Legal Issues: Treaties, SOFAs, and ACSAs

Panel Presentations

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I was asked to analyze the current SOFA treaties that are in force for a number of countries and try and pull out any environmental language that was in them and to look for other language that might bear some relevance to environmental cleanup, or observing environmental standards. This analysis is contained in my paper, "Status of Forces Agreements: Excerpts Relevant to Environmental Claims." (Available in Appendix.) I looked at language that bears on possible civil claims. I should tell you what's not in the paper before I tell you what is in it. As you can see it's Cuba, Germany, Japan, Korea, Panama and the Philippines. What I've chosen is not comprehensive. There are many other particulars that are not in there, including provisions in many of these treaties, particularly the German treaty with regard to construction, forced maneuvers and training. I also didn't look at criminal provisions at all, even though I know that environmental crime is a possibility, because those provisions were quite long.

I tried to give you the actual legal language so that you could make comparisons between the different countries. Also, with a word to language, the reason that I did this is because treaties are kind of like poems in that every word matters, and I can give you a couple of examples. Most of the SOFA treaties have a provision saying that it's the duty of a force to respect the law of the receiving state. This is important language because it says I can respect your opinion but I don't have to observe it--it's not legally binding. There is some other language, however, in both the Panamanian and German agreements that specifically speaks to installations where the treaty says that Panamanian law or German law shall apply which is binding. The German treaty is the most developed. Obviously the Germans took a lot of care negotiating it, and had the power to do so with the United States. One of the surprises that I found was a number of environmental provisions in the Panama Canal treaty. Just to sum up some of the main points, I already pointed out the "Respect the Law" provisions on the first page. If you'll notice, though, in the German SOFA, that provision is followed by a provision that says "this paragraph shall not impose an obligation on a contracting party to carry out measures which would contravene its laws or conflict with its predominant interest with regard to the protection of the security of the state or of public safety." That's a big change.

The next thing I looked at was language regarding actual transfers of military bases. Panama is the only treaty that has a provision on responsibility for cleanup that goes towards base closure. Most of the countries waive obligations to compensate for damage that's tied in with a complete waiver on the part of the United States to pay for what it calls "Residual Value." In other words, when the United States considers they're giving something of value to the host country so they usually try to set it off against compensation, and they usually try to get it so it ends up somewhere near zero.

If you'll notice, instead of a waiver, the Germany agreement appears a bit differently. It says that the "federal German Republic shall reimburse ascending state" and that "compensation for

damages shall be subtracted from Germany's payment for Residual Value." It's very explicit there.

Germany is very clear about the set-off. If you look at article 52 it says "Germany shall reimburse ascending state for the value of improvements" and then "compensation shall be subtracted from that payment." In other words, compensation owed Germany from the United States.

The second page of the Base Transfer section on Panama has a very strong environmental provision. It's Article 4 Paragraph 4 of the SOFA agreement which says " at the termination of any activities or operations under this agreement the United States shall be obligated to take all measures to ensure insofar as may be practicable that every hazard to human life health and safety is removed from any defense site or a military area of coordination or any portion thereof" and it includes "removal of hazards to human health, life and safety and compensation to residual value." Again, that language is in there, but that's prior to the transfer of any installation - the two governments have to consult concerning those issues.

Another limitation with regard to the SOFA treaties is what happens when the treaty is breached? A claim can be submitted to the World Court, but we know that the U.S. has rejected the World Court's jurisdiction. So, there's a problem with getting enforcement of the treaties even when the language is there.

With the Philippines I included the old SOFA language, which you can see is just like many of the other ones, including Korea and Japan. Most of the of the language says that the United States is not obliged when it returns facilities and areas to restore the facilities and areas to condition in which they were when they became available to the U.S. What I did include with the Philippines was two "Relinquishment" agreements that contain agreements to relinquish different military property. There are in each one of those a "hold harmless" clause where the Republic of the Philippines says that it will hold the United States government harmless from "any and all actions, claims or expenses which may rise as a result of the use or disposition of said properties after the effective date of their relinquishment." With regards to "rights respecting installations and areas" there's a very old Cuban agreement there from 1903, and believe it or not it's still in force, concerning Guantanamo, and you can see the extreme language in that one where regarding installation in areas or bases the U.S. has a right, generally, to "do any and all things necessary" to fit the premises for use as Naval stations. Another thing to pay attention to with these provisions is that you notice there's a big difference in the German treaty which talks about installation. It says "within accommodations made available for exclusive use," that's how it's defining the areas, which gives the U.S. a privilege to "take all measures necessary for defense purposes." The other treaties (Japan and Korea) define "define facilities and areas" quite broadly. In the case of Korea, include "existing furnishing, equipment and fixtures wherever located, used in the operation of such facilities." That's a pretty broad grant.

Some of the treaties also include territorial waters and air space adjacent to the vicinities of these bases asserting these as "privileged areas." Again, I'd like to stress what I said before that in the case of Germany, it does say with regard to installations that German law shall apply to the use

of these accommodations. So that means that whatever health and safety regulations there are apply. That's not true in the other SOFA's.

Panama is also stronger than many of the SOFA's in that it lists specific areas and installations. They're actually listed in the treaty, so it's not a general grant in that sense. It also says that the "law of the Republic of Panama shall apply in the areas made for the use of the United States of America." Again, that's much stronger language. However, Panama does not have the right of access to the installations. "They shall be inviolable" it says, whereas in the case of Germany, Germany has negotiated for itself the right to enter the installation in the case of an emergency, and that's a big difference.

The next section of my report is titled "Health and Safety" or "Express Environmental Provisions". In the case of Germany there is explicit environmental language. The visiting force must examine the environmental compatibility of all projects, identify, analyze, and evaluate any potential environmental effects and finally, it has to offset them by taking appropriate restorative or balancing measures. The German SOFA also requires visiting forces to observe emissions standards. If you'll notice, on the other hand in Japan and Korea, there's only one provision in each of those treaties that has any mention of public safety at all. The exact language is "Operations in the facilities and areas in use by the government of the United States shall be carried on with due regard to the public safety," which is limiting.

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And finally, in Panama there is a provision in the Panama Canal treaty that is completely dedicated to the environment and sets out the establishment of a joint mission to which the United States and Panama are obliged to furnish with information on any actions having an effect on the environment etc.

Another interesting provision is under "Utilities and Services." There is a provision, Article 63, that actually requires visiting forces to pay for the "assessment, evaluation, and remedying of hazardous substance contamination caused" by it. This language is in the German treaty. The costs are determined pursuant to German law. The only caveat is that the provision ends saying "the authorities of the force or the civilian component shall pay these costs as expeditiously as feasible consistent with the availability of funds and the fiscal procedures of the government of the ascending state." In other words, if the U.S. Congress says it doesn't have any money, the Germans aren't going to get it.

In the "Claims for Damages" section, I highlight some general claims for civil damages that could be advanced. These are quite complicated, so I didn't quote them directly. But if a government wants to sue the United States for damage to a government property that has been used for military purposes there's a complete waiver, if it's other property, like public lands, then there's a provision saying that it must go to an arbitrator "who shall be a national of the receiving state," in other words, the host country. And that decision is binding and conclusive, which

means that there's no appeal. With regard to claims for damage by non-governmental third parties if the damage arose in performance of official duty then the claim is presented in the host state, that government settles the case and pays for the claim, then the other countries may be responsible to compensate it. And you can imagine the problems with this in a poor country. What poor country is going to have the money to settle a multi-billion dollar claim.

If the third party is suing for damages not arising in the course of official duty the receiving state must pay the claim, and in this case contributions by the ascending state are not obligatory, it's up to them. It's called "ex gratis" making payment totally optional.

The last thing I would note is one provision that differs in the Philippines for damage claims. The provision includes a waiver for claims by one country against another country, but in all other cases besides contract claims it says the "United States government will pay just and reasonable compensation" in settlement of "meritorious claims for damage, loss, personal injury or death caused by acts or emissions of United States personnel or otherwise incident to the non-combat activities of the United States forces."

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My background on overseas base contamination is pretty new. In June 1999 I began initial research on compensation for base contamination. I believe there is a very valid way to proceed -- at least in the Philippines, and I believe in other nations as well. However, it is very complex.

Let's begin with step one of how this works. The question that I asked Mr. Hamilton (see "Status of the U.S. Overseas Bases Program: Governmental Perspective, p. I-1) was very simple: Are there any limits to the power of the United States to do what it wants once a country signs an agreement to bring the United States to their land? For either there are restraints and obligations, or there are not. The truth of the matter is very clear: the United States is not above international law. The more powerful the country, the greater the need that that country acknowledges international law as the ultimate definition of rights and responsibilities. Whether the United States is held accountable will come down to a very simple question in each host nation: Will the government of the host nation involved insist that international law be applied to the United States? For if indeed the host nation will not bring these claims then we are arguing with the ocean and telling it to stop its roaring. Now, in order to succeed once the host nation agrees to take action, action from NGO's in the host nation and in the United States is critical. Without that support and without the support, of business and industries in the host nation, this effort will fail. It is a campaign of bringing people together and persuading the United States, to understand that what the host nation asks for is reasonable and appropriate.

There are viable claims that exist in virtually every host nation. There may be some host nations that have waived specific rights but it is very rare to find a host nation that has given up through an express waiver the rights of its people.

The purpose of the military bases agreement in general is to provide, in theory, protection for the host nation. But it is clear that the U.S. has sought to keep itself as the definer of law. If there are limitations of American power, the question becomes: who enforces them? Nicaragua brought a case before the International Court of Justice, saying that the United States had violated early treaties with Nicaragua and international law by supporting the Contra movement. Specifically in

mining harbors. The World Court ruled against the United States. The United States then withdrew and refused to participate further, and a judgment was entered. The United States has systematically ignored that judgement, and the argument has been put forth by several people that that is indicative of how the United States would react to any action of the World Court. How is this applicable currently? From the perspective of the United States, they were not dealing with a treaty they had entered into with the allies. That is critical to understanding whether the United States would ignore a case from the International Court of Justice. In the cases of the Philippines, Panama, Japan, South Korea and Italy, these are allies, and what is being disputed is the meaning of words on a piece of paper. If indeed the United States were to take the position that when there is a disagreement about what words mean in a treaty, that the interpretation matters. If this means that interpretation is what the U.S. says the words mean, then no government would be safe in dealing with the United States.

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So we come back to the question: is there a limitation of power? If there is a limitation of power someone other than the United States has to decide what those words mean. That place is the International Court of Justice. Now to proceed before the International Court of Justice does not end negotiations. It does not end the role of the NGO's in the host nation, it does not end the role of the businesses in the host nation, and it does not end the role of the NGO's in the United States. Indeed it is a matter of politics, as Mr. Hamilton correctly explained. This means that if we want to succeed our message must be heard by congress in an appropriate fashion. That appropriate fashion is by understanding the nature of American politics, understanding the nature of the American people, and understanding the fact that the United States, its people and its government want every government to understand that there are limits to its power.

In the International Court of Justice the question would be what international law applies? Under international law it is understood that in general the polluter must pay. The United States has signed onto that treaty. Furthermore, under international law, it is understood that no country has the right to reach out and destroy other countries. The United States, with its military bases, is a tenant. It's law does not apply, unless there is a specific grant, and the sovereignty of the host nation is to be maintained.

An important area that I believe is underrated is that the United States is a trespasser when it comes to land outside military bases. It has absolutely no right under international law to go beyond the perimeters of the bases it uses. And indeed as we know with airborne and waterborne contaminants, this type of contamination frequently goes outside of base borders themselves. Let me be specific. If the United States has the right, if it so chooses, to contaminate outside the area of military bases, then it has the right to bulldoze every tree, every plant, and to kill every living creature that exists on the property for all time with impunity and without obligation.

You may ask then: why if it is this clear-cut, has nothing been done? The cases themselves are exceedingly complex. It may sound to be a simple matter to bring the United States to the International Court of Justice and to have these matters heard, but the reality is far more complex. It requires a knowledge of international law, it requires in addition a knowledge of environmental laws of the United States, it requires a knowledge of how the judicial system works in the United States, it requires a knowledge of how international law will work, and it requires a knowledge of how congress, the executive branch, and the bureaucracy work. Due to its complex nature, host nations have been hesitant to assert their rights, which simply means that individuals have died, needlessly and indeed in violation of international law. It is important to understand this complexity, however, if one is to go to your host nation and press for action.

Question and Answer Period

Question: Assume that the United States refuses to accept the judgment of the ICJ, how does the host nation get paid?

Doug Abrams: I would believe that specifically, any of the host nations that have continuing relations with the United States would have a wide list of ways to get compensation. In the Philippines for example, there is still in existence the VFA. And indeed, it is clear that the more host nations that join together, the stronger their position. For the countries that have assets of the United States in their countries, they're allowed to seize them. But again it comes down to the political will of the country of the host nation. And it comes down to how activists and NGO's and businesses interact. I would think that the example in Nicaragua is in fact instructive. For the United States to disregard an ICJ ruling it has to be dealing with a country with whom it has no relationship, and that is not the case here. Other than Cuba, all of the other countries involved indeed do have close relationships with the United States.

Question: My question has four parts. For any of the countries represented here, what international legal instruments would you use to sue the United States before the International Court? Two, have such international legal instruments ever been brought before the ICJ against the United States in the past? Three, what were the outcomes? Four, if they have never been brought against the United States, why do you think that is?

Doug Abrams: Step number one, the different agreements. If you look at Amy's brief you'll see the essential treaties are either the "Status of Forces" agreement or the Military Bases agreement, so you would go through those as the essential agreements that outline the ability of the United States to come to a foreign nation and house soldiers and personnel. You would go to those in the context of the Vienna convention that says that with treaties or agreements between nations, if there is a dispute as to their meaning rather than fighting wars we agree that it'll be determined by a branch of the ICG after the parties bring forth their disagreement in an official capacity. Not an unofficial capacity, but in government to government negotiations. Two, has it been done before, as it relates to the United States. There are two examples that I'm aware of: Nicaragua and Yugoslavia.

Question: Just to clarify, the specific legal instruments that you would invoke before the ICJ have never been invoked before the ICJ.

Doug Abrams: That is true.

"Host nations misunderstand the difference between the United States having a large army and the United States having no limits, and the fact that the United States has managed to intimidate the host nations."

Question: Why is that?

Doug Abrams: Because I think the host nations misunderstand the difference between the United States having a large army and the United States having no limits, and the fact that the United States has managed to intimidate the host nations.

Amy Grunder: One of the authors that I looked at (Weggman and Bailey) talked about when there are gaps in the SOFA agreements that international customary law would be used to fill in the gaps. And other writers have noticed that environmental standards are quickly attaining the status of international customary law. I also thought why not a solution for getting major cleanup done, the idea of a class action in a U.S. court is not bad for publicity. The only thing I don't know is if it is possible to get jurisdiction over a corporation in its home country or if individuals could sue the United States military. But I know that individuals in the military have sued the United States military.

Doug Abrams: I've actually looked into that in some detail and the instrument is that the United States under several different procedures can be held liable under the Federal Tort Claims Act, accept for actions that are discretionary. Countries that attempt to invoke the Federal Tort Claims Act would be going in front of Federal District Court Judges who sit as the finder of fact or a jury. But, to be clear, the area that we are going into is new area, but of course that is the nature of frankly, international law, that is the nature of litigation the International Court of Justice hears very few cases.

Question: The government of Puerto Rico is thinking about the army and the navy base in Vieques. I wonder if the federal court, could we go openly to the court? Or would the United States say that it is a domestic issue?

Doug Abrams: I believe, in the case of Puerto Rico, that the United States would take the position that it is a domestic issue. Again, you come to the same point that I have made several times--it's really a matter of combining litigation with the political power that has to take place.

Question: Panama had a substantial agreement with the United States. It has been specified that the 1977 treaty deals specifically with the issue of decontamination. Panama has underlined and stressed again that Panama has a treaty with the United States which was supposed to be in perpetuity and which did speak to the issue of decontamination. And it has also been pointed out that the United States was brought before the international court of Justice by Nicaragua and chose to renounce the decision of that court. Is it also true that the treaties recognize US

responsibility for cleanup, especially of firing ranges? The question is, with a treaty or without a treaty, with rigor or without rigor, if the United States chooses to disregard all of this, what is the international mechanism that these countries can implement to force compliance?

Doug Abrams: Panama is, to me, the perfect example of how the system should work. Panama has a claim before the International Court of Justice to have the International Court of Justice determine what is a practicable amount of cleanup. I believe that if such a case went before the International Court of Justice hearings would be held to determine, scientifically, whether it was feasible and practicable to do more cleanup. Now as practical matter, for this to be successful it must be presented fully with NGO support, both with in the United States and outside the United States, with government participation, and participation again by appropriate cleanup businesses, where result was reached that people could live with.

Question: In Panama the actual reporting of the physical conditions of the bases seems to be obscured. The military personnel was hiding information and trying to disallow a lot of the information going into certain reports, in other words, falsifying government reports. Are there any legal ramifications that these individuals can be subject to as a result of criminal investigations?

Doug Abrams: There is no question that any individual that participates in obstruction of justice would be liable in various courts, including courts of the United States, and certainly within courts of the various host nations. So, yes, if there is falsification going on, there are both civil penalties, and criminal sanctions that exist.

Question: If you can go ask for an individual military commander that provides the rest of the people second thoughts about continuing an operation.

Doug Abrams: Well, what you're saying is really true. In Germany for example, criminal charges were brought against a base commander for allowing extensive pollution at his base in violation of German law. That base got cleaned up immediately, and there were reports by the GAO saying, these base commanders need to get serious, or they are going to find themselves in the jails of foreign countries. In the case of Germany it certainly got the attention of the military when a person came to get served an indictment.