type of violations committed by the DOD at the bases in the Philippines.

Similarly, requiring DOD compliance with U.S. environmental laws in their overseas operations is consistent with international law as set forth in the Restatement of Foreign Relations Law.<sup>262</sup> Section 402 of the Restatement states:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

- (1)(a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) *the activities, interests, status, or relations of its nationals outside as well as within its territory*; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.<sup>263</sup>

Thus, pursuant to section 402, the United States may prescribe laws with respect to activities of U.S. forces outside the United States, such as on overseas military bases.

Section 403 of the Restatement provides, in pertinent part:

- (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
- (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
  - (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
  - (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated . . . ;

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261. *Stockholm Declaration*, *supra* note 258, at Principle 22 (emphasis added).

262. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

263. *Id.* § 402 (emphasis added).

- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.<sup>264</sup>

In view of these factors, it is reasonable for the United States to prescribe law with respect to activities at U.S. bases located in the Philippines because there were strong ties between the two nations,<sup>265</sup> both nations regulate such activities in their own jurisdictions (indicating also that the Philippines has a strong interest in regulating the activity),<sup>266</sup> and because there was no conflict between U.S. and Philippine regulations, as Philippine environmental laws mirror U.S. laws.<sup>267</sup>

In short, an application of RCRA to overseas U.S. installations is consistent with international law. One must acknowledge that such an application respects Philippine sovereignty because: (1) the military facilities that created the violations were under U.S. control, and therefore, under U.S. jurisdiction; (2) the Philippines had an interest in regulating the very kind of activities that caused the environmental damage, as evidenced by the fact that the Philippines has laws in place regulating such activities; (3) it is desirable for all host country nations that the activities be regulated; (4) it is equally desirable for the United States that its overseas forces abide by U.S. environmental laws to preserve good political and diplomatic relations with host countries; and (5) the U.S. laws to be applied mirror Philippine environmental law, and, as such, are not incompatible with Philippine laws.

#### CONCLUSION

The cleanup of the environmental damage caused by the United States during its occupation and control of U.S. bases in the Philippines will cost millions of dollars, a substantial expense which the Philippines cannot afford. Although the last military base agreement in force offered no well-defined environmental responsibility for the United States,<sup>268</sup> the agreements clearly granted the United States the use and control over U.S. facilities at the bases during American occu-

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264. *Id.* § 403.

265. See discussion *supra* parts I.A & I.B (tracing the history and auspicious relations between the Philippines and the United States).

266. See discussion *supra* parts III.A & III.B and text accompanying notes 173-74.

267. See *supra* text accompanying notes 173-74.

268. See *supra* text accompanying note 86.

pation.<sup>269</sup> The United States enjoyed this benefit 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. With the United States's benefit from the use of the bases must come liability, or at the very least, the obligation to maintain the bases in safe condition so that they were toxic-free when they were returned to the Philippines. In fact, Article VIII of the 1947 Agreement gave the United States the right to take necessary steps "to improve health and sanitation in areas contiguous to the bases" and offered compensation from the United States for any damage resulting from such steps taken.<sup>270</sup> The agreement thus contemplated that the United States would take health and safety measures.

Furthermore, the agreement only exonerated the United States from obligations for damage to non-removable buildings and structures, and from returning the bases in the condition they were in at the time of U.S. occupation.<sup>271</sup> The United States had been creating hazardous waste problems and contamination over the years during its occupation<sup>272</sup>—it would hardly be desirable for the United States to return the bases in such condition. However, the agreement did not exonerate the United States from returning the bases in their original untainted condition, or at least, in a safe and toxic-free condition.<sup>273</sup>

Moreover, DOD overseas policy and President Carter's Executive Order required compliance by overseas federal facilities with, at least, host nation environmental laws.<sup>274</sup> Since 1976, the Philippines had in place environmental laws modeled after U.S. laws.<sup>275</sup> By failing to comply with those laws, the DOD violated its own policy and the Executive Order. Unfortunately, the DOD policy and the Executive Order do not create a cause of action against the United States for any violations.<sup>276</sup> Also, although the base agreement allows for civil liability claims under Article XXIII, such claims must have been made within one year of the occurrence or incident from which the claim arose.<sup>277</sup> It would be too late to bring a claim under this article now because the United States left the Philippine bases over a year ago. While compensation from the United States is available under Article VIII, it is limited to private claims arising out of measures taken by the United States to ensure health and safety.<sup>278</sup>

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269. See discussion *supra* part II.

270. 1947 Military Bases Agreement, *supra* note 37, art. VIII, at 4023.

271. See *supra* notes 107-09 and accompanying text.

272. See generally 1992 GAO REPORT, *supra* note 6.

273. See *supra* text accompanying notes 105-09.

274. See discussion *supra* part III.C.

275. See *supra* text accompanying notes 173-74.

276. See *supra* note 172.

277. See *supra* note 92 and accompanying text.

278. See *supra* text accompanying note 91.

In its Annual Report of Environmental Compliance submitted to the President and Congress, the DOD admitted that no uniform policy concerning environmental restoration at operating overseas bases had been set.<sup>279</sup> Notwithstanding, the DOD also conceded that it is "responsible for environmental contamination resulting from decades of operations both in the United States and overseas."<sup>280</sup> The DOD added that it is "committed to cleaning up environmental damage resulting from past practices . . . [and] managing responsibly the natural and cultural resources it holds in public trust."<sup>281</sup> This policy should thus be applied to the environmental damage caused by past U.S. practices at its bases in the Philippines. Furthermore, in creating this damage, the United States violated RCRA, as amended by the FFCA, which, as discussed above, applies, or should apply, to overseas military bases. In enacting RCRA, the congressional intent was to apply RCRA to the DOD in light of the reports of violations at military installations. Furthermore, even the Department of Defense recognized its obligations to comply with RCRA regarding its overseas activities.

Finally, mandating compliance by the DOD with U.S. environmental laws at their overseas bases is consistent with U.S. extraterritorial principles and international law because compliance respects sovereignty of the Philippines and protects both countries' interests in regulating such activities. 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.

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279. ANNUAL REPORT, *supra* note 186, at 89.

280. *Id.* at 83.

281. *Id.* at 90.

