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THE UNCOMFORTABLE SOFA: ANTI-AMERICAN SENTIMENTS IN SOUTH KOREA AND THE US-SOUTH KOREA STATUS OF FORCES AGREEMENT

JIMMY H. KOO

I. INTRODUCTION

This article will analyze the anti-American sentiments in South Korea in the context of the US-South Korea Status of Forces Agreement (SOFA). First, it will compare the Articles concerning criminal jurisdiction in the US-South Korea SOFA with the US-NATO SOFA which, is arguably the most reciprocal and fair SOFA signed by the US.¹ Analysis will show that the crux of the problem is not in the text of the US-South Korea SOFA, but in the habitual procedures of dealing with concurrent criminal jurisdictions.² Next, it will compare the Articles concerning the terms and conditions of returning the military bases to the host nations in the two SOFAs.³ Unlike the US-NATO SOFA, the US-South Korea SOFA essentially exempts the US from environmental accountability and burdens South Korea to bear the full costs of cleaning up the returned facilities.⁴ This article will recommend revising procedural habits to promote the legitimacy and the consistency of concurrent criminal jurisdiction procedures.⁵ It will also recommend textual revision of provisions concerning the return of military bases to promote a more equitable solution involving cost-sharing by the two countries.⁶ By implementing these recommendations, the US-South Korea SOFA will be more transparent and evenhanded, thereby alleviating the concerns of inequality and injustice among the South Korean public.⁷ Doing so will reduce sources of anti-American sentiment arising out of the US-South Korea SOFA and in turn, will strengthen the support for the alliance between the two

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1 *See infra* sec. III A.

2 *See infra* sec. III A.

3 *See infra* sec. III B.

4 *See infra* sec. III B.

5 *See infra* sec. IV.

6 *See infra* sec. IV.

7 *See infra* sec. IV.

countries.⁸ In light of the threat posed by the nuclear brinkmanship of North Korea and the increasing economic and political importance of South Korea, maintaining a robust alliance is crucial for the US's interests. This article will conclude that the first step towards maintaining a healthy relationship is to lessen the rising frequency of anti-American sentiment by addressing the concerns arising from the US-South Korea SOFA.

II. BACKGROUND.

A. The dynamics of the US-South Korea alliance since the Korean War and the rise of anti-American sentiment in South Korea.

The end of the Korean War in 1953 marked the beginning of the modern day alliance between South Korea and the US.⁹ In 1954, the United States Forces Korea (USFK) was stationed throughout the peninsula, allowing the US to maintain its geopolitical influence in East Asia.¹⁰ By the 1990's South Korea had achieved tremendous socioeconomic growth and the end of the Cold War had fundamentally altered the dynamics of the alliance.¹¹ Today, around 29,000 USFK troops are still stationed in South Korea.¹² Over the years, clashes between the USFK and local South Koreans have caused emotional controversies and occasionally resulted in public expressions of anti-American sentiment in what is otherwise a long and successful alliance.¹³ According to Sung-Han Kim, there are three kinds of anti-Americanism in South Korea: ideological, issue-specific, and popular.¹⁴ The majority of anti-American sentiment in South Korea is issue specific and arises from the crimes against South Koreans perpetrated by the USFK and the terms and conditions of returning the military facilities back to South Korea.¹⁵

In the summer of 2000, 14,000 South Korean protesters clashed with the police in Seoul while

8 See *infra* sec. IV.

9 See Ting Xu, *US-ROK Alliance: Looking Toward the Future*, SAIS US-SOUTH KOREA Y.B. 2007, at 19, available at http://uskoreainstitute.org/pdf/YB07/SAIS_Yearbook_Rev072007.pdf.

10 See *id.* at 20 (insisting that the Mutual Defense Treaty improved military quality of South Korea, allowed South Korea to develop economically, and helped the US counteract communism in the region).

11 See *id.* (highlighting the common view among South Koreans by the end of the Cold War that they should have more control over their own security, while many Americans started to consider South Korea as ungrateful free riders).

12 E.g., Sung-ki Jung, *US to Keep 28,500 Troops in Korea*, THE KOREA TIMES, Apr. 20, 2008, available at https://www.koreatimes.co.kr/www/news/nation/2009/05/205_22820.html.

13 Scott Snyder, *Pursuing a Comprehensive Vision for the US-South Korea Alliance*, CTR. FOR STRATEGIC AND INT'L STUD., April 2009, at 1, available at http://www.csis.org/media/csis/pubs/090409_snyder_pursuingcompvion_web.pdf.

14 Sung-Han Kim, *Brothers Versus Friends: Inter-Korean Reconciliation and Emerging Anti-Americanism in South Korea*, in KOREAN ATTITUDES TOWARD THE UNITED STATES: CHANGING DYNAMICS, 195 (David I. Steinberg ed., M.E. Sharpe 2005).

15 See Bruce Cummings, *The Structural Basis of Anti-Americanism*, in KOREAN ATTITUDES TOWARD THE UNITED STATES: CHANGING DYNAMICS, at 99 (David I. Steinberg ed., M.E. Sharpe 2005) (referring to the demonstrations, many of which included people of all ages marching together to urge reform of the US-South Korea SOFA, and to move military bases out of Seoul).

expressing their discontent over the actions of American soldiers stationed in South Korea.¹⁶ In 2002, thousands of South Korean protesters demanded the US to hand over the soldiers who accidentally killed two South Korean schoolgirls while driving an armored car en route to a training exercise.¹⁷ The US ultimately declined to surrender jurisdiction and the two responsible soldiers were subsequently acquitted for negligent homicide under a US military court.¹⁸ An underlying frustration towards a seeming pattern of unfairness and injustices sparked the protests. The South Korean public reacted explosively by targeting soldiers and foreigners to open aggression, intimidation and discrimination.¹⁹

In the 2006 Korean movie *The Host*, a monster that mutated as a result of pollution by the USFK causes havoc in Seoul.²⁰ The summer blockbuster satirically reminded the South Korean public of the controversy in 2000, involving illegal discharge of toxic chemicals into the Han River by a USFK personnel and the subsequent refusal by the USFK to prosecute the wrongdoer.²¹ This highly controversial incident initiated greater awareness of environmental pollution caused by the USFK.²² Environmental concerns have recently resurfaced in the Korean media due to the discovery of severe pollution at bases which the US is scheduled to return to Korea in 2010.²³ The controversy mainly involves the burden on the South Korean government to bear all of the costs of the clean up ranging from hundreds of millions to billions of dollars.²⁴

B. History of military base agreements and the use of Status of Forces Agreements.

16 See *Thousands in S. Korea Protest US*, L.A. TIMES, July 26, 2000, available at <http://Articles.latimes.com/2000/jul/26/news/mn-59376> (“Armed with rocks and bamboo staffs, students and farmers attacked club-wielding police and wrote protest messages in blood...”).

17 See Don Kirk, *Koreans Protest US Military’s Handling of a Fatal Accident*, N.Y. TIMES, Aug. 4, 2002, at A14, available at <http://www.nytimes.com/2002/08/04/world/koreans-protest-us-military-s-handling-of-a-fatal-accident.html>.

18 See Yoon-Ho Alex Lee, *Criminal Jurisdiction Under the US-South Korea Status of Forces Agreement: Problems to Proposals*, 13 J. TRANSNAT’L L. POL’Y 213, 215–16 (2003) (observing that the US reluctantly charged the soldiers with negligent homicide but refused to surrender primary jurisdiction and were eventually tried in an all-US-citizen jury trial).

19 See Brian Deutsch, *2002 Tank Incident and Aftermath*, THE KOREA TIMES, June 19, 2008, available at http://www.koreatimes.co.kr/www/news/opinion/2009/05/198_26181.html (tracing the root cause of the massive protests against the US in the summer of 2002).

20 See *Gwoemul* (2006), <http://www.imdb.com/title/tt0468492/> (the events at the beginning of the movie were based on actual events when a US military civilian was directed to dispose of “formaldehyde” by discarding it into the Han River at the objection of a South Korean assistant).

21 See *The Eighth US Army Division Discharged Toxic Fluid (Formaldehyde) into the Han-River*, GREEN KOREA UNITED, Sept. 1, 2002, available at <http://green-korea.tistory.com/74> (demanding punishment of USFK personnel who issued the order to dump twenty boxes of formaldehyde and methanol into the Han River without detoxification).

22 See *Environmental Problem Related to Military Activities*, GREEN KOREA UNITED, Jan. 16, 2008, available at <http://green-korea.tistory.com/44> (observing that since the formaldehyde dumping incident, the increased intensity of investigation has revealed 8.8 cases of pollution incidents per year after 2000, which is more than twice as much as in the 1990’s).

23 *Severe Pollution Levels Detected at 13 US Bases Scheduled For Return to S. Korea*, THE HANKYOREH, Mar. 18, 2009, available at http://english.hani.co.kr/arti/english_edition/e_national/344760.html (listing the level of pollution in the military bases, some of which, exceeded the South Korean standard by more than 150 times over the legal limit).

24 See *id.*

Before the end of World War II, the US maintained complete jurisdiction in military bases abroad, based on the principle of the Law of the Flag.²⁵ However, the competing principle of Territorial Sovereignty argues that the host state should exercise exclusive jurisdiction over all occurrences within its territories.²⁶ Today, Territorial Sovereignty remains as the default jurisdictional principle unless states formulate special agreements such as the SOFA.²⁷ The US and South Korea signed its SOFA in 1966, under Article IV of the Mutual Defense Treaty.²⁸ Considering the comparative levels of socioeconomic and political maturity between the US and South Korea in 1966, critics argue that South Korea did not have much input in negotiating the terms of the agreement and that the texts of the SOFA are unfairly favorable to the US.²⁹

III. ANALYSIS

A. Criminal jurisdiction provisions of the US-South Korea SOFA and the US-NATO SOFA are essentially identical.

The US-NATO SOFA has become the template after which other SOFAs are modeled after, and many states view it as the ideal SOFA agreement.³⁰ Critics argue that the inherent unfairness of the US-South Korea SOFA criminal jurisdiction provision is derived from the textual unfairness and it should be revised to mirror the criminal jurisdiction provision in the US-NATO SOFA.³¹ However, a comparison of the criminal jurisdiction provision of the two SOFAs reveals the weaknesses in the

25 *E.g.*, Ryan M. Scoville, *A Sociological Approach to the Negotiation of Military Base Agreements*, 14 U. MIAMI INT'L & COMP. L. REV. 1, 6–7 (2006) (stating that the US Supreme Court's holding in *Schooner Exxb. v. McFaddon*, 11 US 116 (1812) justified Law of the Flag since it was tactically important for the visiting military to maintain exclusive control over the forces).

26 *See* Jeffrey L. Dunoff et al., *INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 360 (2d ed. 2006) (noting that during the 19th century, most of the states assumed that territorial jurisdiction limited their own ability to regulate conduct outside of their territory).

27 *See* Jennifer Gannon, *Renegotiation of the Status of Forces Agreement Between the United States and the Republic of Korea*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 263, 265 (2000) (reasoning that SOFAs represent a balancing of host nation's sovereignty and the US's interest in governing its troops abroad, whereas before SOFAs the US enjoyed a "much broader immunity" by the nations who hosted US military installations).

28 Agreement under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of the United States Armed Forces in the Republic of Korea, US-S. Korea, July 9, 1966, 17 UST. 1677 [hereinafter US-South Korea SOFA].

29 *See* Lee, *supra* note 18, at 221 (elaborating that in 1966, South Korea was still trying to rebuild from the Korean War and therefore, did not have much influence in negotiating the US-South Korea SOFA).

30 *E.g.*, Steven G. Hemmert, *Peace-Keeping Mission SOFAs: US Interests in Criminal Jurisdiction*, 17 B.U. INT'L L.J. 215, 226 (1999) (stating that when the US signs a SOFA with another country, it refers to the US-NATO SOFA as the model agreement, even though the US usually maintains criminal jurisdiction over its troops that are stationed within the borders of other countries).

31 *See* John W. Egan, Comment, *The Future of Criminal Jurisdiction Over the Deployed American Soldier: Four Major Trends in Bilateral US Status of Forces Agreement*, 20 EMORY INT'L L. REV. 291, 293 (2006); *see also* Lee, *supra* note 18, at 220 (emphasizing that the US-NATO SOFA remains the only completely reciprocal SOFA with the US as a party).

critics' arguments.³²

Article XXII of the US-South Korea SOFA and Article VII of the US-NATO SOFA, specify the applicable criminal jurisdiction procedures.³³ The most notable difference between the criminal jurisdiction provisions of the US-South Korea SOFA and the US-NATO SOFA is that under the former, the US may claim jurisdiction over the dependents of USFK personnel, including its military and civilian components.³⁴ On the other hand, under the US-NATO SOFA, the US may claim jurisdiction over all members of the armed forces but not their dependents.³⁵ Therefore, under the US-South Korea SOFA, a dependent of the USFK is relatively immune from the criminal jurisdiction of South Korea and is exempted from the jurisdiction of the USFK solely due to their status as a dependent.³⁶ The passage of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) narrowed this gap in criminal jurisdiction by making felonious actions of the dependents abroad a federal crime.³⁷ However, the MEJA merely filled in the jurisdictional gap that existed in US laws concerning dependents accompanying the Armed Forces and did not resolve the loophole in the US-South Korea SOFA.³⁸ Therefore, even with the passing of the MEJA, US citizens who are classified as a dependent of the USFK remain immune from the criminal jurisdiction of South Korea, unlike other non-USFK-related dependents.³⁹

However, this discrepancy between the US-South Korea SOFA and the US-NATO SOFA is not the focal point of the controversy. Most anti-American sentiment arises from the actions of the military component of the USFK and not the civilian component or the dependents.⁴⁰ In most

32 Compare US-South Korea SOFA, *supra* note 28, art. XXII, with Agreement, with Appendix, between the United States of America and Other Governments, June 19, 1951, 4 UST. 1792, T.I.A.S. No. 2846 [hereinafter US-NATO SOFA], art. VII (comparing the respective criminal jurisdiction provisions reveal the striking similarity between the two SOFAs).

33 Compare US-South Korea SOFA, *supra* note 28, art. XXII, with US-NATO SOFA, *supra* note 32, art. VII.

34 See Lee, *supra* note 18, at 228 (explaining that under Paragraphs 1(a), 2(a), and 3(a), South Korea has never enjoyed exclusive criminal jurisdiction over the dependents of the military forces who commit offenses that are punishable under its law).

35 See US-NATO SOFA, *supra* note 32, art. VII, ¶ 1(a), 2(a), 3(a) (stating that the sending State has primary jurisdiction over those subject to its military law).

36 See Lee, *supra* note 18, at 226 (assessing that the US-South Korea SOFA unfairly protects dependents of the US military because neither the US domestic law nor the Uniform Code of Military Justice applied to civilians in a foreign country although the US reserved the right to exercise primary jurisdiction over them).

37 See generally Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, § 3261(a), 114 Stat. 2488 (codified at 18 USC. § 3261) (allowing persons employed by or accompanying the armed forces overseas to be prosecuted for any offense that would have been punishable if committed within the US).

38 See Fredrick A. Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 HOUS. J. INT'L L. 579, 597 (2005) (analyzing the definition of persons "accompanying the Armed Forces" under the MEJA to include dependents of members of the Armed Forces, the Department of Defense, and Department of Defense contractors).

39 See Lee, *supra* note 18, at 226 (stating that the MEJA only applied to US criminal law, but did not provide for South Korea to prosecute USFK dependents).

40 See Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "NO"*, 40 A.F.L. REV. 1, 10 (1996) (acknowledging that despite the continued good relations among allies most of the time, friction between the visiting military personnel and the host nation's population is inevitable).

incidents involving a clash between USFK military personnel and South Koreans, both countries will have significant interests in the matter and therefore, the heart of the controversy involves the concurrent nature of the jurisdictions and the resulting procedural tensions.⁴¹

The concurrent jurisdiction provisions are identical under the US-South Korea SOFA and the US-NATO SOFA.⁴² Therefore, the critics' argument condemning the textual unfairness of the SOFA is unconvincing.⁴³ The true source of conflict in the US-South Korea SOFA criminal jurisdiction provision lies in the concept of official duty and the procedural habits involving the issuance of official duty certificates and jurisdictional waiver requests.⁴⁴

Paragraph 3(a) of the respective concurrent criminal jurisdiction articles in the US-South Korea SOFA and the US-NATO SOFA states the US shall have primary jurisdiction over: (i) crimes committed only against the interests of the US, and (ii) "offenses arising out of . . . performance of official duty."⁴⁵ The US-NATO SOFA does not define official duty.⁴⁶ On the other hand, the Agreed Minutes of the US-South Korea SOFA specifies that a "substantial departure from the acts a person is required to perform in a particular duty will usually indicate an act outside of the person's official duty."⁴⁷ It also notes that a duty certificate issued by a competent USFK officer is conclusive and is sufficient evidence of official duty for the purpose of allocating jurisdiction to the US unless it is successfully challenged by the South Korean authorities.⁴⁸

In light of these guidelines, official duty under the US-South Korea SOFA refers not to any act a person performs while on duty but something similar to an act a person is required to perform during that particular duty.⁴⁹ It also refers to any action by USFK personnel that has qualified to

41 See Egan, *supra* note 31, at 315 (explaining that after years of requests by the South Korean government, the US revised the US-South Korea SOFA to more equitably share the sovereign prerogative of criminal jurisdiction).

42 Compare US-South Korea SOFA, *supra* note 28, art. XXII, ¶ 3, with US-NATO SOFA, *supra* note 32, art. VII, ¶ 3.

43 See Youngjin Jung, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT'L L. REV. 1103, 1143 (2003).

(pointing out that after two rounds of revisions, the US-South Korea SOFA is very similar to the US-NATO SOFA and has drastically lessened the extent the critics may argue that the agreement is unfair).

44 See Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 174 (1994) (describing important criminal jurisdiction exceptions: (1) crimes committed only against the sending state, (2) the official duty exception, and (3) the jurisdictional waiver exception).

45 Compare US-South Korea SOFA, *supra* note 28, art. XXII, ¶ 3a, with US-NATO SOFA, *supra* note 32, art. VII, ¶ 3a.

46 See Lepper, *supra* note 44, at 176 (stating that after multiple rounds of negotiations, delegates were unable to agree on an acceptable definition of official duty and each state is left to rely on its own definitions).

47 Agreed Minutes to the Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of the United States Armed Forces in the Republic of Korea, US-S. Korea, art. XXII, re para. 3(a), July 9, 1966, 17 UST. 1677 [hereinafter US-South Korea SOFA Agreed Minutes regarding 3(a)].

48 See *id.* (advancing that the US authorities "shall give due consideration" if South Korean authorities object to the conclusiveness of the duty certificate).

49 Cf. Kimberly C. Priest-Hamilton, Comment, *Who Really Should Have Exercised Jurisdiction Over the Military Pilots Implicated in the 1998 Italy Gondola Accident?*, 65 J. AIR L. & COM. 605, 624 (2000) (comparing the two most extreme definitions of official duty asserted by members of the US-NATO SOFA: 'only the acts done within the limits of an official duty' and 'any act surrounding the duties of the US military').

receive a duty certificate, as long as South Korean authorities do not successfully challenge them.⁵⁰ Although the Agreed Minutes only provide what is not considered an official duty, the US-South Korea SOFA nonetheless contains more substantive guidance in this matter than the US-NATO SOFA.⁵¹ However, the guidelines in the Agreed Minutes do not necessarily equate to a more equitable SOFA for South Korea. In practice, the US has issued duty certificates almost automatically, when it should have been issued only in appropriate circumstances.⁵² On paper, the South Korean government has the right to challenge the duty certificate's validity.⁵³ Nevertheless, once a duty certificate is issued, South Korean officials have customarily accepted it as conclusive and binding without questioning its validity or impartiality, thereby waiving the jurisdiction to the US.⁵⁴ Even though the US-NATO SOFA document is silent on the duty certificate system, an identical system exists in many NATO countries as well.⁵⁵

The US-South Korea SOFA and the US-NATO SOFA also contain identical jurisdictional waiver request systems.⁵⁶ According to the SOFAs, jurisdictional waivers should be requested only if the issue is of particular importance to the sending state and the state with primary jurisdiction should grant waivers only after giving it sympathetic consideration.⁵⁷ Therefore, in theory, the SOFAs limit the US from requesting jurisdictional waivers only to cases in which not doing so would gravely endanger its interests.⁵⁸ However, in practice, the US has indiscriminately requested jurisdictional waivers without giving much consideration as to the matter's particular importance in order to maximize jurisdiction without considering on what basis it would prosecute the military personnel.⁵⁹ In addition, South Korea has granted jurisdictional waivers almost automatically without sympa-

50 See Ruppert, *supra* note 40, at 30 (noting that US authorities have generally labeled any act or omission occurring "incidental" to the performance of official duty to be eligible to receive a duty certificate).

51 See Priest-Hamilton, *supra* note 49, at 627 (pointing out that the US-NATO SOFA's drafting committee failed to define official duty and left it open for interpretation by signatory members).

52 See Lepper, *supra* note 44, at 176 (noting that official duty certificates should only be issued in appropriate circumstances to preserve its credibility).

53 *E.g.*, US-South Korea SOFA Agreed Minutes regarding 3(a), *supra* note 47.

54 See Lee, *supra* note 18, at 240 (describing the tendency of South Korean authorities to automatically accept duty certificates).

55 See Priest-Hamilton, *supra* note 49, at 625–26 (addressing the counterintuitive US-NATO SOFA procedure in which the sending state obtains the waiver of receiving state's primary jurisdiction through its issuance of official duty certificates).

56 Compare US-South Korea SOFA, *supra* note 28, art. XXII, ¶ 3(c), with US-NATO SOFA, *supra* note 32, art. VII, ¶ 3(c).

57 See Jung, *supra* note 43, at 1129 (commenting that the jurisdictional waivers should be granted to punish offenders under the proper jurisdiction and not to grant immunity).

58 See Michael Noone, *Treaty Implementation: Lessons Taught by US/UK Cooperation Under the NATO Status of Forces Agreement*, 13 N.Y. INT'L L. REV. 39, 58–59 (2000) (discussing the Senate resolution concerning the ratification of the US-NATO SOFA which authorized jurisdictional waiver requests only if the accused will not be granted his Constitutional rights under the laws of the receiving state).

59 See Ruppert, *supra* note 40, at 31 (commenting that waiver requests are often used to maximize jurisdiction without considering the underlying reasons for prosecution).

thetic considerations.⁶⁰ As a result of these procedural habits of automatically issuing and accepting official duty certificates and jurisdictional waivers, the US has retained jurisdiction over many cases which the accused USFK personnel have walked away with just a slap on the wrist.⁶¹ Consequently, these toothless procedural limits have strengthened the South Korean public's view that the US-South Korea SOFA is just a tool allowing USFK personnel to avoid prosecution for the crimes they have committed in the peninsula.⁶² Many locals in NATO countries share the same feelings of injustice and inequality as the South Koreans.⁶³ Since it is highly unlikely that the US will relinquish jurisdiction over its personnel any further than it has under the US-NATO SOFA, the perceived injustice must be resolved by changing the procedural habits of the US and South Korea.⁶⁴

B. Environmental provisions under the US-South Korea SOFA and the US-NATO SOFA differ significantly.

The terms and conditions of returning the facilities back to the host nations differ significantly between the US-South Korea SOFA and the US-NATO SOFA, including the supplementary US-Germany SOFA.⁶⁵ Paragraph 5(c) of Article LXIII of the US-Germany SOFA specifies that the German authorities may negotiate the terms of compensation and return of facilities.⁶⁶ Paragraph 6(c) states that if the fixtures on the facilities do not have practical public use, the US must pay to clear the area.⁶⁷ The US-Germany SOFA also “requires the US to pay for the “assessment, evalua-

60 See Jung, *supra* note 43, at 1130 (mentioning that South Korea's rate of exercising jurisdiction is about three percent of all criminal cases, which means that South Korea has waived its jurisdiction about ninety-seven percent of the time at the request of the USFK).

61 See *id.* at 1130–31 (commenting that although the US military authorities suggest that the high jurisdictional waiver rates are due to the confidence other countries have in the US military justice system, critics argue that US court martial convictions in a foreign country are very lenient and cannot deter criminal offenses by US service members).

62 See *id.* at 1131 (asserting that serious crimes committed by US service members have often stirred up public protests in South Korea because authorities of the US and South Korea will most likely fail to respond satisfactorily to such crimes).

63 See Priest-Hamilton, *supra* note 49, at 607 (describing a controversial incident in 1998 in which the US retained jurisdiction based on an official duty argument, after a US military jet flew into ski gondola cables in Italy, killing twenty passengers).

64 See Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAW., Aug. 2000 23, at 28–29 (2000) (noting that the Philippines attempted to solidify more favorable terms than those given to European countries under the US-NATO SOFA but failed as the US refused to sign a new SOFA before the expiration of the old agreement).

65 Compare US-South Korea SOFA, *supra* note 28, art. IV, with Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, U.S.-F.R.G., Aug. 3, 1959, 14 UST. 531, art. LXIII [hereinafter US-Germany SOFA] (advancing two different sets of environmental obligations under the two SOFAs).

66 US-Germany SOFA, *supra* note 65, art. LXIII, ¶. 5(c).

67 *Id.* at art. LXIII, para. 6(c).

tion, and remedying of hazardous substance contamination caused” by it.⁶⁸

Conversely, under paragraph 1 of Article IV of the US-South Korea SOFA, the US may return the facilities without compensating the South Korean government for the cost of restoring and cleaning up the facilities.⁶⁹ The second paragraph states that the South Korean government “is not obliged to [pay] . . . for any improvements made in facilities” regardless of whether it has any practical civilian uses.⁷⁰ The Agreed Minutes state that the US will “respect relevant [South Korean] environmental laws” and “promptly undertake to remedy contamination caused by [USFK] . . . that poses a known, imminent and substantial endangerment to human health.”⁷¹

Through careful choice of words, the US avoids environmental obligations under the US-South Korea SOFA.⁷² Even if an imminent and substantial endangerment to human health is proven, the US is obliged only to remedy the contamination that is proven to be caused by the US military activity and only respect, not enforce, South Korean environmental laws.⁷³ Unlike the words “will” or “shall”, the word “respect” is not legally binding and the requirement of an “imminent and substantial” endangerment sets a very high bar of required proof.⁷⁴ Maintaining its position, the US argues that the improved value of the returned facilities will offset the costs of the cleanup because the South Korean government is not obliged to compensate the US for the value of the property being returned.⁷⁵

This “offset” approach assumes the improved value will exceed the cost of cleanup and the improvements made to the facilities will have practical civilian uses.⁷⁶ In reality, redeveloping the military bases for civilian purposes require removal of military facilities and will only add to the costs

68 Yusun Woo, Note, *Environmental Problems on the US Military Bases in the Republic of Korea: Who is Responsible for the Cleanup Expenses and Whose Environmental Standards Will Apply?*, 15 SOUTHEASTERN ENVTL. L.J. 577, 601 (2007) (pointing out the part of the US-Germany SOFA that is commonly cited by South Korean critics to prove the unfairness of the US-South Korea SOFA).

69 US-South Korea SOFA, *supra* note 28, art. IV, ¶ 1 (exempting the US from restoring the facilities to its original condition and from compensating South Korea).

70 *Id.* at art. IV, ¶ 2.

71 Amendments to the Agreed Minutes of July 9, 1966 to the Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of the United States Armed Forces in the Republic of Korea, U.S.-S. Korea, re art. III, ¶ 2, July 9, 1966, 17 UST. 1677 [hereinafter US-South Korea SOFA Agreed Minutes regarding Article III 2].

72 See Tania Marie Proechel, *Solving International Environmental Crimes: The International Environmental Military Base Reconstruction Act—a Problem, a Proposal, and a Solution*, 29 LOY. L.A. INT’L & COMP. L. REV. 121, 124 (2007) (explaining that the “imminent and substantial danger to human life” standards has been commonly used in other SOFAs and treaties to limit obligations by focusing on immediately obvious dangers and ignoring latent, long-term harms).

73 US-South Korea SOFA Agreed Minutes regarding Article III 2, *supra* note 71.

74 Woo, *supra* note 68, at 605–06.

75 See *id.* at 600–02 (analyzing the rationale that normally, when the US closes an overseas military base, the host country is required to compensate the US for the current value of the property).

76 See *id.* at 601.

for South Korea.⁷⁷ Accordingly, the offset approach is a flawed argument that ignores the reality of the cleanup process. Instead, the calculation of the residual value of the returned property should be based on the future usefulness for the host country and the US-South Korea SOFA should be revised to reflect equitable sharing of costs between the two countries.⁷⁸

IV. RECOMMENDATIONS

In light of the threat posed by the nuclear brinkmanship of North Korea and the increasing importance of South Korea to the economic and political interests of the US, the need to maintain a healthy US-South Korea alliance is as important as any point in the past. For example, in order for a policy against North Korea to be successful, it would certainly require at least an implicit cooperation by South Korea.⁷⁹ Regardless of the positions of the official channels of diplomacy between the two nations, the true source of a healthy alliance is derived from the support of the general population. Therefore, in order for the US to maintain its geopolitical influence and to protect its interests in the peninsula, it is crucial to reduce the possible sources of anti-American sentiment in South Korea when it is possible to do so.⁸⁰ Notwithstanding the planned transfer of wartime operational control from the US to South Korea in 2012 and the relocation of the Yongsan Garrison to a base outside of Seoul by 2014, the USFK will continue to maintain around 29,000 troops in the peninsula.⁸¹ Therefore, regardless of decreased military presence and influence exerted by the US, significant number of USFK personnel will continue to interact with local South Koreans. Such redesign of the military element of the US-South Korea alliance must remain sensitive to the sources of anti-American sentiments that could potentially undermine the strength of the alliance.⁸²

The revised approach must benefit both countries while being practical and not purely theoretic-

77 See generally *Severe Pollution Levels Detected at 13 US Bases Scheduled For Return to S. Korea*, *supra* note 23 (discussing the bases that were returned to South Korea in 2007 and how the initial estimated cleanup cost has tripled as the full extent of the environmental damage has been revealed over time).

78 See Woo, *supra* note 68, at 602; see generally *79.1% of Koreans Believe That the US Should Clean Up Pollution Within US Military Bases*, GREEN KOREAN UNITED, Feb. 13, 2006, available at <http://green-korea.tistory.com/49> (listing the answers to the following questions posed to South Koreans: “Who should be responsible for the cost of cleaning up pollution within US military bases: the US 79.1%, Korea 4.0%, both countries 10.8%” and “Possible solutions to US military base pollution: amending the US-South Korea SOFA 59.6%, demanding US to take responsibility 25.1%, making pollution assessments transparent to the public 10.7%”).

79 See Mark E. Manyin, SOUTH KOREAN POLITICS AND RISING “ANTI-AMERICANISM”: IMPLICATIONS FOR U.S. POLICY TOWARD NORTH KOREA, *South Korean Politics and Rising “Anti-Americanism”: Implications for U.S. Policy Toward North Korea*, REPORT FOR CONGRESS 11 (Congressional Research Service 2003), available at <http://fpc.state.gov/documents/organization/27530.pdf>.

80 See Lee, *supra* note 18, at 249 (noting that neither the US nor South Korea benefits from anti-American sentiments and both countries recognize the importance of maintaining US troops in the peninsula).

81 See Sung-Ki Jung, *USFK Seeks to Expand Role Outside Peninsula*, THE KOREA TIMES, Feb. 24, 2010, available at http://www.koreatimes.co.kr/www/news/nation/2010/02/205_61388.html; Sung-Ki Jung, *Yongsan Garrison to be Relocated by 2014*, THE KOREA TIMES, Jan. 5, 2009, available at http://www.koreatimes.co.kr/www/news/nation/2009/01/113_37344.html.

82 See Victor Cha, *U.S.-Korea Relations: Obama’s Korea Inheritance*, COMP. CONNECTIONS: A Q. E-JOURNAL ON E. ASIAN BILATERAL REL., Jan. 2009, available at http://csis.org/files/media/csis/pubs/0804qus_korea.pdf.

cal in nature.⁸³ The anti-American sentiment arising from the crimes perpetrated by USFK personnel against local South Koreans are mostly attributable to the implementation of the criminal jurisdiction provisions rather than the document itself. A pattern of automatic jurisdiction transfers and the lack of punishments have created a sense that USFK soldiers can “get away with murder” under the veil of the SOFA.⁸⁴

First, the US should adopt the following provision to request waivers of exclusive jurisdiction as well as primary jurisdiction “[i]t is understood that the United States authorities shall exercise utmost restraint in requesting waivers of . . . jurisdiction.”⁸⁵ Limiting jurisdictional transfers to truly meritorious cases will improve the legitimacy of the procedure. It will also deter USFK personnel from committing crimes in South Korea to avoid the likelihood of being prosecuted by South Korean courts rather than by the seemingly more lenient US court martial.⁸⁶ Additionally, it will help to convince the South Korean public that the criminal jurisdiction process of the US-South Korea SOFA is as fair and reasonable as it would have been under the applicable South Korean laws.⁸⁷ On a similar note, “official duty” should be defined more concretely to create a more stable guideline rather than a case-by-case analysis that naturally arises out of the Agreed Minutes regarding 3(a) and the US should issue duty certificates only in truly meritorious cases.⁸⁸ Duty certificates must not become an abusive tool to maintain jurisdiction in every case of concurrent jurisdiction.⁸⁹ A concrete definition will boost the credibility of duty certificates and the process of jurisdictional negotiations will be more efficient and less suspicious.⁹⁰

Second, granting immunity to the dependents of the USFK should be removed to mirror the US-NATO SOFA. Even with the MEJA, US citizens who are classified as the dependents remain relatively immune from the criminal jurisdiction of South Korea compared to other non-USFK-related civilians. Especially in light of the approval by the Department of Defense to allow military USFK personnel to live with their family members in South Korea, this gap in South Korean jurisdiction should be removed.⁹¹ By removing the protection of dependents, the US-South Korea

83 See, e.g., Lee, *supra* note 18, at 242 (explaining that any revision of the US-South Korea SOFA must be practical enough to be implemented by both parties).

84 See Jung, *supra* note 43, at 1143 (commenting on the perception among South Koreans that US soldiers are not properly punished for their crimes).

85 See US-South Korea SOFA Agreed Minutes regarding Article III 2, *supra* note 71.

86 See Lepper, *supra* note 44, at 179 (arguing that maximizing jurisdiction does not mean that the US must secure a jurisdictional waiver in every instances); see also Jung, *supra* note 43, at 1131 (explaining the criticism that when a soldier is tried under US jurisdiction as a result of waivers, the resulting punishments tend to be “a slap on the wrist”).

87 See Lee, *supra* note 18, at 247 (claiming that SOFA will endure only so long as the two nations maintain a good relationship through a uniform approach that will ensure that all parties are treated equally in all situations).

88 See US-South Korea SOFA Agreed Minutes regarding 3(a), *supra* note 47; see also Lepper, *supra* note 44, at 176 (warning that absent a set definition of official duty, the tendency to maximize jurisdiction will deteriorate future credibility of duty certificates).

89 See Lepper, *supra* note 44, at 176 (describing the possibility that an expansive definition of official duty will in effect implement the Law of the Flag doctrine).

90 See Priest-Hamilton, *supra* note 49, at 634–35 (discussing the dispute between Italy and the US in determining official duty and describing how the US is perceived as a bully that will ultimately get its way).

91 See *USFK Seeks to Expand Role Outside Peninsula*, *supra* note 81.

SOFA will mirror the US-NATO SOFA and will reduce another unnecessary source of anti-American sentiments.⁹² The removal will not necessarily be unfair to the US but will only lower the granted level of protection of the dependents to the level that is granted by the most equitable SOFA that the US is a party: the US-NATO SOFA.⁹³

Finally, Article IV of the US-South Korea SOFA should be revised to resemble Article LXIII of the US-NATO SOFA. In order to account for the absence of South Korean troops and bases in the US, the US should not be fully accountable for the environmental damages caused by the presence of USFK.⁹⁴ Instead, the two governments should calculate the difference between the cost of the cleanup and the value of the improvements made by the USFK that has potential civilian uses. If the cost of the cleanup is not offset by the value of the improvements, the remainder should be divided into portions to be paid by both governments.⁹⁵ If the value of the improvements exceeds the cost of the cleanup, the South Korean government should pay the US a reasonable amount for compensation.⁹⁶ Regardless of how the cost will be shared, the most important point is that the US should be somewhat responsible for the pollution caused by its past actions.⁹⁷

V. CONCLUSION

South Korea remains as a valuable ally for the US in maintaining its geopolitical influence in East Asia.⁹⁸ Whether the issue is about supporting the US's policy towards North Korea or importing American products into the South Korean market, the determining factor behind South Korea's position is the support of the general public. It is more than likely that the US-South Korea alliance will continue to exist for some time to come. However, the strength of the alliance will depend significantly on the support of the general public. Adopting the recommendations listed in this article will promote discipline among USFK military personnel and will help to match the US's rheto-

92 See Gannon, *supra* note 27, at 263–64 (characterizing South Koreans' resentment over the SOFA criminal jurisdiction provision).

93 See Lee, *supra* note 18, at 220 (commenting that although the US-South Korea SOFA was modeled after the US-NATO SOFA, the latter remains as "the only completely reciprocal SOFA" signed by the US).

94 See Woo, *supra* note 68, at 601–02 (explaining the US's position that the reason for the reciprocal nature of the US-Germany SOFA is because Germany has a reciprocal obligation to compensate the US for the facilities within the US bases).

95 See Woo, *supra* note 68, at 597 (explaining that since host nations receive economic, political, and national security benefits from the presence of the US military, the host nation and the US should be jointly responsible for the environmental pollution).

96 See *id.* at 601 (commenting on the US's argument that South Korea benefits by not paying off the difference between the residual value of the bases and "the environmental remediation expenses instead is 'allowed' to give up its remediation claims").

97 See *id.* at 612 (arguing that the US should admit its responsibility for the portion of the cleanup expenses and negotiate with South Korea to allocate the responsibility for the expenses in good faith while considering the economic and the social security provided by the presence of USFK).

98 See Snyder, *supra* note 13, at 1 (explaining that the US-South Korea alliance continues to be an instrument through which the US demonstrates its commitment for stability and balance of power in East Asia, especially in light of the threat posed by North Korea).

ric concerning environmental accountability with its official policies, while also easing the tension between the USFK and local South Koreans.⁹⁹ Therefore, the US and South Korea should seriously consider changing their procedural habits, defining crucial terms, and revising certain provisions in the US-South Korea SOFA in order to reduce the possible sources of anti-American sentiment arising out of the presence of USFK, thereby preventing a systematic deterioration of the alliance.

⁹⁹ See Ruppert, *supra* note 40, at 47 (criticizing the US for failing to match the rhetoric concerning environmental compliance in its military bases overseas).