

THE STATUS OF FORCES AGREEMENT

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I. INTRODUCTION

In 2006, the Korean film *Host* (the Korean title was *Monster*) was watched by thirteen million Koreans to become the highest-grossing Korean movie ever. Its premise— toxic waste dumped into the Han River in Seoul by an American turns a fish into a dangerous monster—was suggested by an actual event. In 2000, a U.S. Forces Korea (USFK) mortuary worker poured formaldehyde into a drain leading to the Han River. The incident angered environmentally aware Koreans and sparked a renewed debate about the fairness of the U.S.-Korea Status of Forces Agreement (SOFA) defining the rights and responsibilities of U.S. personnel stationed in South Korea. *Host* quickly became one of the year's most talked-about movies, and another round of public debate in Korea about the SOFA ensued.



With its headquarters located in the heart of Seoul and scores of bases throughout South Korea, USFK was a very visible entity in Korea. Discontent with the USFK or U.S. policy in general often led to South Korean public criticism of the SOFA and calls for its revision. Such sentiments blazed when incidents involving USFK occurred.



Traditionally, the South Korean focus was on offenses by USFK personnel, such as murder and sex crimes, and the related issue of whether the accused would be tried in Korean civilian courts or American military courts-martial. Recently, however, the Korean public became equally concerned about environmental protection issues. The 2000 formaldehyde incident was a case in point, and popular concern about the environment only increased since then. During U.S.-ROK negotiations in 2006 on the realignment and reduction of U.S. Forces Korea, soil and water in U.S. bases to be returned were found to be contaminated by fuels and other toxins, prompting public demands for the U.S. to pay for the clean-up and renewed calls for stronger environmental protection provisions in the U.S.-ROK SOFA.

II. OVERVIEW OF SOFAS GLOBALLY

At the end of the Cold War, the U.S. maintained permanent SOFAs with approximately 40 countries. As of 2006 the number had grown to more than 90. Although each SOFA was negotiated individually with the host country, all SOFAs normally dealt with issues necessary for the day-to-day business of U.S. forces stationed abroad, such as personnel entry into and exit from a country, employment of host-nation workers, claims, contractors, and applicability of host-country income and sales taxes. U.S. SOFAs were generally similar but details varied to reflect unique circumstances in each host country. Increasingly, countries other than the U.S., including South Korea, were negotiating SOFAs with countries to which they had dispatched their own military personnel.

III. THE U.S.-ROK SOFA

After the end of the Korean War in 1953, the U.S. and South Korea concluded a Mutual Defense Treaty as a means to deter further North Korean aggression.

In accordance with article 4 of the treaty, the ROK granted the U.S. the right to station army, navy, and air forces on Korean territory. However, a U.S.-ROK SOFA was not signed until 1966, reflecting controversy over SOFA provisions even at that early date. Among the deepest-held popular beliefs was that the U.S.-ROK SOFA was not as fair to the host country as the U.S.-Japan and U.S.-German SOFAs.

IV. MAJOR ISSUES REGARDING THE U.S.-ROK SOFA

In some host countries, especially those with a large U.S. military presence such as South Korea and Japan, SOFAs with the U.S. were perennially a major political issue. A complicating factor was that many host countries' citizens had mixed feelings about foreign bases on their territory; thus, demands to renegotiate the SOFA were often combined with calls for foreign troops to withdraw. In the case of South Korea, four aspects of the SOFA—the environment, criminal and civil jurisdiction, U.S. military areas and facilities, and privileges and immunities—constituted the most prominent issues in 2006.

1. ENVIRONMENT

With enhanced awareness of the environment in Korea in recent years, pollution on U.S. bases there became an important political issue in Korea. In addition, there appeared to be an increasing number of pollution incidents involving USFK. One cause of USFK environmental problems was the superannuated status of much of its infrastructure. Many USFK facilities were built in the 1950s, and some, such as fuel pipelines, dated back to the Japanese colonial period.

To address growing popular concern, especially after the formaldehyde incident, the U.S. and South Korea signed a “Memorandum of Special Understandings on Environmental Protection” as part of a revision of the SOFA in 2001. In the memorandum, the two countries agreed on procedures to share environmental information and to conduct joint investigations, remediation, and implementation.

The 2001 memorandum appeared to have strengthened environmental protection in the U.S.-ROK SOFA beyond that in the U.S. SOFA with Japan. The U.S.-ROK memorandum was binding and inseparable from the SOFA. While the U.S. and Japan had a joint declaration on the environment, it was not part of the SOFA. With the signing of the 2001 U.S.-ROK memorandum, the envi-

ronmental protection agreements that the U.S. had with host countries in Korea, Japan, and Germany became similar in substance. In all cases, the U.S. and the host country agreed to work together to notify the other when incidents of pollution occurred and in investigating and remediating problems.

In principle, the U.S. followed U.S. environmental regulations on its bases in Korea. When those regulations were not consistent with Korean law and regulations, the U.S. agreed to apply and enforce the stricter standard. The U.S. undertook periodic reviews of its Environmental Governing Standard (EGS) to ensure that it accommodated the latest environmental regulations. Since Korean environmental law could not be applied directly on U.S. bases, the U.S.-ROK SOFA required the two countries to react jointly to environment pollution caused by USFK. When USFK environmental pollution posed a “known, imminent, and substantial endangerment to human health,” officers at the concerned U.S. base were required to notify local Korean government authorities. Thereafter, the U.S. and the ROK would begin consultations for an investigation of the polluted area by USFK and the ROK Ministry of Environment. When such a joint investigation determined USFK culpability, the U.S. bore responsibility for remediation.

Evaluating environmental damage demanded expertise and time to detect the source and scale of pollution, and the cost of remediation was often high. As the history of joint cooperation on environmental issues was relatively short, effective implementation of the new SOFA environmental provision would require significant effort on both sides. The South Korean government and public regarded plans for USFK to return many of its bases as an important opportunity to establish precedents regarding USFK environmental protection. In any event, with heightened awareness about the environment in Korea and the increasing activities of South Korean environmental NGOs, environmental issues involving USFK appeared likely to remain of great interest to Koreans.

2. JURISDICTION

One of the most important aspects of a SOFA regarded which country had civil and criminal jurisdiction in cases involving foreign forces. The starting proposition of most SOFAs was that the host country exercised complete authority over all of its territory and anyone on that territory.

For the U.S., the SOFA was a means by which the Department of Defense protected the rights of U.S. military personnel who might be subject to criminal trial by foreign courts and imprisonment in foreign prisons. For the host country, the

SOFA was a means of ensuring that its domestic law and regulations were properly respected in order to protect its legal system and the safety of its citizens.

Most SOFAs recognized the host government's right to "primary jurisdiction," i.e. the host country exercised jurisdiction in all cases in which U.S. military personnel were accused of violating the host country's laws. Two exceptions existed: 1) when the offense was committed by Americans under SOFA status against other Americans under SOFA status (*inter se* cases), and 2) when the offense was committed by Americans in the conduct of their official duties. In these situations, the U.S. had primary jurisdiction over the accused American. In practice, most crimes by USFK service members against local civilians occurred while off duty and, in accordance with the SOFA, were subject to Korean jurisdiction.

Since determining what constituted official duty was sometimes open to interpretation, the potential for conflict existed between the host country and the stationing state. The U.S.-ROK SOFA was revised twice. Both revisions were prompted by Korean public demands after controversies involving custody and jurisdiction issues. Controversy was of course greatest in the cases of charges involving serious crimes, such as murder, manslaughter, robbery, and sexual offenses.

Tensions could occur when the charge was defined differently by the legal systems of the two nations. In an incident in 2002 in which a USFK vehicle accidentally struck and killed two Korean schoolgirls, USFK determined that the soldiers involved had been on official duty and thus they were tried under U.S. criminal jurisdiction. A USFK court martial panel, finding no criminal intent or negligence, ruled the act to have been an unavoidable accident and acquitted the service members. The decision prompted widespread protests across Korea and demands that the soldiers be retried in a Korean court. Some observers said that the Korean reaction reflected, in part, differing legal systems and cultures in the two countries regarding the handling of serious traffic accidents.

Different national practices might also result in tensions. While the U.S. and host countries generally agreed on what constituted a crime, many U.S. observers felt that host-country justice systems granted weaker protections to the accused than the U.S. and that host-country courts could be subject to popular pressure to deliver a guilty verdict. A fundamental U.S. concern was that American service members ordered to a foreign posting should not be forced to give up the rights afforded to them under the Bill of Rights of the U.S. Constitution. Host country citizens, however, sometimes felt that the U.S. was making excuses to ensure special treatment for U.S. military personnel being tried or incarcerated by host-country authorities.

3. AREAS AND FACILITIES

Most SOFAs made provision for the host country to lend areas and facilities for use by foreign forces. The process, however, differed in each country according to specific conditions and cases. In principle, the South Korean government lent public land for USFK's use, while the U.S. paid for its facilities. In practice, however, the Korean government offered significant support for the construction of USFK facilities. Korea also compensated USFK for some of its other local stationing costs, although not as much as did Japan and Germany.

Some "burden-sharing" aspects of the U.S.-ROK SOFA were more favorable to the host country than were the U.S. SOFAs with Japan or Germany. The major difference was that when the U.S. returned areas or wished to change the purpose for which an area was used, Article 2 of the U.S.-ROK SOFA required the bilateral SOFA Joint Committee to reach agreement, while there was no such obligation in the U.S.-Japan and U.S.-Germany SOFAs.

4. PRIVILEGES AND IMMUNITIES

Host-country nationals naturally tended to regard different legal provisions for foreign military personnel as unequal and unfair. Foreign military personnel stationed abroad, however, were not like foreign tourists or businesspeople who were entirely subject to local jurisdiction. Like diplomats, who had a special status under international conventions, foreign military personnel were ordered abroad by their government to conduct official business.

Thus, U.S. service members stationed in South Korea, as in other countries, had particular privileges and immunities reflecting their special status and their need to conduct military missions. Accidents while on duty were tried in U.S. courts-martial, and tariff and tax immunities were provided to support their activities in Korea. Also, for entry and exit, instead of using the international airport, U.S. service members could use U.S. military aircraft and cross borders with military travel documents.

In principle, privileges and immunities applied only in the case of official activities. In practice, however, there was a gray area in which private activities were sometimes indirectly related to official activities. The issue of which side had the right to make the final decision as to whether an activity was official remained controversial.

To resolve such issues, both countries engaged in close and active consultations over the years. The two SOFA revisions (the first enacted on February 1, 1991, and the second on April 2, 2001) in part addressed Korean concerns about the appropriate balancing of USFK privileges and immunities. In the first revision, changes were made to expand the realm of Korean investigative authority. In the second revision, improvements were made in the areas of criminal jurisdiction, environment, labor, inspection of animals and plants, lending and return of facilities and areas, tax-exempt institutions, and court jurisdiction over egregious crimes involving murder and rape.

In matters concerning USFK privileges and immunities, effective management and implementation of the SOFA were as important as revised language. Important tasks included educating legal authorities and local governments about the SOFA and helping them to implement the SOFA correctly, as well as providing guidance on how they should handle issues not stipulated in the SOFA.

V. TENSIONS OVER SOFA REVISION

Although tensions remained between the U.S. and the ROK over some SOFA provisions even after the 2001 revision and some Koreans continued to call for further changes, the U.S. showed little willingness to consider another revision. SOFA negotiations had proved to be painstaking and time-consuming, with the second revision taking many years of effort. In earlier negotiations, the U.S. objected to the large number of changes demanded initially by the ROK. For the U.S., the U.S.-ROK SOFA was but one out of its many SOFAs; it was therefore hesitant about making revisions that could establish precedents for its other SOFAs. The U.S. also insisted on many SOFA provisions as necessary for the maintenance of internal military discipline.

In Korea, various NGOs continued in 2006 to argue for actual “improvements” and not mere “revision” of the SOFA. Some observers suggested that such calls for revision would gain in persuasiveness if based on broad, comparative studies of U.S. SOFA agreements with other countries and examination of South Korea’s SOFAs with other states, such as the 2002 South Korea-Kyrgyzstan SOFA.

VI. CONCLUSION

As overseas deployments were naturally sensitive and important matters for both sending and receiving countries, careful thought needed to be given to SOFA arrangements and what additional provisions might be necessary. Once the SOFA was agreed upon or revised, the question of SOFA interpretation and implementation posed an important challenge.

The U.S. and South Korea reaffirmed the importance of the SOFA to the alliance on many occasions. Although there was no major, immediate problem in 2006 regarding the U.S.-ROK SOFA apart from pollution in areas the U.S. intended to return, issues regarding the agreement had the potential to flare into controversy at any time.

To minimize misunderstandings, Americans and Koreans needed to make greater efforts to understand the SOFA and each other’s perspectives and concerns. Fortunately, along with increased awareness of, and interest in, the SOFA on the part of both the governments and NGOs, more information had become available through books, research papers, seminars, and the Internet. Such developments made fact-finding easier, opening the path toward better understanding and implementation of the U.S.-ROK SOFA.