NOTES

Not in My Backyard, but in Yours: United States Overseas Environmental Policy in Japan and South Korea

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I. INTRODUCTION

This note addresses the environmental regulations that apply to U.S. federal actions overseas and, more specifically, the Department of Defense's ("DoD") activities in Japan and South Korea. Japan and South Korea provide a uniquely rich reservoir of international environmental regulatory issues due to the U.S. military's widespread presence in each nation since the end of World War II.[1] As part of the analysis, this note compares the domestic environmental regulations of the United States to those of Japan and South Korea and determines which regulations would provide a greater level of protection. Additionally, it examines the stated rationale for the regulatory system that applies to U.S. federal actions overseas and considers whether that system constitutes a double standard when compared to the regulations applied to federal actions within the United States.

In Part II, the note establishes the background for the overseas environmental regime by discussing the applicability of U.S. domestic laws overseas and the creation of U.S. government policy to constrain federal actions abroad. It also briefly outlines the relevant environmental laws and regulations in Japan and South Korea. Part III will analyze the advantages and disadvantages of the overseas environmental protection regime, paying particular attention to activities in Japan and South Korea. In summary, the note demonstrates that, rather than being guided by recognized environmental protection principles present in international and domestic environmental laws, U.S. environmental regulation of activities overseas is motivated by foreign policy, national security, and diplomatic concerns. Further, the exercise of these priorities results in a lower level of environmental protection for the host nation than would be provided in the United States.

II. U.S. ENVIRONMENTAL LAWS AND DOMESTIC MILITARY ACTIVITIES

Military activities present a wide range of environmental hazards, including air emissions, water discharges, and hazardous waste disposal, among others.

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1. *See* Doug Bandow, *U.S. Filled Okinawa with Bases and Japan Kept Them There: Okinawans Again Say No*, FORBES (Nov. 26, 2014, 7:00 AM), http://www.forbes.com/sites/dougbandow/2014/11/26/u-s-filled-okinawa-with-bases-and-japan-kept-them-there-okinawans-again-say-no/; John Glaser, *Are U.S. Troops in South Korea Still Necessary?*, AL JAZEERA AM. (Jan. 22, 2014, 8:45 AM), http://america.aljazeera.com/opinions/2014/1/are-u-s-troops-insouthkoreastillnecessary.html.

Although most U.S. domestic laws apply to military activities domestically, the environmental laws and regulations that apply to military activities overseas are derived from a complex array of U.S. domestic laws, executive orders, federal agency directives, foreign laws, and international agreements.

Despite the common law precept that generally prevents a sovereign from being sued in court without its consent,[2] most domestic environmental laws and regulations apply to military installations within the United States.[3] Further, in 1978, President Carter signed Executive Order ("E.O.") 12088, which mandated that the pollution control standards embedded in major U.S. environmental laws apply to federal facilities and activities.[4] E.O. 12088 required federal agencies to comply with any pollution control requirements that would apply to a private entity in the United States, including federal, state, and local regulations.[5] In short, there is both legislative and executive intent to apply domestic environmental law to military installations in the United States.

III. APPLICATION OF U.S. LAWS OVERSEAS

For the most part, domestic environmental legislation does not apply to federal actions overseas, including actions that take place within U.S. military installations abroad.[6] Absent express intent to the contrary, U.S. legislation is presumed not to apply outside of the United States.[7] However, some examples of U.S. environmental laws that may constrain federal actions overseas include the National Environmental Policy Act, the National Historical Preservation Act, the Endangered Species Act, and the Marine Mammal Protection Act. This note examines each statute's foreign implications.

A. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act ("NEPA"), enacted in 1970, established a national environmental policy and requires federal agencies to incorpo-

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2. *Cf.* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1976) [hereinafter FSIA]. Under FSIA, Congress created a narrow set of circumstances in which a foreign sovereign may be sued in U.S. courts. Nevertheless, this law does not apply to military activities in the United States. *See id.*

3. *See* Charles L. Green, *A Guide to Monetary Sanctions for Environmental Violations by Federal Facilities*, 17 PACE ENVTL. L. REV. 45, 45 (1999). The Clean Water Act; Clean Air Act; Resource Conservation and Recovery Act; and Comprehensive Environmental Response, Compensation, and Liability Act, among others, all have provisions waiving sovereign immunity for federal facilities.

4. Exec. Order No. 12,088, 43 Fed. Reg. 47707 (1978).

5. *Id.*; Margaret Carlson, *Environmental Diplomacy: Analyzing Why the U.S. Navy Still Falls Short Overseas*, 47 NAVAL L. REV. 62, 69 (2000).

6. *See* Richard A. Wegman & Harold G. Bailey, Jr., *The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed*, 21 ECOLOGY L.Q. 865, 924-25 (1994).

7. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).

rate environmental planning into major federal actions.[8] More specifically, NEPA requires federal agencies to prepare environmental impact statements for major federal actions that the agencies determine will significantly affect the environment.[9] Although NEPA is largely considered a procedural statute, it does impose significant constraints on federal agency actions through its detailed environmental evaluation requirements.[10] Perhaps more importantly, citizens may delay or block federal actions by obtaining injunctive relief from federal courts via provisions of the Administrative Procedure Act.[11] NEPA, however, does not contain specific language that expands the law's jurisdiction beyond the territory of the United States.

Despite the lofty goals of the statute, NEPA does not apply to military activities overseas because of the judicial presumption against extraterritorial application of federal statutes, the implication of foreign policy interests, and the fact that the effects of the activities occur mostly in foreign countries.

1. Massey and Its Progeny

Despite the presumption against extraterritoriality, in 1993 the U.S. Court of Appeals for the District of Columbia held that NEPA applies outside U.S. territorial jurisdiction in some limited circumstances.[12] In *Environmental Defense Fund v. Massey*, the D.C. Circuit concluded that the presumption against extraterritoriality does not apply when most of the regulated conduct takes place inside the United States and the alleged effects of the action take place in a continent without a sovereign.[13] Plaintiff Environmental Defense Fund alleged that the National Science Foundation violated NEPA when it failed to prepare and submit an environmental impact statement before going forward with plans to incinerate food wastes in Antarctica.[14] The court reasoned that, because the processes required by NEPA "take place almost exclusively in [the United States] and involve the workings of the U.S. government, they are uniquely domestic."[15] No subsequent court, however, has applied the *Massey* holding to federal actions outside of the United States or Antarctica.

After *Massey*, domestic environmental laws may apply to federal actions that occur in the global commons, which include "sovereignless" areas such as the

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8. *See* National Environmental Policy Act of 1969, § 101, 42 U.S.C. § 4321 (2012).
9. *See id.* § 4332.
10. *See id.*
11. *See* Administrative Procedure Act, 5 U.S.C. § 702 (1976); *see also* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1128 (D.C. Cir. 1971) (holding U.S. Atomic Energy Commission regulations did not satisfy NEPA requirements).
12. *See* Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993).
13. *See id.*
14. *Id.*
15. *Id.* at 532.

high seas, international airspace, or outer space.[16] This reasoning is significant for the U.S. military, which routinely operates in sovereignless areas.

The persuasive weight of *Massey*, however, has since been called into doubt. In *Basel Action Network v. Maritime Administration*, a 2005 case dealing with NEPA's extraterritorial application, environmental groups, including Basel Action Network and Sierra Club, sought a temporary restraining order and preliminary injunction to prevent the United States Maritime Administration ("MARAD") from exporting defunct vessels to the United Kingdom. The environmental groups feared that the vessels would leak toxic substances in violation of federal environmental laws.[17] Despite the precedent in *Massey*, the U.S. District Court for the District of Columbia held that, although Sierra Club did have associational standing to sue, NEPA did not apply to MARAD's transfer of the vessels over the high seas.[18] The court distinguished *Massey* by relying on the U.S. Supreme Court case *Smith v. United States*, in which the Court held that the presumption against extraterritoriality applied with equal vigor in "sovereignless" areas.[19] No court has yet returned to this question of whether NEPA applies in sovereignless areas.

2. NEPA and Foreign Policy Interests

Additionally, courts are reluctant to apply NEPA extraterritorially when its application may implicate foreign policy interests. For instance, in a 1990 case concerning NEPA's extraterritorial application, environmental non-profit Greenpeace USA attempted to secure a preliminary injunction to halt the Army's transfer of chemical munitions from an installation in West Germany to Johnson Atoll.[20] The U.S. District Court for Hawaii held that NEPA did not apply to the munitions transfer, which was based on a presidential agreement between the United States and West Germany and thus not subject to the NEPA's requirements.[21] The court cited the grave foreign policy implications that would result from the application of NEPA to actions subject to international agreements, with effects primarily in a foreign sovereign's jurisdiction.[22] In *Greenpeace USA*, the court was particularly concerned about the domestic statute's potential to interfere with the substance of a presidential agreement.[23]

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16. *See id.* at 531; *see also* James E. Landis, *The Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States' Overseas Environmental Policies*, 49 NAVAL L. REV. 99, 115 (2002).

17. Basel Action Network v. Mar. Admin., 370 F. Supp. 2d 57, 61 (D.D.C. 2005).

18. *Id.* at 71.

19. *See id.* at 72 (citing Smith v. United States, 507 U.S. 197, 204 (1993)).

20. Greenpeace USA v. Stone, 748 F. Supp. 749, 752 (D. Haw. 1990).

21. *Id.* at 761.

22. *Id.*

23. *See id.*

The *Greenpeace USA* court did not explicitly hold that NEPA did not apply to the global commons, but did state that the Army's compliance with E.O. 12114, which required the federal government to prepare an environmental impact statement for major federal actions that affected the global commons, should be given weight when determining whether NEPA applies to a major federal action.[24]

Three years later, the influential U.S. District Court for the District of Columbia further recognized the weight of foreign policy interests in the NEPA context.[25] In *NEPA Coalition of Japan v. Aspin*, an environmental group asked the court to consider whether NEPA required the DoD to prepare environmental impact statements for U.S. military installations in Japan.[26] The court relied on the presumption against extraterritoriality to hold that NEPA did not apply to U.S. federal actions within Japanese territorial jurisdiction.[27] The court reasoned that the status of U.S. military installations in Japan was not analogous to the Antarctica research site in *Massey* because the U.S. military installations in Japan were governed by treaty arrangements.[28] Additionally, the court held that, even if NEPA did apply extraterritorially in this case, an environmental impact statement would not be required because the government's asserted foreign policy interests outweighed the benefits of preparing an EIS.[29]

Courts also look to the extent to which the effects of the action occur in a foreign jurisdiction. For instance, in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, the D.C. Circuit held that NEPA does not require the NRC to prepare an environmental impact statement for international nuclear transactions when the potential effects occur completely in the foreign jurisdiction.[30] The court reasoned that Congress did not intend for NEPA's unilateral requirements to interfere with bilateral or multilateral agreements respecting the environment.[31] This illustrates the extent to which courts will find in NEPA a congressional intent to defer to executive international agreements.

In addition to NEPA's jurisdictional limitations, several other nonjurisdictional exceptions may prevent the application of NEPA to military actions overseas. First, federal agencies are not required to prepare and submit environmental impact statements when the acknowledgement of federal agency decisionmaking

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24. *See id.* at 762.
25. *See* NEPA Coal. of Japan v. Aspin, 837 F. Supp. 466, 467 (D.D.C. 1993).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 468 (citing Comm. for Nuclear Responsibility v. Seaborg, 463 F.2d 796, 798 (D.C. Cir. 1971) ("NEPA requirements must give way when government made assertions of harm to national security and foreign policy.")). In *Aspin*, the court determined that the government made plausible assertions that requiring EIS preparation would impact the foreign policy interests of the United States. *Id.*
30. Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1348 (D.C. Cir. 1981).
31. *See id.*

may jeopardize national security.[32] Second, presidential actions are excluded from NEPA's procedural requirements.[33] So, even if NEPA did apply extraterritorially, many military activities would fall under one or both of these exceptions and thus not be subject to the strictures of NEPA.

B. NATIONAL HISTORIC PRESERVATION ACT

The National Historic Preservation Act of 1966 ("NHPA") is another U.S. statute that may constrain federal activities abroad. Although not considered an environmental statute, NHPA requires the preservation of the historical and cultural foundations of the nation, which may involve some elements of environmental protection.[34] Section 106 of the NHPA requires federal agencies to "take into account the effect of [an] undertaking on any district, site, building, structure, or object that is included or eligible for inclusion in the National Register."[35] In 1980, Congress amended the NHPA to require federal agencies to take into account possible adverse effects from federal undertakings outside the United States.[36]

In 2008, the U.S. District Court for the Northern District of California applied NHPA's procedural requirements to federal actions abroad.[37] In *Okinawa Dugong v. Gates*, Japanese and American citizens and environmental groups filed suit against the U.S. Secretary of Defense for violating Section 402 of the NHPA by failing to consider how the construction of a proposed military facility in Okinawa might affect the dugong, a marine mammal of cultural and historical significance to the Japanese people.[38] The district court held that the DoD's involvement in the planning of the installation's construction constituted a federal undertaking and that the agency failed to adequately take into account the facility's effect on the dugong.[39] Unlike the NEPA cases discussed earlier, the district court was not concerned with NHPA's possible interference with foreign policy considerations, but rather stressed that the statute places affirmative duties on the DoD, and the DoD may carry out those duties in coordination with the

32. *See* Weinberger v. Catholic Action of Haw., 454 U.S. 139, 145 (1981).

33. *See* 40 C.F.R. § 1508.12 (1970); *see also* Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy, 383 F.3d 1082, 1088 (9th Cir. 2004).

34. *See* 16 U.S.C. § 470(b)(2).

35. *Id.* § 470f.

36. *See* 16 U.S.C. § 470a-2 (2012). This extraterritorial provision was added to comply with the Convention Concerning the Protection of World Cultural and Natural Heritage, which the United States ratified in 1973. H.R. REP. NO. 96-1457, at 43-44 (1980).

37. Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082, 1083 (N.D. Cal. 2008).

38. *See id.*

39. *See id.* at 1101, 1111. Because of its cultural significance, the dugong is listed as a protected natural monument on the Japanese Register of Cultural Properties, which the court considered the equivalent of the U.S. National Register under NHPA. *Id.* at 1100.

government of Japan.[40] Nonetheless, no court has subsequently applied Section 402 to federal actions outside of the United States.

C. ENDANGERED SPECIES ACT AND MARINE MAMMAL PROTECTION ACT

The Endangered Species Act of 1973 ("ESA") and the Marine Mammal Protection Act ("MMPA") are two domestic environmental statutes that may apply, in limited situations, outside U.S. territory. The ESA requires all federal agencies to seek the conservation of endangered and threatened species.[41] Although the U.S. Supreme Court has held that the ESA does not apply in foreign territory,[42] it has not addressed whether the ESA applies to federal actions on the high seas, which might implicate actions by the U.S. Navy. Implementing regulations promulgated by the Department of Interior extend the ESA's conservation requirements to federal actions carried out on the high seas.[43] However, the meaning of "high seas" is not defined in the statute[44] or the implementing regulations.[45] Under some interpretations of the ESA, the federal government may need to secure permits under the ESA to engage in federal actions outside of U.S. territorial waters.[46] Additionally, the Secretary of Defense may exempt an agency action if necessary for reasons of national security.[47]

The MMPA was enacted in 1972 to protect marine mammals from the adverse effects of human activities.[48] Like the ESA, the MMPA's protections extend to the high seas,[49] and case law makes clear that the MMPA's reach does not extend into the territory of foreign sovereigns.[50]

In summary, despite the presumption against the extraterritorial application of federal statutes, some federal environmental laws constrain federal actions outside of the United States. But the extent to which federal laws constrain extraterritorial activities depends on whether the action possibly conflicts with the jurisdiction of a foreign sovereign.

IV. U.S. GOVERNMENT POLICY

Despite the inapplicability of the majority of U.S. environmental statutes extraterritorially, U.S. government policy does place environmental restrictions

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40. *See id.* at 1109.
41. Endangered Species Act, 16 U.S.C. § 1531(c)(1) (2012).
42. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992).
43. 50 C.F.R. § 402.01(a) (2014).
44. *See* 16 U.S.C. § 1532 (2012).
45. *See* 50 C.F.R. § 402.02 (2009).
46. *See, e.g.*, Keith S. Gibel, *Defined by the Law of the Sea: "High Seas" in the Marine Mammal Protection Act and the Endangered Species Act*, 54 NAVAL L. REV. 1, 7 (2007).
47. *See* 16 U.S.C. § 1536(j) (2012).
48. Marine Mammal Protection Act, 16 U.S.C. § 1361 (1994).
49. 16 U.S.C. § 1372(a)(1) (1994).
50. *See, e.g.,* United States v. Mitchell, 553 F.2d 996, 1004 (5th Cir. 1977) (holding under MMPA takings without permits were prohibited only in U.S. territory and on the high seas).

on federal actions overseas. These restrictions are based on a series of executive orders and federal agency directives, which are presently considered.

A. EXECUTIVE ORDERS 11752, 12088, AND 12114

In the 1970s, Presidents Nixon and Carter expanded environmental regulation of federal actions, both domestically and overseas. In 1973, President Nixon signed Executive Order 11752, requiring executive agencies responsible for the construction and operation of domestic federal facilities to comply with the environmental standards of the jurisdiction in which they are located.[51] Additionally, E.O. 11752 required the heads of federal agencies to consider NEPA-like environmental impacts in the planning of a new facility or the modification of an existing facility.[52] But, like NEPA, E.O. 11752 exempts agencies from having to meet applicable standards in the interest of national security or in extraordinary cases.[53]

In 1978, President Carter replaced E.O. 11752 with E.O. 12088, which went a step further and addressed the issue of environmental regulation of federal facilities abroad.[54] E.O. 12088, for the first time, required the heads of executive agencies to ensure that the construction or operation of federal facilities abroad complied with the environmental pollution control standards of general applicability in the host country or jurisdiction.[55] Additionally, E.O. 12088 took the significant step of recognizing the sovereignty of host nations.[56]

President Carter again broadened the regulation of federal facilities abroad by signing E.O. 12114 eighteen months later.[57] E.O. 12114 required agencies to consider the environmental impacts of overseas federal actions, both on and off military installations.[58] E.O. 12114 provides a list of categories of activities that are covered by its requirements and some applicable procedures that agencies should follow.[59] However, agencies are left with the discretion to determine their own specific procedures.[60] E.O. 12114 also exempts certain federal actions from its requirements, including actions taken by the president, actions that involve national security or interests, and intelligence activities.[61] This succession of executive orders set the stage for federal agencies to implement agency-specific implementing policies.

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51. Exec. Order No. 11,752, 3A C.F.R. § 240 (1973).
52. *Id.*
53. *Id.*
54. *See* Exec. Order No. 12,088, 3 C.F.R. § 243 (1979).
55. *Id.* para. 1-8.
56. *See id.*
57. *See* Exec. Order No. 12,114, 3 C.F.R. § 356 (1980).
58. *See id.* para. 1-1.
59. *See id.* paras. 2-4, 5.
60. *See id.* para. 3-1.
61. *See id.* para. 2-5.

B. DEPARTMENT OF DEFENSE POLICY

In March 1979, the DoD implemented E.O. 12114's requirements with DoD Directive 6050.7.[62] Directive 6050.7 provides policies and procedures for the military departments to satisfy the requirements of E.O. 12114.[63] Although short of mandating specific environmental standards, Directive 6050.7 does lay out key definitions and responsibilities.[64] Additionally, the document's enclosures outline the required content of environmental impact statements and the type of federal actions that must be assessed.[65]

In 1991, the DoD expanded upon Directive 6050.7 with Directive 6050.16 and established the first minimum environmental standards for military installations overseas.[66] Importantly, Directive 6050.16 does not cover operations of U.S. vessels or military aircraft, which are mostly covered by other DoD policies, or potentially by international agreements.[67] Perhaps the most important aspect of Directive 6050.16 was its introduction of a policy to establish and maintain a baseline guidance document for the protection of the environment at U.S. installations outside of the United States.[68]

1. Overseas Environmental Baseline Guidance Document

The Overseas Environmental Baseline Guidance Document ("OEBGD") establishes criteria, standards, and management practices for environmental protection at U.S. installations overseas.[69] It applies to actions of DoD components outside of the United States, but, like Directive 6050.16, it does not apply to the operation of U.S. military vessels or aircraft.[70] OEBGD's standards also do not apply to off-installation operational deployments, such as hostilities or contingency operations.[71] This means that its standards place strict limits on the disposal of hazardous waste by an installation's public works department but apparently do not apply to the disposal of a similar waste by a training convoy just miles away

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62. *See* U.S. DEP'T OF DEF., DIR. 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS (1979).

63. *Id.* at 3.

64. *Id.* at 2-5.

65. *Id.* at 8, 12.

66. *See* U.S. DEP'T OF DEF., DIR. 6050.16, DOD POLICY FOR ESTABLISHING AND IMPLEMENTING ENVIRONMENTAL STANDARDS AT OVERSEAS INSTALLATIONS (1991) [hereinafter DoD Dir. 6050.16]; Richard Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 55 (1995).

67. *See* DoD Dir. 6050.16, *supra* note 66, para. 2.3. See also Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 1046 U.N.T.S. 120, for one example of an international agreement that constrains the actions of vessels.

68. *See* DoD Dir. 6050.16, *supra* note 66, para 3.1; U.S. DEP'T OF DEF., DOD 4715.05-G, OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (2007) [hereinafter OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE].

69. *See* OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE, *supra* note 68, at 3.

70. *Id.* para. C1.3.3.

71. *Id.*

outside the installation in a foreign country. Although the OEBGD provides minimum standards, its primary purpose is to set criteria from which to develop Final Governing Standards ("FGS") applicable to individual nations.[72]

However, the OEBGD specifically states that it "does not create any rights or obligations enforceable against the United States, the Department of Defense, or any of its components, nor does it create any standard of care or practice for individuals."[73] This means that the standards are only enforced internally by the DoD.

2. Final Governing Standards

FGS are country-specific, comprehensive environmental standards, typically involving technical limitations on effluent, discharges, or specific management practices.[74] The standards are comprised of a combination of U.S. standards, host nation laws of general applicability, and applicable treaty provisions.[75] According to the OEBGD, these country-specific standards should reflect the stronger of environmental protections between the United States and the host nation.[76] The various military departments self-enforce the FGS, including required environmental compliance audits.[77] The government addresses violations through primarily administrative means, such as adverse performance evaluations of responsible decisionmakers.[78] This lack of external enforcement mechanisms may lead to a lack of credibility in the eyes of host nations and the international community.

Aside from containing substantive standards, FGS incorporate the environmental impact assessment requirements from E.O. 12114 and DoD Directive 6050.7 and are the primary source for an installation's environmental assessment program.[79] Similar to NEPA, the type of action and extent of potential harm to the environment determine what level of review is required.[80] But, unlike in the NEPA context, no action or assessment is required if the host nation participates in the action.[81]

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72. *Id.* para. C1.1.
73. *Id.* para. C1.5.6.
74. *Id.* para. C1.4.3.
75. *See id.* para. C1.4.5.
76. Carlson, *supra* note 5, at 78.
77. Phelps, *supra* note 66, at 69.
78. Carlson, *supra* note 5, at 99.
79. *Id.* at 84.
80. *Id.* The three levels of environmental assessment under this framework, in order of detail, are (1) Overseas Environmental Impact Statement, (2) Environmental Study, and (3) Environmental Review. *Id.* at 85.
81. *Id.*

3. Final Governing Standards in Japan and South Korea

The DoD promulgated the most recent version of the FGS that apply to Japan, the Japan Environmental Governing Standards ("JEGS"), in November 2010.[82] The JEGS are purported to be the more protective of the OEBGD, Japanese environmental laws, and relevant international agreements.[83] However, similar to the OEBGD, the standards in the JEGS do not create any enforceable rights or standards of care that could lead to legal liability against the DoD.[84]

South Korea's FGS were most recently published in June 2012 and apply to all installations and facilities in the Republic of Korea ("ROK") that the U.S. military directly controls or manages.[85] They contain substantive provisions, typically in the form of technical limitations on effluent, discharges, or specific management practices.[86] As in Japan, the military is not required to obtain discharge or use permits mandated by Korean environmental statutes or regulations.[87]

V. FOREIGN ENVIRONMENTAL LAWS

In order to effectively compare the substantive laws contained in the FGS to foreign environmental laws, it is helpful to briefly examine the foreign environmental laws of Japan and South Korea.

A. JAPAN

As recently as the 1960s, Japan was considered among the most polluted nations in the world.[88] The combination of Japan's post-World War II industrial growth and a dearth of pollution controls led to significant environmental problems.[89] The 1960s also brought the "big four" cases, which include the Kumamoto Minamata Disease, Niigata Minamata Disease, Toyama Itai-Itai Disease, and Yokkaichi Asthma.[90] Each of the "big four" demonstrated a lack of regulation of industrial pollution, an unresponsive government, and resultant public outcry.[91] After the "big four," the Japanese government was emboldened to reform existing environmental statutes.[92]

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82. *See* U.S. DEP'T OF DEF., JAPAN ENVIRONMENTAL GOVERNING STANDARDS (2010).
83. *Id.* para. C1.1.2.
84. *Id.* para. C1.5.5.
85. U.S. FORCES KOREA, USFK REG 201-1, ENVIRONMENTAL GOVERNING STANDARDS (EGS) (2012).
86. *Id.* para. 1-5.
87. *Id.* para. 1-7.
88. MARGARET A. MCKEAN, ENVIRONMENTAL PROTEST AND CITIZEN POLITICS IN JAPAN 17 (1981).
89. *See* Shiro Kawashima, *A Survey of Environmental Law and Policy in Japan*, 20 N.C. J. INT'L L. & COM. REG. 231, 239 (1995).
90. *Id.*
91. *See id.* at 239-40.
92. *Id.* at 242.

Although it does not provide explicit environmental protection, the Japanese Constitution grants autonomous powers to both prefectural governments and Japanese cities with populations greater than one million, such as the legislative authority to protect the health and welfare of residents.[93]

1. Overview of Japanese Environmental Law

In 1967, the Japanese government enacted the first national comprehensive environmental protection legislation, the Fundamental Act for Environmental Pollution Prevention.[94] But the law included a "harmony clause," which emphasized that environmental and public health protection measures should be in harmony with industrial development.[95] The harmony clause was subsequently eliminated in 1970 during the environmental-pollution-related Diet (Japanese legislature) debate, which was partly inspired by growing public concern about the national government's environmental policy.[96]

In 1970, the Diet amended the law, establishing the legal framework that was in effect until 1993.[97] As part of the amendments, the Diet enacted thirteen environmental laws, including an amended Air Pollution Control Law and the Water Pollution Control Law.[98] The Waste Management Law of 1970 regulates domestic and industrial solid and hazardous waste.[99] Additionally, the Environmental Agency was established in 1971.[100] The principal function of the agency, now the Ministry of the Environment, was to coordinate national environmental policy.[101]

In 1972, the Diet passed the National Environment Preservation Act, which was created to promote the preservation of the natural environment.[102] The National Environment Preservation Act outlined the general responsibilities of national and local governments, industry, and the public.[103]

2. The Fundamental Act for the Environment of 1993

The Fundamental Act for the Environment, passed in 1993, consolidated the Japanese government's somewhat discursive policies for pollution prevention

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93. 2 COMPARATIVE ENVIRONMENTAL LAW AND REGULATION § 32:1 (Nicholas A. Robinson et al. eds., 2014).
94. Kawashima, *supra* note 89, at 242-43.
95. COMPARATIVE ENVIRONMENTAL LAW AND REGULATION, *supra* note 93, § 32:7; Kawashima, *supra* note 89, at 242.
96. Kawashima, *supra* note 89, at 243.
97. *Id.* at 243-44.
98. COMPARATIVE ENVIRONMENTAL LAW AND REGULATION, *supra* note 93, § 32:8.
99. *Id.* § 32.10.
100. Kawashima, *supra* note 89, at 254.
101. *Id.* at 255.
102. *Id.* at 246.
103. *Id.* at 247.

and environmental preservation.[104] The Act sets overarching environmental protection goals and calls for the national government to endeavor to promote international cooperation in the pursuit of environmental preservation.[105] However, the extent to which this legislation is successful in pollution prevention or conservation depends on the subsequent regulations adopted by local governments.[106] The Diet, also enacted the Environmental Impact Assessment Law in 1997, which covers major infrastructure projects and requires the preparation of detailed environmental impact statements and a period of public review.[107]

Prefectural and municipal governments also play a prominent role in environmental regulation. The Fundamental Act for the Environment gives prefectural governments the authority to control environmental pollution unless the exercise of that power conflicts with national legislation.[108] Additionally, some environmental regulation, such as noise and waste disposal, is delegated to municipal governments.[109]

B. SOUTH KOREA

South Korea, much like Japan, experienced rapid economic growth in the post-World War II period.[110] As in Japan, industrial expansion was accompanied by high environmental costs. Significant pollution led to the Pollution Prevention Act of 1968, which was South Korea's first environmental legislation.[111] Throughout the 1970s and 80s the Korean government, mainly in response to increased environmental activism, expanded environmental regulation.[112]

1. Overview of South Korean Environmental Law

The South Korean government is highly centralized, with its most substantive policies emanating from the national government in Seoul.[113] The government established the Ministry of Environment ("MOE") in 1990, granting it general jurisdiction over all environmental matters.[114] The MOE is also charged with the enforcement of environmental laws.[115] In some cases, the MOE delegates

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104. *Id.* at 248.
105. *Id.* at 248, 250.
106. *See id.* at 251.
107. *See* Environmental Impact Assessment Law, Law No. 81 of 1997, art. 1 (Japan), *translated in* MINISTRY OF THE ENVIRONMENT, Gov't of Japan, http://www.env.go.jp/en/laws/policy/assess/index.html (last visited Feb. 3, 2015).
108. COMPARATIVE ENVIRONMENTAL LAW AND REGULATION, *supra* note 93, § 32:32.
109. *Id.*
110. *See generally* BYUNG-NAK SONG, THE RISE OF THE KOREAN ECONOMY (3rd ed. 2003).
111. *See* Hong Sik Cho, *An Overview of Korean Environmental Law*, 29 ENVTL. L. 501, 503 (1999).
112. *See id.* at 504-05.
113. *See* SONG, *supra* note 110, at 78.
114. COMPARATIVE ENVIRONMENTAL LAW AND REGULATION, *supra* note 93, § 49:6.
115. *Id.* § 49:7.

enforcement authority to provincial or city governments.[116]

South Korea's environmental regulatory framework is composed of statutes, enforcement decrees, ministerial decrees, and regulations.[117] The MOE passed the most recent iteration of the Framework Act on Environmental Policy ("FAEP") in 2010, which contains basic environmental policy goals, defines key environmental terms, and establishes duties for various stakeholders.[118] Specific environmental standards are set forth in specialized environmental statutes, including the Clean Air Conservation Act, Water Quality and Ecosystem Conservation Act, Soil Environment Conservation Act, and Wastes Management Act, among others.[119]

2. Environmental Impact Assessment and Enforcement

The South Korean government passed the Environmental Impact Assessment Act ("EIAA") in March 2008.[120] Article 4 of the Act lists the types of projects that would require an environmental impact assessment, including urban development, road construction, and national defense and military facility installations, among others.[121]

The EIAA requires the submission of an environmental impact appreciation statement to MOE prior to major development projects, such as energy exploitation and harbor, highway, and airport construction.[122] The MOE may request a developer to amend a project due to potential environmental effects, but the EIAA does not authorize any penalties for disobeying such a request.[123] The MOE enforces environmental laws through its regional and local offices.[124] Typical enforcement methods include effluent discharges limitations, improvement orders, shutdown or lockout, and criminal sanctions.[125]

In summary, both Japan and South Korea have relatively comprehensive environmental regulatory frameworks that account for a wide variety of environmental hazards.[126] Each country's environmental regime is uniquely tailored to its experiences with pollution and risks to public health.[127] Accordingly, the

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116. *See* Keum Sub Park et al., *Environmental Law and Practice in South Korea*, PRACTICAL LAW (Oct. 1, 2012), http://us.practicallaw.com/2-508-8379.

117. *Id.*

118. *See* Natural Environment Conservation Act, Act. No. 7297, Dec. 31, 2004, *amended by* Act No. 10032, Feb. 4, 2010 (S. Kor.).

119. Park et al., *supra* note 116.

120. *See* Environmental Impact Assessment Act, Act. No. 9037, Mar. 20, 2008, (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst. 1997).

121. *See id.* art. IV.

122. *Id.* art. X, § 4.

123. *Id.* art. XVII, § 1.

124. *See* COMPARATIVE ENVIRONMENTAL LAW AND REGULATION, *supra* note 93, § 49.25.

125. *See id.*

126. *See infra* Part VI.A, B.

127. *Id.*

application of host nation environmental laws to U.S. federal actions in those jurisdictions would place quite different constraints on the U.S. military.[128]

VI. INTERNATIONAL TREATY OBLIGATIONS

Several international treaties to which the United States, Japan, and South Korea are parties may constrain U.S. military activities abroad. First, U.S. military activities abroad are subject to the bilateral status of forces agreements between the United States and Japan and South Korea, respectively.[129] Second, multilateral agreements covering issues such as transboundary hazardous waste, ocean dumping, and air pollution from ships may constrain U.S. military activities outside the United States.[130] Each is examined in turn.

A. JAPAN AND SOUTH KOREA STATUS OF FORCES AGREEMENTS

Status of Forces Agreements ("SOFAs") are multilateral or bilateral agreements that establish the framework under which U.S. military personnel operate in a foreign country, including how host nation laws apply to military personnel conduct.[131] Under most SOFAs, members of the U.S. military, civilian employees, and their dependents are presumptively subject to the laws of the host nation, and are only excluded from host nation jurisdiction in limited, exceptional circumstances.[132] However, not all SOFAs directly address the issue of environmental protection. Neither the Japanese nor the South Korean SOFA specifically addresses environmental issues.

The SOFA between the United States and Japan was signed in January 1960 and grants the United States the right to use facilities and areas in Japan subject to certain conditions.[133] One condition requires the United States to carry out operations with "due regard for the public safety."[134] Additionally, the SOFA requires members of the U.S. armed forces and their dependents to "respect the law of Japan and abstain from any activity inconsistent with the spirit of [the] Agreement."[135] Further, Article XVII requires each party to waive claims against the other party for damage to property occurring in the course of official duties, which would likely preclude any civil or administrative actions against U.S.

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128. *Id.*

129. *See* Treaty of Mutual Cooperation and Security between the United States of America and Japan, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652 [hereinafter SOFA]; Mutual Defense Treaty between the United States of America and the Republic of Korea, U.S.- S. Kor., Oct. 1, 1953, 17 U.S.T. 1677.

130. *See infra* Part VI.B.

131. *See* R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (2012).

132. *See* Exec. Order No. 12,114, *supra* note 57, para. 2-5; Phelps, *supra* note 66, at 58, 71.

133. SOFA, *supra* note 129, art. VI.

134. *Id.* art. III.

135. *Id.* art. XVI.

military members for the violation of host nation environmental laws.[136] Article XXV establishes the Joint Committee, which includes representatives from both governments and acts as the primary means for consultation between the two nations.[137]

The U.S.-Republic of Korea SOFA was signed in Seoul in 1966 and entered into force in February 1967.[138] The parties subsequently amended the SOFA in 2001, including agreed minutes on environmental protection, which contained pledges to review and update Environmental Governing Standards, exchange information regarding issues that affect the environment of the Republic of Korea, and regularly consult each other regarding environmental issues through an Environmental Subcommittee.[139] Otherwise, the framework of the U.S.-Republic of Korea SOFA is largely the same as the U.S.-Japan SOFA.

B. MULTILATERAL AGREEMENTS

In addition to the bilateral SOFAs between the United States and host nations, several multilateral agreements may constrain military actions outside of the United States. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal ("Basel Convention") regulates the transboundary movement of hazardous wastes, and thus may implicate the actions of the U.S. military abroad.[140] The United States was one of the original signers of the convention, but has not ratified it and is currently not a party.[141] Because it prohibits the transportation of hazardous waste from a nation that is a party to a non-party nation, DoD's transportation of hazardous waste from Japan and South Korea, both of which are parties, to the United States violates the Basel Convention.[142] Although a violation of the Basel Convention would not concern the United States, the peculiar status of the U.S. military on foreign soils may create a situation in which the host nation is unable to ensure that disposal activities on its own soil comply with its international obligations.

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136. *Id.* art. XVIII.

137. *Id.* art. XXV.

138. *See* Facilities and Areas and the Status of United States Armed Forces in Korea, U.S.-S. Korea, July 9, 1966, 17 U.S.T. 1677, *available at* http://www.usfk.mil/usfk/Uploads/130/US-ROKStatusofForcesAgreement_1966-67.pdf.

139. *See* Agreement Between the United States of America and the Republic of Korea Amending the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea of July 9, 1966, as amended, U.S.-S. Korea, at 28-29, Jan. 18, 2001, *available at* http://www.usfk.mil/usfk/Uploads/130/US-ROKStatusofForcesAgreement2001Amendments.pdf.

140. *See* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 23, 1989, 28 I.L.M. 649.

141. Phelps, *supra* note 66, at 72-73. Although the U.S. Senate gave its advice and consent to ratify, additional statutory authorities needed for implementation have not been obtained, and, as a consequence, the United States has not ratified the convention. *Id.* at 73 n.192.

142. *See id.* at 72.

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 ("London Convention") aims to prevent pollution of the sea from the dumping of wastes and other matter.[143] The 1996 London Protocol modified the London Convention by prohibiting all ocean-dumping except for a narrow list of acceptable wastes.[144] Japan and South Korea are both parties to the more restrictive London Protocol, while the United States is only party to the original, less restrictive London Convention.[145]

Another multilateral agreement that may constrain U.S. actions abroad is the Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention"), signed in Espoo, Finland in 1991.[146] The Espoo Convention requires parties to appropriate measures to reduce and control significant adverse transboundary environmental impacts from proposed activities.[147] Much like NEPA in the United States, the party proposing an activity must prepare an environmental impact assessment prior to authorizing the proposed activity.[148] Covered activities include industrial energy production, large dams and reservoirs, and major storage facilities for chemical products.[149] Although most of the proposed activities are commercial in nature, there is no explicit exception for military activities.[150] The United States is a signatory but has not ratified the Convention, and neither Japan nor South Korea is a signatory.[151] However, because the United States is a signatory and other countries that host U.S. installations, such as Germany and Italy, are parties, the United States may incur some obligations towards those countries.[152]

Another international agreement that may constrain U.S. action abroad is the International Convention for the Prevention of Pollution from Ships, 1973 ("Marpol 73/78").[153] Marpol 73/78 provides a framework for the elimination of intentional pollution of the maritime environment by oil and other harmful substances and applies to all ships entitled to fly the flag of a party to the

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143. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter art. 1, Dec. 29, 1972, 1046 U.N.T.S. 120.

144. *See* 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter art. 4, Nov. 7 1996, 36 I.L.M. 1.

145. Map of Parties to the London Convention and Protocol, INT'L MAR. ORG., (Sept. 15, 2014), http://www.imo.org/OurWork/Environment/LCLP/Documents/Map%20of%20Parties%20Sept%202014.pdf.

146. *See* Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309.

147. *Id.* at 310.

148. *Id.* art. 2.3.

149. *Id.* at 321-22.

150. *See id.*

151. Participants, Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309 *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&lang=en.

152. *Id.*

153. *See* International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, as modified by the 1978 Protocol, 34 U.S.T. 3407, 1340 U.N.T.S. 184.

convention.[154] The United States, Japan, and South Korea are parties to the majority of the provisions of Marpol 73/78.[155] However, the U.S. implementing legislation, the Act to Prevent Pollution from Ships, exempts ships owned or operated by the United States when engaged in noncommercial service, including ships of the armed forces.[156] Thus, although Marpol 73/78 may constrain U.S. vessels outside the United States, it does not reach military actions because of the military exemption in the U.S. implementing legislation.

So, in addition to U.S. environmental statutes, government policy, and foreign environmental laws, U.S. federal actions may be constrained by bilateral and multilateral international agreements.[157]

VII. DISCUSSION

Although many parties have attempted to apply environmental statutes to federal actions overseas,[158] the only meaningful constraints come from U.S. government policy and, potentially, host nation environmental laws. Despite the political and operational advantages of having only policy constraints from the government's perspective, internally created and enforced policy is probably an insufficient control if one is interested in effective environmental protection. Some of the most significant shortfalls of a government policy regime include myriad exemptions and exceptions and a lack of genuine enforcement. Furthermore, although the differences between the FGS and Japanese and South Korean environmental standards may be insignificant, the U.S. government enforcement mechanisms may result in fewer environmental protections.[159]

A. SHORTFALLS OF GOVERNMENT POLICY

1. Myriad Exemptions and Exceptions

The numerous exemptions and exceptions in government policy regulating environmental effects overseas significantly weaken the effectiveness of the regime. First, and most significant, is the lack of application of domestic environmental laws to federal actions overseas. Because of the presumption against extraterritoriality, none of the major U.S. environmental statutes apply to federal actions overseas.[160] Given the application of U.S. environmental statutes

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154. *Id.* art. 1.

155. *See* Status of Conventions, INT'L MAR. ORG., (Jan. 30, 2015), http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx. The United States has not ratified Annex IV, which requires the prevention of sewage pollution from ships.

156. Act to Prevent Pollution from Ships, 33 U.S.C. § 1902(b)(1) (2006).

157. *See infra* Part VI.B.

158. *See, e.g.*, Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993).

159. *See infra* Part VI.B.

160. *See, e.g.*, National Environmental Policy Act of 1969, § 101, 42 U.S.C. § 4332 (2012).

to federal actions inside the United States, this is one potential double standard in U.S. regulation of federal actions overseas. Notwithstanding foreign sovereignty concerns, Congress has the ability to write specific language to extend application of domestic environmental statutes to federal actions overseas.[161] Even considering the possible concerns a foreign sovereign would have with U.S. laws applying within its territory, the protective goals of the statute might militate against those concerns.

Additionally, even if Congress were to extend application of domestic statutes to federal actions overseas, many military activities would fall under the presidential or national security statutory exemptions.[162] If Congress wanted to ensure that military activities abroad are subject to the same restrictions as the activities of any person in the United States, then it would have to limit the scope of presidential and national security exemptions and exceptions that already apply to domestic environmental statutes.

In many circumstances, the myriad exemptions and exceptions make sense. Under the U.S. Constitution, both national security and foreign relations powers reside with the commander-in-chief and the executive branch.[163] To be effective, the executive branch must have enough authority and discretion to carry out its constitutional duties. Expanding the scope of congressional environmental legislation to cover military actions abroad impinges on these powers.[164] Nonetheless, exempting military actions from environmental legislation creates two important problems. First, it removes military actions from the coverage of environmental regulations that go through the legislative process, which includes input from both branches of Congress and the approval of the president. Second, exempting military actions abroad allows the military to avoid potential legal sanctions via the numerous citizen suit provisions in domestic environmental legislation.

The DoD's overseas policy also contains numerous exemptions and exceptions that limit its effectiveness in environmental protection. According to the OEBGD and country-specific FGS, joint-use military facilities are not regulated to the extent that the DoD does not control the instrumentality or operation regulated.[165] Some overseas installations are joint-use because of cost saving and interoperability advantages.[166] Perhaps more impactful is the OEBGD's exemp-

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161. *See id.* § 4332(2)(F); *see also* United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003) ("It is beyond doubt that, as a general proposition, Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.") (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

162. *See generally* Weinberger v. Catholic Action of Haw., 454 U.S. 139 (1981).

163. *See* U.S. CONST. art. II; *see also* United States v. Curtiss-Wright Export Co., 299 U.S. 304, 319 (1936); *see generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

164. *See* Landis, *supra* note 16, at 125.

165. *See* OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE, supra note 68, para. C1.3.2.

166. *See* Daniel Widome, *The List: The Six Most Important U.S. Military Bases*, FOREIGN POLICY (May 13, 2006), http://foreignpolicy.com/2006/05/13/the-list-the-six-most-important-u-s-military-bases/.

tion for the operations of military vessels and aircraft,[167] which make up a substantial part of the U.S. military's environmental footprint abroad.[168] While a national security exemption for unplanned contingencies is prudent, placing a reasonable constraint on routine training activities may be a justifiable extension to the existing regulation of military installations, which balances environmental protection goals with national security needs.

Another significant exemption in the OEBGD exempts the DoD from having to correct environmental problems caused by past activities.[169] This exemption could allow the United States to evade responsibility for environmental pollution caused by its activities. For example, a 1992 Government Accountability Office ("GAO") report confirmed significant environmental damage caused by toxic waste from U.S. bases in the Philippines.[170] The United States departed the bases later that year without cleaning up contaminated soil and water, which was probably not required under DoD policy.[171] If the more stringent Resource Conservation and Recovery Act ("RCRA") requirements applied to the DoD's activities in the Philippines, then the United States would likely be forced to invest much more in the cleanup or risk high civil penalties.[172]

The U.S. government's recent return of twenty-three contaminated military sites in South Korea demonstrates potentially critical gaps in the overseas regime. In 2007, of thirty-one military installations returned to the South Korean government, twenty-three were found to have soil and groundwater contaminated with pollutants such as benzene, arsenic, and several heavy metals.[173] After negotiations between the two countries, the Korean government eventually decided to accept the return of the bases despite the contamination.[174] The U.S. government refused to remediate the sites, arguing that the pollution at the sites did not constitute a "known, imminent, and substantial endangerment to human health."[175] Conversely, if the contamination took place on U.S. soil, the U.S. government would likely be liable for cleanup under CERCLA's more expansive standards of liability.[176] This is a stark example of a situation in which strong

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167. *Id*. para. C1.3.3.

168. Landis, *supra* note 16, at 119.

169. *See* OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE, *supra* note 68, para. C1.3.5.

170. M. Victoria Bayoneto, *The Former U.S. Bases in the Philippines: An Argument for the Application of U.S. Environmental Standards to Overseas Military Bases*, 6 FORDHAM ENVTL. L.J. 111, 111-12 (1994).

171. *See id.* at 112.

172. *See id.* at 148-49.

173. Young Geun Chae, *Environmental Contamination at U.S. Military Bases in South Korea and the Responsibility to Clean Up*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10078, 10078 (2010).

174. *Id.*

175. *Id.* at 10087 (The U.S. and South Korean governments agreed upon the "known, imminent, and substantial endangerment" ("KISE") standard as a threshold finding of contamination, above which the U.S. government would assume responsibility for remediation under the 1966 SOFA agreement and 2001 Memorandum of Special Understandings on Environmental Protection). *Id.* at 10078.

176. *See id.* at 10086.

environmental protections apply to military activities domestically, but not overseas.

2. Lack of Enforcement

A second major shortfall of the U.S. overseas environmental regime is the dearth of legal enforcement mechanisms. Although *Okinawa Dugong v. Gates* demonstrates the possibility that a U.S. court will place environmental constraints on federal actions abroad,[177] the vast majority of courts have refused to do so for a variety of reasons.[178] The lack of judicial enforcement removes the ability of citizens to meaningfully participate in environmental protection, whether through lawmaking or through citizen lawsuits.

The only way to verify compliance with government policy is through self-regulation and an internal auditing process.[179] Self-regulation takes the form of record-keeping requirements and internal assessments and inspections.[180] DoD policy only requires its components to establish and implement an audit program to assess compliance every three years.[181] Failure to carry out these requirements results in the reprimand of an installation's commander, which may or may not negatively affect that commander's career.[182]

Enforcement for criminal violations overseas is also very unlikely. SOFAs tend to grant the U.S. military the authority to enforce criminal actions against its members overseas.[183] This tends to insulate military and civilian officials from prosecution under foreign criminal laws.[184] It is also currently unclear whether a military member can be prosecuted under the Uniformed Code of Military Justice for violating environmental standards created by the OEBGD or FGS.[185] Both of these documents assert that they do not create enforceable rights or standards of care.[186]

B. U.S. POLICY COMPARED TO FOREIGN ENVIRONMENTAL LAWS

Although U.S. government policy requires the U.S. military to adopt the more protective of U.S. or foreign country standards, it is worth envisioning what the

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177. *See generally* Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082 (N.D. Cal. 2008).

178. *See, e.g.,* Basel Action Network v. Mar. Admin., 370 F.Supp.2d 57, 71-72 (D.D.C. 2005); NEPA Coal. of Japan v. Aspin, 837 F. Supp. 466, 467-68 (D.D.C. 1993).

179. *See* Carlson, *supra* note 5, at 96.

180. *See id.*

181. *Id.* para. C1.5.2.

182. Carlson, *supra* note 5, at 96.

183. *Id.* at 97.

184. *See id.*

185. *See id.*; *see also* Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 46-47 (1996).

186. *See* OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE, *supra* note 68, para. C1.5.6.

overseas environmental protection regime would look like if foreign nations' laws applied.

1. Japan and South Korea

If Japanese environmental regulations applied to U.S. military activities in Japan, it is unlikely that the U.S. government would have to meet significantly higher standards. Pollution standards would be largely the same because the FGS that currently apply to the U.S. military in Japan are supposed to adopt the higher of the standards between U.S. and Japanese law.[187] In fact, it is possible that the FGS that currently apply to the U.S. military are more stringent than Japanese standards.

Nonetheless, the prospect of environmental enforcement by Japanese courts or regulatory agencies may create a greater incentive for the U.S. military to comply with environmental standards. Under Japanese law, local governments would be able to set restrictions and ensure compliance through pollution control agreements with military installations.[188] A significant advantage of this scenario is that Japanese citizens would have some input concerning the regulation of their local environment.

In South Korea, the application of host nation laws would likely have a similar effect. Perhaps the most significant change would be a requirement for the U.S. military to obtain emissions permits from South Korean regulators prior to emitting air or water pollution.[189] One problem inherent in this arrangement is the potential for South Korean regulators to deny permits based on an opposition to U.S. military activities generally, and not out of concern for environmental effects. In fact, the possibility that anti-military activists will seek to curtail U.S. military activities under the guise of environmental protection remains with any regulation that allows citizen participation. Nonetheless, it is likely that restrictive standing requirements in U.S. courts would effectively screen out the majority of this type of disingenuous activism.[190]

2. Germany Status of Forces Agreement Compared

It is helpful to compare the U.S. overseas policy in Japan and South Korea to the experience in Germany. The U.S. SOFA with Germany is more restrictive

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187. *See* U.S. DEP'T OF DEF., JAPAN ENVIRONMENTAL GOVERNING STANDARDS (2010) para. C1.1.2.

188. *See* George F. Curran III, *Pacific Rim Environmental Regulation: A Western Perspective of Several Countries' Environmental Liability Laws*, 3 J. INT'L L. & PRAC. 47, 52 (1994).

189. *See* Keum Sub Park et al., *supra* note 116. Although it does not have a comprehensive permitting regime, the Clean Air Conservation Act, Water Quality and Ecosystem Conservation Act, and Noise and Vibration Control Act each require permits for a specific type of emission. *Id.*

190. *See, e.g.*, Basel Action Network v. Mar. Admin., 370 F. Supp. 2d 57, 70 (D.D.C. 2005) (holding one of the several environmental group plaintiffs has no formal members and no associational standing).

and places more burdens on the U.S. military to meet German environmental standards and pay the resultant costs of compliance.[191] In fact, a supplemental agreement reached between the two countries in 1993 requires the United States to apply German law to its use of an installation or facility except in purely internal activities that do not affect the German public.[192]

Japan and the United States may be currently seeking a separate agreement like the one the United States has with Germany. In December 2013, the governments of Japan and the United States announced that they would negotiate a framework to further environmental stewardship of U.S. military activities in Japan.[193] The framework reportedly includes a bilateral agreement that will supplement the current SOFA.[194] The dialogue is intended to expand upon the Joint Statement on Environmental Principles that the parties announced in 2000.[195]

In general, host nation governments are likely to enter into more restrictive supplemental agreements with the U.S. government. Both the U.S.-Japan and U.S.-Republic of Korea SOFAs were drafted and signed before the onset of substantial environmental regulation in each of the countries.[196] As host nation environmental protection becomes more important, host nation governments will be less likely to allow the United States to avoid stringent environmental standards or responsibility for past environmental pollution.

C. SHORTFALLS OF "ENVIRONMENTAL DIPLOMACY"

One perspective on the U.S. government's overseas regime describes it as one of "environmental diplomacy.[197] This theory argues that the overseas regime represents a flexible policy that allows the U.S. government to selectively implement environmental protection measures to accommodate national security, foreign relations, and environmental imperatives.[198] While there are significant advantages to having a flexible diplomatic approach, the disadvantages likely outweigh the benefits.

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191. *See* Phelps, *supra* note 66, at 58-59.

192. *See id.*; Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, 1 U.S.T. 531, 481 U.N.T.S. 262, *amended by* Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces With Respect to Foreign Forces Stationed in the Federal Republic of Germany, Mar. 18, 1993.

193. *U.S., Japan to Negotiate Environmental Stewardship Pact*, AM. FORCES PRESS SERV. (Dec. 25, 2013), http://www.defense.gov/News/NewsArticle.aspx?ID=121400.

194. *Id.*

195. *See id.*; Joint Statement on Environmental Principles, U.S.-Japan, Sept. 11, 2000, *available at* http://www.mofa.go.jp/mofaj/area/usa/sfa/rem_env_01en.html.

196. *See* MASON, *supra* note 131, at 11-12; Sakurai Kunitoshi, *Environmental Restoration of Former US Military Bases in Okinawa*, 11 ASIA-PAC. L.J., no. 47, Nov. 25, 2013, at 1, *available at* http://www.japanfocus.org/site/make_pdf/4038.

197. Carlson, *supra* note 5, at 62.

198. *See, e.g.*, *id.*

If allowed the discretion, the U.S. government, and the U.S. military specifically, will likely attempt to avoid minimal environmental protection requirements where there is any risk of impact to even routine military activities.[199] Additionally, the U.S. military's desire to maintain maximum operational flexibility will lead U.S. diplomatic negotiators to avoid environmental constraints sought by host nation governments.

Arguably, it is in each stakeholder's interest to fully implement and comply with the most protective environmental standards.[200] The federal government, and more specifically the DoD component, benefits from diplomatic goodwill with the host nation, thereby solidifying its presence in support of military objectives. The host nation benefits by ensuring that its territory and laws are respected and followed. The local residents who live near the installations benefit by experiencing minimal environmental degradation and having confidence in their national sovereignty and independence.

VIII. CONCLUSION

The U.S. overseas environmental regime presents a complex balance of competing interests. The U.S. government must first consider its own national security imperatives. To carry out its mission of protecting the U.S. homeland, the military must be able to mobilize, train, and carry out activities as necessary to meet military objectives. On the other hand, host nations, such as Japan and South Korea, must balance their own national security concerns, which may cause them to defer to the U.S. military, against the need to protect their own sovereignty, especially to alleviate concerns from a restive population. Finally, and perhaps subordinately, there is each stakeholder's desire for environmental protection. While the United States has an interest in protecting its reputation as an environmental steward, host nations have a strong interest in both environmental conservation and the health and safety of their citizens.

The current overseas regime exists because it furthers U.S. government national security and diplomatic objectives. Although the overseas policies contain protective standards, the lack of enforcement mechanisms is a critical shortfall that will inevitably result in weaker environmental protection. Reliance on military commanders and diplomatic officials to "self-regulate" is a foolhardy endeavor because when faced with a decision between protecting the environment and avoiding risks to military training or diplomacy, the commander or the official will presumably avoid risks to military or diplomatic interests. The stronger legal mechanisms that apply domestically in the United States do not entail the same level of discretion. Perhaps the overseas regime should follow suit.

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199. *See generally id.* at 108.
200. *See id.* at 65.