

## **Status Of Forces Agreements (SOFA Agreements) - A Primer**

Article By:

Government Contracts Practice Group

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Government contractors are called-upon with increasing frequency to perform their contractual obligations abroad. Apart from the myriad of laws and regulations governing their performance on the international stage, government contractors also must be cognizant of the terms and conditions of any applicable Status of Forces Agreements. SOFAs, as they are commonly referred to, are voluntary multilateral or bilateral peacetime agreements that define the legal status of personnel and property (“covered individuals”) of one nation in the territory of another nation (“host nation”). Covered individuals will want to familiarize themselves with the pertinent SOFA because it is the agreement that sets forth the legal framework under which they operate in the host nation. The pertinent SOFA may cover a broad range of topics, ranging from civil and criminal jurisdiction to the wearing of uniforms by armed forces while away from military installations.

### ***Scope and Substance***

Individuals and property covered by SOFAs between the United States and other nations include members of the United States Armed Services and, in certain circumstances, personnel of private contractors working on behalf of the United States government. Additionally, SOFAs are often limited to cover conduct when the personnel are “on duty.” However, since SOFAs are peacetime agreements, they do not address the rules of war, the Laws of Armed Conflict, or the Laws of the Sea. In the event of an armed conflict, the terms of a SOFA become inapplicable.

The most common topic addressed by SOFAs is the application of domestic civil and criminal laws to covered individuals in the host nation. Typically, SOFAs provide for the United States to share jurisdiction with the host nation. An example of a SOFA with shared jurisdiction is the SOFA between the United States and the members of the North Atlantic Treaty Organization (“NATO”). In shared jurisdiction SOFAs, if a covered individual violates the laws of just one country (be it the United States or the host country), that country is typically the only country that can assert jurisdiction over the offender. If an individual commits an act that violates the laws of both countries, however, both countries may have concurrent jurisdiction over the offender. In the event of concurrent jurisdiction, there are additional agreed-upon protocols in place that determine which country can assert jurisdiction.

In contrast to SOFAs providing for shared jurisdiction, some SOFAs provide for one country to have exclusive jurisdiction regardless of whether the offender violates the laws of the United States or the

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host nation. An example of a SOFA that provides exclusive jurisdiction to the United States is the SOFA between the United States and Mongolia. Pursuant to this SOFA, if a covered individual violates the laws of either the United States or Mongolia (or both), the United States has the right to exercise jurisdiction over all criminal and disciplinary matters while the offender is in Mongolia. While the SOFA provides exclusive jurisdiction to the United States, the SOFA also requires the United States to give “sympathetic consideration” to a request by the government of Mongolia for a waiver of jurisdiction in cases not involving official duty. The United States is not required, however, to waive jurisdiction. Notably, exclusive jurisdiction can result in complete immunity from the laws of the host nation while the individual is present in that country in order to perform their “official duties.”

Other common topics addressed by SOFAs include rights related to carrying weapons, proper apparel while in the host nation, entry and exit issues, import and export issues, licenses or permits, taxes and fees, use of radio frequencies, driving license requirements, and customs regulations. For example, the SOFA between the United States and the Republic of Iraq permits United States personnel to possess and carry weapons that are owned by the United States “according to the authority granted to them under orders and according to their requirements and duties.”

## ***Form and Formal Requirements***

SOFAs have no prescribed form. A SOFA may exist as a stand-alone document or the terms and conditions commonly found in SOFAs may be contained in other agreements, such as a Security Agreement. The SOFA between the United States and the Republic of Iraq is an example of a SOFA that is contained in a larger agreement: “Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq.” Not only does this document set forth the legal framework under which covered individuals will operate in Iraq, but it also sets forth the date by which the United States must withdraw its military forces.

There are no requirements governing the detail or content of a SOFA. Additionally, there is no prescribed length or format for a SOFA. The Congressional Research Service reports that the United States has entered into SOFAs as short as one page and in excess of 200 pages. A SOFA may be specific to one purpose or activity or may encompass a long-term relationship. For example, in advance of a joint exercise conducted in 1998, the United States and Bangladesh entered into a SOFA specific to one activity. The document consists of five clauses contained on one page. In contrast, the SOFA between the United States and Germany, which is a supplemental agreement to the NATO SOFA, numbers more than 200 pages.

## ***Authority***

The underlying source of authority for a SOFA is not always the same. SOFAs may be based on previous treaties, congressional action, executive agreements, or in some cases, even a lease agreement.

Treaties ratified by the United States Senate provide the underlying authority for the SOFAs between (1) the United States and Japan and (2) The United States and The Republic of Korea. The SOFA with Japan arises from the Treaty of Mutual Cooperation and Security (1960). The SOFA with Korea arises under the Mutual Defense Treaty (1953).

Congressional action is the underlying source of authority for SOFAs between (1) the United States

and Palau and (2) the United States and the Federated States of Micronesia and the Marshall Islands. These states were previously territories of the United States, but became freely associated states through Congressionally approved compacts. The compacts called-for the execution of SOFAs. Palau concluded its SOFA with the United States in 1986. The Marshall Islands and Micronesia consummated SOFAs with the United States in 2004.

SOFAs also may arise from an executive agreement without other underlying authority. An example is the executive agreement reached between the United States and Bahrain (1971), which is not limited to a specific activity or exercise and provides for the status of United States forces in Bahrain.

SOFAs arising through a lease agreement include the lease of military bases in Newfoundland, Bermuda, Jamaica, St. Lucia, Antigua, Trinidad, and British Guiana between the United States and the United Kingdom. This lease agreement was not a stand-alone document, but served the purpose of a SOFA at the specified military bases.

## ***Conclusion***

SOFAs vary greatly from one another and the nuances of SOFA agreements vary in complexity. These complexities, however, can make all the difference as one SOFA agreement may provide for immunity for an individual under specific circumstances and another may not. For example, a given SOFA may encompass the employees of private contractors engaged by the Department of Defense, while another SOFA may not. In the event of a dispute, the rights set forth by the SOFA are generally resolved through diplomatic channels. It would behoove individuals working on behalf of the United States government to familiarize themselves, at a minimum, with the generalities of the pertinent SOFA agreement to determine if and how the SOFA applies to them. Some SOFAs are available to the public on the internet, while others are contained in the international treaties collections of certain libraries.

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