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Environmental Restoration of Former US Military Bases in Okinawa 返還米軍基地の円滑な環境回復をいかに実現するか

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This is the fifth in a five part series: Again Okinawa: Japan-Okinawa-US Relations in a Time of Turmoil

The other articles are:

- **Gavan McCormack, Introduction: The Continued Saga of the Henoko Base and Japan-US-Okinawa Relations**
- **Urashima Etsuko, A Nago Citizens' Opinion on the Henoko Marine Base Construction**
- **Sakurai Kunitoshi, If the Law is Observed, There Can be No Reclamation: A Mayoral Opinion Endorsed by Citizens of Nago and Okinawans**
- **Yara Tomohiro, Withdrawal of US Marines Blocked by Japan in the 1970s**

In addition, we publish today a sixth important article on Okinawa:

- **Jon Mitchell, Okinawa - The Pentagon's Toxic Junk Heap of the Pacific**

Summary

US military bases south of Kadena are slated to be returned to Okinawa, although that is only to happen at various times up to "2028 or later," and their environmental restoration is an important local issue. Article IV (1) of the US-Japan SOFA (Status of Forces Agreement) is understood to exempt the polluter, namely the US Government, from the responsibility for environmental restoration. Although the US-ROK SOFA includes the same article, both the US and the Republic of Korea (ROK) Governments understand that the US Government bears some measure of responsibility for environmental restoration. This paper examines this difference between Japan and Korea in the interpretation of SOFA and makes some recommendations, based on the Korean experience, for environmental restoration of US military bases in Okinawa.

Introduction

Article IV (1) of US-Japan SOFA, signed in 1960, reads as follows:

"The United States is not obliged, when it returns facilities and areas to Japan on the expiration of this Agreement or at an earlier date, to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate Japan in lieu of such restoration."

Exactly the same clause was contained in the US-ROK SOFA signed in 1966, with Republic of Korea substituted for Japan. In other words, the US Government is exempt from the responsibility to restore base lands to their original condition.

Therefore in Japan, both the central and prefectural governments, and local governments hosting US military bases, share a concern over this US exemption.[1] In Japan, based on the PPP ("Polluter Pays Principle"), many people and local governments think that this is not just. In Korea, the Government - at least the Department of the Environment), the judiciary, and many people - believe that the US is responsible for the environmental restoration of returned bases.

Why is there such a difference in the interpretation of the same article of SOFA by the governments in the two countries? It is important to clarify the reason and prepare appropriate steps for the environmental restoration of US military bases south of Kadena at the time when they are returned to Okinawa.

US-South Korea (ROK) Negotiations on Environmental Restoration

In Korea, the reorganization process of US military forces began with the Land Partnership Plan (LPP) in 2002 and the Yonsan Relocation Plan (YRP) in 2004. Between 2003 and 2012, ninety-one US military bases, especially those close to the DMZ, were returned to Korea. However, new areas were offered to the US to strengthen existing bases in Osan, Pyongtaek, Daegu and Pohang.

As a result of the return of many former bases, site cleanup problems have been highlighted and many negotiations have been carried out by the two countries about how to accomplish environmental restoration.

The basic position of the Korean side is that the US is responsible for environmental restoration. That is clearly shown in the following two cases. First, on May 25, 2006 Environment Minister Lee Chi-beom told US Ambassador Alexander Vershbow that the US proposal to remedy returned bases[2] was not sufficient and indicated that the responsibility for environmental restoration lay with the United States.[3] Second, the Grand Bench of the Korean Constitutional Court ruled on November 29, 2001 that environmental issues were not covered by Article IV (1) of SOFA and that this Article neither awarded the US the right to pollute the facilities and areas nor allowed the US to return them without environmental restoration. This interpretation of the Article by the Korean Constitutional Court is shared by many Korean specialists. The US interpretation, on the other hand, based on the Memorandum of Special Understandings on Environmental Protection signed on January 18, 2001, is that the US is not responsible for environmental restoration because of the SOFA Article but that it will undertake to remedy contamination caused by United States Armed Forces in Korea that poses a known, imminent and substantial endangerment (KISE) to human health.

As Yoichi Yoshiyuki indicates,[4] it is doubtful whether the US-Japan SOFA (signed in 1960) and the US-ROK SOFA (signed in 1966) contemplated the cleanup of contaminated bases when the clause "restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces" was included in Article IV (1), because the US Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the so-called Superfund Act, was only enacted in 1980 (to remediate soil pollution) and the Love Canal incident that triggered the legislation only took place in 1978. However, at least in Japan, the US Government has never paid site cleanup costs for former military base land.

The Korean way of thinking is based on the SOFA revision of January 18, 2001. No change was made to Article IV (1) itself but a "Memorandum of Special Understandings on Environmental Protection" was signed and, under the heading "Environmental Performance," it declared that "the Government of the United States confirms its policy … to promptly undertake to remedy contamination caused by United States Armed Forces in Korea that poses a *known*, imminent and substantial endangerment (KISE) to human health."

Based on these special understandings, the Korean Government conducted a series of negotiations with the US about the method of cleanup and the apportionment of costs. However, little progress has so far been made in the cleanup of ex-military bases to the level required by Korean legislation and the level of cost borne by the US remains far below Korean expectation. The US simply rejects Korean demands, saying that the soil pollution of former military bases does not qualify as KISE. The notion of KISE is derived from ISE (imminent and substantial endangerment), a concept evolved in the US through the application of domestic environmental laws such as CERCLA. The letter "K" (known) was added in order to avoid the cleanup responsibility for military bases when the soil pollution was not publicly known at the time of return. It is a clear case of double standard.

US Military Base Problems in Japanese Society

In Japan, US military base problems including environmental ones are almost exclusively limited to Okinawa, where 74 per cent of US bases are concentrated on 0.6 per cent of Japan's national territory. Therefore there is an extreme difference in the awareness of problems between Okinawa and mainland Japan. Korea is quite different from Japan. Yonsan, a huge US military base that accommodates the headquarters of US Armed Forces Korea, is within Seoul, the national capital, and US bases are scattered all over the country. There have been many environmental pollution incidents at Yonsan, including the intentional discharge of a massive amount of formaldehyde from the mortuary into the Han River on February 9, 2000, an incident that shook the country because it meant pollution of the source of the drinking water for one third of the population. This incident, made into a movie entitled "The Host," was seen by many Korean people and stirred anti-American sentiment which was the backdrop to the 2001 revision of SOFA. Because the US worried that the continued existence of US bases in Korea might be threatened, it yielded to the Korean side's request for revision. The fact that the US-ROK SOFA has been twice revised, in 1991 and 2001, shows the intensity of Korean people's anger over incidents of environmental contamination and human rights violation by US military bases. In the case of the US-Japan SOFA, however, 53 years have passed since it was signed and there has been no revision.

It may be a major cause of the difference in interpretation of the SOFA article that in Japan US military base problems are regionally concentrated in Okinawa, while in Korea they are shared nationwide with a major presence in the capital. This speculation is supported by the fact that the "Joint Statement of Environmental Principles" (JSEP) made by the Governments of the United States and Japan on September 11, 2000, is quite similar in content to the "Memorandum of Special Understandings on Environmental Protection" signed by the Governments of United States and the Republic of Korea on January 18, 2001. Although Korean specialists emphasize the special meaning of this Memorandum, almost the same agreement was reached four months earlier between US and Japan. On February 2, 1998, two years before this agreement, the US Department of Defense published instruction Number 4715.8, "Environmental Remediation for DoD Activities Overseas," in which remedial action was considered necessary for extra-territorial US bases. JSEP was within the framework of this 1998 instruction. However, this instruction, by adopting KISE rather than ISE, implied a double standard. It is also the case that KISE principles are to be applied exclusively at the discretion of the commander of US armed forces in the field, without the intervention of host countries. In addition, JSEP was triggered, not by any Japanese initiative but by the provisional deposition of the US Department of Justice to the Yokohama District Court demanding shutdown of the incinerator of an industrial waste treatment company located just beside the residential area of US Atsugi Air Base because its emissions contained high concentrations of dioxin.[5]

Recommendations for Environmental Restoration of Former US Military Bases in Okinawa

As noted above, people in Korea have a deeper sentiment of opposition to US military bases than people in Japan. Against that backdrop, the government of Korea, especially the Department of the Environment, and the Korean people, have pressured the US, insisting it accept responsibility for environmental restoration. As the result of such pressure, a JEAP Joint Environmental Assessment Procedure (JEAP) was adopted in spite of US efforts to render it toothless. It has to be followed by the US and Korean Governments prior to the return of bases.[6] Abstracting several good points from this Korean approach, in what follows I make some recommendations for the environmental restoration of former US bases in Okinawa. These recommendations are addressed to the Prefectural Government of Okinawa, to local governments in Okinawa hosting US bases, and to the Okinawan people who demand the early return of US bases.

Recommendation One

That the cleanup responsibility of US military bases to be returned to Okinawa in the future should follow the Korean experience as relevant precedent. In addition, a Japanese version of JEAP, with contents more practical than those of the Korean version, should be requested of the US and Japanese Governments. Those contents should include, inter alia, entries spelling out the responsible entities, methods, and schedule for soil contamination survey and cleanups, and procedures for evaluation of results. It should also include procedures for consultation among related parties and for information disclosure. In the preparation of a Japanese version JEAP, the manual prepared by the US Department of Defense for its environmental restoration program should be cited.[7] Although

the revision of the US-Japan SOFA is currently stalemated because of resistance from the US side and sabotage from the Japanese government (which is ultra-sensitive to US sentiments), it may be a good idea to newly constitute an environmental clause in SOFA treating environmental issues separately from military issues. It is said that Paragraphs 1 and 2 of Article IV are a matched pair that cancel each other out. But be that as it may, the clause applies only to buildings or structures left on facilities and areas, and does not cover soil pollution.

Recommendation Two

While insisting that responsibility for environmental cleanup rests with the US side, in practice and for the time being the Government of Japan assumes that responsibility and, to make it possible for it to carry decontamination work forward smoothly and at least possible cost, the US side should be required to provide it with "comprehensive," land use data at the earliest time. Based on the Korean experience, the cleanup of soil contamination to the level required by Japanese legislation cannot be expected through the application of KISE even if the US were to admit responsibility. Usually cleanup work is done using the budget of a field military unit and acceptance of responsibility tends to be avoided because of budget limitations, using KISE as a pretext. In the US, military budgets are being substantially reduced due to financial stringency and there is no prospect for a favorable turn in the near future.

In the above recommendation, "at an earlier time" means a minimum of five years and ideally ten years prior to return. Enough lead time has to be guaranteed to prepare the redevelopment plan for the returned site. Because soil contamination of the returned site is not uniform but tends to be spotty, the preparation of development plans based on real information as to soil contamination is crucial for cleanup work to be conducted with lower costs and over a shorter time span. Because the Japanese Government is to assume the cleanup responsibility using monies paid by Japanese tax payers, the minimum responsibility for the US is to cooperate by providing information. "Comprehensive" means all the information that is in the control of US armed forces. It means at least information equal to or more than that included in "The Environmental Condition of Property (ECP) Report."[8]

Recommendation Three

For the Environment Subcommittee of the US-Japan Joint Committee to make clear what land use-related records are held by which US military units and in what form. For a start, it is necessary to make the Okinawa Defense Bureau disclose information it acquired at the time of the return of US bases in the past. That information should include, inter alia, communication channels with US armed forces for the acquisition of data, the scope of the data acquired and the timing of such acquisition. This is a prerequisite for the implementation of Recommendations One and Two. These recommendations will never work without clarifying beforehand what is "comprehensive" information. Although the US armed forces and the Japanese Government as its messenger always claim that the need for military secrecy constitutes a constraint on information disclosure, information about soil contamination should be by no means a military secret. All records and information as to site use should be disclosed in a timely order to facilitate environmental restoration. It is very important to insist that this is a prerequisite for the Japanese Government's assumption of cleanup responsibility.

Further Outstanding Issues_

There are two additional issues to be solved for the smooth restoration of returned US military bases.

First, is the need to clarify the US way of thinking about the cleanup of facilities returned at the time of Okinawa's reversion to Japan [in 1972]. This will facilitate understanding of US cleanup policy in the forthcoming return of bases south of Kadena.

The document entitled "Possible Relocation of Facilities within Okinawa,"[9] said to have been presented by the Special Task Group of USCAR (United States Civil Administration of the Ryukyu Islands) on January 12, 1970 at a meeting with US forces in Okinawa, deserves attention. This document was presented to study the measures to be adopted in accordance with the Joint Communique between President Nixon and Prime Minister Sato on Okinawan reversion. Items 8 and 9 under the title "A. Impact of the Joint Communique," reported that the US should remove coral asphalt and apron to the jump-training site at Yomitan if relocation was done before the reversion, but that the Japanese Government would take steps based on SOFA to exempt the US from this responsibility if the relocation was done after reversion. This document shows the unmistakable US stance of avoiding cost burdens. The relocation of the jump-training site from Yomitan Auxiliary Airfield to Iejima Auxiliary Airfield was not agreed until the US-Japan Joint Committee on October 21, 1999, 27 years after the reversion of Okinawa.

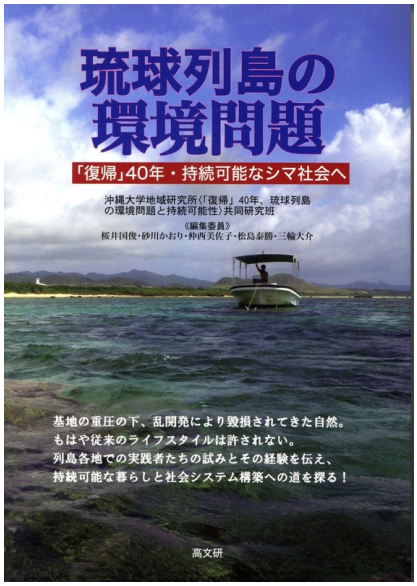
Second, the issue of extraterritorial application of US environmental laws should be studied in more detail, with special attention paid to *ARC Ecology v. United States Department of the Air Force* (*ARC Ecology*).

To deal with the hazardous waste left by the U.S. military at Subic Naval Base and Clark Air Force Base in the Philippines, the nongovernmental organization ARC Ecology attempted to use U.S. hazardous waste law — the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) — it is necessary to compel the government to address contamination. Section 105(d) of CERCLA reads "any person who is, or may be, affected by a release … may petition the President to conduct a preliminary assessment of the hazards to public health and the environment which are associated with such release." Pursuant to this provision, ARC Ecology petitioned the U.S. Navy and Air Force to make a preliminary assessment of the contamination at Clark and Subic. The Navy and Air Force refused, asserting, "CERCLA does not apply to … property located outside the territorial boundaries of the United States." In December 2002, ARC Ecology commenced a CERCLA citizens' suit seeking both an order compelling the United States to conduct assessments and cleanups at Clark and Subic, and a declaratory judgment that section 105(d) of CERCLA applied extraterritorially to the bases. The Ninth Circuit determined that CERCLA does not extend to address contamination on former U.S. military bases in the Philippines. As *ARC Ecology* illustrates, U.S. laws that prevent and remediate domestic environmental harms committed by American government agencies, corporations, and individuals rarely extend beyond U.S. borders. Consequently, environmentally damaging activities carried out by American actors abroad may go unchecked.

Although the extraterritorial application of environmental statutes is, in general, restricted, a small number of environmental statutory provisions contain such express language of extraterritoriality that their extraterritorial application is difficult to deny. Such provisions include, for example, section 470a-2 of the National Historic Preservation Act (NHPA), aimed at helping the United States observe its obligations under the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention). These provisions exhibit the kind of explicit language typically required to achieve extraterritorial application. That was the reason why the plaintiffs (Okinawa Dugong) got a favorable judgment in *Okinawa Dugong v. Rumsfeld.* The judicial presumption against extraterritorial application of domestic laws plays a major role in limiting the scope of U.S. environmental laws to domestic territory. With the general understanding that congressional legislation is domestically focused, and with the objective of preventing the application of U.S. laws in ways that would give rise to a conflict of laws, courts readily apply the presumption to environmental laws and thus disallow their extraterritorial use. In contrast, the presumption has eroded in the realm of securities and antitrust laws and courts have developed alternative tests that more leniently allow for the extraterritorial application of such laws in order to avoid harm to American markets. The inconsistency between how courts apply the presumption in environmental law

as compared to in market law signals both an opportunity and a necessity to overcome the presumption in the context of environmental law.[10] For the future conduct of negotiations with the US, it is important to study *ARC Ecology,* clarifying the reasons that abated the application of section 105(d) of CERCLA to this case.

The cleanup of polluted sites will become a serious problem for the hosting local governments if the bases south of Kadena are returned to them in the near future. To prepare for that, in April 2014 the Prefectural Government of Okinawa will establish a new office called Special Office for Base Environmental Affairs. The author will be very happy if this short paper proves useful to the work of that office as well as to the people of Okinawa concerned with base environmental issues.



Author Sakurai's most recent book, "Environmental problems of the Ryukyu Islands" (2012)

Sakurai Kunitoshi, former president and now professor of Okinawa University, is a specialist in environmental assessment law and a prominent figure in Okinawan environmental conservation circles. His most recent book is *Ryukyu retto no kankyo mondai – 'fukki' 40 nen, jizoku kano na shima shakai e,* Kobunken, 2012. The Japanese original of this paper (dated November 8, 2013) is for presentation at an International Symposium on Base Environment problems to be held in the Okinawan Prefectural Museum on 7 December 2013. For his earlier articles addressing the question of bases and environment, including the environmental impact study on Henoko, see this journal's index. **Edited** by Gavan McCormack

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Notes

[1] If we examine the recent site cleanup cases such as Camp Kuwae North and study the framework of the "Special Measures concerning the Reuse of Returned Military Bases" law promulgated on April 1, 2012, there is no recognition among the Japanese parties concerned that the US is responsible for the environmental restoration of returned military bases. Instead they stick to the position that the restoration of original conditions including environmental restoration is the responsibility of Japanese Government as supplier of the bases. Camp Kuwae North was returned in March 2003, but because of the lack of proper records on site use, cleanup works are not yet finished for one-third of the site. In February-March 2013, the Okinawa Defense Bureau discovered six locations heavily polluted by oil.

[2] This proposal for environmental restoration was made by the Commander of US Armed Forces in Korea, Leon J. LaPorte, before leaving office. The proposal did not include new commitments and did not meet the environmental restoration level required by Korean legislation.

[3] According to WikiLeaks, the US ambassador responded to the remark made by the Korean minister that US forces were in Korea to guarantee Korea's security, a commitment that reflected great American generosity. He warned that it could be damaging for the alliance if there was no agreement on the basis of the very reasonable US proposal. Although this reply may have been half bluff, the ambassador did not deny US responsibility for environmental restoration. Although there is a decisive difference about the level of environmental restoration required, both sides accepted the Polluter Pays Principle.

[4] "US Military Bases and Environmental Problems" (in Japanese), Yoichi Yoshiyuki, Gentousya Renaissance Shinsho, p.19., 2010

[5] JSEP consists of four principles, the third of which is "Response to environmental contamination". Its last half reads as follows: The Government of Japan, in accordance with relevant laws and regulations, will take all available measures to respond appropriately to serious contamination caused by sources outside facilities and areas. This part shows clearly why the agreement became necessary.

[6] Based on the second item, "Information Sharing and Access" of the "Memorandum of Special Understandings on Environmental Protection" signed on January 18, 2001, the Environment Subcommittee of the US-ROK Joint Committee set up a Joint Environmental Information Exchange and Access Procedure. The details of that procedure were established in Appendix A on May 30, 2003. After a series of negotiations, Appendix A was revised and JEAP (Joint Environmental Assessment Procedure) was established on March 2, 2009 as a US-ROK Security Policy Initiative (SPI). According to JEAP,

(1) Evaluation of contamination is to be done based on Korean standards and cleanups are also to be done by the Korean side, with cleanup costs to be borne by the US,

(2) Survey period to be extended from 60 days (Appendix A) to 150 days,

(3) When the US side carries out cleanups, Korean side can monitor the operation,

(4) Consultation will be held at the Environment Subcommittee in the event of problems.

[7] DoD Manual No.4715.20, entitled "Defense Environmental Restoration Program (DERP) Management," was published on March 9, 2012. It does not apply outside the United States.

[8] The US Department of Defense has a program called BRAC (Base Realignment and Closure). "The Environmental Condition of Property (ECP) Report" is the document used in BRAC to assess, determine, and document the environmental condition of all transferable property" at BRAC closing installations. An ECP Report may be prepared for the entire installation or a single parcel. The ECP Report summarizes the historical, cultural, and environmental conditions at the property and includes references to publicly available and related reports, studies, and permits, as available. The scope of the ECP Report depends upon a number of factors including the current property use, the extent (or lack) of contamination, the current status of any remedial or corrective actions being taken at the property, and the presence of protected species or cultural assets.

[9] This document was discovered in the files of USCAR's Reversion Affairs Division by Mr. Miyagi Etsujiro, Director of Okinawa Prefectural Archives.

[10] Anna D. Stasch, "*ARC Ecology v. United States Department of the Air Force*: Extending the Extraterritorial Reach of Domestic Environmental Law," *Environmental Law Review*, 2006, Vol.36, Issue 3, pp. 1065-1095.