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THE NEGOTIATION OF EXECUTIVE AGREEMENTS FOR ENVIRONMENTAL REMEDIATION: IS THE INTEREST-BASED METHOD A WORKABLE MODEL?

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CHAPTER I

INTRODUCTION

Negotiation has been focus of great deal of analysis. International negotiation because the cross-cultural and varied nature of the issues involved is very complex in nature[1] and provides a ripe ground for study.[2] Thus, a significant amount of work has been produced on this topic. Much of the recent literature on negotiation has concerned environmental negotiations. The environmental negotiations literature often discusses the negotiation of domestic environmental issues[3] or the negotiation of multilateral/global environmental conventions.[4] However, literature on bilateral negotiations dealing with environmental issues, especially as it is related to mutual defense arrangements is more scarce.[5] This paper will deal with this latter type of negotiations.

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[1] Richard J. Erickson , *The Making of Executive Agreements By the United States Depatment of Defense: An Agenda for Progress*, 13 B.U. INT'L L.J. 45, 50 (1995) [hereinafter THE MAKING OF EXECUTIVE AGREEMENTS].

[2] It may also be that international negotiation is written about because there are fewer alternatives. Because ICJ jurisdiction is based on consent, that court may not have jurisdiction to hear a case. Regardless of the reason, Erickson asserts that such study is not sufficiently encouraged or undertaken within the Department of Defense or at the federal level. *Id.* at 82-83, 95.

[3] The term "domestic environmental issues" is used in this context to include both public and private and local and federal environmental disputes. Negotiation of these disputes may include resolving issues concerning location of hazardous waste sites to the clean-up of superfund sites. It may also include negotiated rule-making for the Environmental Protection Agency.

[4] Negotiation of multilateral/global environmental conventions includes the negotiation of treaties on such issues as ozone depletion, ocean pollution, preservation of tropical forest, biological diversity, and global warming.

[5] There are articles such as Wegman and Bailey, *infra* note 6, dealing with environmental issues regarding base closure, however, a majority of this literature deals only indirectly with the negotiation.

By the latter 1980's the Department of Defense (DoD) operated more than 5500 military bases and other major facilities around the world.[6] As the Cold War ended and, in the minds of many, threats to U.S. security receded, it became evident that expenditures to maintain these facilities would be increasingly difficult to justify. As a result, the DoD announced plans, in 1991, to end operations or draw down forces at 198 overseas sites.[7] Additionally, nearly 250 domestic bases were also slated for closure.[8] In the process of negotiating the specifics of these closures, some of the most difficult details to resolve have been and continue to be the environmental issues.[9] Overseas, questions about which country's environmental standards will govern the clean-up as well as issues about which country will bear the cost of environmental remediation must be resolved.[10] Additionally, concerns about how the resolution of these issues will affect the relationship must be taken into account.

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[6] Richard A. Wegman and Harold G. Bailey, *The Challenge of Cleaning Up Military Wastes When U.S. Bases are Closed*, 21 ECOLOGY L.Q. 865, 866 (1994), citing Andrew C. Mayer and David E. Lockwood, Congressional Research Service, Military Base Closure: Issues for the 103d Congress CRS-1 (1993); Department of Defense Base Closure and Realignment Report 227 (1993)

[7] Dean C. Rodgers, Closing Overseas Military Installations: Environmental Issues, International Agreements and Department of Defense Policy, (1991) (unpublished LL.M. thesis, George Washington University) (on file with author).

[8] Wegman and Bailey, *supra* note 6, at 867.

[9] The environmental contamination at overseas basses is extensive. For instance, the U.S. Air Force has identified 93 sites of contamination at 39 overseas installations and has projected a conservative estimate of $100 million to pay for clean-up. Rodgers, *supra* note 7, at 3, citing Inventory of Contaminated Sites at United States Air Force Installations, August 1990. However, overseas contamination is normally less extensive because overseas bases are not the large industrial sites that U.S. bases are. Wegman and Bailey, *supra* note 6, 945 nn. 344.

[10] *Id.* at 869.

This paper will explore whether the interest-based negotiation technique[11] can be effectively used in resolving the environmental issues described *supra* that are associated with base closures. It will do so by first describing and responding to some of the criticisms of the fundamental concepts of the interest-based negotiation method. Having described the method, this work will then explore whether the principles of interest-based negotiation can be used to effectively resolve the issues given their complicated cultural, political, and environmental aspects.

[11] Interest-based negotiation is also often referred to as principled negotiation technique. The terms will be used interchangeably throughout this paper. The technique was initially introduced by the Harvard Negotiation Project and will be described in the next chapter.

CHAPTER II

INTEREST-BASED NEGOTIATION METHOD: A DESCRIPTION

> In its simplest terms... the principled negotiation method requires that conflicts be resolved on the basis of impartial standards or principles. Principled negotiation encourages parties in conflict to seek mutual gain rather than haggle over arbitrarily fixed positions from which they will grudgingly retreat, inch by inch, as the conflict moves through progressively destructive phases.[12]

The interest-based method is a not a complicated procedure. It can be used by anyone to negotiate anything.[13] The method is based on four basic concepts which will be described *infra*.

I. Four Basic Concepts of Principled Negotiations

A. Don't Bargain Over Positions.

The primary tenet of those who advocate interest-based negotiations is that a negotiator should not bargain over positions.[14] This is because positional negotiations can produce agreements that are unwise and can endanger an ongoing relationship.[15] Instead negotiations should focus on the interests of the parties.. One of the simplest definitions of interest is as follows: "Positions are what you say you want. Interests are why you want

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[12] William A. Ruskin, *The Use of "Principle Negotiation" In Resolving Environmental Disputes*, 17 AM J. TRIAL ADVOC. 225, 232-233 (1993).

[13] Roger Fisher, ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 135 (2d ed. 1991)[hereinafter GETTING TO YES].

[14] *Id.* at 3.

[15] *Id.* at 4-6.

it."[16] Thus, a position in an environmental remediation context might be that the U.S. must return the land to a pristine condition. The interests behind such a position may be numerous. The interests could include health and safety concerns or concerns for respect for sovereignty. By focusing on the interests, the parties are more likely to reach an agreement which address the needs that led to the negotiation.[17]

B. Separate the People From the Problem

The second basic concept directs the negotiator to separate the people who conduct the negotiation from the underlying problem.[18] Emotions and personalities should not dominate the process. A working relationship should be built between adversaries which encourages attacking a common substantive problem, rather than attacking the other parties to the dispute. Even when the parties disagree, they are encouraged not to be disagreeable. "While agreement makes a relationship more comfortable, the more serious our disagreements, the more we need a good working relationship to cope with them."[19]

C. Develop Creative Options for Mutual Gain

Creative options should be invented for resolving the dispute by encouraging brainstorming.[20] To effectively brainstorm, the "zero sum" assumption that if both parties

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[16] Linda Netsch, Address at United States Air Force Academy Negotiations Course (1996). Comments based on William Ury, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 17 (Rev. ed. 1993)[hereinafter GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION]. "Your position is the concrete things you say you want –the dollars and cents, the terms and conditions. Your interest are the intangible motivations that lead you to take positions – your needs, desires, concerns, fears, and aspirations." *Id.*

[17] GETTING TO YES, *supra* note 13, at 11.

[18] *Id.*

[19] Roger Fisher and Scott Brown, GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE 36 (Penguin Books 1989) [hereinafter GETTING TOGETHER].

[20] GETTING TO YES, *supra* note 13, at 60.

value something the only way to resolve the issue is to divide it must be rejected.[21] Rather the interest-based negotiator focuses on ideas such as the economies of scale and the combination of differing skills to find options that will enhance the value that the parties receive. In other words, the goal of the interest-based negotiator is to "expand the pie" rather than divide it.[22]

D. Insist on Objective Criteria

Finally, objective criteria, including fair standards and procedures, should be developed. It should be those criteria which are relied upon to judge the merits of the options which have been generated.[23]

II. Elements of a Conflict Considered by Interest-Based Negotiators

While the four concepts are the main ideas supporting the interest-based negotiation method, an introduction to the method would not be complete without a discussion of the seven elements of a conflict situation which are considered by the interest-based negotiators.

A. Interest

As the first concept above states, parties should concentrate on interests. Thus, the first element of principled negotiation is interest. As explained above, this means focusing on what the parties' need rather than on the positions that they believe may meet those needs.

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[21] Roger Fisher and Danny Ertel, GETTING READY TO NEGOTIATE: THE GETTING TO YES WORKBOOK, 35-37 (1995) [hereinafter GETTING READY].

[22] *Id.* at 35.

[23] Id. at 61. However, Fisher notes that parties may advance differing standards. He suggests that the parties must also look for an objective basis for deciding between the standards. GETTING TO YES, *supra* note 13, at 89.

B. Communications and Relationship

The second concept above, separating the people from the problem, actually encompasses two essential elements, communication and relationship. The principled negotiator must effectively communicate his own interest as well as be able to draw the interest from the comments of the other party or parties. The principled negotiation technique encourages the negotiator to utilize active listening techniques such as reflective responses, focusing on content as well as emotions, and responding to non-verbal expressions to ensure that the message being conveyed by other parties is actually being received.[24] Use of communication facilitators such as empathetic understanding, altruistic appeal, and extrinsic reward are recommended to encourage sharing of information.[25] Additionally, the interest-based negotiator uses first person speech, breaks down messages into smaller understandable parts, asks the other party to confirm what they have heard, and plans the communication process to minimize mixed messages, in order to make his interaction more effective.[26]

Interest-based negotiators also stress the importance of relationship. One of the central assumptions of the interest-based negotiator is that negotiation should enhance the

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[24] David A. Binder, Paul Bergman, Susan C. Price, LAWYERS AS COUNSELORS: A CLIENT–CENTERED APPROACH (1991) at 54-57.

[25] *Id.* at 40-44.

[26] GETTING TOGETHER, *supra* note 19, at 97-105.

relationship rather than affect it in a negative way.[27] However, unlike positional bargaining, the interest-based method does not encourage the negotiator to trade off interest against relationship. Rather, negotiators are encouraged to "[d]eal with people problems directly" and not to "try to solve them with substantive concessions."[28]

C. Options and Commitment

The third concept above of inventing options for mutual gain also encompasses two elements. Obviously it would include the element of creating options, but it also includes the element of commitment. While the principled negotiation literature cautions that self-censorship may occur if decision-making is not separated from the idea generation phase, it is helpful to consider different levels of commitment in creating options. Fisher and Ury instruct the negotiator to "invent agreements of different strengths."[29] In reality, agreements of differing strength reflect different levels of commitment that the parties may be willing to make. For instance, if the parties are unable to commit to a substantive agreement, they may be willing to commit to a "weaker" agreement on procedure. In attempting to invent options, these types of agreements should be brainstormed. In addition to option generation, the element of commitment also has other components. Commitment requires the parties to consider if an agreement is "operational and durable."[30] More simply, are the

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[27] Jerome T. Barrett, P.A.S.T. IS THE FUTURE: A MODEL FOR INTEREST-BASED COLLECTIVE BARGAINING THAT WORKS (5th ed. 1998).

[28] GETTING TO YES, *supra* note 13, at 21.

[29] *Id.* at 69.

[30] GETTING READY, *supra* note 21, at 96-101.

parties capable of carrying out the agreement and have mechanisms, such as mediation and arbitration, been agreed to which will allow the parties to handle future problems.[31]

D. Legitimacy and Alternatives

The concept of insisting on objective criteria encompasses the remaining two elements of principled negotiation, legitimacy and alternatives. In order for a proposed agreement to be acceptable to both sides, it must appear to be legitimate. Basing an agreement on objective criteria such as "precedent, law, or the principle of reciprocity" gives it the agreement legitimacy.[32] However, if one of the parties refuses agreement based on such criteria, the other party may find it in its best interest to refuse to agree. That party is then left to select its best alternative.

Alternatives are often confused with options. However, alternatives are different from options because they are developed outside of the negotiation process. They are the actions that may be taken if no agreement is reached. The principled negotiation technique suggests developing a "Best Alternative To A Negotiated Agreement (BATNA). Ury and Fisher write:

> The reason you negotiate is to produce something better than the results you can obtain without negotiating. What are those results? What is that alternative? What is your BATNA - your Best Alternative To a Negotiated Agreement? That is the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.

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[31] The idea of including mechanisms to effectively resolve future disputes is sometimes referred to as second-order compliance. Interest-based negotiation encourages the inclusion of second-order compliance mechanisms to add credibility to proposals. Roger Fisher ET AL, COPING WITH INTERNATIONAL CONFLICT: A SYSTEMATIC APPROACH TO INFLUENCE IN INTERNATIONAL NEGOTIATION 228 (1997) [hereinafter COPING WITH INTERNATIONAL CONFLICT].

[32] Roger Fisher, ET AL., BEYOND MACHIAVELLI: TOOL FOR COPING WITH CONFLICT 77 (1994)[hereinafter BEYOND MACHIAVELLI].

> Your BATNA not only is a better measure but also has the advantage of being flexible enough to permit the exploration of imaginative solutions. Instead of ruling our any solutions which does not meet your bottom line, you can compare a proposal with your BATNA to see whether it better satisfies your interest.[33]

III. Utilizing the Principles and Elements of the Interest-Based Method

Utilizing the principles and elements set forth above, Fisher and Ury have asserted that the "method is an all-purpose strategy"[34] which can be used "for coming to mutually acceptable agreements in every sort of conflict."[35] Others have stated that negotiators can "successfully employ these techniques in attempting to resolve environmental disputes."[36] The objective of this paper is to explore the potential for using the technique to resolve international environmental disputes resulting from military base closures.

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[33] GETTING TO YES, *supra* note 13, at 100.

[34] *Id.* at xix.

[35] *Id.* on cover.

[36] Ruskin, *supra* note 12, at 233.

CHAPTER III

CRITICISMS OF INTEREST-BASED NEGOTIATIONS

While interest-based negotiation has been a widely accepted as a means of settling disputes on a domestic level, it has also received a substantial amount of criticism. Much of that criticism has centered on the perceived inability of principled negotiation to deal with international disputes. This section of the paper will analyze whether the criticisms are accurate.

I. Ignores Distributive Bargaining

One of the primary criticisms of *Getting to Yes*[37] and the interest-based negotiation technique it encourages is that both concentrate "too much attention on the integrative aspects of bargaining... failing to deal with the difficulty of responding to distributive issues."[38] One source of this criticism has been an article written by James White. White writes,

> *Getting to Yes* is a puzzling book. On the one hand it offers a forceful and persuasive criticism of much traditional negotiating behavior. It suggests a variety of negotiating techniques that are both clever and likely to facilitate effective negotiation. On the other hand, the authors seem to deny the existence of a significant part of the most troublesome problems inherent in the art and practice of negotiation ...One can concede the authors' thesis (that too many negotiators are incapable of engaging in problem solving or in finding adequate options for mutual gain), yet still maintain that the most demanding aspects of nearly every negotiation is

[37] GETTING TO YES, *supra* note 13.

[38] Jacqueline M. Nolan-Haley, ALTERNATIVE DISPUTE RESOLUTION 23 (1992).

> the distributional one in which one seeks more at the expense of the other.[39]

White further criticizes the interest-based negotiation method's insistence on the use of objective criteria, stating that to some extent every party will have some rationale for the position it takes.[40] White suggests,

> [t]he authors' [Fisher's and Ury's] suggestion ...that one can...eliminate the exercise of raw power is at best naive ... Their suggestion that the parties look to objective criteria ... is a useful technique used by every able negotiator. Occasionally it may do as they suggest: give an obvious answer on which all can agree. Most of the time it will do no more than give a superficial appearance of reasonableness and honesty to one party's position.[41]

Roger Fisher responds to this criticism by stating that White fails to recognize that while some of the parties interests may be directly opposed in a distributional setting, they continue to have shared interest in the process of resolving the dispute.[42] "Both parties have an interest in identifying quickly and amicably a result acceptable to each, if one is possible. How to do so is a problem. A good solution to that process-problem requires joint action."[43]

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[39] James J. White, Essay Review: *The Pros and Cons of Getting to Yes*, 34 J. OF LEGAL EDUC. 115 (1984). This article is a criticism primarily aimed at GETTING TO YES; however, in criticizing the book it also addresses a criticism of principled negotiation techniques leveled by others. Nolan-Haley, *supra* note 38, recognizes this criticism but states that in "Getting Past No: Negotiating With Difficult People, Ury responds to some of these criticisms and discusses what to so when the other negotiator refuses to adopt a problem-solving approach to negotiation." *Id.*

[40] White, *supra* note 39, at 117.

[41] *Id.*

[42] *Id.* at 121 (Fisher's response to White's review pr.inted at same cite).

[43] *Id.*

II. Inadequate Attention to the Prenegotiation Phase

A second criticism of the principled negotiation approach is that it does not adequately address the prenegotiation phase. Harold Saunders writes:

> My concern ... is that some readers may get the impression that major international disputes could be resolved if only mediators would use the Fisher-Ury approach ... Fisher and Ury suggest effective techniques for reaching agreement despite conflicting interests, but barriers to international agreement in the prenegotiation phase – feelings of fear, suspicion, anger, and rejection – require different treatment. Nations and peoples are divided not only by differences over rationally definable interest, but also by deeply rooted convictions about what they need to achieve security, identity, dignity, honor and justice.[44]

However, a closer look at the principled negotiation technique reveals that it places great emphasis on overcoming barriers to conflict resolution. While *Getting to Yes* seems to collapse the prenegotiation phase into actual negotiation, it does take into account Saunders' concerns about the need to address the "feelings of fear, suspicion, anger and rejection."[45] Fisher and Ury write,

> [d]eal with people problems directly; don't try to solve them with substantive concessions. To deal with psychological problems, use psychological techniques. Where perceptions are inaccurate, you can look for ways to educate. If emotions run high, you can look for ways to educate. If emotions run high, you can find ways for each person involved to let off steam.[46]

Other examples of the use of "prenegotiation problem-solving discussions"[47] by interest-based negotiators are abundant. William Ury used such discussions as he "mediated" what was described as "peace talks" between the Russians and the

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[44] Harold H. Saunders, *Getting to Negotiation*, 95 HARV. L. REV. 1503, 1504-1505 (1982).

[45] *Id.*

[46] GETTING TO YES, *supra* note 13, at 21.

[47] A term used by Ronald J.Fisher in *Prenegotiation Problem-solving Discussions: Enhancing the Potential for Successful Negotiation* in GETTING TO THE TABLE: THE PROCESS OF INTERNATIONAL PRENEGOTIATION 206 (Janice Gross Stein ed., 1989)

Chechens.[48] Additionally, interest-based negotiators have developed tools specifically meant to help analyze decisions about whether to negotiate. The Currently Perceived Choices Tool is one such tool.[49] Howard Raiffa, writing of his experience in 1991 with a negotiation workshop for diplomats from nations of the Conference for Security and Cooperation in Europe, states that as they systematically talked about barriers to negotiation, he kept thinking "that the decision whether a country should negotiate or not is a complex one, to say the least, and probably little systematic analysis is done."[50] He then suggests that utilizing the system of pluses and minuses such as the Currently Perceived Choices Tool, advocated by Roger Fisher, "evokes the whole set of costs that can be identified with the barriers to negotiation."[51] Thus, using the Currently Perceived Choices Tool, encourages a party to consider the essential elements of the prenegotiation phase.

For purposes of analyzing negotiations on environmental remediation associated with base closure, it should also be considered that prenegotiation phase issues may not be prominent. While concerns over subjects such as security may be involved, because the parties have had previous relations, it is anticipated that getting to the negotiation table will not be a substantial problem.

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[48] Doug Stewart, *Expand the pie before you divvy it up*, SMITHSONIAN, Nov. 1997, at 78. This example is cited for the proposition that interest-based negotiators do consider the prenegotiation phase, not for the success of the method in resolving conflict. The recent events in Chechnya make it obvious that the conflict continues. Michael R. Gordon, *Russian Troops Meet Stiff Resistance From Chechen Rebels Entrenched in Grozny*, N.Y. Times, Dec. 27, 1999 at A1.

[49] GETTING TO YES, *supra* note 13, at 45.

[50] Haward Raiffa, *Analytical Barriers* in BARRIERS TO CONFLICT RESOLUTION 133 (Kenneth Arrow et al. eds., 1995).

[51] *Id.*

Saunders also expresses concern that cultural differences may affect the prenegotiation phase. "Cultural gaps may account for different – and often misunderstood – views about what the issues in a dispute are and what are acceptable conditions for negotiation."[52] He believes the interest-based negotiation technique does not adequately address cultural differences.[53]

As discussed *infra*, the prenegotiation phase may be substantially reduced in importance in environmental remediation negotiations dealing either base closure. However, even when the prenegotiation phase is not a significant concern, cultural differences may influence other stages of the negotiation. It is a failure to take account of cultural differences, which is the final area of criticism of the principled negotiation technique. This criticism will be the subject of the next chapter.

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[52] Saunders, *supra* note 44, at 1506.

[53] *Id.*

CHAPTER IV

PRINCIPLED NEGOTIATIONS FROM A CROSS-CULTURAL PERSPECTIVE

Raymond Cohen, author of Negotiating Across Cultures, states that "in most cases negotiation failure is more likely to be the result of divergent interests than of subjective misunderstanding. After all, for negotiators to have any prospect of success they must first and foremost identify shared interest."[54] With this language, Cohen appears to be embracing principled negotiation's emphasis on shared interest. Additionally, Cohen acknowledges that trends toward "interdependence," "globalization" and "cultural convergence" may lessen the impact of culture on negotiation.[55] Nevertheless, Cohen asserts that "cultural factors may hinder relations in general, and on occasion complicate, prolong, and even frustrate particular negotiations where there otherwise exist an identifiable basis for cooperation."[56] Like Saunders, in the previous chapter, Cohen asserts that the interest-based negotiation technique advocated by William Ury and Roger Fisher fails to take into account these cultural differences.

> When theorists posit a universal paradigm of negotiation (usually involving such features as the 'joint search for a solution,' isolating the people from the problem,' and the maximization of joint gains'), they are in effect proposing an ideal version of the low-context problem solving model ... There exists another, quite different paradigm of negotiation just

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[54] Raymond Cohen, NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD 216-217 (Rev. Ed. 1997).

[55] *Id* at 217.

[56] *Id.* at 8.

> as valid in its own terms as that exemplified by Fisher's low-context problem solving approach.[57]

As Cohen describes Fisher's approach, he associates it with use by "low context" cultures. According to Cohen, low context cultures: 1) value freedom and individual rights; 2) base group affiliation on personal choice which are subject to change; and 3) define rights and duties according to law and contract.[58] In contrast, high context cultures, the other paradigm to which Cohen refers, are:

> associated with interdependent societies that display a collectivist, rather than individualistic ethos... In contrast to the results-oriented American model, it declines to view the immediate issue in isolation; lays particular stress on long term and affective aspects of the relationship between the parties; is preoccupied with considerations of symbolism, status and face; and draws on highly developed communication strategies for evading confrontation.[59]

Fisher acknowledges Cohen's criticism, writing, "[s]ome have said that the approach is partisan - that if applied, it promotes a Western democratic view of the world over any competing worldview."[60] However, Fisher responds, "[t]he approach and all the tools provide a neutral system of analysis, and if both sides in a conflict use the approach, it does not cancel itself out."[61] Others involved in cross-cultural negotiation seem to agree that principled negotiation provides a suitable process to deal with cross-cultural process.

> Negotiators are people first. When faced with a cross-cultural negotiation, one should strive to apply the techniques of principled negotiation and

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[57] *Id.* at 216-217.

[58] *Id.* at 28

[59] *Id.* at 217.

[60] COPING WITH INTERNATIONAL CONFLICT, *supra* note 31, at 13.

[61] *Id.*

> attempt to separate the people ... from the real problems at hand. This is why adequate preparation is so important ...Cultural factors are relative to the actual interest of the other side. It is vital that one understands so that one can develop empathy - a vital attribute for any principled negotiation. Combined with sensitivity, a sense of empathy will enable one to uncover underlying interest and concerns ... An understanding thus reached, all parties will then be able to attack the problem together.[62]

It is obvious that there is a difference of opinion as to the effectiveness of principled negotiation in a cross-cultural negotiation.

I. Cultural Factors and the Elements of Conflict

The next section of the paper will discuss the interplay between cultural factors and the elements of interest-based negotiations which were set forth in the introduction. While the assumption is that cultural factors may negatively affect negotiations, this discussion will illustrate that principled techniques may help meet with the challenges posed by cultural difference and that some cultural differences may actually foster the utilization of the interest-based negotiation technique. Thus, the interest-based negotiator views culture as something richer, exciting, and full of potential rather than something with which one must "merely cope."[63]

A. Options and Interest

Cultural differences may positively influence the ability to invent options for mutual gain because of the diverse interest of the parties. Fisher, though not speaking

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[62] Peter H. Corne, *The Complex Art of Negotiation Between Different Cultures*, ARB. J, December 1992 at 50. See also Julie Barker, *International Mediation - A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L COMP. L.J. 1, 51 (1996) and Yassin El-Ayouty, *Challenges Facing Inter-Governmental Political Negotiations Which Are Common to International Business Negotiators: An Analysis of Shared Concerns*, 3 ISLA J. INT'L & COMP. L. 829, 837.

[63] Brian Groth, *Negotiating in the Global Village: Four Lamps to Illuminate the Table*, 8 *NEGOTIATION J.* 241, 244 (1992).

particularly to international negotiations, states, "[s]ometimes different perceptions and priorities can serve to 'make the pie larger' for all concerned."[64] Such is the case with the long-term emphasis of by high context cultures and the more short-term emphasis of low context cultures. As Roger Fisher points out, "reconcilable interest might best be illuminated by listing separately long-term and short term interest."[65]

The option generation potential created by the differences in low context and high context cultures can be illustrated by looking at U.S. business dealings with the Japanese. As reflected by the importance they place on the potential for growth and market share, Japanese firms are "future-oriented." They are thus only secondarily concerned with short-term profits.[66] In contrast, U.S. firms are often concerned with short-term profit. As a result, numerous options exist for ventures that ensure short-term profit to the U.S. firm and reserve potential long-term benefits for the Japanese firm.[67] Likewise, providing opportunity for short-term profits for U.S. businesses involved in assessment of environmental situations might also serve the long-term interest of high context cultures in ensuring environmental sustainability.

B. Communication

Communication is an essential element to the success of negotiations based on the principled negotiation technique. Because cultural differences may negatively affect

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[64] BEYOND MACHIAVELLI, *supra* note 32, at 38.

[65] *Id.* at 39.

[66] Corne, *supra* note 62, at 47-48. Corne adds that one reason that Japanese business can place secondary emphasis on short term profitability is because the "shares of Japanese companies are generally held by large financial institutions that are not greatly concerned about receiving short-term returns on investment." *Id.*

[67] *Id.*

communication, they may constitute an additional obstacle to successful negotiations utilizing the interest-based technique.

Intercultural communications may be hindered by not only differences in language, as will be discussed later, but also by disparate ideas about the "nature and value of social relationships."[68] While cultural communications may vary greatly, for purpose of this discussion cultural communications will be divided into the two categories suggested by Cohen, low context and high context.[69]

Cohen describes high context cultures communication as follows:

> A high-context communicates allusively rather than directly. As important as the explicit content of the message are the context in which it occur, surrounding nonverbal cues, and hinted-at nuances of meaning...Language is a social instrument - a device for preserving and promoting social interest as much as a means for transmitting information...Face to Face conversation contains many emollient expressions of respect and courtesy alongside a substantive element rich in meaning and low in redundancy. Directness, and especially contradiction, are much disliked. It is hard for speakers in this kind of culture to deliver a blunt no. They wish to please their interlocutors, and prefer inaccuracy and evasion to painful precision...it is hard for members of collectivistic culture to deal with a stranger from outside the circle ... Before frank exchange is possible, let alone the conduct of business, a personal relationship must be cultivated. But relationships are not simply instrumental; they are, profoundly, ends in themselves. Timing is also important. Much probing and small talk precede a request, because rebuff causes great embarrassment. "[70]

In contrast, low context communication is explicit. Communication is to inform rather than to serve a more social function.[71] Efficient and accurate transmission of

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[68] Cohen, *supra* note 54, at 14.

[69] *Id.* at 28-38.

[70] *Id.* at 31.

[71] *Id.* at 33.

information is encouraged.[72] "Refutation is not felt to be offensive. The reverse is the case, because society flourishes on debate, persuasion, and the hard sell."[73] Cohen aptly describes low context communications in this way, "'Straight-from-the-shoulder' talk is admired. 'Get to the point' is the heartfelt reaction to small talk and evasive formulations. People have little time or patience for 'beating around the bush' and wish to get down to business and move on to another problem."[74]

Cultural communication differences also entail spoken language differences. Language differences are a definite obstacle to communications. For example, the English word value is frequently translated into the Russian word UeHa, which means price or cost.[75] Therefore, it is often difficult for English speaking negotiators to elicit information concerning interest in a project if he mistakenly asks about the underlying value of the project. In response to such an inquiry, the Russian negotiator may give a price figure.[76] Fisher and Ury recognize this problem, stating, "[w]here the parties speak different languages the chance for misinterpretation is compounded. For example, in Persian, the word 'compromise' apparently lacks the positive meaning it has in English of 'a midway solution both sides can live with,' but only has a negative meaning as in 'our integrity was compromised.'"[77] Similarly, international communication is complicated when an idea exists in one culture and lacks an equivalent in another. One concept found

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[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] Goldstein and Weber, *The Art of Negotiating*, 37 N.Y.L. SCH.L. REV. 325, 334 (1992).

[76] *Id.*

[77] GETTING TO YES, *supra* note 13, at 33.

in U.S. culture is the idea of fair play. This is an important concept in principled negotiations; however, it lacks an equivalent in some cultures.[78]

While inadequate language or concept translation would impede negotiation under any negotiating style, a difficulty of this sort is has a particularly negative effect on principled negotiations. Fisher and Ury recognize that positional bargaining does not require the same level of communication as does interest-based negotiation. "Positional bargaining is easy, so it is not surprising that people often do it. It requires no preparation, it is universally understood (sometimes you can even do it with fingers when you and the other side do not share a common language)... In contrast, looking behind positions for interest, inventing options for mutual gain, and finding and using objective criteria take hard work ..."[79]

Although cross-cultural communications may make principled negotiations more difficult, they do not foreclose it. For example, use of the one-text procedure, advocated by Fisher and Ury, addresses some communications barriers encountered in negotiations involving at least one high context culture. In the one-text process, either a low context party or a third party mediator may prepare a draft, then recommendations for approval or criticism is requested. Based on the parties' feedback, the draft is continually changed to better reflect the interest of the parties. When it is determined that no further improvement can be made, the parties are asked to accept or reject the draft.[80] The one-

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[78] Glen H. Fisher, PUBLIC DIPLOMACY AND BEHAVIORAL SCIENCES, 108 (1972). While Fisher recognizes that there was not original counterpart in French and Spanish, he recognizes that such a concept is developing.

[79] GETTING TO YES, *supra* note 13, at 151.

[80] The process is explained in more detail in GETTING TO YES, *supra* note 13, at 112-116.

text procedure allows the high context negotiator to provide input reflecting interests without making any concession or commitment.[81] As a result, it minimizes the potential for loss of face. Also, because draft criticism may be discussed by a party outside the presence of the other party, high context negotiators may avoid face to face confrontations. An additional advantage of the parties meeting out of the presence of the other party is that it provides the high context negotiator with an opportunity to build consensus within his own bureaucracy. Finally, the one-text procedure allows each party to "know exactly what they are going to get. And a yes answer can be made contingent on the other side also saying yes."[82]

C. Relationship

Although communication is an important element in dealing with cross-cultural disputes, as Fisher points out, "Our communicating with the other side is not worth much if the other side does not believe us."[83] Fisher also acknowledges that "[t]rusting someone is ... a matter of assessing the risk. That risk may be influenced by personal working relationship ..."[84] Because loss of face is a risk which must be avoided at all cost in a high context culture, relationship is of utmost concern to the high context negotiator. For example, Cohen, quoting Mushakoji Kinhide's study of Japanese diplomacy, asserts that "'the first order of business in Japan is the establishment of a

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[81] BEYOND MACHIAVELLI, *supra* note 32, at 128 The One text process was one of the tools used in the 1978 negotiations between Egypt, a high context culture, and Israel, a low context culture.

[82] GETTING TO YES, *supra* note 13, at 115. Additional suggestions on how to best deal with a language barrier through the use of an interpreter can be found in Barker, *supra* note 62, at 28.

[83] GETTING TO YES, *supra* note 13, at 120.

[84] *Id.* at 79, 80.

personal relationship between the parties which will allow them to speak frankly and to give and receive favors.'"[85]

Like high context cultures, principled negotiation also stresses relationship. Fisher writes the "'[i]nternational conflict'... is, after all, largely about what happens when working relationships cease to work effectively."[86] Fisher devotes a substantial portion of his writings to discussing the importance of relationships and how to develop "effective working relationship, relationships that have a high degree of rationality, understanding, communication, reliability, noncoercive means of influence and acceptance."[87] This stress on relationships in principled negotiations, may aid the low-context negotiator in understanding and adjusting to the emphasis placed on relationship by the high context negotiators.

D. Commitment

High context cultures are wary of committing to a position or an agreement because of potential loss of face. "Face-salient cultures ... may prescribe a ...procedure namely to postpone showing one's hand for as long as possible."[88] The Japanese negotiating style illustrates this.

> When the Americans state their position the Japanese tendency is to listen quite carefully, to ask for additional details, and to say nothing at all committal...They may also consider it unwise to expect the two delegation leaders to make initial, clear statements of their negotiating position;

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[85] Cohen, *supra* note 54, at 69. In subsequent pages Cohen also provides examples of U.S. interactions with China, Mexico and Egypt which stressed the importance of establishing relationships.

[86] COPING WITH INTERNATIONAL CONFLICT, *supra* note 31, at 113.

[87] *Id.* at 119. In fact, Fisher dedicates one entire text to discussing how to build relationships. See GETTING TOGETHER, *supra* note 19.

[88] Cohen, *supra* note 54, at 84.

> wouldn't it be wiser to let them speak only after the two sides had worked out a mutually acceptable position at the working level?[89]

It is therefore essential that prior to commitment, high context cultures be given the opportunity to work informally with the other party. Cohen explains that the 1989-90 "strategic impediments initiative" almost failed because "no informal sessions were arranged at which the parties might raise ideas ('brainstorm') without commitment."[90]

Interest-based negotiation encourages similar informal brainstorming exercises without commitment. Consider these instructions for inventing options from Ury and Fisher: "[s]ince judgment hinders imagination, separate the creative act from the critical one... Select a time and a place distinguishing the sessions as much as possible from regular discussions. The more different a brainstorming session seems from a normal meeting, the easier it is for participants to suspend judgment."[91]

Fisher and Ury also recognize those sought for agreements are sometimes "beyond reach."[92] As such they suggest that, "[y]ou can multiply the number of possible agreements on the table by thinking of 'weaker versions'" of agreement.[93] Thus, if negotiations do not result in commitment to a substantive agreement, at least agreement on procedural aspects may be reached. Commitment to these "weaker versions" may be more easily achieved.

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[89] *Id.* at 85, quoting Leo J. Moser, *Negotiating Style: Americans and Japanese*, in TOWARD A BETTER UNDERSTANDING 43 (Bendahmanne and Moser eds., 1986).

[90] Cohen, *supra* note 54, at 77.

[91] GETTING TO YES, *supra* note 13, at 60-61.

[92] *Id.* at 69.

[93] *Id.*

As stated above, avoiding commitment is a manner of avoiding risk for the high context negotiator. Because low context cultures tend to be less risk averse, they can encourage commitment by following an approach that places the risk on the less risk averse party. One such approach to expanding the pie is the "if-then" approach suggested by Ury.[94] In such an approach the low context party takes the risk, but if the joint action is successful, the low context culture obtains a greater portion of the benefit. Ury provides the example of a marketing consultant negotiating with a client regarding his fee. The consultant would normally receive fifteen thousand dollars for his services; however, the particular client is unwilling to pay more because he is uncertain if the services will actually help his business. Instead of trying to persuade the client, the consultant agrees to take a lower amount but if sales increase a certain percentage, then the client agrees to pay a bonus which will put the total earning above fifteen thousand.[95] While this is not an example involving international transactions, it is easy to see how such a technique could be used when negotiating an international agreement or business venture. By considering the high context cultures aversion to risk, principled negotiation addresses commitment difficulties. Similarly, if a high context culture is averse to the risk associated with hazardous waste clean-up, they may agree to allow the clean-up to be accomplished by the domestic companies of the low context party. Thus, the low context benefits its domestic industry.

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[94] William Ury, GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE 99-100 (1991) [hereinafter GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE].

[95] *Id.*

Commitment may also be a concept with varying meanings between high context and low context cultures. An agreement, once "committed to", may not be implemented by the high context party.[96] Often the lack of "compliance" may result from differing conceptions of an agreement.[97] High context cultures tend to view "agreement as beginning, not the end of an arrangement; it is simply assumed that, if the relationship is healthy, the contracting parties will be able to work out future differences in a cooperative, rather than litigious, spirit of goodwill."[98] Thus, in a high context culture, rather than being tied to the agreement, commitment is attached to the continuing relationship. This is illustrated by the Japanese attitude toward contracts. "Because of the importance placed upon the totality of the relationship, actual terms of the contract would become secondary to the relative needs and abilities of the party."[99]

Interest-based negotiators understand that "[e]ven if the other party agrees, he may not carry out the terms."[100] As a result, Ury suggests that a dispute resolution procedure be built into agreements. The procedure may call for the parties to try to negotiate the differences. If negotiations fail, the parties may submit the matter to mediation. In turn, if mediation does not successfully deal with the issue, binding

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[96] Cohen, *supra* note 54, at 200.

[97] *Id.* at 201. Cohen also discusses other reasons why an high context negotiator may accept an agreement which he later refuses to implement. In some situations, it may be that "agreement is the line of least resistance" to a too persistent low context negotiator by a high context negotiator who wants to avoid "unnecessary abrasion." In other situations it may be motivated by face saving concerns. "Pseudo-agreement ... may lead nowhere, but it preserves appearances and can be presented as a success." *Id.*

[98] *Id.* at 201.

[99] Corne, *supra* note 62, at 47.

[100] GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE, *supra* note 94, at 132.

arbitration by a mutually acceptable party is suggested.[101] Just such a dispute resolution mechanism was built into the North American Agreement on Environmental Cooperation (NAAEC, better known as the Environmental Side Agreement to the North American Free Trade Agreement). Under NAAEC, the Commission for Environmental Cooperation was established to accomplish dispute resolution. Cohen recognizes that this type of ongoing commission works well in a cross-cultural atmosphere because the members are able to establish an "essential personal rapport."[102]

Additionally, even if the other party has been "fully involved in the process of shaping an agreement, he may resist coming to terms. Often his resistance stems from an unmet interest that you have overlooked."[103] By exploring and understanding the high context party's interest, principled negotiation makes it more likely that an interest such as face saving will not be unmet and as such will not present obstacles to commitment.

E. Legitimacy

Closely related to commitment is the concept of legitimacy. It is unlikely that a party will commit to an agreement that he believes is not based on a legitimate standard. Cohen observes that low context cultures negotiators, such as those in the United States, tend to view as legitimate, and thus persuasive arguments based on "factual-inductive reasoning" which "draws conclusions on the basis of factual evidence; eschewing grand philosophical debate, it plunges straight into discussion of concrete detail."[104] In contrast,

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[101] *Id.* at 133-134.

[102] Cohen, *supra* note 54, at 72, citing and quoting Glen Fisher, INTERNATIONAL NEGOTIATION: A CROSS-CULTURAL PERSPECTIVE 30-31 (1980).

[103] GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE, *supra* note 94, at 95.

[104] Cohen, *supra* note 54, at 101-102.

high context negotiators tend to see as legitimate and persuasive, arguments based on a "axiomatic-deductive" style which "argues from general principles to particular application."[105] Cohen recommends that "one way to reconcile this contradiction is to combine the two: agree on practical steps under a canopy of general principles that meet the other side's psychological needs."[106] An interest-based negotiator recognizes this same need. In a chapter on legitimacy, Fisher proposes that requests regarding what we want the other government to do to resolve the conflict should be "formed in terms of principles accepted by the other government. If the proposed decision is formulated as one that is required by standards, policies, or rules accepted by the government we are trying to influence, it will be more readily acceptable to that government's officers."[107] Fisher further suggests:

> [I]n coping with an international conflict, it is a good idea to look for external standards of legitimacy, such as preexisting treaties, customary international law, equality, or most-favored-nation treatment. It is also wise to consider how a fair process, such as impartial fact finding, neutral recommendations, or arbitration, might produce results that would be acceptable because of the process itself would be widely recognized as legitimate."[108]

F. Alternatives

As stated above, if one of the parties feels that the agreement is not legitimate, they will refuse to commit to it. In many cases, this refusal will occur even if the

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[105] *Id.* See also Guy Oliver Faure, Cultural Aspects of International Negotiation, in INTERNATIONAL NEGOTIATION: ACTORS, STRUCTURE/PROCESS, VALUES 22 (1999)(discussing how culture influences the way negotiators operate to reach agreement and concluding that the French and German cultures favor a deductive approach.)

[106] *Id.* at 106.

[107] COPING WITH INTERNATIONAL CONFLICT, *supra* note 31, at 245.

[108] BEYOND MACHIAVELLI, *supra* note 32, at 77.

alternatives of the party are unfavorable. Fisher cites the 1975 natural gas negotiations between Mexico and the United States as an example of a situation in which an agreement perceived by one side as illegitimate was rejected for an unfavorable alternative. In this negotiation, the U.S. felt that Mexico would settle for a "relatively low price" because the U.S. was the only market readily accessible by pipeline. The Mexican government refused to accept this low price because they felt it was not legitimate. It also ordered the burning of millions of dollars of gas at the wellhead. In the end, the U.S. agreed to a price that it had previously offered.[109]

Because the principled negotiation technique entails not only developing a party's own Best Alternative to a Negotiated Agreement (BATNA) but also considering the other party's BATNA, it will help prevent underestimation of the consequences of failing to reach agreement. This is true in both domestic as well as cross-cultural negotiations. However, being able to place oneself into the other party's shoes is especially important in cross-cultural disputes. President Carter once expressed the belief that "one of the most important techniques for an international negotiator is to put himself in the other party's shoes in order to better understand position and develop a different perspective."[110] This different perspective should include an understanding of the other party's BATNA.

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[109] *Id.* at 77-78.

[110] Barker, *supra* note 62, at 22, citing President Jimmy Carter, *Jackson H. Ralston Lecture: Principles of Negotiation*, in 23 STAN. J. INT'L L. 1,10 (1987).

II. Summation of Remarks on Culture

In concluding his study, Cohen provides ten recommendations for the low context negotiator dealing with a party from a high context culture. It is interesting to note that although Cohen is critical of principled negotiation for failing to address culture diversity, as evidenced by Appendix 1, for each of Cohen's recommendations there is a similar recommendation contained in the principled negotiation literature.

Many of the authors writing about cross-cultural negotiations give advice similar to that provided by Cohen. However, they also recommend caution in relying on cultural stereotyping. "Stereotypes may be helpful or harmful depending on their use...stereotypes are effective when they are consciously held, descriptive rather than evaluative, accurate as to the societal norm, and based or modified upon actual observation and experience. On the other hand stereotypes may lead to serious misunderstandings and inhibit effective communications."[111] Advocates of the interest-based negotiators consider the other party based on his individual background, including but not limited to his cultural background. Therefore, while cultural factors may affect negotiations, the tenets of interest-based negotiation allow a negotiator to deal with these challenges.

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[111] Barker, *supra* note 62, at 23-24.

CHAPTER V

PUBLIC INTERNATIONAL DISPUTES

As discussed in the previous chapter, the interest-based negotiation technique accommodates the special demands of cross-cultural exchanges. This chapter will explore whether the interest-based method is equally adapted to successfully dealing with international disputes of a public, rather than a private, nature.

I. Characteristics of Public International Disputes

At the outset, it is important to remember that in evaluating whether a "conflict management program" will be effective in dealing with a specific type of dispute, it is necessary to keep in mind the characteristics of that dispute.[112] As has been pointed out, although no dispute is exactly like another, public disputes do have some common characteristics.[113]

Nearly all public disputes entail "divergent beliefs about what is right and what is wrong."[114] In other words, public disputes involve strongly held values.[115] Often the policy decisions involve choices among competing values such as economics and safety issues.

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[112] Susan L. Carpenter and W.J.D. Kennedy, MANAGING PUBLIC DISPUTES 11 (1988).

[113] *Id.* at 4. As is evident from further footnotes. The attributes discussed herein reflect the attributes discussed in Carpenter and Kennedy. *Id.* However, some of the attributes discussed in that source are not applicable to international environmental remediation actions. As a result, those attributes have not been included in this chapter.

[114] *Id.* at 10.

[115] *Id.*

Public disputes usually involve a wide range of complex issues.[116] For example, in addition to resolving economic liability issues, groups negotiating the proper solution for environmental remediation questions may also need to address clean-up standards, maintenance and monitoring responsibility, and property value questions. Additionally, as negotiators explore the concerns associated with one issue, other issues are likely to arise.[117]

Due to the complexity of the issues involved, another characteristic of public disputes is that technical information is important because it is needed to understand the nature of the problem and to find solutions.[118]

Public disputes also involve numerous parties with diverse interests. These parties are normally groups or organizations rather than individuals.[119] Adding to the complicated nature of the interests is the fact that the group involved may represent a diverse membership. As a result, group representatives may have personal interests that are somewhat divergent from the group interest they represent.[120] For instance, while the negotiation of the North American Agreement on Environmental Cooperation (NAAEC), better known as the Environmental Side Agreement to the North American Free Trade Agreement (NAFTA), did not have non-governmental parties directly involved, the

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[116] *Id.* at 9.

[117] *Id.*

[118] *Id.* at 9.

[119] *Id.* at 5.

[120] *Id.*

influence of environmental groups on the negotiation is undeniable.[121] Yet, the NGOs had such diverse membership that at one stage in the negotiation they began to form into two differenct alliances. One set continued to oppose NAFTA, while the other determined that supporting NAFTA, given the gains previously made, would be in their best interest.[122]

The parties involved also have varying levels of expertise and forms of power.[123] For example, government agencies often have a substantial amount of technical knowledge on which they can draw. It is this knowledge as well as their ability to influence administrative policies and regulations that serve as the basis for their power.[124] Alternatively, some citizen groups may not have a significant degree of technical knowledge; however, they may exercise power through political pressure or through

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[121] For example, one representative from the NGO environmental community was appointed to the Advisory Committee for Trade Policy and Negotiations and thus had "preferential access to the NAFTA negotiating process." David Wirth, *Public Participation In International Processes: Environmental Case Studies at the National and International Levels*, 7 COLO. J. INT'L L. & POL'Y 1,28 (1998). Additionally, their influence can be seen in the provisions of the Environmental Side Agreement. One of the initial demands of the NGOs was increased public participation. Letter from 51 Environmental NGOs (from Canada, Mexico, and the United States) to Environmental Protection Agency Administrator William K. Reilly, Regarding NAFTA July 20, 1992 reprinted in NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 679-680 (Daniel Magraw Ed., 1995). The Environment Side Agreement provides for such participation by allowing the Secretariat to consider "a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law." North American Agreement on Environmental Cooperation, Sept. 8-14, 1993, U.S.-Can.-Mex., art. 14(1), 32 I.L.M. 1480 [hereinafter Environmental Side Agreement].

[122] Darla W. Jackson, Negotiation of NAFTA's Agreement on Environmental Cooperation 7 (May 1, 1998) (unpublished manuscript, on file with author), citing Jan Gilbreath and John B. Tonra, *The Environment : Unwelcome Guest at the Free Trade Party*, in NAFTA DEBATE, GRAPPLING WITH UNCONVENTIONAL TRADE ISSUES 86 (M. Delal Baer and Sidney Weintraub eds., 1994).

[123] Carpenter and Kennedy, *supra* note 112, at 5.

[124] *Id.* at 6.

litigation or they may have substantial financial resources that they can commit to solving a particular problem.[125]

The parties involved often have differing decision-making procedures.[126] Governmental organizations normally have hierarchical chains for decision-making.[127] As such, they may be represented by responsible individuals who can make decisions and commit their organization. However, just as often, such representatives must coordinate decisions up the chain, which may take substantial time. Citizen groups are more likely to be more loosely organized. If this is the case, time for consensus building within their membership may be necessary. The nature of the decision-making procedures of one group may not be fully appreciated by other groups with a differing decision-making scheme. A delay caused by the need for coordination may be misinterpreted by another party as simply a delay tactic or as a signal of disinterest in further negotiations. Thus, the presence of differing decision-making processes has the potential to cause additional misunderstandings between parties already disputing parties.

II. Politics as a Barrier to Conflict Resolution

As noted previously, public disputes involve numerous parties with different power bases that have greatly differing values and differing decision-making processes. In other words, public disputes involve politics, both domestic and international. While

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[125] *Id.* The NAFTA negotiation provides an example of litigation as a source of group power. In Public Citizen v. U.S. Trade Representative, 5 F.3d. 549, 303 U.S. App. D.C. 297 (D.C. Circuit Sept 24, 1993), three NGOs sued the U.S. government alleging that the U.S. government had infringed the National Environmental Policy Act by failing to prepare a formal environmental impact statement for NAFTA. Some viewed the suit as having the potential to kill NAFTA, because preparing such a document would require an enormous amount of time. In that time, it was feared that opposition would grow and the window of opportunity would be lost. Jackson, *supra* note 122, at 6-7.

[126] Carpenter and Kennedy, *supra* note 112, at 7.

domestic politics are often a forgotten element of public international disputes, domestic and international politics can greatly affect the outcome of the dispute.[128]

As illustrated by the U.S.-German Wartime Host Support Program example discussed *infra*, politics may affect the resolution of a dispute because political concerns often pose barriers to conflict resolution. This section will identify the barriers imposed by politics and will examine whether the interest-based negotiation technique can help overcome these barriers.

Barriers to conflict resolution often are categorized into three categories: 1) tactical and strategic barriers; 2) psychological barriers; and 3) institutional, organizational and structural barriers.[129] Specific obstacles included in each of these categories may result from the interplay of politics in an international negotiation.[130]

A. Tactical and Strategic Barriers

1. Secrecy and Deception

Because one of the characteristics of public disputes is that the parties have varying levels of information and knowledge, the temptation of the parties not to fully disclose information is one tactical barrier to conflict resolution.[131] This may be in part

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[127] *Id.*

[128] Erickson expressed the view that working within the domestic political structure is as difficult, if not more difficult than negotiating within the international sphere. THE MAKING OF EXECUTIVE AGREEMENTS, *supra* note 1, at 51,112 & nn. 21, 282. Robert Strauss, Special Trade Representative to the Tokyo Round of Trade Negotiations, also expressed this view. Robert D. Putnam, *Diplomacy and Domestic Politic: The Logic of Two Level Games*, 42 INT'L ORG. 433 (1988).

[129] Introduction by Robert H. Mnookin and Lee Ross in BARRIERS TO CONFLICT RESOLUTION, *supra* note 50.

[130] The specific barriers included in each of the three categories are also discussed in Mnookin and Ross, *Id.* In the interest of efficiency each individual barrier has not been footnoted. However, specific reference has been made to the description of distinct barriers.

[131] *Id.* at 9.

because parties to a negotiation can use negotiation as an intelligence gathering mechanism rather than a dispute resolution mechanism.[132] If substantial numbers within the domestic constituency believe that the other party to the negotiation is engaging in this type of traditional strategy, they may pressure the negotiator to engage in similar behavior. Additionally, like other types of negotiations, if there is insufficient trust between the "client" (i.e., the domestic constituency) and the negotiators, use of a competitive strategy may help convince the client that his representative is representing the appropriate interests, and not "selling out" to the other party.[133] Thus, domestic politics may suggest that information not be shared. As such, they pose a barrier to conflict resolution.

2. Hardball Tactics or Intransigence

Another tactical barrier is the use of hardball tactics or intransigence. "Even when both parties in a negotiation know all the relevant information and are fully aware of the potential gains available from a negotiated deal, strategic bargaining over how to divide the pie can still lead to deadlock."[134] This barrier to conflict resolution may often result from the publicity surrounding an international negotiation and may interact with other barriers such as equity seeking which will be discussed later. Often negotiators will assert positive statements of the progress that has been made in a negotiation or will

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[132] Fred Charles Ikle, HOW NATIONS NEGOTIATE 48 (1964)

[133] Donald G. Gifford, LEGAL NEGOTIATION: THEORY AND APPLICATION 86 (1989). "Getting credit from a domestic constituency (for being tough or for continuing a dialogue); impressing or reassuring allies; discrediting internal opponents; and retaining White House control over the process" are all reasons that that the negotiation process may continue in a certain way that does little to achieve resolution of the issue. COPING WITH INTERNATIONAL CONFLICT, *supra* note 31, at 103. Yet, the press did not have not much affect on German negotiations. However, it did have affect on the Philippines negotiation because battle was fought in press. THE MAKING OF EXECUTIVE AGREEMENTS, *supra* note 1, at 120 & n. 305.

assert the "justness" of the position that is being asserted. Having repeated this to the constituency, the individual negotiator may be locked into his assertion by the overconfidence of the constituency based on his comments.[135] Additionally, the support of a powerful domestic constituency may make alternatives to reaching agreement appear more attractive.

B. Psychological Barriers

1. Equity or Justice Seeking

This barrier occurs when proposals are refused even though there is no realistic hope of more favorable terms because the proposal violates a party's sense of fairness.

2. Reactive Devaluation

Reactive devaluation occurs when a settlement proposal is less positively received because the other party or a representative of the other party proposes it. While this could occur regardless of domestic politics, in international negotiations, if the media supplies information to the constituents that a proposal is being proposed or forcefully encouraged by one party, it is possible that the constituency will also react negatively to the proposal irrespective of its merit.

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[134] Mnookin, *supra* note 129, at 9.

[135] Erickson writes that if negotiations are held in the host country, the host country delegation may use the proximity of their press to influence the course of the talks. Alternatively, if the talks are held in the U.S. the counterpart country team will be "exposed to the dynamics of the U.S. political scene" and may also encounter other flexibility limitations due to limited communications with its leadership. Richard J. Erickson, *Status of Forces Agreements: Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 137, 145.

3. Loss Aversion

Loss aversion tends to influence individuals to risk large but uncertain losses rather than to accept small but certain losses.[136] Thus, in civil litigation, the defendant may decide to litigate rather than settle because this entails risking a large but uncertain loss or award to the plaintiff rather than accepting the certainty of a small loss.[137] The same may be true in international negotiations. If the domestic constituency is averse to loss, the domestic political implications may tend to influence the decision-maker not to negotiate a settlement which would entail a certain loss, even if it were relatively small.

C. Institutional, Organizational, or Structural barriers

Politics may impose a strategic barrier by influencing the negotiator to select a tactic based on pressure from the domestic constituency. Politics may also influence the flow of information by influencing the structure of the institutions or mechanisms through which disputes are to be settled or decisions made.[138]

1. Restricted Channels of Information and Communication.

Like the secrecy barrier discussed *supra*, this barrier deals with the restrictions on the flow of information necessary to resolve the conflict; however, it does so by restricting the parties' opportunity to air their grievances or to provide each other with the information about priorities and interest. The source of such a barriers can be "political or even legal."[139] Political considerations often shape the selection of the chief negotiator or the composition of the negotiating team. For example, political pressures to make cuts

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[136] Mnookin, *supra* note 129, at 17.

[137] *Id.* at 17.

[138] *Id.* at 19.

in the Washington bureaucracy have caused a reduction in the staffing of the Office of Foreign Military Rights Affairs (FMRA), which is responsible within the Defense Department for the development of policies and positions for negotiations with foreign governments for military operating rights overseas.[140] Because of the "restrictive" staffing, FMRA is unable to participate in many negotiations and its ability to "perform its fundamental role as guardian of DoD interests in base rights negotiations" is limited.[141] FMRA's absence, which is affected by politics, restricts the flow of information between the DoD and foreign representatives.

2. Principal/Agent.

This barrier refers to the situation in which the interests of the representative, serving as a negotiator, are different from the interest of the party the negotiator represents.[142] This barrier seems almost innate in the United States political system. When the United States is involved in an international dispute, the executive branch has the responsibility for setting and implementing foreign affairs policy.[143] However, because Congress has the spending power,[144] if the agreement reached by the executive in furtherance of foreign policy requires the expenditure of funds, Congress has oversight. As a result, if Congress is dissatisfied with the agreement, it may refuse to provide funds

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[139] *Id.*

[140] THE MAKING OF EXECUTIVE AGREEMENTS, *supra* note 1, at 87. Even further cuts are expected. Telephone Interview with Richard J. Erickson, HQ USAF, Judge Advocate International and Operational Law Division, formerly an international negotiator with the Office of the Assistant Secretary of Defense for International Security Affairs and author of THE MAKING OF EXECUTIVE AGREEMENTS, *Id.*, (Dec. 7, 1998)[hereinafter Erickson Interview].

[141] THE MAKING OF EXECUTIVE AGREEMENTS, *supra* note 1, at 92.

[142] Mnookin, *supra* note 129, at 20.

[143] U.S. CONST. art. II, §3.

to implement the agreement.[145] In practical terms, the decision-making procedures in the U.S. are bifurcated. Thus, to ensure Congressional support, there needs to be continuous interaction with Congress.[146] In fact, some have concluded that "negotiating" within the domestic forum for support for a given proposal may be more difficult than negotiating with a foreign country on the proposal. [147]

III. U.S. - German Host Nation Support Program: An Example of Political Concerns as Barriers to Conflict Resolution

A prime example of how these various barriers can affect a negotiation can be seen in the negotiation of the U.S.-German Wartime Host Nation Support Program. Having studied the negotiation, Linda P. Brady writes,

> cooperative elements clearly dominated the discussions. The identification of compatible if not identical interest and objectives was facilitated by the existence of the alliance relationship and long history of interaction between the United States and the Federal Republic of Germany. The parties tended to view the negotiation not in a win-lose or sum zero terms but rather as a cooperative endeavor our of which both had much to gain.
> If the United States and West Germany shared many common interest and objectives and were predisposed to see the negotiations succeed, what explains the many problems associated with the negotiation of the 1982 WHNS Agreement and subsequent implementing arrangements?"[148]

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[144] U.S. CONST. art. I, § 8.

[145] THE MAKING OF EXECUTIVE AGREEMENTS, *supra* note 1, at 68.

[146] *Id.* at 99.

[147] *Id.* at 51 & n 21. *See also* Robert D. Putnam, *Diplomacy and Domestic Politics*, 42 INT'L ORG. 433 (1988). Putnam notes that Robert Strauss, speaking of his experience in trade negotiations, stated, "During my tenure as Special Trade Representative, I spent as much time negotiating with domestic constituents (both industry and labor) and members of the U.S. Congress as I did negotiating with our foreign trading partners." *Id.*

[148] Linda P. Brady, THE POLITICS OF NEGOTIATION: AMERICA'S DEALINGS WITH ALLIES, ADVERSARIES, AND FRIENDS 65 (1991).

Her answer to this question is that many influences were involved but that the "common thread" was politics.[149]

A. Justice Seeking

One of the barriers posed by politics in the WHNS negotiation was equity, or "justice seeking." Congressman Joseph Addabbo commented on the absurdity of giving millions to the Germans to "protect their own soil."[150] While this type of statement appealed to the equity concerns of the domestic constituency, resolution of the issue could only be had if the U.S. more accurately viewed the agreement as a means of addressing security problems.

B. Principal/Agent

The principal/agent barrier also delayed resolution of the issue. Heads of state and foreign ministers, as well as mid-level civilians and military officers, were involved in conducting the negotiations.[151] However, funding for the U.S. commitments had to ultimately come from the Congress. As a result, Article 2 of the WHNS stated that costs would be shared by the parties "subject to the availability of funds."[152] The West German negotiators felt this language was suspect because they assumed the executive branch had obtained Congressional approval before entering into the agreement.[153] The disagreement of the German negotiators was "grounded" primarily in inadequate information about the

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[149] *Id.*

[150] *Id* at 55, citing Addabbo, Department of Defense Appropriations for Fiscal Year 1983, Hearings before the Defense Subcommittee of the House Appropriations Committee, 97th Cong., 1st Sess., 41.

[151] Brady, *supra* note 148, at 66.

[152] *Id.* at 65, citing the Wartime Host Nation Support Agreement, art. 2, para. 1.

[153] Brady, *supra* note 148, at 65.

differing nature of the two nations' political systems (i.e., decision-making processes).[154] Failure of the German Bundestag to ratify an agreement entered into by the executive branch would most likely result in the fall of the government. As a result, the Germans saw the agreement as a national commitment, whereas to the U.S. representatives the commitment was conditional.[155]

C. Hardball Tactics

Finally, the use of hardball tactics served as a barrier to timely resolution of the issue. Representatives of the Department of Defense were able to obtain congressional funding for the program only by pledging that a majority of the equipment for the program would be obtained from U.S. sources.[156] This commitment was made despite the wording of the WHNS Agreement that all procurement of equipment would be "made on the basis of joint decisions."[157] U.S. negotiators then used these public commitments to Congress as leverage in discussions regarding equipment sourcing.[158]

IV. Politics as a Barrier to Resolution of Environmental Issues

Many of the barriers to conflict resolution caused by political concerns in the WHNS negotiations can also be seen in negotiation of environmental remediation issues.

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[154] *Id.* at 66.

[155] In fact, failure to build domestic consensus resulted in delayed implementation of the agreement due to insufficient funding in the initial years of the agreement. *Id.* at 50.

[156] *Id* at 61. This pledge was made irrespective of input from officers at U.S. Army Europe and U.S. Air Force Europe that the forces would be more effective if the equipment to be used by WHNS units were similar to equipment with which the units were familiar (i.e. German equipment). *Id* at 58.

[157] *Id.*, citing Wartime Host Nation Support Agreement, art. 3, para. 6.

[158] Brady, *supra* note 148, at 58. It was Germany's concerns about the effect on other cooperative programs that led to support of the agreement even in the face of such tactics. *Id.* at 62.

Both the principal/agent barrier and the equity seeking barrier are evident. Barriers such as secrecy have also resulted from the political implications raised by remediation.

A. Secrecy

In past environmental negotiations, as well as those currently on-going, the U.S. has often been hesitant to share information. This may in part be due to both domestic politics and international politics. In 1987, the Deputy Assistant Secretary of Defense for Environmental Matters indicated in testimony before Congress that international political concerns have led to a failure to share information. The Deputy Assistant Secretary stated that it was difficult to comprehensively assess the extent of the environmental contamination at overseas bases because the military had not fully disclosed pertinent information due to its fear that release of the information might jeopardize relationships with other countries.[159] This hesitancy was also reportedly exemplified in an internal Air Force memo regarding information on potential environmental problems in Germany. The memo is quoted as saying, "[I]f they identify sites, do nothing and the Germans find out, pollution exist, they have problems."[160]

The negotiations for return of land in Panama provide another example of U.S. hesitancy to share information. According to one source, the United States refused Panama's request for copies of a draft Unexploded Ordinance Assessment conducted on

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[159] Hazardous Waste Problems at Dep't of Defense Facilities: Hearings Before the Subcomm. On Env't, Energy & Natural Resources of the House Comm. On Gov't Operations, 100th Cong., 1st 81 (1987) (testimony of Carl Schafer, Deputy Asst Secretary of Defense (Env't)).

[160] Wegman and Bailey, *supra* note 6, at 873, citing Seth Shulman, THE THREAT AT HOME: CONFRONTING THE TOXIC LEGACY OF THE U.S. MILITARY 111 (1994). See also Michael Satchell, The Mess We've Left Behind, , U.S. NEWS & WORLD REP., TERNATIONAL NEGOTIATION, Nov. 30, 1992 (reporting that in 1990 the Assistant Secretary for the Army for Environment stated that he was not aware of an existing report

land that was to be returned.[161] The Government of Panama instead obtained the information from an U.S.-based nongovernmental organization that had used the Freedom of Information act to obtain the document.[162] The emphasis on relationship and sharing information in interest-based negotiation could perhaps reduce the likelihood that this type of behavior would recur. Had the U.S. considered the effect that a refusal for information would have on the future of the relationship between the parties, it is likely that it would have provided such information. Thus, this barrier to conflict resolution could have been avoided.

This example should also provide notice to U.S. negotiators that the domestic constituency may not be homogeneous in nature. While some member of the domestic constituency may favor withholding information as a source of power, another domestic group may favor sharing the information. Particularly in environmental issues, U.S. nongovernmental organizations (NGOs) have begun to form alliances with NGOs in other countries. As such, they may provide access to information not otherwise available to those with whom the U.S. is negotiating.[163]

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about contaminated sites in Europe even though the Army had identified major environmental problems at several bases in Germany.)

[161] Martin Wagner and Neil A.F. Popovic, *Environmental Injustice on United States Bases in Panama: International Law and the Right to Land Free From Contamination and Explosives*, 38 VA. J. INT'L L. 401, 423 (1998).

[162] *Id.*

[163] DODI 4715.8, Environmental Remediation for DoD Activities Overseas, 2 February 1998, para. 6 provides:

> The DoD Component may develop information, and shall maintain existing information, about environmental contamination at DoD locations for five years after the locations is returned to the host nation and all claims or other issues about contamination are finally resolved ... Subject to security requirements, this information shall be provided, through the DoD Environmental Executive Agent and the Embassy, where required, to host-nation authorities upon request.

B. Principal/Agent

As previously discussed, when the executive branch negotiates such agreements, it will include a "subject to availability of funds" clause in the agreement. Many countries strongly dislike this U.S. practice and perceive the inclusion of this clause in the negotiated agreement as evidence of a lack if commitment by the U.S. However, when sufficient attention has been given to establishing a relationship, this difficulty can be overcome. For instance, as evidenced by the WHNS negotiations, Germany was initially wary of U.S. insistence on inclusion of the clause. However, in subsequent agreements, in part because of the relationship developed between the lead U.S. negotiator and the German negotiator, German concern about a lack of commitment based on inclusion of the clause was substantially reduced.[164] Additionally, experience with the U.S. system has also allowed Germany to develop a confidence that in most cases the funds will be forthcoming.[165] As a result, German negotiators were not overly concerned regarding the inclusion of the subject to availability of funds clause in the 1993 Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Republic of Germany.[166]

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[164] Interview of Lt. Col. William Schmidt, former deputy Staff Judge Advocate, United States Air Force Europe, and lead negotiator. In fact, the Germans later begin to include the clause in some agreements they negotiated.

[165] Erickson Interview, *supra* note 140.

[166] The Agreement to Amend the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971 and 18 May 1981, 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, signed 18 March 1993. "For the first time in any SOFA, the United States agreed to bear the cost of identifying, analyzing, and remedying environmental damage it caused which exceed an undefineable and changeable German legal standard...Payment will be made 'subject to availability of funds' but the obligation will remain if funding is inadequate." THE MAKING OF EXECUTIVE AGREEMENTS, *supra* note 1, at 74. The Germans have experienced one instance in which the U.S., due to legislative prohibitions of the use of funds for a specific purpose, has been unable to make payment required for by

While Congress has exercised its spending power only on isolated instances to bar obligation of funds to carry out executive agreements,[167] there is evidence that Congress is willing to do so on the issue of environmental remediation measures. For instance, in 1998 Congress authorized the expenditure of funds for environmental clean-up of former defense sites in Canada. However, this expenditure was initially not authorized in 1997, even though the notes serving as the basis for the expenditure were exchanged in October 1996.[168] Additionally, Congress made specific findings of fact regarding the expenditure for the clean-up, including the fact that environmental contamination at some of the sites could pose a "substantial risk to the health and safety of the United States citizens residing in States near the border between the United States and Canada."[169] This indicated that if other remediation projects did not include similar concerns, funding might not be forthcoming. Finally, Congress specifically imposed a requirement that the Department of Defense notify Congress of its intention to negotiate any future ex-gratia environmental clean-up actions.[170] Such an action would provide Congress with additional opportunity to advise the DoD not to negotiate an agreement which Congress had no intention of funding.

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international agreement. This was the case when Congress prohibited the use of funds for the payment of German Real Estate taxes. However, the Germans are relatively unconcerned because they continue to record the amounts due but unpaid and plan to reduce residual value payments by the amounts due but unpaid. Erickson Interview, *supra* note 140.

[167] Erickson, *supra* note 1, at fn 115.

[168] Agreement on a Full and Final Settlement of All Claims for Cost of Environmental Clean-up at Former U.S. Military Installations in Canada, October 9 1996, U.S.-Can., Temp. State Dep't No. 96-191.

[169] National Defense Authorization Act For Fiscal Year 1998, Pub. L. No. 105-261 §322, 112 Stat. 1920 (1998)

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[167] Erickson, *supra* note 1, at fn 115.

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[169] National Defense Authorization Act For Fiscal Year 1998, Pub. L. No. 105-261 §322, 112 Stat. 1920 (1998)

C. Equity seeking

In the negotiation of environmental remediation agreements, arguments that constitute equity seeking are very similar to the arguments put forth in the WHNS negotiations. Congress has continually expressed the idea that the Europeans have and continue to benefit from the presence of U.S. troops. As a result, Congress has expressed the idea that Europe should shoulder the burden of remediation irrespective of "fault" in creating the necessity for such clean-up.[171]

D. Hardball Tactics

The use of hardball tactics due to political concerns has varied in the negotiation of several environmental remediation agreements. For example, the negotiation of remediation issues dealing with bases in Germany did not involve the use of such tactics. In part this may have been due to the familiarity that the Germans had with the U.S. system and thus were able to avoid such attempts at use.[172] The fact that the negotiations were not widely publicized may also have been involved.[173]

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[170] National Defense Authorization Act For Fiscal Year 1998, Pub. L. No. 105-261 §321, 112 Stat. 1920 (1998)

[171] Reference to statements made in Congress, appropriations language. According to Erickson, the Europeans respond to such "burden sharing" arguments by asserting that in reality the U.S. presence in Europe is clearly for the benefit of the U.S. rather than to protect the Security of Europe. Erickson Interview, *supra* note 140.

[172] Erickson states that the Germans are very familiar with our system and that other countries are becoming more familiar. Erickson also advised that due to the lack of military background and experience of the chief negotiator, he tended to give the Germans what they requested rather than using tactics. Additionally, the negotiation of the German Supplemental Agreement involved numerous states which supported favorable terms for Germany. They supported such terms because under the current circumstances, the U.S. is the primary sending state and the other counties are primarily sending states. As such, they are much more likely to benefit from favorable terms which are favorable to receiving states. Erickson Interview, *supra* note 140.

[173] THE MAKING OF EXECUTIVE AGREEMENTS, *supra* note 1, at 120 & n. 305.

While there is not sufficiently clear evidence to establish that hardball tactics were used in the negotiation and U.S.- Canadian Agreement, the appearance of wording in the appropriations act to the effect that U.S. contractors will be used when no such wording appears in the initial agreement, indicates that perhaps tactics similar to that used in the WHNS equipment issue may have been utilized. Additionally, the fact that appropriation for the Canadian agreement was not forthcoming in the first year of the agreement[174] may also be indicative that the same type of pressure was applied.[175] However, the experience of the Canadians with U.S. procedures gained in the North American Free Trade Agreement negotiations would lead one to believe that Canada might not be as susceptible to the use of such tactics.

V. Using Interest-Based Negotiation to Overcome the Political Barriers to Resolution of Environmental Remediation Issues

In summary, the interest-based method follows principles that can assist a negotiator in overcoming obstacles to resolution of environmental remediation issues that are imposed by politics. As previously discussed, secrecy can be a barrier to resolving environmental disputes. The interest-based method's emphasis on focusing on interest and communicating clearly assist a negotiator in understanding how secrecy can be a barrier. Additionally, principled negotiations force the negotiator to consider the consequences to the relationship when he fails to disclose information which may be

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[174] See *infra* note 211.

[175] Interview with Colonel Erik Winborne, Deputy Assistant Secretary of Defense for Legislative Affairs, United States Air Force Academy, Co. (Nov. 4, 1998). Colonel Winborne stated that U.S. companies, having concluded assessment in the U.S. are now encouraging claims from other countries and then lobby Congress to include these types of conditions in the agreements.

obtained from another source or discovered by the other party. As such, the potential for failing to disclose information necessary to the informed decision-making is reduced.

The interest-based negotiation method may also help overcome the barriers to conflict resolution posed by the principal/agent barrier. First, by opening lines of communication, the method provides the opportunity for U.S. teams to explain the political realities of its decision-making process. This assists in avoiding situations such as that which occurred in the WHNS negotiations. Second, because the interest-based method does not rest on alternating concession-making, but rather insists on objective criteria, U.S. negotiators who have gained advantage by insisting on objective criteria in earlier stages of the negotiation will be less likely to be able to justify request for additional concessions based purely political concerns. Because requesting concessions as a way of overcoming the principal/agent barrier are less likely to be successful, the use of such hardball tactics is likely to decrease.

Finally, the insistence on legitimacy will help ensure that equity-seeking does not foreclose resolution of the conflict. For example, because international law, as well as prior agreements, provide precedent for U.S. involvement in clean-up efforts, "burden sharing" arguments will presumably not be the focus of the negotiations.

CHAPTER VI

INTERNATIONAL ENVIRONMENTAL NEGOTIATIONS

It has been established that the interest-based negotiation technique is, regardless of criticism, well suited for dealing with international disputes which involve public interests and cross-cultural exchanges. The question remains, however, whether the interest-based method can be successfully employed to resolve international environmental disputes.[176]

I. Characteristics of International Environmental Disputes

Prior to discussing whether a particular technique is well suited for dealing with specific type of dispute, it is necessary to discuss the characteristics of that type of dispute. As will become evident, some of the attributes are similar to those in set out in Chapter V dealing with public disputes, because environmental disputes are in many cases public disputes.

> International environmental disputes normally involve more than two parties.[177]
>
> Even in the instance of bilateral discussions there are likely to be various onlookers (other states, regional or international organizations, the media) with an interest in the outcome, and who function, in effect as additional negotiating parties. Moreover, even in the simplest of international disputes over the environment, issues are likely to be sufficiently complex

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[176] Some writers on negotiation indicate that the negotiator should not analyze the negotiation process according to topic. See Bernard A. Ramundo, EFFECTIVE NEGOTIATION 5 (1992). However, Fisher suggests that you may become an expert in a number of fields such as communication as well as a topic expert and that then you combine these expertise to take into account the process. COPING WITH INTERNATIONAL CONFLICT, *supra* note 31, at 278. It is this goal that the author will continue to pursue in this paper.

[177] Guy-Olivier Faure and Jeffery Z. Rubin, *Organizing Concepts and Questions*, in INTERNATIONAL ENVIRONMENTAL NEGOTIATION 21 (Gunnar Sjostedt ed., 1993).

> that a variety of negotiating, decision and advisory roles are necessary. Thus the conclusion of a successful agreement requires input from policymakers, scientist, and engineers, as well as the host of government officials who will be charged with implementing any agreement reached.[178]

As noted above, there may be many actors because so many people are affected by international environmental issues.[179] "Some of these [environmental] disputes touch us all: the role of nuclear power, the protection of wildlife habitats ...extinction of natural species, and more generally, the vexing tradeoffs between economic and environmental qualities of life."[180] Additionally, the actors involved may change. The individuals who may work out the general framework of an agreement may not be the best to fill in the scientific or technical details because they may not have sufficient scientific knowledge.[181] As a result, the actors involved at different stages of the negotiation may vary.

A second attribute of environmental negotiations is that they involve multiple issues. "What appears to be a relatively straightforward environmental issue soon turns out to have important economic, social, and political implications."[182]

A third characteristic of environmental negotiations is that they involve "scientific and technical uncertainty."[183] Often, because the science involved is only in a developmental stage, it may even be difficult to get the parties to agree that there is a

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[178] *Id.*

[179] *Id.* at 21.

[180] Howard Raiffa, THE ART AND SCIENCE OF NEGOTIATION 310 (1982).

[181] Faure and Rubin, *supra* note 177, at 25.

[182] *Id.* at 21.

problem.[184] Debates about the thinning of the ozone layer, the possible causes, and the optimal solution provide examples of scientific uncertainty involved in an environmental issue.

Another characteristic of environmental negotiations is that they involve "negative perception of immediate outcomes."[185] More simply, an environmental negotiation is perceived as a process the outcome of which in the short term will be cost generating and inconvenient and from which only in the long term will there be benefit.[186] Related to the above is the fact that the persons negotiating environmental agreements may not be the ones to "benefit from the agreement reached."[187]

A final aspect of international environmental negotiations is that they often do not involve situations in which meaningful boundaries are evident. "As soldiers in World War I discovered, poison gas does not respect national borders. Nor does pollution or acid rain."[188] Although the environmental negotiations discussed in this paper do involve issues that are apparent within national boundaries, they share an attribute with transboundary issues: they may involve issues on which it may be difficult to evaluate who bears responsibility for the particular problem.

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[183] *Id.* at 22; See Developments in the Law -- International Environmental Law, Part III. The Creation of International Environmental Agreements, 104 HARV. L. REV. 1521, 1528 (1991).

[184] Faure and Rubin, *supra* note 177, at 22.

[185] *Id.* at 23.

[186] *Id.* at 24.

[187] *Id.*

[188] Faure and Rubin, *supra* note 177, at 21.

II. Interest-Based Negotiation of International Environmental Issues

A. Interest

Richard Erickson, an experienced international negotiator, has expressed the opinion that interest-based negotiation is the only really effective way to negotiate international agreements.[189] Effective negotiations, in his view, are negotiations that reach an agreement that both parties will carry out. To achieve such an agreement, "both parties have to feel they are getting something."[190] What they are "getting" in most cases are their interests. However, Erickson is quick to point out that in some cases it is necessary to assist the other party in understanding what their interests are.[191] In international environmental remediation issues, for instance, a state in which a closing base is located may perceive that its primary interest is to obtain agreement for the U.S. to return the land to a pristine condition. However, agreement to impose such standards on the U.S. may provide precedent for the same standards to be applied to the government itself in carrying out remedial actions in conjunction with the U.S. or at other locations for which it is solely responsible. Thus, it may be in the state's interest to create options which will avoid imposing a particular set of standards. One creative option for doing so is discussed *infra*. If the other party is acting contrary to their interests, the interest-based negotiator understands that he may be able to persuade the other side by assisting them in understanding the interests. Further, because an agreement based on persuasion rather than coercion is more likely to positively affect the relationship and in turn is more likely to be complied with,[192] the interest-based negotiator understands that his consulting with the other party regarding interests will be to his benefit.

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[189] Erickson Interview, *supra* note 140.

[190] *Id.*

[191] *Id.*

[192] GETTING TOGETHER, *supra* note 19, at 134.

Obviously there are innumerable interests that could be discussed as part of this section. However, I will limit this discussion to a single example regarding how interest may be served through the use of the interest-based negotiation method.

One of the characteristics of environmental disputes set forth above is the fact that they are perceived as involving short-term cost and only long-term benefit. It is clear that a host nation would view environment clean-up as a long term benefit which meets its interest. Avoiding short-term cost such as third party claims would also be an interest. Yet, inventing options that would allow the host nation to avoid liability for claims would seem impossible unless the host nation shares its interest and information about liability within its legal system.

For example, a German administrative court ruled that the federal government was not liable for costs linked to the restoration of former Soviet military bases in eastern Germany.[193] However, the court assessed liability for damages to the environment caused during the period of time between the signing of an agreement regulating the withdrawal and the actual withdrawal of Soviet forces.[194] Consistent with such a ruling, an option allowing Germany to conduct needed environmental remediation or to have contractors perform such task rather than to delay U.S. departure while remediation is accomplished would seem to better serve German interest of avoiding claims. However, without the encouragement for open communications provided by the interest-based method, U.S. negotiators may never obtain such information.[195]

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[193] Germany, *Government Not Liable for Cost to Restore Former Soviet Military Bases in East Germany*, 18 INT'L. ENVTL. REP. 225 (BNA 1995).

[194] *Id.*

[195] Utilization of the interest-based method is also more likely to result in explorations of such options because it encourages negotiators to realize that each party has multiple interests. See GETTING TO YES, *supra* note 13, at 47. Additionally, using the Currently Perceived Choices Tool, discussed *infra* in Chapter 3, allows the interest-based negotiator to identify mutual gains served by an option permitting expedited U.S. withdrawal. For instance, a U.S. interest in reducing operating cost would be accomplished by such an option.

B. Communication and Relationship

While communication is important to the success of negotiators employing almost any negotiation technique, it is essential to the success of the principled negotiator. While international negotiations on environmental issues may involve some of the constraints on communication discussed in Chapter 4, these negotiations also have certain characteristics that help reduce the potential for miscommunication.

First, as discussed *supra*, the resolution of environmental issues necessarily involves technical and scientific questions. As a result, technical and scientific experts are involved in the negotiations. The inclusion of these experts often aids communication because the experts from both sides may communicate in the universal languages of their professions.

> Another factor that reduces the impact of cultures derives from the highly specialized nature of many international negotiations on complex issues such as disarmament, the environment, or international trade. This means that national delegations often are no longer composed exclusively of professional diplomats or politician, but rather include scientist, economist, medical professional, military officers, intelligence specialist and so forth. Each of these professions has its own professional concepts, jargon, and way of defining problems that are shared across national, ethnic, and religious boundaries.[196]

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[196] P. Terrance Hopmann, THE NEGOTIATION PROCESS AND THE RESOLUTION OF INTERNATIONAL POLITICS 143-144 (1996). One might expect that diplomats themselves would have developed a specialized language which would facilitate communications. Indeed, Raymond Cohen cites Sir Harold Nicolson's famous study, Diplomacy, for the proposition that "there is a universal diplomatic language of specialized words and phrases used by diplomats when they communicate." Cohen, *supra* note 54, at 4. However, Cohen asserts that "technical competence in conveying a message does not ... ensure understanding of its content." Thus Cohen concludes that "professional ties can ease, but in many cases ... not eliminate, cross-cultural dissonance grounded in profoundly contrasting views of the world modes of communication, and styles of negotiation." *Id.*

Additionally, many of these experts have worked together or shared information previously. As a result, they have established relationships that reduce the potential for miscommunication.[197]

While the inclusion of experts on negotiating teams may reduce the potential for miscommunication between the parties, it may make the communication between interest groups and the national team more complex by causing a gap in knowledge. However, inclusion of the public in the negotiation process may assist in overcoming this gap.[198]

Secondly, by their very nature, negotiations of this type often involve nations, which have previously established a relationship and have, to at least some degree, previously found a basis for working together.[199] This common basis combined with previous experience in working together may help. However, the U.S. has often failed to take advantage of historical relationships. Individuals who have previous experience negotiating with a nation have been reassigned or are otherwise unavailable.[200] Additionally, historical notes regarding previous negotiations have not been kept.[201] Additional training in the interest-based method of negotiation, which emphasizes the

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[197] The Agenda of Science for Environment and Development in the 21st Century is noted as a conference at which developed and developing country scientist worked together to promote "networking and information sharing on a large scale." Marybeth Long, *Expertise and the Convention to Combat Desertification*, in INNOVATIONS IN INTERNATIONAL ENVIRONMENTAL NEGOTIATION 103 (Lawerence E. Susskind et. al. eds., 1997).

[198] Eileen Gay Jones, *Risky Assessments: Uncertainties In Science And The Human Dimensions Of Environmental Decisionmaking*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 1, 42-52 (1997).

[199] However, it may be that this familiar ground is shaky. For instance, in 1966, France withdrew from NATO and demanded that all U.S. troops be withdrawn. In 1974, the U.S. recovered $100 million for the residual value of improvements. This amount was a substantially less than the amount of the U.S. investment. France made no demand for environmental remediation. However, some believe that even in these circumstances, France desired to preserve some standing in NATO. John Woodliffe, THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW 309-310 (1992)

[200] THE MAKING OF EXECUTIVE AGREEMENTS, *supra* note 1, at 110.

importance of relationship as well as the significance of precedence in establishing legitimacy, would presumably encourage the U.S. to improve in both of these areas. As a result, the potential for effective negotiation would be increased.

C. Legitimacy

1. Standards, Risk Aversion and Values

As discussed *supra*, international environmental negotiations are characterized by scientific and technical uncertainty. The interest-based negotiation method suggests that "to produce an outcome independent of will, you can use either fair standards for the substantive question or fair procedures for resolving the conflict of interest."[202] Because of the technical uncertainty involved in environmental negotiations, it is almost impossible to agree on fair standards for environmental clean-up. Even in the negotiation of domestic environmental disputes, in which cross-cultural factors may not be as apparent, fair standards may often be difficult to reach.[203] This is, in part, because of the different levels of risk aversion reflected in the differing values present in environmental standards.[204] Stephen Breyers writes that excessive risk aversion is what is leading to ineffective environmental regulation.[205] The public, and the regulators representing

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[201] *Id.* at 130.

[202] GETTING TO YES, *supra* note 13, at 86.

[203] Carpenter and Kennedy, *supra* note 112, at 204. However, Carpenter and Kennedy acknowledge that "[e]ven when people disagree on practically everything else, they can agree that it is 'right' to be fair." *Id.*

[204] Jones, *supra* note 198, at 32-41.

[205] Stephen Breyer, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION (1993). Some also contribute this "excessive" risk aversion is due to a lack of knowledge; thus it has been suggested that education and communication with the public must be encouraged. Jones, *supra* note 198, at 42-50. However, it should be noted that there exists an opposing view that there is not sufficient concern about environmental issues. Following this line of thought, increased education would only serve to heighten environmental concerns.

them, he says, often do not recognize when enough is enough. Rather, they often press forward for the last ten percent in a clean-up program even though the marginal cost of that last ten percent greatly outweighs the marginal benefits.[206] He cites as an example the EPA's alleged insistence that each Superfund site be cleaned to the point that children could safely eat dirt from the site for an extended period of time even though the probability of such consumption usually is minuscule.[207] Public influence on the establishment of environmental standards has also been criticized in countries where the United States is closing bases.[208]

Because standards reflect values, including differing levels of risk aversion, as discussed *supra*, creative options may be necessary. The Agreement on a Full and Final Settlement of All Claims for Cost of Environmental Clean-up at Former U.S. Military Installations in Canada[209] establishes no agreement on standards is an example of possible options. Instead it obligates the U.S. to pay an agreed upon sum into the Military Sales Trust Account. That same sum must be used by the Canadian government to pay for environmental clean-up actions. Thus, the agreement does not address the standards to which clean-up must be accomplished.

Although the U.S. – Canadian Agreement creatively dealt with the standards problem, legitimacy continued to be a question. The Department of Defense while

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[206] Breyer, *supra* note 205, at 12.

[207] *Id.*

[208] " In practice, the German government delegates certain technical decisions to private groups and routinely consults with federal advisory committees of experts and interest group representatives in the course of setting environmental standards. These consensual practices .... are often poorly adapted to environmental issues...." Susan Rose-Ackerman, SYMPOSIUM: *Changing Images Of The State: American Administrative Law Under Siege: Is Germany A Model?*, 107 HARV. L. REV. 1279,1290 (1994).

including funding for the agreement in its budget request, questioned the legitimacy of the agreement because it felt the United States had no international obligation to further clean the Canadian sites.[210] It was also the obligation issue that caused Congress to initially refuse to fund for the agreement.[211] Understandably, the Canadian government indicated an opposing view of the obligations under international law.[212] This disagreement indicates the importance of international law in establishing legitimacy. Thus, the next section will address the current state of international law regarding military activities affecting the environment.

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[209] Agreement on a Full and Final Settlement of All Claims for Cost of Environmental Clean-up at Former U.S. Military Installations in Canada, *supra* note 168.

[210] Erickson Interview, *supra* note 140; Telephone Interview with Ann M. Mittermeyer, Senate Armed Services Committee, Deputy General Counsel (Nov. 13, 1998).

[211] The Conference Report on the request for authorization read as follows:

> The House bill contained a provision (sec. 343) that would authorize the Secretary of Defense to pay the Government of Canada up to $100 million through annual payments over a ten year period for the environmental clean-up of four sites formerly operated by the U.S. Armed Forces in Canada ... The authorization request was based on a bilateral agreement between the United States and Canada. The agreement provided for the payment of the $100 million into the Foreign Military Sales (FMS) Trust Fund Account so that the Canadian Government could draw against this account to purchase unspecified military equipment from an undetermined manufacturing source . . . The conferees decline to provide the requested authorization and direct the Department to focus on funding and conducting environmental clean-up at sites where there is an existing legal obligation. H.R. Conf. Rep. No 105-340 (1998).

When funding for the agreement was provided in the subsequent year, recognizing that a country's actions could serve as a basis for the establishment of future obligations, the Congress emphasized that the payment was characterized as ex-gratia. National Defense Authorization Act For Fiscal Year 1998, *supra* note 169, at §322. Additionally, to ensure that ex-gratia payments do not become a regular practice, legislators placed a duty on the Services to report the negotiation of any such payments in the future. National Defense Authorization Act For Fiscal Year 1998, *supra* note 170, at §321.

[212] Agreement on a Full and Final Settlement of All Claims for Cost of Environmental Clean-up at Former U.S. Military Installations in Canada, *supra* note 168.

2. International Law and Legitimacy

There are numerous articles on the topic of the duties of states to protect the environment. They most often cite the Trail Smelter arbitration[213] as the leading case in international environmental law. In the Trail Smelter arbitration, a smelter in British Columbia had caused damage in the state of Washington. The arbitration tribunal awarded compensation for some of the damage the U.S. had suffered as well as directing changes in the plant's operation to limit harmful emissions. The ruling established the proposition that no state has the "right to use or permit the use of its territory in such a manner as to cause injury ... in or to the territory of another or the properties or persons thereof."[214] However, this simple statement of the law does not specifically apply to environmental issues associated with the closure of bases overseas. First, the action of the United States which the host country may claim "caused" the damage will most likely not have "occurred" within U.S. territory.[215] This would not necessarily foreclose U.S. liability. Principle 21 of the Stockholm Declaration of 1972 states:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[216]

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[213] Trial Smelter Arbitration (U.S. v. Canada), 3 UNRIAA 1905 (1949).

[214] *Id.* at 1965.

[215] However, the argument could be made that the decisions supporting the action have been made in the U.S. Such arguments have met with some limited successful in suits regarding the application of NEPA to actions to be taken overseas.

[216] Report of the United Nations Stockholm Conference on the Human Environment, UN Doc. A/Conf. 48/14, at 2, Principle 21 (1972), in 11 I.L.M. 1420 (1972)[hereinafter Stockholm Declaration]. However,

Thus, liability may be asserted if the activities causing environmental damage are within the control of the state, even if the activities are not within the state's territory. The United Nations Convention on Biological Diversity, often referred to as the Rio Declaration, also provides that "[s]tates have . . . the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other states ...."[217] Certainly, in some cases, the maintenance of bases can be said to be within the control of the United States. However, as the following points out, control may be difficult to establish.

> The Stockholm/Rio Doctrine of liability for activities within a country's control only applies to contamination that can be traced directly to U.S. activities. In the case of overseas base closures, the allocation of responsibility for contamination is likely to be quite murky because the management and burden of operating an overseas base is often shared between the United States and the host nation. NATO defense bases, where operation is multilateral, present particularly difficult allocation of responsibility problems.[218]

Additionally, the above authority deals with a state's obligations regarding the environment during peacetime. It may be asserted that military activities, even though not occurring during a declared war, should be subject to differing standards.[219]

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some caution that "[g]iven the reluctance of states ... to commit themselves to general rules of state environmental responsibility, the true meaning of Principle 21 (and, indeed, its legal status) must develop through customary state practice." Allen L. Springer, *United States Environmental Policy and International Law: Stockholm Principle 21 Revisited*, in INTERNATIONAL ENVIRONMENTAL DIPLOMACY 51 (John E. Carroll ed., 1988).

[217] United Nations Convention on Biological Diversity, Jan. 5, 1992, 31 I.L.M. 818, 824

[218] Wegman and Bailey, *supra* note 6, at 934

[219] Additionally so, given the fact that since World War II, the practice of formally recognizing a state of war or belligerency "fell into disuse." INTERNATIONAL LAW: CASES AND MATERIALS 874 (Loius Henkins et al. eds., 3rd ed. 1993).

For example, it has been suggested that States involved in a Military Operation Other Than War (MOOTW) must:

> *[a]t a minimum ... to the extent practicable under the circumstances* not cause significant injury to the environment of another State or of areas beyond the limits of their national jurisdiction, notify affected states if *significant environmental damage* has or will potentially occur, and take *precautionary measures* when there is a substantial risk of significant environmental damage.[220] (emphasis added)

As the authors point out, this obligation is vague due to the fact that the terms "to the extent practicable" and "significant environmental damage" have not been defined, nor has the term "precautionary measures" been developed.[221] Additionally, because Military Operations Other Than War are defined to include peace enforcement operations,[222] they may involve actual combat activities and thus be governed to some extent by the law of armed conflict. As a result they are likely to be substantially different than the day to day activities of other military activities.[223]

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[220] Rear Admiral Bruce Harlow and Commander Michael E. McGregor, *International Environmental Law Considerations During Military Operations Other Than War*, in PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT 328 (Richard J. Grunawalt, et al., eds., 1996), citing A.L.I. Restatement (Third) of the Foreign Relations Law of the United States, §601 & Reporter's n. 4.

[221] Harlow and McGregor, *supra* note 220, at 328.

[222] MOOTW is also defined to include peacekeeping, counterdrug, evacuation and disaster relief efforts which would not normally be governed by the law of armed conflict. See Christopher Greenwood, International Humanitarian Law and United Nations Military Operations, 1 Y.B. of Int'l Humanitarian L. 3 (1998) for a discussion of activities which would be governed by the Laws of Armed Conflict.

[223] One author has expressed the view that "too much of the work done in the field" of military activities and the environment has "been grounded exclusively or predominantly in the law of armed conflict. We need to forge a partnership of 'greens' (the environmental community) and 'khaki' (the military)." Ryan James Parsons, *The Fight to Save the Planet: U.S. Armed Forces, "Greenkeeping," and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict*, 10 GEO. INT'L ENVTL. L. REV. 441, 445 (1998). See Michael N. Schmitt, Green War: An Assessment of the Environmental Law of International Armed Conflict, 22 YALE J. INT'L L. 1 and Michael N. Schmitt, *War and the Environment: Fault Lines in the Prescriptive Landscape*, (Cambridge University Press, Carl Bruch ed.) (forthcoming), reprinted in 37 Archiv des Völkerrechts 25-67 (1999) as examples of some of the work regarding the environment and the Law of War. Schmitt expresses the view that while there has been a significant amount of discussion of the environment and the Law of War, it is only recently that scholarly analysis of

Another approach is to treat these military activities as "preparations for war."[224] The 1980 U.N. General Assembly Resolution on the Historical Responsibility of States for the Preservation of Nature for Present and Future Generations[225] seems to serve as the basis for the proposition that preparations for war can negatively affect the environment. It states, in pertinent part:

> Conscious of the disastrous consequences which war involving the use of nuclear weapons and other weapons of mass destruction would have on man and his environment,
> Noting that the continuation of the arms race including the testing of various types of weapons, especially nuclear weapons, and the accumulation of toxic chemicals are adversely affecting the human environment and damaging the vegetable and animal world, ...
> 1. Proclaims the historical responsibility of States for the preservation of nature for present and future generations;
> 2. Draws attention of States to the fact that the continuing arms race has pernicious effects on the environment and reduces the

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the topic has begun to appear. Additionally, he cites the lack of military guidance on the topic as evidence that the military has not overly analyzed the topic. Interview with Lieutenant Colonel Michael N. Schmitt, Deputy Department Head United States Air Force Academy Department of Law, United States Air Force Academy (April 12, 1999). Further, Lt. Col. Schmitt continues to find a lack of definitional analysis of the terms used in the provisions relating to the Environment and the Law of War troubling. For example, he sites the fact that the term "severe damage to the environment" utilized in the 1977 Protocol I Additional to the 1949 Geneva Convention Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 16 I.L.M. 1391 (1977), has not been sufficiently defined to allow those trying to apply the provision to know how to measure the severity of the damage. Lt. Col. Michael Schmitt, Address to the United States Air Force Dep't of Law (Feb. 25, 1999)[hereinafter Schmitt Address]. This problem is similar to that discussed *supra* regarding insufficient development of the term "significant environmental damage" utilized in the A.L.I. Restatement (Third) of the Foreign Relations Law of the United States, *supra* note 220. Definition of terms was a problem in trying to impose liability of Iraq for damages caused in the Gulf War. Schmitt Address, *supra*. Thus, the UN Security Counsel instead relied upon Iraq's violation of the prohibition on the use of force contained in Article 2(4) of the United Nations Charter as a basis for awarding compensation to claimants for environmental damage resulting from the conflict. "Resolution 687 presumes Iraq's liability 'under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals, and corporations as a result of Iraq's unlawful invasion and occupation of Kuwait.' Iraq was also declared liable for any damages caused by the allied forces in driving out the occupying armies. With liability presumed, the UNCC [United Nations Compensation Commission] focuses exclusively on assessing the amount of damages." Jay Austin and Carl Bruch, *The Greening of Warfare*, ENVTL. F. , Nov./Dec. 1998 at 32, 33.

[224] Paul Szasz, INTERNATIONAL ENVIRONMENTAL LAW CASEBOOK , Chapter 12: Military Activities, Magraw Weiss, Lutz, Mccaffrey & Szasz (forthcoming) on file with author.

[225] G.A. Res. 35/8, U.N. GAOR, 35th Sess., U.N. Doc. A/RES/35/8 (1980).

> prospects for the necessary international co-operation in preserving nature on our plant:

While the primary focus seems to be on nuclear weapons, the language regarding the adverse effects caused by the "accumulation of toxic chemicals" is precisely the issue likely to be addressed in negotiation of environmental remediation for base closures. Thus, it seems fair to include the maintenance of bases and operational exercises in the category of activities classified as "preparations for war." If they are included, special rules do not apply to the activities simply because they are military in nature.

> It is in the course of these preparations that steps can be taken that are of great importance for the protection of the environment before, during, and after actual armed conflict. This is so in part because the preparations for war are normally carried out during periods of peace, when states are fully subject to their normal international legal obligations, while during conflict special rules may apply and some normal rules may be suspended."[226]

Arguments may also be made that a failure to remediate environmental damage may be a violation of international human rights principles. For example, it has been asserted that U.S. actions in Panama have violated the right of the Panamanian people to a healthy environment.[227] The concept of a right to a "secure, healthy, and ecologically sound environment"[228] can be found in a number of international instruments.[229]

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[226] Szasz, *supra* note 224.

[227] Wagner and Popovic, *supra* note 161, at 481.

[228] Draft Principles on Human Rights and the Environment, Review of Further Developments in the Fields with Which the Sub-Commission Has been concerned, Human Rights and Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Repportuer, U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Annex I, Prin 22, U.N. Doc E/CN.4/Sub.2/1994/9 (1994) [hereinafter HUMAN RIGHTS AND THE ENVIRONMENT].

[229] Wagner and Popovic, *supra* note 161, at 481. However, it should be noted that the authors recognize that a number of these instruments are not binding and that the right to a healthy environment is viewed by some only as an emerging concept. *Id.* Wagner and Popovic also discuss a number of other emerging human rights norms which are arguably violated by U.S. failures to adequately remedy environmental damage. *Id.* at 483-499.

Additionally, while in 1976 the European Commission of Human Rights dismissed an application on the grounds that "no right to nature conservation" was included in the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHR),[230] the European Court of Human Rights has recognized that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely."[231] Such interference violates Article 8 of the EHR.[232]

Other international bodies have similarly made the link between the right to life and the environment. For example, the Inter-American Commission on Human Rights has related environmental quality with various rights recognized in the American Declaration of the Rights and Duties of Man in the Yanomani Indian case.[233] In that instance, the construction of a highway through territory where Indians lived was found by the Commission to exploit the territory's resources and expose the Indians to outsiders

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[230] European Convention for the Protection of Human Rights and Fundamental Freedoms. 213 U.N.T.S. 221 (1950). Richard Desgagne, *Integrating Environmental Values Into the European Convention on Human Rights*, 89 A.J.I.L. 263, citing X. and Y. v. Federal Republic of Germany, App. No. 7407/76, 5 Eur. Comm'n H.R. Dec. & Rep. 161 (1976).

[231] Guerra and Others v. Italy, App. No. 14967/89, 26 Eur. H.R. Rep. 357, para 60 (1998)(Eur. Ct. H.R.), citing Lopez Ostra v. Spain, 303-C Eur. Ct. H.R. (ser. A) App. No. 16798/90 (1995), 20 Eur. H.R. Rept. 277, para 51.

[232] However, because the U.S. is not a party to the EHR, complaints for such a violation would stand only against a host state which was a signatory to the treaty. Additionally, the complainant would be required to establish that an action by the host state rather than an action by the U.S. resulted in the interference. Arguably, the host state's action could be failure to procure remediation.

[233] Desgagne, *supra* note 230, at 266, citing Case No. 7615 (Yanomani Indians v. Brazil), Inter-Amer. C.H.R. 24, 1984-1985 OEA/Ser.L.V/II/66, doc. 10 rev. 1 (1985). *Id.* Although the United States is not a party to the American Convention on Human Rights, and has not agreed to the jurisdiction of the Inter-American Human Rights Court in contentious cases, because the United States is a member of the Organization of American States, the Inter-American Commission of Human Rights can hear complaints against the U.S. for human rights violations. See U.S. Military Action in Panama, Case 10.573, InterAm. C.H.R. 312, OEA/ser. L/V/II.85, doc. 9 rev. (1993) (Annual Report 1993) and William Andrews, Case 11.139, Report No. 3/95, OEA/Ser/L/V/II.88 Doc. 15 (1995).

carrying contagious diseases. Thus, the Commission concluded that the failure of the Brazilian Government to take action on behalf of the Indians had resulted in violation of the right to life, liberty and personal security guaranteed by Article I of the American Declaration of the Rights and Duties of Man, as well as violations of the right of residence and movement and the right to the preservation of health and well-being guaranteed by Articles VIII and XI of the Declaration.

Human Rights and the Environment, a final report to the U.N. Economic and Social Council, also recognized that

> the right to life is the most important among all human rights legally guaranteed and protected ... this right, like no other, may be directly and dangerously threatened by detrimental environmental measures. The right to life and the quality of life depend directly on positive and negative environmental conditions.[234]

The report further stated that states have a "strict duty ... to take effective measures to prevent and safeguard against the occurrence of environmental hazards which threaten the lives of human beings."[235]

The language contained in Article 55(1) of the 1977 Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of

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[234] HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 228, quoting comments made to the special rapporteur.

[235] *Id.* (quotations omitted). See U.N. Comm. For Human Rights, Fact Sheet No.7, Communications Procedures (visited Apr. 15, 1999) <http://www.unhchr.ch/html/menu6/2/fs7.htm> detailing the processing of individual complaints for violations of human rights before the UN Commission on Human Rights and Daniel Silien, *United Nations Procedures for Processing Allegations of Human Rights Violations* (1996)(unpublished manuscript, New York University)(on file with author). See also Wagner and Popovic, *supra* note 161, at 502, regarding mechanisms for enforcement of human rights.

International Armed Conflict[236] also seems to recognize the relation between the environment and life. That provision states,

> care shall be taken in warfare to protect the natural environment against wide-spread, long-term severe damage. This protection includes a prohibition of the use of methods of warfare which are intended or may be expected to cause such *damage to the natural environment and thereby to prejudice the health or survival of the population.* (emphasis added)[237]

Even if it were agreed that international law imposes an obligation to remediate environmental damage caused by military activities in the host nation's state, there remains the question as against what standards the remediation must be performed. The general principles of international law do not provide much guidance in this area. Some argue that the U.S. should clean-up to U.S. standards.[238] It may also be argued that customary international law could provide guidance. There are numerous problems, however, with the argument that customary international law provides guidance as to the standards for clean-up. The primary difficulty is that practice is not consistent. When Clark Air Force Base and Subic Bay Naval Facility in the Philippines were closed, little restoration was accomplished even though there were significant levels of contamination.[239] Clean-up in Panama has thus far not been to U.S. standards.[240] In Germany, the United States agreed to clean to German standards.[241] As described *supra*,

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[236] Protocol I, *supra* note 223.

[237] Id., art. 55.

[238] M. Victoria Bayoneto, Note: *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. LAW J. 111 (1994).

[239] *Id.* and Wegman and Bailey, *supra* note 6, at 939.

[240] Wagner and Popovic, *supra* note 161, at 404.

[241] Wegman and Bailey, *supra* note 6, at 939.

the issue of standards was avoided. Thus, practice seems to vary depending in part on the development of the country and the strength of the state's environmental standards.[242]

Failure to reach an agreement on standards, as previously discussed, may result because the standards reflect values. While negotiations involving strongly held values may be difficult to handle,[243] conflicts are caused "not because the values are different but because one side demands that the other side give in."[244] One method interest-based negotiators use to remove this barrier to resolution is to agree on a fair procedure.[245] For instance, it has been suggested that a variation on the "one cuts, the other chooses" may be to have the parties negotiate a fair arrangement before they decide their roles."[246] In environmental negotiations this type of procedure might entail having the parties determine a fair standard for remediation prior to deciding which party will be responsible for a specific portion of the clean-up. Some other procedural solutions include "taking turns, drawing lots, and letting someone else decide."[247] In some

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[242] *Id.* at 939. States have, however, begun to request agreements concluded with other states before negotiating. It is possible that this might lead to an insistence on more conformity in the area of standards. Erickson interview, *supra* note 140 and Mittermeyer Interview, *supra* note 210. However, this development is likely to be slow. In 1972, Principle 22 of the Stockholm Declaration, *supra* note 216, placed on states the task of developing international law concerning the liability and compensation for environmental damage. Yet, the law in this area has not fully developed. Principle 22 declares that "states shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction." Additionally, states may argue that Principle 22 would only apply to pollution that migrates off-base.

[243] Carpenter and Kennedy, *supra* note 112, at 198-199.

[244] *Id.* at 10.

[245] *Id.*

[246] GETTING TO YES, *supra* note 13, at 87.

[247] *Id.* In some instances, resort to fair procedures has allowed the parties to reach agreement; however, it has not provided sufficient incentive for the parties to later implement the agreement. For example, during the Law of the Sea negotiations, a deadlock developed over how to allocate mining sites in the deep seabed. A procedure was developed which would provide the benefits of technology and expertise to both

situations, it may be that legitimacy has been bestowed on a third-party by previous agreements between the parties. The NATO Status of Forces Agreement, as an example, provides,

> all differences between the Contracting parties relating to the interpretation or application of this Agreement shall be settled by negotiation between them without recourse to any outside jurisdiction. Except where express provision is made to the contrary in this agreement, differences which cannot be settled by direct negotiation shall be referred to the North Atlantic Council.[248]

Thus, the parties to the NATO Status of Forces Agreement had previously recognized the legitimacy of the North Atlantic Council to fairly decide an issue.[249]

D. Commitment

U.S. commitment is perceived by many nations to be an area of difficulty. As set forth previously, this perception often occurs because of a lack of experience with the U.S. political system and the concept of separations of powers. The open

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the private mining companies from wealthier nations and to poor nations. The solution was to agree that a private company seeking to mine the seabed would present the Enterprise, a mining organization to be owned by the United Nations, with two mining sites. The Enterprise would select one site for itself and grant the company a license to mine the other. Such an agreement would provide an incentive to the company to propose two equally promising sites since the private company would not know which site it would be granted a license to mine. *Id.* at 86. Since this agreement, however, new provisions regarding mining of the seabed have been reached. These changes were necessitated by the fact that a number of states had failed to ratify the 1982 Convention on the Law of the Sea due primarily to the provisions on seabed mining. The 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Annex §2 and §5 alter the licensing and technology transfer provision. For more detail on the changes instituted see Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 733 (1994). See also COPING WITH INTERNATIONAL CONFLICT, *supra* note 31, at 142, regarding the use of the MIT model as an objective standard in the Law of the Sea negotiations.

[248] Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, art. XVI, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.

[249] Resort to the North Atlantic Council, in accordance with Article XVI, is an alternative if the parties fail to agree. However, it provides legitimacy to an option including resort to a third party if such is agreed to by the parties.

communications, encouraged by the interest-based method, can assist in overcoming this perception.

As discussed in Chapter II, commitment entails more than simply agreeing to carry out the terms. It also includes agreeing on mechanisms to handle future disputes. Even in those agreements in which the environment has been an area of concern, commitment to handling of future concerns has continued to be a problem. An example is the 1977 Panama Canal Treaty.

In the 1977 Panama Canal Treaty, the United States and Panama agreed that by the year 2000, the United States would transfer control of all U.S. military bases in Panama to the Government of Panama. The agreement included language to the effect that implementation of the Treaty would be in a manner consistent with the protection of the natural environment of the Republic of Panama. To that end, Panama and the United States agreed to consult and cooperate with each other in all appropriate ways to ensure that due regard was given to the protection and conservation of the environment.[250] Regarding the transfer of military bases, the Treaty provides:

> 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, safety is removed from any defense site or a military area of coordination or any portion thereof, by the date the United States Forces are no longer authorized to use such site. Prior to the transfer of any installation, the two Governments will consult concerning: (a) its conditions, including removal of hazards to human life, health and safety; and (b) compensation for its residual value, if any exists.[251]

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[250] Panama Canal Treaty, Sept 7, 1977, U.S. – Pan., 33 U.S.T. 39, 16 I.L.M. 1022 [hereinafter Panama Canal Treaty] art. VI (1).

[251] Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept 7, 1977, U.S.- Pan., art. IV(4) [hereinafter Article IV Agreement].

To carry out consultation on the environment, the treaty set up the Joint Commission on the Environment.[252] The treaty also established the Joint Committee. The Joint Committee was established to further consultations on defense matters. However, neither of the commissions has any power to decide the matters. As a result, it has been asserted that the United States has unilaterally interpreted the "as may be practicable" language of the treaty in such a way as to greatly limit its obligations of the treaty.[253] Accordingly, it may be that individuals or the Panamanian Government would have to resort to other means to deal with the problem.[254]

While not addressing environmental issues arising from defense activities, the North American Free Trade Agreement may be an example that treaties could follow which would more effectively deal with future problems. Under the North American Agreement on Environmental Cooperation Environmental Side Agreement to the North American Free Trade Agreement, the U.S., Canada, and Mexico agreed that the Council, consisting of cabinet-level or equivalent representatives of the Parties, may upon the written request of any consulting Party and by a two-thirds vote, convene an arbitral panel to consider matters previously resolved by consultation.[255] The panel is to be selected from a roster which is composed of members who have "expertise or experience in environmental law or its enforcement, or in the resolution of disputes arising under

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[252] *Id.*

[253] Wagner and Popovic, *supra* note 161, at 401,408.

[254] *Id.* at 499

[255] Environmental Side Agreement, *supra* note 121, art. 7, 24, . The U.S. has traditionally not favored such alternative dispute resolution forums. Springer, *supra* note 216, at 55. Perhaps this is because some have questioned the constitutionality of such Commissions on the basis that it is an unlawful delegation of the judicial power contained in Article III.

international agreements, or other relevant scientific, technical or professional expertise or experience."[256] The chair of the panel is selected by one of the parties and the parties also select the remaining members of the panel on an equal basis.[257] If the panel determines that one of the parties has not complied with its obligations, after taking intermediate measures, it may impose a monetary assessment, which if not paid can result in loss of benefits under the treaty.[258]

One of the interest-based negotiator's primary concerns is not damaging the relationship.[259] As evidenced by the situation in Panama, reaching an agreement that does not contain provisions for effectively dealing with future disputes has the potential to further damage the relationship. Thus, the interest-based negotiation method encourages the use of arbitral boards such as that provided for in the Environmental Side Agreement. Such an arrangement also follows the guidance that getting the other side involved in the process gives them a stake in implementation of the agreement.[260]

E. Options

Because environmental negotiations often involve conflicting values and numerous issues, they may provide fertile ground for the interest-based negotiator interested in creating options for mutual gain.[261] For example, cleaning up hazardous

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[256] Environmental Side Agreement, *supra* note 121, art. 25.

[257] *Id.*, art. 27.

[258] *Id.*, arts. 31-35.

[259] Barrett, *supra* note 27.

[260] GETTING TO YES, *supra* note 13, at 27.

[261] Interest-based negotiations work best with complex issues that allow for "careful analysis of interest that can be shared or creatively dovetailed." *Id.* at 152.

sites may create more risk to workers than the health risk created by not cleaning up.[262] Thus, those states with more risk averse societies may desire remediation but may not want their citizens to perform the clean-up. This is an opportunity for U.S. intervention because U.S. companies desire to get involved. For example, while the U.S. – Canadian agreement for settlement of claims does not set forth an agreement that Canada will employ U.S. firms to undertake the clean-up, the Authorization Act committing the funds for FY 1999 specifically states, " [t]he Government of Canada is committed to spending the entire... reimbursement ... in the United States, which will benefit United States industry and United States workers."[263] An interview with one German official indicates that there is a preference in Germany for the U.S. to clean-up toxic dumpsites and other "highly polluted areas" before the site is returned. However, the German government prefers to clean-up the site and deduct the cost from agreed upon residual value if the area is one of "low-level" contamination.[264]

A type of debt-for-nature option might also be considered. In a debt-for-nature swap, an exchange or cancellation of a foreign country's debt is made in return for the debtor country's commitment to use local funds to protect a certain area or to establish environmental education programs.[265] In a debt-for-nature swap, a nongovernmental

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[262] Frank B. Cross, *Second Annual Cummings Colloquium on Environmental Law Risk In the Republic: Comparative Risk Analysis and Public Policy: Making Risk Policy in the Face of Expert/Public Conflicts: The Subtle Vices Behind Environmental Values*, 8 DUKE ENVTL. L. & POL'Y 151, 158.

[263] National Defense Authorization Act For Fiscal Year 1998, *supra* note 169,at §322 (a)(8).

[264] Keith Cunningham and Andreas Klemmer, *Restructring the U.S. Military Bases in Germany: Scope, Impacts and Opportunities, Report 4*, BONN INT'L CEN. FOR CONVERSION 45 (June 1995) <bicc.uni-bonn.de/bases/report4/p42_47.pdf>

[265] Rosanne Model, *Debt-For-Nature Swaps: Environmental Investments Using Taxpayer Funds Without Adequate Remedies For Expropriation*, 45 U. MIAMI L. REV. 1195, 1197 (1991)

organization (NGO) finds threatened environmental resources and initiates a swap transaction to the government and central bank of a debtor country. The NGO then purchases foreign debt of the debtor country in the international debt market at a discount and presents the debt to the debtor nation's central bank for redemption in local currency. The debt is thus retired and the NGO uses the local currency to fund environmental projects.[266] Assistance in funding of NGO projects has been undertaken by the United States in the past.[267] This type of action could also be undertaken to clean-up areas. This would allow the U.S. government to support U.S. NGOs interested in assisting with environmental clean-up and would avoid setting a precedent of using U.S. appropriated funds to directly fund clean-up, while at the same time facilitating remediation actions.[268]

F. Alternatives

The filing of claims in other forums may be one alternative for those countries in which environmental damage has occurred. Most status of forces agreements contain claims provisions. Even if claims to the foreign government's property have been waived, if environmental damage has migrated off-base, claims can be made under those provisions. Such action has been suggested under the Agreement in Implementation of Article IV of the Panama Canal Treaty.[269] Complaints to U.N. and regional human rights forums may also be possible. For instance, complaints to U.N. Commission on Human

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[266] *Id.*

[267] *Id.* at 1200-1202 & nn. 41-42.

[268] It should be noted, however, that economic and developmental situations in some countries might not support the use of such options. *Id.* at 1199.

[269] Wagner and Popovic, *supra* note 161, at 499-500. Claims under the Panama Canal Treaty for failure to implement the treaty "in a manner consistent with the protection of the natural environment of Panama" could also be made. *Id.* at 501. Wagner and Popovic also suggest invoking the dispute resolution

Rights or initiation of formal proceeding before the Inter-American Commission on Human rights have been suggested for human rights violations suffered by Panamanians.[270]

The U.S., at least in Panama, has determined that it may unilaterally return the property to Panama if agreement cannot be reached.[271] The Policy Guidance for Transfer reads, "[i]n those exceptional cases when agreement cannot be reached with the GOP, the United States Forces, in keeping with the intent of the treaty, may unilaterally transfer areas or installations which are no longer required."[272] There is disagreement regarding what action must be taken with regard to environmental issues if such a unilateral return is made. Article IV, Section 4 of the Agreement in Implementation of Article IV of the Panama Canal Treaty requires that the DoD identify known hazards to human life, health and safety and take "all measures insofar as may be practicable" to remove them. The Policy guidance seems to indicate that although the two governments are to consult concerning the transfer of any installation concerning that the U.S. can make practicality determinations by considering factors including "whether a hazard poses a known imminent and substantial danger to human life, health and safety; the cost of removing

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provisions of the Biodiversity Convention or the Chemical Weapons Convention for failure to disclose information as required by those treaties. *Id.* at 501-502.

[270] *Id.* at 502-503. See cases cited *supra* note 233 regarding the admissibility of such claims under the Inter-American Commission and source cited *supra* note 235 regarding complaints through United Nations mechanisms.

[271] Lt. Col. Addicott, TJAGSA Practice Note: International and Operational Law Note: *Policy Guidance For the Transfer of DoD Installations To The Government of Panama*, ARMY LAW., OCT. 1994, at 68.

[272] Memorandum from Brigadier Gen. J.G. Garrett to Secs. of the Military Depts., Policy Guidance for the Transfer of DoD Installations to the Government of Panama, Nov. 2, 1995, para. 5(a)

the hazard; the time required to remove the hazard; any adverse effects upon the environment from removing the hazard; and the technology available.[273]

By understanding the alternatives and the affect that resorting to such may have on the relationship, the interest-based negotiator can determine when it is in his best interest to continue negotiating or to resort to his alternatives. Additionally, knowing his BATNA allows him to evaluate possible agreements.

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[273] *Id.* at para. 4(b)

CHAPTER VII
CONCLUSION

It is obvious that the negotiation of environmental remediation issues associated with base closure is a complicated and complex process. A determination of U.S. liability for environmental remediation must include consideration of many factors, such as: "1) conditions prior to U.S. presence; 2) contribution of other nations to contamination; 3) residual value of U.S. improvements (if applicable); 4) interpretation of international agreements; 5) congressional concerns and direction; and 6) political circumstances."[274] Thus, to effectively resolve such issues, a negotiation method must provide the negotiator with tools which allow him to adequately account for the scientific and legal uncertainty involved in these issues, as well as the cultural and political concerns which may serve as barriers to effective resolution. The interest-based negotiation method provides such tools.

Because conflicts cannot be effectively resolved without communications, the interest-based method provides tools for the negotiator to overcome cross-cultural barriers to communication. Additionally, interest-based negotiations allow differing values, often present in cross-cultural negotiations, to be dovetailed to generate options for mutual gain.

The interest-based method further encourages the negotiator to use brainstorming to generate options which can effectively meet the primary interest of the parties without requiring them to agree on specific standards for remediation. As discussed previously, this is essential in situations where scientific uncertainty and legal standards do not provide a

basis for agreement. However, as illustrated by the U.S.-Canadian agreement, to be effective an agreement must not only overcome the problem of a lack of standards, it must also provide the parties with external standards of legitimacy. The interest-based method encourages the parties to obtain legitimacy by agreeing on fair procedures when an agreement based on standards cannot be reached.

Because the interest-based method advocates the use of external standards of legitimacy, it assists the negotiator is withstanding political pressures which might serve as barriers to conflict resolution. The emphasis on communications and relationship aids the negotiator in overcoming barriers such as secrecy and the use of hardball tactics which have been experienced in the past.

Finally, interest-based negotiation provides an opportunity to consider these factors in a way in which mutual gain can be found. Its emphasis on commitment promotes the use of mechanisms that not only resolve current issues but also provide a means of resolving future issues. As such, it will help lessen some of the foreign policy and relationship concerns which result from environmental issues at closing overseas bases. This is essential as we consider the importance of coalition action in the future, for as the U.S. increases its technical capabilities, it may be that our allies "may deny us access to bases believing that we will be able to accomplish our objectives without their bases."[275] While such denials may be, in part, because our allies believe our presence may invite an attack on their

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[274] Rodgers, *supra* note 7, at 146.

[275] General James P. McCarthy (ret), Political Implications of the Revolution in Military Affairs, Remarks at the Olin Lecture of the United States Air Force Academy (Mar. 30, 1999)(transcript on file with author).

territory,[276] weakening foreign relations resulting from unresolved environmental issues would no doubt incentivize denial of U.S. access. In this atmosphere, it is essential that negotiators obtain training to improve their skills.[277]

While the U.S. has not reached absolute isolationism, concentrating on the use of interest-based negotiations will assist in preventing such an occurrence. The U.S. is likely to benefit from improved foreign relations if it is able to utilize interest-based negotiations to emphasize the integrative aspects of problem-solving rather than concentrating on the distributive aspects of the issue. This is true in the resolution of environmental issues but in any area in which negotiation plays a substantial role in resolving issues or developing a framework for interaction.[278]

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[276] *Id.*

[277] THE MAKING OF EXECUTIVE AGREEMENTS, *supra* note 1, at 98 & n. 223. However no such program of study currently exist within the DoD. *Id.*

[278] Erickson writes that "it is difficult to understand why the DoD has paid so little attention to the process of negotiation when so much of its activity depends upon it." *Id.*, at 96. Others have also commented on the significant advancements that might be had by developing negotiating expertise. Gains might be seen in other areas of international law, such as in the area of Law of War or the establishment of an International Criminal Court. Interview with Lieutenant Colonel Michael N. Schmitt, *supra* note 215.

REFERENCES

Books

Principled Negotiation

Fisher, Roger, William Ury and Bruce Patton, *Getting To Yes: Negotiating Agreement Without Giving In*, New York: Penguin Books, 1991.

Fisher, Roger and Scott Brown, *Getting Together: Building a Relationship That Gets to Yes*, Boston: Houghton Mifflin Co., 1988.

Hall, Lavita (Editor), *Negotiation: Strategies for Mutual Gain*, Newbury Park: Sage Publications, 1993.

Ury, William, *Getting Past No: Negotiating Your Way From Confrontation to Cooperation*, New York: Bantam Books, 1991.

Negotiation and Conflict Resolution

Bendahmane Diane B. and John W. McDonald (Editors), Perspectives on Negotiation: Four Case Studies and Interpretations, Washington D.C.: U.S. Printing Office, Foreign Service Institute, U.S. State Department, 1986.

Carpenter, Susan L. and W.J.D. Kennedy, *Managing Public Disputes: A Practical Guide to Handling Conflict and Reaching Agreements*, San Francisco: Jossey-Bass Publishers, 1988.

Cohen, Herb, *You Can Negotiate Almost Anything*, Secaucus: Lyle Stuart Inc., 1980.

Druckman, Daniel, *Negotiations: Social-Psychological Perspectives*, Beverly Hills: Sage Publications 1977.

Gifford, Donald G., *Legal Negotiation Theory and Applications*, St Paul: West Publishing Co, 1989.

Nierenberg, Gerald I., *The Complete Negotiator*, New York: Nierenberg & Zeif Publishers, 1986.

Pruitt, Dean G. and Peter J. Carnevale, *Negotiation In Social Conflict*, Pacific Grove: Brooks/Cole Publishing Co., 1993.

Raiffa, Howard, *The Art and Science of Negotiation*, Cambridge: Harvard University Press, 1982.

Rumundo, Bernard A., *Effective Negotiation: A Guide to Dialogue Management and Control*, New York: Quorum Books, 1992.

Sparks, Donald B., *The Dynamics of Effective Negotiation*, Houston: Gulf Publishing Co., 1982.

Wall Jr., James A., *Negotiation Theory and Practice*, Glenview: Scott, Foresman and Company, 1985.

Zartman, I. William, *The Negotiation Process: Theories and Applications*, Beverly Hills: Sage Publications, 1978.

Zartman, I. William, *The Practical Negotiator*, New Haven: Yale Univ. Press, 1982.

International Negotiation and Diplomacy

Brady, Linda P, *The Politics of Negotiation: America's Dealing with Allies, Adversaries, and Friends*, Chapel Hill: The Univ. of North Carolina Press, 1991.

Berton, Peter, Hiroshi Kimura, and I. William Zartman, *International Negotiation: Actors, Structure/Process, Values*, St. Martin's Press, 1999.
Cohen, Raymond, *Negotiating Across Cultures: Communication Obstacles In International Diplomacy*, Washington: United States Institute of Peace Press, 1991.

Fisher, Roger, *International Conflict for Beginners, New York: Harper & Row, 1969.*

Fisher, Roger, Elizabeth Kopelman & Andrea Kupfer Schneider, *Beyond Machiavelli: Coping With Conflict*, Cambridge: Harvard University Press, 1994.

Fisher, Roger, Elizabeth Kopelman & Andrea Kupfer Schneider, *Coping With International Conflict: A Systematic Approach to Influence In International Negotiation*, Upper Saddle River: Prentice Hall, 1997.

Fisher, Glen, *International Negotiation: A Cross-Cultural Perspective*, Yarmouth: Intercultural Press, 1980.

Fisher, Glen, *Mindsets: The Role of Culture and Perception in International Relations*, Yarmouth, ME: Intercultural Press, Inc., 1988.

Habeeb, William Mark, *Power and Tactics in International Negotiation: How Weak Nations Bargain With Strong Nations*, Baltimore: John Hopkins Press, 1988.

Hopmann, P. Terrence, *The Negotiation Process and the Resolution of International Conflicts*, Columbia: Univ. of S. Carolina Press, 1996.

Jonsson, Christer, *Communication In International Bargaining*, New York: St. Martin's Press, 1990.

Mautner-Markhof, Frances, *Process of International Negotiations*, Boulder: Westview Press, 1989.

McDonald, John W. and Diane B.Bendahmane (Editors), *Perspectives on Negotiation: Four Case Studies and Interpretations*, Washington D.C., Department of State Publications, Foreign Service Institute, Center for the Study of Foreign Affairs, 1986.

Environmental Negotiation and Diplomacy

Bascow, Lawrence S. and Michael Wheeler, *Environmental Dispute Resolution*, New York: Plenum Press, 1984.

Carroll, John E. (Editor), *International Environmental Diplomacy: The Management and Resolution of Transfrontier Environmental Problems*, Cambridge: Cambridge University Press, 1988.

Hurrell, Andrew and Benedict Kingsbury (Editors), *The International Politics of The Environment: Actors, Interest, and Institutions*, Oxford: Clarendon Press, 1992.

Ikle, Fred C., *How Nations Negotiate*, New York: Harper & Row, 1964.

Lake, Laura M. (Editor), *Environmental Mediation: The Search for Consensus*, Boulder: Westview Press, 1980.

Sjostedt, Gunnar (Editor), *International Environmental Negotiation*, Newbury Park: Sage Publications, 1993.

Stein, Janice Gross (Editor), *Getting to the Table: The Process of International Prenegotiation*, Baltimore: John Hopkins Press, 1989.

Susskind, Lawerence E., *Environmental Diplomacy: Negotiating More Effective Global Agreements*, New York: Oxford University Press, 1994.

Environment and Defense Oriented Publications

Boyle, Alan E. and Michael R. Anderson, *Human Rights Approaches to Environmental Protection*, Oxford: Clarendon Press, 1996.

Caldwell, Lynton K., International Environmental Policy: Emergence and Dimensions. Durham,N.C. Duke Univ. Press, 1990 (2nd Ed.).

Dycus, Stephen, *National Defense and the Environment*, Hanover: University Press of New England, 1996.

Grunawalt, Richard, John King and Ronald McClain (Editors), *Protection of the Environment During Armed Conflict: U.S. Naval War College International Law Studies*, Vol. 69, Newport: Naval War College, 1996.

Harkavy, Robert E. Bases Abroad: The Global Foreign Military Presence, New York: Oxford University Press, 1989.

Huntley, James R., *Man's Environment and the Atlantic Alliance*, Brussels: NATO Information Service, 1972.

Lazareff, Serge, *Status of Military Forces Under Current International Law*, Leyden: A.W. Sijtoff, 1971.

McDonald, John W. and Diane B.Bendahmane (Editors), *U.S. Bases Overseas: Negotiations with Spain, Greece and the Phillipines*, Boulder: Westview Press, 1990.

Rose-Ackerman, Susan, *Controlling Environmental Policy: The Limits of Public Law in Germany and The United States*, New Haven: Yale Univ. Press, 1995.

Sands, Philippe (Editor), *Greening International Law*, London: Earthscan, 1993.

Seidman, Karl F. (Editor), *Best Practices in Defense Conversion: A Practitioner's Guide to Successful Strategies and Programs*, Washington: National Council for Urban Economic Development, 1995.

Woodliffe, John, *The Peacetime Use of Foreign Military Installations Under Modern International Law*, Dordrecht: Martinus Nijhoff Publishers, 1992.

Articles

Bayoneto, M. Victoria, *The Former U.S. Bases In the Phillipines: An Argument for the Application of U.S. Environmental Standards to Overseas Military Bases*, 6 Fordham Envtl..J. 111(1994).

Charnovitz, Steve, *The NAFTA Environmental Side Agreement: Implications for Environmental cooperation, Trade Policy, and American TreatyMaking*, 8 Temp. Int'l & Comp. L.J. 257 (1994).

Desgagne, Richard, *Integrating Environmental Values Into the European Convention On Human Rights*, 89 A.J.I.L. 263 (1995).

Erikson, Richard J., *The Making of Executive Agreements By the United States Department of Defense: An Agenda For Progress*, 13 B.U. Int'l L.J. 45 (1995).

Erikson, Richard J., *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F.L. Rev. 137 (1994).

Glinka , Charlotte Elizabeth, *Global Imperative - An Effective System of Resolution Techniques for International Environmental Disputes: The Canadian-United States Example*, 14 Suffolk Transnat'l L.J. 127 (1991).

Koplow, David A., *How Do We Get Rid of theses Things? Dismanteling Excess Weapons While Protecting the Environment*, 89 Nw. U.L. Rev. 445 (1995).

Phelps, Richard A., *Environmental Law For Overseas Installations*, 40 A.F.L. Rev. 49 (1996).

Ruppert, Mark R., *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No"*, 151 Mil.L. Rev. 1 (1996).

Ruskin, William A., *The Use of "Principle Negotiation" In Resolving Environmental Disputes*, 17 Am.J. Trial Advoc 225 (1993). (This article centers on U.S. domestic rather than international disputes.)

Sands, Philippe , Paul C. Szasz , et. al., *The Gulf War: Environment As A Weapon*, 85 Am. Soc'y Int'l Proc. 214 (1991).

Satchell, Michael, *The Mess We've Left Behind; Pollution Caused By US Military Bases Overseas*, U.S. News & World Report, Vol. 113 No. 21, November 30, 1992, p.28.

Saunders, Harold H., *Getting to Negotiation*, 95 Harv. L. Rev. 1503 (1982).

Stewart, Doug, *Expand the Pie Before You Divvy It Up*, Smithsonian, November 1997, p. 78

Wegman, Richard A. and Harold G. Bailey, *The Challenge of Cleaning Up Military Waste When U.S. Bases Are Closed*, 21 Ecology L.Q. 865 (1994).

White, James J, *The Pros and Cons of "Getting to Yes"*, 34 J. Legal Educ. 115 (1984).

Wirth, David A., *Public Participation In International Processes: Environmental Case Studies At The National and International Levels*, 7 Colo.J. Int'l Envtl. L. & Pol'y 1.

APPENDIX A

COMPARISON OF COHEN AND INTEREST-BASED RECOMMENDATION ON RESOLVING ISSUES INVOLVING CULTURAL ISSUES

Cohen's Recommendation[i]

1. Prepare for a negotiation by studying your opponents' culture and history, and not just the issue at hand. Best of all, learn the language. Immerse yourself in the historical relationship between your two nations.

2. Try to establish a warm, personal relationship with your interlocutors. If possible, get to know them even before the negotiations get underway.

3. Do not assume that what you mean by a message - verbal or non-verbal - is what representatives of the other side will understand by it. They will interpret it in light of their cultural and linguistic background not yours. By the same token, they may be unaware that things look different from your perspective.

4. Be alert to indirect formulations and nonverbal gestures. Traditional societies put a lot of weight on them. You may have to read between the lines to understand what you partners are hinting at. Do not assume they will come right out with it. Be ultra-careful in your own words and body language. Your partners may read more into them than you intend. Do not express criticism in public. Do no lose your temper. Anything that leads to loss of face is likely to be counterproductive.

5. Do not overestimate the power of advocacy. Your interlocutors are unlikely to shift their position simply in response to good arguments. Pressure may bring short-term results, but risk damaging the relationship. Facts and circumstances speak louder than words and are easier to comply with.

6. Adapt your strategy to your opponents' cultural needs. On matters of inviolable principle, attempt to accommodate their instinct for prior agreement with your preference for progress on practical matters. Where haggling is called for, leave yourself plenty of leeway. Start high, bargain doggedly, and hold back a trump card of the final round.[ii]

7. Flexibility is not a virtue against intransigent opponents. If they are concerned to discover your real bottom line, repeated concessions will confuse rather than clarify the issue. Nor is there merit in innovation for its own sake. Avoid the temptation to compromise with yourself.

8. Be patient. Haste will almost certainly mean unnecessary concessions. Resist the temptation to labor under artificial time constraints; they will work to your disadvantage. Allow your opponents to decide in their own good time. Their bureaucratic requirements cannot be short circuited.

9. Be aware of the emphasis placed by your opponents on matters of status and face. Outward forms and appearances may be as important as substance. For face-conscious negotiators, an agreement must be presentable as an honorable outcome. On the other hand, symbolic gains may compensate them for substantive losses.

10. Do not be surprised if negotiation continues beyond the apparent conclusion of an agreement. Implementation is unlikely to be automatic and often requires continuing discussion. To assist compliance, it may help to build a system of graduated, performance-based incentives into the original contract.

Principled Negotiation Recommendations

1. Tune into your opponents' wavelength.
You will do better if you prepare in advance.[iii]
If he is from a different culture, ... use phrases from his language.[iv]
You will understand it better if you see how the problem looks from his or her point of view.

2. The best time for handling people problems is before they become people problems. This means building a personal and organizational relationship with the other side that can cushion the people on each side against the knocks of negotiations.[v]

3. Attempt to understand a conflict from many views.
The core assumptions that negotiators and advisors bring with them limit their ability to understand the other parties to a conflict.[vi]

4. Tune into your opponent's wavelength.
Much of the message comes across in the form, not the content of communication. Observe you counterpart's communicative manners.[vii]
Go to the balcony... Use your time to keep your key on the prize - an agreement that satisfies your interest... Instead of getting mad or getting even, concentrate on getting what you want.[viii]

5. Show how circumstances have changed.
One face-saving approach is to explain that originally you opponent may have been right but that circumstances have changed.[ix]
In the power game, you switch from ... building a golden bridge to forcing him down the gangplank ... Even if you win the battle, you may lose the war. In the process you may destroy your relationship.[x]

6. Agree first on principle. Before even considering possible terms, you may want to agree on the standard or standards to apply.[xi]

7. Being nice is no answer.
If the hard bargainer insist on concessions and makes threats while the soft bargainer yields in order to avoid confrontation ... the negotiating game is biased in favor of the hard player. The process will produce an agreement, although it may not be a wise one.[xii]

8. Don't rush to the finish.
Whatever the reason for the rush, it is easy to make mistakes in this atmosphere. If you hurry your opponent, he will often react by exploding ... or suddenly finding fault with part of the agreement. In order not to lose him, you need to slow down, back off, and give him a chance to think... Encourage him to consult with his constituents.[xiii]

9. Help your opponent save face.
Even if you are able to satisfy you opponent's substantive interest, he may not agree ...There is always a constituency or audience...Since his people can obstruct the agreement you want, it is your job to help him deal with them.[xiv]

10. Keep implementation in mind.
Even if your opponent agrees, he may no carry out the terms. Design the Deal to minimize your risk ... If you have doubts about reliability, structure the deal so that you don't have to carry out your side of the agreement until he fulfills his... Build in a dispute resolution procedure ... Reaffirm the relationship.[xv]

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[i] Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World*, Washington D.C.: United States Institute of Peace Press (Rev. Ed. 1997), 225-226.

[ii] See Brian Groth, Negotiating in the Global Village: Four Lamps to Illuminate the Table, 8 *Negotiation J.* 241, 251 (1992) for the implication that recommendations 2 and 6 seem to be inconsistent. Groth indicates that this inconsistency is in part due to Cohen's attempt to maintain a neutral stance which does not favor either a low context or high context approach

[iii] Roger Fisher and William Ury, *Getting to Yes: Negotiation Agreement Without Giving In*, New York: Penguin Books, (2nd Ed 1991), 85 [Hereinafter *Getting To Yes*]

[iv] William Ury, *Getting Past No: Negotiating With Difficult People*, New York: Bantam Books (1991), 47.

[v] *Getting to Yes*, supra note iii, at 77.

[vi] Id. at 36.

[vii] Roger Fisher, Andrea Kupfer Schneider, Elizabeth Borgwardt, Brian Ganson, *Coping With International Conflict: A Systematic Approach to Influence in International Negotiation*, Upper Saddle River, NJ: Prentice Hall, Inc., (1997), 48

[viii] *Getting Past No*, supra note iv, at 46.

[ix] Id. at 33.

[x] Id. at 102.

[xi] Id at 111-112.

[xii] *Getting To Yes*, supra note iii, at 88

[xiii] Id. at 7-8

[xiv] *Getting Past No*, supra note iv, at 108

[xv] Id. at 100-101

[xvi] Id. at 132-135.

APPENDIX B

AGREEMENT ON A FULL AND FINAL SETTLEMENT OF ALL CLAIMS FOR COST OF ENVIRONMENTAL CLEAN-UP AT FORMER U.S. MILITARY INSTALLATIONS IN CANADA

Record 106 out of 164

Country: USA, CANADA
Subject: DEFENSE
Treaty Name: Agreement on a full and final settlement of all claims for costs of environmental clean-up at former U.S. military installations in Canada
CTIA: 9177.000
Type: Agreement
Parallel Citations:
Department of State: -96-191
Date Signed: October 9, 1996
Date Entered Into Force: October 9, 1996
In Force: Yes

Title: 96-191. Agreement between the United States and Canada on a full and final settlement of all claims for costs of environmental clean-up at former us. military installations in Canada. Effected by exchange of notes at Washington Oct. 7 and 9, 1996. Entered into force Oct. 9, 1996.

DEPARTMENT OF STATE WASHINGTON

October 7, 1996

His Excellency

Raymond Chretien,

Ambassador of Canada.

Excellency:

I have the honor to refer to discussions which have taken place between representatives of the Government of the United States of America and the Government of Canada concerning the settlement of certain costs of environmental clean-up at four former U.S. military installations in Canada.

As you know, our Department of Defense follows a policy of risk management, remediating environmental damage that constitutes a substantial endangerment to human health and safety. Based upon this policy, the U.S. Government believes that $100 million (constant-year 1995-1996 United States dollars) represents an appropriate settlement amount for clean-up at the four former military installations: the 21 Dew Line sites returned to Canada between 1989 and 1993 as described in the appendix; the former U.S. naval facility at Argentia, except for approximately 33 acres of land retained as specified at paragraph 1.4.3 of the United States Navy's Base Realignment Plan of May 22, 1993, pursuant to Article 21 of the Leased Naval and Air Bases Agreement of 27 March 1941 between the United States and the United Kingdom; a section of the Canadian Forces Base at Goose Bay, Labrador; and the Haines-Fairbanks pipeline.

It is the view of the United States Government that it has no legal obligation under current United States and international law to reimburse the costs of environmental clean-up at the four former military

installations described above. Nevertheless, because the remediation in question concerns work that would ordinarily have been conducted by United States forces at the four installations in Canada prior to their closure, the United States Government shall make an ex gratia settlement in the sum of $100 million (constant-year 1995-1996 United States dollars). It would be the United States Government's intent to place funds equalling this amount in the Canadian Foreign Military Sales Trust Account over a ten-year period commencing in U.S. fiscal year 1998.

In the absence of legislative authority, the United States Government's ex gratia offer must necessarily be subject to the obtaining of specific legislative authority from the United States Congress. Such Congressional action (i.e., authorizations and appropriations) lies within the discretion of the Congress. Nevertheless, the United States Government undertakes to seek such legislative authority at an early date.

The points of contact for implementation of this Agreement shall be the Principal Assistant Deputy Under Secretary of Defense for Environmental Security for the Government of the United States of America, and the Assistant Deputy Minister, Infrastructure and Environment, Department of National Defense for the Government of Canada. With regard to the four aforementioned installations, these officials shall be authorized to implement this Agreement fully, including, as mutually agreed, the establishment of and the making of adjustments to, the schedule of payments that are to be made into the Canadian Foreign Military Sales Trust Account.

If the foregoing meets with the approval of the Government of Canada, I have the honor to propose that this note and Your Excellency's affirmative note in reply shall constitute an Agreement between our two Governments, which shall enter into force on the date of Your Excellency's note in reply.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Acting Secretary of State:

Appendix to the U.S. Note

List of DEW Line Sites Komakuk Beach BAR-1 Shingle Point BAR-2 Tuktoyaktuk BAR-3 Nicholson Point BAR-4 Cape Parry PIN-M Clinton Point PIN-1 Cape Young PIN-2 Lady Franklin Point PIN-3 Byron Bay PIN-4 Cambridge Bay CAM-M Jenny Lind Island CAM-1 Gladman Point CAM-2 Shepherd Bay CAM-3 Pelly Bay CAM-4 Mackar Inlet CAM-5 Hall Beach FOX-M Longstaff Bluff FOX-2 Dewar Lakes FOX-3 Cape Hooper FOX-4 Broughton Island FOX-5 Cape Dyer DYE-M Canadian Embassy NOTE NO. 0318

EXCELLENCY:

I have the honour to acknowledge receipt of your Excellency's note of October 7, 1996, concerning environmental issues at the four former U.S. military installations in Canada mentioned in your note.

I have the honour to inform you that the United States Government's proposal contained therein is acceptable to the Government of Canada. However, contrary to the views of the United States Government, it is the view of the Government of Canada that the Government of the United States has legal obligations under international law to pay claims for the environmental clean-up of these former U.S. military installations.

I wish to assure you that the Government of Canada understands that the specific legislative authority, i.e. authorizations and appropriations, to which the United States' ex gratia settlement is subject shall be a

matter for decision by the United States Congress. The Government of Canada also understands that payment in full of the ex gratia settlement shall constitute a full and final settlement of all claims for costs of environmental clean-up at the four installations described.

I have the honour to confirm that your note and this reply, done in duplicate in English and French, shall constitute an Agreement between the Governments of the United States and Canada on this matter, that enters into force on this date.

Accept, Excellency, the renewed assurances of my highest consideration.

Washington, D.C.

October 9, 1996