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RECIPROCITY AND RESPECT: STRENGTHENING A KEY ALLIANCE IN STRATEGIC COMPETITION

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INTRODUCTION

The equality of sovereign states is a canon of customary international law.¹ It is also fundamental to international relations and the very foundation of the United Nations Charter.² However, the principle of equality among sovereigns does not stop powerful states from exploiting superior bargaining power in bilateral agreements. But partnerships formed under such agreements are born of transactional diplomacy rather than mutual respect among equals. The United States (U.S.) has, quite naturally, created a large number of agreements that fall into this category of transactional diplomacy. In the short-term, these agreements are extremely effective. They meet U.S. interests abroad, while granting little or nothing to the weaker party. There is, perhaps, no better example of such agreements than the various non-reciprocal Status

¹ See Thomas H. Lee, *Case Studies in Conservative and Progressive Legal Orders: International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 L. & CONTEMP. PROBS. 147 (2004).

² U.N. Charter art. 2, ¶ 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”). By way of example, the Vienna Convention on Diplomatic Relations is universally applied to all states, giving diplomatic privileges and immunities reciprocity in all host nations as a matter of customary international law. See Jonathan Brown, *Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations*, 37 INT’L & COMP. L. Q. 1 (1988). Status of Forces Agreements are often compared to diplomatic privileges and immunities, and indeed, bilateral arrangements with some host nations provide U.S. service members the equivalent status of diplomatic administrative and technical staff. However, unlike diplomatic protections, SOFA protections are not given reciprocity in bilateral arrangements with the U.S. This result is incongruous with the customary principle that sovereign states are equals.

of Forces Agreements (SOFA) between the U.S. and its allies across the Indo-Pacific. This Article argues that such relationships will be insufficient to meet great power competition, and indeed, transactional diplomacy may no longer be strategically beneficial in the long run. The U.S. must instead shift its approach to bilateral agreements with allies and partners. It must seek to deepen alliances by demonstrating it is not a wounded superpower,³ but rather a principles-based partner.

This Article proposes one simple and incremental change for the U.S. to begin on a new path of principles-based partnerships, while more effectively achieving national security goals. Specifically, it proposes the creation of a reciprocal SOFA between the U.S. and Australia.

The Indo-Pacific Region. Today's central challenge to U.S. security is strategic competition from revisionist powers,⁴ expressly identified in the 2018 National Defense Strategy as China and Russia.⁵ It is no accident that China is listed first. As the new Biden Administration stated informally: "It's China, China, China, Russia."⁶ In December of 2020, John Ratcliffe, Director of National Intelligence, unequivocally stated, "China poses the greatest threat to America today."⁷ The statement repeats a common theme during the Trump Administration,⁸ which held that China and Russia "want to shape a world antithetical to U.S. values and interests."⁹ This theme has generally continued into the Biden

³ HENRY KISSINGER, ON CHINA 533–34 (2012 ed.) (noting that Chinese "hardliners" will argue that the U.S. is a "wounded superpower determined to thwart the rise of any challenger"). Some Australians, particularly younger Australians, often come to the same conclusion when discussing U.S.-China competition.

⁴ U.S. DEP'T OF DEF., SUMMARY OF THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 2 (2018) [hereinafter NATIONAL DEFENSE STRATEGY]. Revisionist powers is used here in reference to a state seeking to change or end the current international order. The international order, in turn, means many different things in official discourse, but generally has reference to the multi-lateral institutions, international law, and norms that emerged in the aftermath of the Second World War, centered on the United Nations. See Ben Scott, *But What Does "Rules Based Order" Mean?*, THE INTERPRETER (Nov. 2, 2020), <https://www.lowyinstitute.org/the-interpreter/what-does-rules-based-order-mean>.

⁵ NATIONAL DEFENSE STRATEGY, *supra* note 4, at 2.

⁶ Katrina Manson et al., *What Does a Biden Presidency Mean for the World?*, FIN. TIMES (Jan. 19, 2021), <https://www.ft.com/content/75592d75-61ec-43f2-b435-c760db86394a>.

⁷ John Ratcliffe, Opinion, *China is National Security Threat No. 1*, WALL ST. J. (Dec. 3, 2020, 1:20 PM), <https://www.wsj.com/articles/china-is-national-security-threat-no-1-11607019599>.

⁸ See, e.g., Michael R. Pompeo, Sec'y of State, Address at the Richard Nixon Presidential Library: Communist China and the Free World's Future (Jul. 23, 2020).

⁹ WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 25 (Dec. 2017) [hereinafter NATIONAL SECURITY STRATEGY].

Administration, with Secretary of State Antony Blinken calling China “the biggest geopolitical test” of this century.¹⁰

Key alliances. To meet this test, the National Security Strategy emphasizes the crucial role of alliances and friendships with South Korea, Japan, Australia, and others.¹¹ Similarly, the National Defense Strategy identifies “strengthening alliances as we attract new partners,” as one of three lines of effort in strategic competition.¹² These alliances are often framed and managed through legal agreements, including SOFAs, and are especially important in the Indo-Pacific.¹³ Strong alliances and partnerships provide pooled resources, access to critical regions,¹⁴ and perhaps most significantly, create a collective weight of influence that no competitor can match.¹⁵ As Blinken stated more simply, “we can approach Beijing most effectively when we are working together.”¹⁶

Following the 2020 U.S. Presidential Election, the Biden Administration issued Interim National Security Strategic Guidance in March 2021.¹⁷ Similar to his predecessor, President Biden’s strategic guidance emphasized the role of allies and partners, referring to them as “America’s greatest strategic asset.”¹⁸ Biden committed to “reinvigorate and modernize” alliances.¹⁹ Further, he described the need to reaffirm alliances with expressly identified critical partners, including Australia.²⁰

Strengthening the alliance. For Australia, and many other countries within the U.S.’ “constellation of allies,” the lines of demarcation

¹⁰ Simon Lewis & Humeyra Pamuk, *Biden Administration Singles out China as “Biggest Geopolitical Test” for U.S.*, REUTERS (Mar. 3, 2021, 9:07 AM), <https://www.reuters.com/article/us-usa-china-blinken-idUSKBN2AV28C>. Some commentators have expressed concern with the Trump Administration’s rhetoric in describing competition with China, overstating it as an existential threat. The Biden Administration seems to be notably calmer in its use of language, but clearly remains “clear-eyed” about the threat posed by China. *See id.*

¹¹ NATIONAL SECURITY STRATEGY, *supra* note 9, at 46. The U.S., Japan, India, and Australia make up the quadrilateral cooperation, or “quad,” that has joined efforts in securing a “free and open Indo-Pacific.” *See* Press Release, The White House, Quad Leaders’ Joint Statement: “The Spirit of the Quad” (Mar. 12, 2021).

¹² NATIONAL DEFENSE STRATEGY, *supra* note 4, at 5.

¹³ *Id.* at 9.

¹⁴ *Id.* at 8–9.

¹⁵ *See id.* at 8.

¹⁶ Antony J. Blinken, U.S. Sec’y of State, Remarks to the Press in Brussels, Belg., Sec’y Antony J. Blinken and High Rep. for Foreign Aff. Josep Borrell After Their Meeting (Mar. 24, 2021).

¹⁷ WHITE HOUSE, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE (Mar. 2021) [hereinafter INTERIM STRATEGIC GUIDANCE].

¹⁸ *Id.* at 10.

¹⁹ *Id.*

²⁰ *Id.*

in strategic competition are unclear.²¹ These countries “do not regard themselves as elements in an American containment policy, nor of a revived Chinese tributary order.”²² Instead they hope for “good relations” with both “and will resist pressure to ‘choose’ between the two.”²³ These countries may still hope for Henry Kissinger’s ideas of “coevolution,” in place of competition.²⁴ Kissinger concludes his famous 2011 book, *On China*, by calling for a merging of U.S.–China efforts “not to shake the world, but to build it.”²⁵ In the past decade, however, an overwhelming and bipartisan consensus has emerged in the U.S., holding that the era of U.S.–China engagement “has come to an unceremonious close.”²⁶ China’s use of predatory economics and influence operations, combined with its clear pursuit of regional hegemony have challenged even the most quixotic advocates of cooperation.²⁷

With this background, some policy experts, including National Security Advisor, Jake Sullivan, have advocated for a middle ground between zero-sum competition and naive cooperation, namely, “clear-eyed coexistence.”²⁸ This coexistence may place competition first but simultaneously seeks opportunities for cooperation.²⁹ As Blinken has said, “[o]ur relationship with China will be competitive when it should be, collaborative when it can be, and adversarial when it must be.”³⁰ This oscillating and nuanced approach requires “a new model of major power relations.”³¹ It requires humility³² in exerting U.S. influence, and

²¹ Kurt M. Campbell & Jake Sullivan, *Competition Without Catastrophe: How America Can Both Challenge and Coexist with China*, FOREIGN AFFS. (Sept./Oct. 2019), <https://www.foreignaffairs.com/articles/china/competition-with-china-without-catastrophe>. To illustrate the ambiguity, Campbell and Sullivan argue that the very term “strategic competition” implies a certain level of uncertainty. *Id.* Just as “strategic patience” implies uncertainty about what to do, “strategic competition” implies uncertainty about the objective of competing. It must be clear that, contrary to the impressions of some foreign observers, US foreign policy is not that of a wounded superpower, fighting to stay on top. Instead, the US is seeking the triumph of principles. *See id.*

²² KISSINGER, *supra* note 3, at 540.

²³ *Id.*

²⁴ *Id.* at 543–44.

²⁵ *Id.* at 530.

²⁶ Campbell & Sullivan, *supra* note 21. Similarly, though perhaps in a harsher tone, Secretary of State Mike Pompeo said in July 2020 that the past fifty years of U.S.–Chinese engagement has been a failure. Pompeo, *supra* note 8.

²⁷ *See* NATIONAL DEFENSE STRATEGY, *supra* note 4, at 2; Campbell & Sullivan, *supra* note 21.

²⁸ Campbell & Sullivan, *supra* note 21.

²⁹ *Id.*

³⁰ Lewis & Pamuk, *supra* note 10.

³¹ Susan E. Rice, U.S. Nat’l Sec. Advisor, Address at Georgetown University: America’s Future in Asia (Nov. 20, 2013).

³² Campbell & Sullivan, *supra* note 21.

increased delegation of strategic autonomy to regional allies.³³ That is to say, the U.S. must strengthen alliances through mutual respect and principled partnerships, while moving away from transactional diplomacy.

This Article does not advocate an alarmist's view that the Australia–U.S. alliance is broadly at risk, but like many Indo-Pacific countries, Australia's place in the U.S.–China competition is not as simple as U.S. officials may sometimes assume.³⁴ While it is beyond question that the U.S. is Australia's primary security partner,³⁵ China is, by far, Australia's largest source of trade.³⁶ As it is for nearly all countries in the region, China is indispensable to the Australian economy.³⁷ Further, a growing generational divide exists within Australia, wherein younger Australians have begun to question their connection to the U.S.³⁸ When asked to choose Australia's "more important relationship," fifty-four percent of Australians under thirty years of age chose China.³⁹ Only thirty

³³ RICHARD JAVAD HEYDARIAN, *ASIA'S NEW BATTLEFIELD: THE USA, CHINA AND THE STRUGGLE FOR THE WESTERN PACIFIC* 7 (2015).

³⁴ See Austl. Associated Press, *Scott Morrison Says Australia Will Not Pick Sides Between China and US*, SBS NEWS (Nov. 24, 2020, 8:12 AM), <https://www.sbs.com.au/news/scott-morrison-says-australia-will-not-pick-sides-between-china-and-us> ("Our actions are wrongly seen and interpreted by some only through the lens of the strategic competition between China and the United States," Mr. Morrison said. "It's as if Australia does not have its own unique interests or views as an independent sovereign state. This is false and needlessly deteriorates relationships.").

³⁵ Nathan Church, *The Australia-United States Defence Alliance*, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/AustUSDefence (last visited Mar. 21, 2022).

³⁶ Anne Holmes, *Australia's Economic Relationships with China*, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/China (last visited Feb. 5, 2022) ("Today, China is Australia's largest trading partner in terms of both imports and exports. Australia is China's sixth largest trading partner; it is China's fifth biggest supplier of imports and its tenth biggest customer for exports. Twenty-five per cent of Australia's manufactured imports come from China; 13% of its exports are thermal coal to China.").

³⁷ HEYDARIAN, *supra* note 33, at 12.

³⁸ See, e.g., Laura Silver et al., *Unfavorable Views of China Reach Historic Highs in Many Countries*, PEW RESEARCH CENTER (Oct. 6, 2020), <https://www.pewresearch.org/global/2020/10/06/unfavorable-views-of-china-reach-historic-highs-in-many-countries/> (noting that 2020 saw a dramatic rise in unfavorable ratings toward China, in part, as a reaction to COVID-19 and that before 2020, about forty-five percent of Australians under thirty years-of-age viewed China unfavorably, which is far lower than that of older Australians).

³⁹ Natasha Kassam, *Generation Why? Younger Australians Wary of United States*, THE INTERPRETER (June 24, 2020, 6:00 AM), <https://www.lowyinstitute.org/the-interpreter/generation-why-younger-australians-wary-united-states>. Kassam correctly notes the study is largely influenced by a general distaste for Donald Trump, who

percent of Australians over sixty did the same.⁴⁰ In this environment, Australia’s Prime Minister, Scott Morrison recently said, “pursuing [Australia’s] interests in the midst of strategic competition between the U.S. and China is not straightforward . . . [Australia is] not to be forced into any binary choices.”⁴¹ Australia’s connections to Beijing, and its resistance to binary choices, highlights a growing need to strengthen the alliance for the future.⁴²

This Article will first place the proposed SOFA in the broader context of the Australia–U.S. strategic alliance and SOFAs more generally. It will then discuss the extant Status of U.S. Forces in Australia Agreement (Austl.–U.S. SOFA) more specifically. This will include consideration of its 1963 Protocol, which commits the parties to create a reciprocal SOFA in the future.⁴³ Finally, this Article will address the U.S.’ historical objections to reciprocity and present policy and legal arguments in support of a reciprocal Austl.–U.S. SOFA. In the process, this Article will identify the best legal path for the accomplishment of SOFA reciprocity. A reciprocal SOFA will not be a panacea, but it presents an opportunity to reaffirm a key strategic alliance at a critical time.

I. AUSTRALIA

A. *Historical Background — The Strategic Australia–U.S. Alliance*

Australia sometimes escapes the notice of the world because it is stable and peaceful, and its continent-island is “mostly empty and a long way away.”⁴⁴ But Australia, often described as a middle power of

according to polls, young Australians trusted less than Xi Jinping. *Id.* The numbers are likely different under the Biden Administration but would still likely reveal a generational divide and growing concern for the Australian perception of the U.S. relationship.

⁴⁰ *Id.* When asked if they prefer China or the U.S. to be the world’s greatest superpower, the overwhelming majority of Australians choose the U.S.; however, the percentage is lower in Australia than it is in many Indo-Pacific countries, including Japan, Korea, and the Philippines. Richard Wike et al., *Most Prefer that U.S., not China, be the World’s Leading Power*, PEW RSCH. CTR. (Oct. 1, 2018), <https://www.pewresearch.org/global/2018/10/01/most-prefer-that-u-s-not-china-be-the-worlds-leading-power/>. Nearly all Australians identify China as its most important relationship in Asia. See HEYDARIAN, *supra* note 33, at 262.

⁴¹ Austl. Associated Press, *supra* note 34.

⁴² Charles Edel & John Lee, *The Future of the U.S.-Australia Alliance in an Era of Great Power Competition*, U.S. STUD. CTR. (June 13, 2019), <https://www.ussc.edu.au/analysis/the-future-of-the-us-australia-alliance-in-an-era-of-great-power-competition>.

⁴³ Agreement with the United States Government Concerning the Status of United States Forces in Australia, and Protocol, Austl.–U.S., May 9, 1963, 14 U.S.T. 506 [hereinafter Austl.–U.S. SOFA].

⁴⁴ BILL BRYSON, DOWN UNDER: TRAVELS IN A SUNBURNED COUNTRY 2 (2000).

“considerable heft,”⁴⁵ is a crucial ally, with a strong military,⁴⁶ a large geographic footprint in the Indo-Pacific, and deep connections to the U.S.⁴⁷

The Commonwealth of Australia came into being through an act of the United Kingdom (UK) Parliament in 1900.⁴⁸ Although Australia did not receive full *de jure* independence until 1986,⁴⁹ it expressly declared the U.S. to be its primary security ally as early as 1941.⁵⁰ That year, Prime Minister John Curtin publicly stated, “I make it quite clear that Australia looks to America,” above all others, for mutual defense support.⁵¹

Curtin made the statement during World War II, wherein approximately 1,000,000 U.S. service members spent time in Australia.⁵² For over 100 years, the U.S. and Australian militaries have held a “long-cherished and unwavering friendship,”⁵³ that includes fighting side-by-side in every major conflict since World War I.⁵⁴ In 2011, President Barack Obama said the U.S. “has no stronger ally than Australia.”⁵⁵

The Australia–U.S. alliance has also experienced its fair share of vicissitudes. Shortly before his 1975 dismissal, Australia’s Labour Prime Minister Gough Whitlam briefly suggested withdrawal from the U.S. alignment due to his aggressive opposition to nuclear weapons and the

⁴⁵ Richard Javad Heydarian, *Trump is Forcing China to Reassess its Strategy*, NAT’L INT. (Oct. 20, 2018), <https://nationalinterest.org/feature/trump-forcing-china-reassess-its-strategy-33917?page=0%2C1>.

⁴⁶ Sikder Taher Ahmad, *Australia Ranks World’s 21st Military Power*, SBS BANGLA (Apr. 16, 2018), <https://www.sbs.com.au/language/english/australia-ranks-world-s-21st-military-power>.

⁴⁷ NATIONAL SECURITY STRATEGY, *supra* note 9, at 46; INTERIM STRATEGIC GUIDANCE, *supra* note 17, at 10.

⁴⁸ Commonwealth of Australia Act, 1900 (Imp), 63 & 64 Victoria, c. 12, § 9 (U.K.) (this Act is the enacting legislation for the Australian Constitution.).

⁴⁹ See Australia Act 1986, c. 2 (U.K.). It should be noted that Australia has been, and is today, within the Commonwealth of Nations, with the Queen as head of state. *Protocol Guidelines*, AUSTL. DEPT. OF FOREIGN AFF. AND TRADE, <https://www.dfat.gov.au/about-us/publications/corporate/protocol-guidelines> (last visited Apr. 2, 2022) It has held de facto independence since 1901, however, the UK’s formal authority to legislate over Australia was not removed until 1986. See *id.*

⁵⁰ *Australia–World War II*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Australia/World-War-II> (last visited Mar. 21, 2022).

⁵¹ See Penny Wong, *John Curtin’s Turn to America, 75 Years on*, THE INTERPRETER (Oct. 1, 2016, 12:00 PM), <https://www.lowyinstitute.org/the-interpreter/john-curtins-turn-america-75-years>.

⁵² *Battle of Brisbane*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Battle-of-Brisbane> (last visited Mar. 21, 2022).

⁵³ Assoc. Press, *The Latest: Americans, Australians Celebrate in Rose Garden*, WASH. TIMES (Sept. 20, 2019), <https://m.washingtontimes.com/news/2019/sep/20/the-latest-australias-pm-at-white-house-for-state-/>.

⁵⁴ NATIONAL SECURITY STRATEGY, *supra* note 9, at 46.

⁵⁵ Barack Obama, Remarks by President Obama and Prime Minister Gillard of Austl. in Joint Press Conf. (Nov. 16, 2011).

conflict in Vietnam.⁵⁶ However, as Obama said in 2016, the Australia–U.S. alliance transcends party politics and endures temporary challenges;⁵⁷ notwithstanding its close relationship with the U.S., Australia also maintains a strong connection to China.⁵⁸

B. Chinese Connections—Competition for Influence in Australia

Similar to the U.S., Australia established diplomatic relations with Beijing in 1972,⁵⁹ and has since become increasingly connected with China.⁶⁰ In 2014, Australia’s conservative Prime Minister Tony Abbott described Australia and China’s “comprehensive strategic partnership.”⁶¹ His immediate predecessor in the office, Kevin Rudd, spoke fluent Mandarin Chinese and was a subject matter expert on Chinese relations.⁶² In formal messaging today, Australia’s Department of Foreign Affairs acknowledges “differences of view on some important issues,” but nonetheless explains, “the Australia-China bilateral relationship is based on strong economic and trade complementarities,” and covers a wide range of mutual interests.⁶³ China accounts for nearly twenty percent of all Australian international trade,⁶⁴ more than twice as much as any other country.⁶⁵ Every year Australia hosts vast numbers of Chinese university students and Australia has recently increased its bilateral defense work with China, including military educational exchange programs.⁶⁶ Simultaneously, the Australia-China relationship often involves tension. In one recent example, a Chinese Government official created and

⁵⁶ Kassam, *supra* note 39. The post-Vietnam era, in which Whitlam came to power, was one of five post-World War II waves of “declinist debates” in which the U.S. saw a substantial decrease in soft power. HEYDARIAN, *supra* note 33, at 6.

⁵⁷ Austl. Associated Press, *Obama Reassures Turnbull U.S.-Australia Alliance Will Transcend “Party Politics”*, THE GUARDIAN (Nov. 20, 2016, 4:41 PM), <https://www.theguardian.com/world/2016/nov/21/obama-reassures-turnbull-us-australia-alliance-will-transcend-party-politics>.

⁵⁸ *China Country Brief*, AUSTL. DEPT. OF FOREIGN AFF. & TRADE <https://www.dfat.gov.au/geo/china/china-country-brief#:~:text=China%20is%20Australia's%20largest%20two,per%20cent%20during%20this%20period> (last visited Apr. 2, 2022).

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ Tony Abbott, Prime Minister of Austl., Address to Parliament at Parliament House, Canberra (Nov. 17, 2014).

⁶² The Honorable Kevin Rudd, Asia Soc’y Pol’y Inst. <https://asiasociety.org/policy-institute/honorable-kevin-rudd> (last visited Mar. 31, 2022).

⁶³ *China Country Brief*, *supra* note 58.

⁶⁴ *Id.*

⁶⁵ AUSTL. DEPT. OF FOREIGN AFF. & TRADE, AUSTRALIA-U.S. FREE TRADE AGREEMENT (July 12, 2021).

⁶⁶ *China Country Brief*, *supra* note 58.

published a fabricated image of an Australian soldier cutting the throat of a young girl in Afghanistan.⁶⁷ The Chinese Government published the image in the wake of a comprehensive investigation by the Inspector-General of the Australian Defence Force, which found Australia's Special Forces had committed war crimes in Afghanistan.⁶⁸ Australia's Prime Minister demanded an apology for the fake image, but the Chinese Government refused and further accused Australia of barbarism.⁶⁹ The row came during a tumultuous period of trade tensions over Chinese-imposed tariffs and trade blocks on Australian wine, barley, and beef.⁷⁰ These tensions arose soon after Australia called for an investigation into the origins of the COVID-19 pandemic.⁷¹

Yet within Australia's internal political discourse, some apologists are willing to overlook bullying by China.⁷² These officials often invoke the excuse articulated by former Prime Minister Gough Whitlam, "Only the impotent are pure"—a phrase used to advocate opening relations with China in the 1970s.⁷³ In 2018, Australia's second most populous state, Victoria, independently signed onto China's Belt and Road Initiative to seek additional trade and infrastructure investment.⁷⁴ Victoria did not consult with the Department of Foreign Affairs, which held grave concerns

⁶⁷ See Shaimaa Khalil, *Australia Demands China Apologise for Posting "Repugnant" Fake Image*, BBC (Nov. 30, 2020), <https://www.bbc.com/news/world-australia-55126569> (The image included a caption that read, "don't be afraid, we are coming to bring you peace.").

⁶⁸ *Id.* The investigation found "credible evidence" of war crimes, specifically murder and abuse of detainees. The details of the Inspector General's report are not relevant to this paper. However, the prodigious investigation and reporting is of substantial pedagogical value, particularly as a case study of international criminal law, the practice of operations law, and the obligation to investigate suspected war crimes. See Paul Brereton, *Inspector-Gen. of the Austl. Defence Force Afg. Inquiry Rep.* (2020), <https://afghanistandinquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

⁶⁹ Samantha Maiden & Ben Graham, *China Doubles Down on Sick Doctored Image Over Alleged War Crimes in Afghanistan*, NEWS.COM.AU (Dec. 1, 2020, 12:24 AM), <https://www.news.com.au/national/politics/china-trolls-australia-with-sick-doctored-image/news-story/2f48f2199dfa76eb26c55b76d664cf23>.

⁷⁰ Khalil, *supra* note 67.

⁷¹ *Id.*

⁷² See Frank Yuan, *When China Lashed Out*, THE INTERPRETER (Dec. 17, 2020, 5:00 AM), <https://www.lowyinstitute.org/the-interpreter/when-china-lashed-out>.

⁷³ *Id.* In Whitlam's time, the phrase also implied that a compromise of principles may sometimes be necessary for political success.

⁷⁴ Josh Taylor, *China's Belt and Road Initiative: What is it and Why is Victoria Under Fire for Its Involvement?*, THE GUARDIAN (May 25, 2020, 2:28 PM), <https://www.theguardian.com/world/2020/may/25/chinas-belt-and-road-initiative-what-is-it-and-why-is-victoria-under-fire-for-its-involvement>.

for China's use of the agreement as a propaganda victory.⁷⁵ Instead Victoria's Premier lectured the Federal Government on improving relations with China.⁷⁶ The same Victorian Government held fast to its agreement amid more recent trade tensions, and even criticized its own Federal Government for "vilifying" China.⁷⁷ The Federal Government responded by creating legislation that enabled the Foreign Minister to cancel international agreements between Australian states and foreign powers.⁷⁸ In late April 2021, Foreign Minister Marise Payne used this legislative power to cancel the Belt and Road Initiative in Victoria.⁷⁹

Shortly before these events, the Northern Territory Government, in a less populated but regionally significant area,⁸⁰ signed a ninety-nine year lease of its Port of Darwin with the large Chinese firm Landbridge, a private company with close connections to the Chinese Communist Party.⁸¹ The Royal Australian Navy and the U.S. military use the Port of Darwin heavily, particularly for the U.S. Marine Rotational Force in Darwin.⁸² At the request of Landbridge, the Northern Territory granted statutory authority to the Chinese firm to board and search vessels in the port, despite strong opposition from the Federal Government.⁸³

⁷⁵ Anthony Galloway & Michael Fowler, *End Nears for Victoria's Belt and Road Deal Under Foreign Veto Laws*, THE AGE (Mar. 10, 2021, 6:56 PM), <https://www.theage.com.au/national/victoria/end-nears-for-victoria-s-belt-and-road-deal-under-foreign-veto-laws-20210310-p579lf.html>.

⁷⁶ *See id.*

⁷⁷ Taylor, *supra* note 74.

⁷⁸ *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth) s 3 [hereinafter *Australia's Foreign Relations Act*].

⁷⁹ Evan Young, *Federal Government Rips Up Victoria's Controversial Belt and Road Agreements with China*, SBS NEWS (Apr. 21, 2021, 8:29 PM), <https://www.sbs.com.au/news/federal-government-rips-up-victoria-s-controversial-belt-and-road-agreements-with-china/1f2b62d7-6304-4103-a3b7-0be2feca29fa>.

⁸⁰ *See Bombing of Darwin*, AUSTL. WAR MEM'L, <https://www.awm.gov.au/collection/E84294> (last visited Jan. 24, 2022) (The Port of Darwin sits on the northern tip of Australia, near the city of Darwin. *Id.* It is the largest city on Australia's vast, but largely uninhabited northern coast, and the only area in Australia to have been attacked during World War II.).

⁸¹ *See* Jano Gibson, *Consider Reclaiming Darwin Port from Chinese Company Landbridge, Committee Advises Federal Government*, ABC NEWS (Mar. 17, 2021, 7:13 AM), <https://www.abc.net.au/news/2021-03-17/government-urged-consider-reclaiming-ownership-darwin-port/13256968> [hereinafter *Consider Reclaiming Darwin Port*]. Public reporting indicates Landbridge is privately held, but its principal owner holds close ties to the Chinese Communist Party. *See* Angus Grigg, *China's "Invisible Billionaire" – The Port of Darwin's New Owner*, AUSTL. FIN. REV. (Nov. 23, 2015, 12:15 AM), <https://www.afr.com/world/chinas-invisible-billionaire--the-port-of-darwins-new-owner-20151122-gl4rtn> (discussing public reports indicating that Landbridge is privately held, its principal owner holds close ties to the Chinese Communist Party).

⁸² *Consider Reclaiming Darwin Port*, *supra* note 81.

⁸³ *See Ports Management Act 2015* (N. Terr.) s 40 pt 5 div 2 (Austl.) (The authority is granted to the "port operator" in the legislation, which is the title given to

These and other events illustrate that the U.S. cannot take its alliance with Australia for granted. During this crucial time of strategic competition, China and the U.S. both seek more influence in Australia.⁸⁴ China often finds marginal gains in this effort through transactional diplomacy and economic bullying.⁸⁵

C. Australia–U.S. Alliance: A Matter of Strategic Importance

Amid this web of competing interests, and in the face of increasing strategic competition between the U.S. and China, Australia has stood firm for the rule of law, even in strong opposition to China where necessary. Just one of many recent examples includes a March 23, 2021, statement wherein Australia unequivocally condemned “severe human rights abuses” in China.⁸⁶ Australia has also conspicuously reaffirmed that it is “a staunch and active ally of the United States.”⁸⁷ In Australia’s Defence Strategic Update for 2020—Australia’s version of the National Defense Strategy—the Minister for Defence stated that Australia remains committed to “deepen” its alliance with the U.S.⁸⁸ Operationally, the U.S. and Australia have implemented a series of force posture initiatives to increase U.S. military presence and enhance air cooperation.⁸⁹ These measures are built on a robust 2014 Force Posture Agreement.⁹⁰

Tactically, service-members from the United States and Australia maintain exceptionally close ties, created through deployments, training,

Landbridge in a separate Northern Territory Gazette. Naturally, U.S. vessels would assert sovereign immunity where appropriate.)

⁸⁴ See Amy Searight, *Countering China’s Influence Operations: Lessons from Australia*, CSIS (May 8, 2020), <https://www.csis.org/analysis/countering-chinas-influence-operations-lessons-australia> (discussing America’s regional leadership in Australia and China’s rising influence in Australia).

⁸⁵ *Id.* It should also be noted that the more conservative Federal Government passed legislation in 2020 to give authority to the Minister for Foreign Affairs to cancel agreements between state or territory governments and foreign entities. See *Australia’s Foreign Relations Act*, *supra* note 78 (The Minister has not yet exercised this authority but is actively considering several agreements across Australia.).

⁸⁶ See Marise Payne, *Joint Statement on Human Rights Abuses in Xinjiang*, AUSTL. MINISTER FOREIGN AFF. (Mar. 23, 2021), <https://www.foreignminister.gov.au/minister/marise-payne/media-release/joint-statement-human-rights-abuses-xinjiang>.

⁸⁷ AUSTL. GOV’T DEP’T OF DEF., 2020 STRATEGIC UPDATE 22 (2020).

⁸⁸ *Id.* at 7.

⁸⁹ See *United States Force Posture Initiatives*, AUSTL. GOV’T DEP’T OF DEF., <https://www.gov.au/Initiatives/USFPI/> (last visited Jan. 24, 2022) (The Force Posture Initiatives also include major exercises, marine rotational presence, and the creation of U.S. fuel storage facilities.).

⁹⁰ The Force Posture Agreement Between the Government of Australia and the Government of the United States of America, Austl.–U.S., Aug. 12, 2014, [2015] ATS 1.

and exchange positions.⁹¹ Although there is no permanent U.S. base on Australian soil today, thousands of U.S. service members visit Australia every year on exercises and temporary rotations, and just under 1,000 U.S. Department of Defense (DOD) personnel are permanently stationed across the country under the Austl.–U.S. SOFA.⁹² A similar number of Australian Defence Force personnel visit the U.S. for similar purposes but without the protection of a SOFA.⁹³

II. STATUS OF FORCES AGREEMENTS — THE GATEWAY FOR DEFENSE COOPERATION

A. *Legal Foundation*

Broadly speaking, SOFAs define the legal status, protections, and privileges of military personnel, property and activities in a foreign country.⁹⁴ The U.S. has some form of SOFA with more than 100 countries around the world.⁹⁵ More than half are with NATO partners or modeled after the NATO SOFA.⁹⁶ Others come in the form of diplomatic notes, visiting forces or defense cooperation agreements.⁹⁷ Each of these different types of arrangements primarily seek to protect U.S. DOD personnel and ensure freedom to conduct DOD activities without undue restraint from host nation law.⁹⁸ Although SOFAs cover a wide variety of subjects, the

⁹¹ *U.S. Relations with Australia*, U.S. DEP'T OF STATE (Jan. 21, 2020), <https://www.state.gov/u-s-relations-with-australia/>.

⁹² See Christian Senyk, *Detachment Provide Support for Servicemembers Across Australia LT COL Troy Saechao*, DVIDS (Aug. 9, 2019), <https://www.dvidshub.net/video/752223/detachment-provide-support-servicemembers-across-australia-lt-col-troy-saechao> (discussing U.S. service members' presence in Australia and what services they provide); see generally Agreement Between the Government of the Commonwealth of Australia and the Government of the United States of America Concerning the Status of United States Forces in Australia, Austl.–U.S., May 9, 1963, T.I.A.S. No. 5349, 469 U.N.T.S. 55.

⁹³ See *Australia-US Defence Relationship*, AUSTR. IN THE USA, <https://usa.embassy.gov.au/defence-cooperation> (last visited Jan. 29, 2022).

⁹⁴ INT'L SEC. ADVISORY BD., REPORT ON STATUS OF FORCES AGREEMENTS 1–2 (2015), <https://2009-2017.state.gov/documents/organization/236456.pdf> [hereinafter REPORT ON STATUS OF FORCES AGREEMENTS].

⁹⁵ *Id.* at 1.

⁹⁶ *Id.*

⁹⁷ See *id.* at 2–3 (listing the following types of SOFA-like agreements that exist around the world: (1) NATO SOFA, (2) bilateral agreements, (3) exchange of diplomatic notes, (4) defense cooperation agreements, (5) visiting forces agreements, (6) visiting forces acts, (7) UN model, and (8) no protection).

⁹⁸ *Id.* at 1–2.

most controversial subject has historically been criminal jurisdiction, an issue that strikes at the heart of territorial sovereignty.⁹⁹

It is no accident that, with the notable exception of the NATO SOFA, these agreements are not reciprocal.¹⁰⁰ This is primarily because the U.S. has a strong interest in controlling its borders, controlling foreign government activities within those borders, and preserving jurisdiction over crimes that occur within those borders.¹⁰¹ These interests are embodied by customary international law and have been articulated by the U.S. Supreme Court in Chief Justice John Marshall's expression of the territorial principle of jurisdiction in *Schooner Exchange v. McFaddon*.¹⁰² Marshall wrote, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."¹⁰³ Conversely, the principle of the "law of the flag," derived from maritime law, holds that a sending state retains jurisdiction over its forces in any location.¹⁰⁴ These two principles inevitably conflict and require compromise between the sending and receiving states. In recognition of this need to compromise, and notwithstanding the territorial principle, Marshall also wrote in *Schooner Exchange* that a host nation may be understood to "cede a portion of his territorial jurisdiction . . . where he allows the troops of a foreign prince to pass through his dominion."¹⁰⁵ Marshall's opinion from *Schooner Exchange* and more recent commentary acknowledge that receiving and sending states share common defense interests that necessitate a harmonizing of conflicting jurisdictional interests.¹⁰⁶

⁹⁹ SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 43 (1971).

¹⁰⁰ See 32 C.F.R. § 151.6 (1996) (noting that nothing abridges the U.S. from doing what it needs to safeguard its own security). Some reciprocity exists in visiting forces agreements with, for example, Israel and Singapore. See REPORT ON STATUS OF FORCES AGREEMENTS, *supra* note 94, at 25. However, these "counterpart agreement[s]" do not take precedence over inconsistent U.S. federal or state law. *Id.* at 6; *but see* United States v. Belmont, 301 U.S. 324, 332 (1937) (stating that the U.S. laws and policies do not have extraterritorial authority except when it comes to its own citizens).

¹⁰¹ *Id.*

¹⁰² *Schooner Exch. v. McFaddon*, 11 U.S. 116, 137 (1812).

¹⁰³ *Id.* at 136.

¹⁰⁴ LAZAREFF, *supra* note 99, at 9.

¹⁰⁵ *Schooner Exch.*, 11 U.S. at 139. Some commentators argue that Marshall is expressly adopting, in *dicta*, the law of the flag principle, as an exception to the territorial principle. See LAZAREFF, *supra* note 99, at 14. That view seems to be the minority. *Id.* at 15 (This Article focuses on the implicit requirement to harmonize conflicting interest, which is accomplished through bilateral agreements.).

¹⁰⁶ See *Schooner Exch.*, 11 U.S. at 136; *see also* VLADIMIR ATANASOV ET AL., THE HANDBOOK OF THE LAW OF VISITING FORCES 170 (Dieter Fleck 2d ed. 2018) (2001).

B. Historical Background—The Status of U.S. Forces and Reciprocity

Jurisdictional interests between receiving and sending states were not often harmonized prior to 1914, primarily because friendly foreign visits were rare.¹⁰⁷ During World War I, the U.S. argued for exclusive jurisdiction of its forces under the law of the flag.¹⁰⁸ Most likely due to its relative bargaining power, the U.S. succeeded in obtaining exclusive jurisdiction in France, but not in the United Kingdom.¹⁰⁹ During World War II, as the UK Government became more desperate, the U.S. did obtain exclusive jurisdiction for its forces on UK soil.¹¹⁰ For all other sending states, the United Kingdom imposed its *Allied Forces Act*, which generally withheld jurisdiction for criminal offenses.¹¹¹ Similarly, the U.S. gave special concessions to the United Kingdom during World War II, but did not provide similar protection to other states.¹¹²

At the conclusion of World War II, some commentators noted that an aggregated analysis of jurisdictional agreements shows that states tended to articulate positions in terms of the territorial jurisdiction or law of the flag principles.¹¹³ However, these positions were flexible, and agreements depended primarily on the relative bargaining power of the parties.¹¹⁴ Following World War II, agreements continued to be driven by political and economic power of the parties.¹¹⁵ Thus, after World War II, the relative strength of the U.S. allowed it to “have its cake and eat it too.”¹¹⁶ The bilateral agreements created after the NATO SOFA seek to maximize U.S. privileges and protections overseas, while granting none to allies and partners in the U.S.¹¹⁷

¹⁰⁷ See LAZAREFF, *supra* note 99, at 7.

¹⁰⁸ *Id.* at 11.

¹⁰⁹ MANUEL E. F. SUPERVIELLE, *The Legal Status of Foreign Military Personnel in the United States*, in THE ARMY LAW 3, 8 (John B. Jones, Jr. ed., 1994).

¹¹⁰ Norman Bentwich, *The U.S.A. Visiting Forces Act, 1942*, 6 MOD. L. REV. 68, 70 (1942).

¹¹¹ Allied Forces Act 1940, 3 & 4 Geo. 6 c. 51 (U.K.). Serious common law offenses, such as rape and murder, were under the U.K.’s jurisdiction. See also Roland J. Stanger, *Criminal Jurisdiction Over Visiting Armed Forces*, 52 INT’L L. STUD. 141, 141 n.3, 155 (1958).

¹¹² See LAZAREFF, *supra* note 99, at 25 (As an act of symbolism, rather than necessity, the U.S. provided exclusive criminal jurisdiction to the UK for British forces in the U.S.).

¹¹³ *Id.* at 28.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 45.

¹¹⁶ SUPERVIELLE, *supra* note 109, at 25.

¹¹⁷ See LAZAREFF, *supra* note 99, at 44.

C. Reciprocity Policy—An Increasingly Sensitive Matter

Although there is no authoritative document clearly outlining U.S. policy on reciprocity, the historical record indicates the U.S. has generally been inflexible in its bilateral SOFA negotiations.¹¹⁸ Shortly after the dissolution of the Soviet Union, there was some indication of change.¹¹⁹ In 1989, the U.S. Senate considered a bill that included a provision granting authority to the President to reciprocate SOFA rights for particular sending state forces.¹²⁰ The bill was defeated for reasons unrelated to the SOFA provision.¹²¹ However, in advocating for the bill, the U.S. Senate Committee on Foreign Relations argued that SOFA reciprocity would facilitate additional base rights agreements with new partners.¹²² Shortly after the bill was drafted, some commentators predicted a softened policy toward reciprocity.¹²³ However, no further movement followed the bill's defeat.¹²⁴

Years later, the U.S. Department of State completed a comprehensive report in 2015 on SOFAs worldwide and similarly advocated for more flexibility in offering SOFA reciprocity.¹²⁵ The Department of State argued that offering reciprocity would substantially improve the negotiating climate for future SOFAs and other military agreements with allies.¹²⁶ The report held that “the absence of reciprocity has become a sensitive issue.”¹²⁷ While recognizing the difficulty of implementing a reciprocal SOFA in U.S. law, the report stated that

¹¹⁸ *Id.* at 43.

¹¹⁹ Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 BOST. U. INT'L L.J. 45, 136 (1995).

¹²⁰ S. 1347, 101st Cong. (1989). Whether the proposed bill would have survived a constitutional challenge is beyond the scope of the present Article. The point here is that at least some members of Congress were agreeable to granting broad reciprocity in the recent past.

¹²¹ SUPERVIELLE, *supra* note 109, at 24. Supervielle notes that Australia, among others, requested reciprocity and that this request helped drive the draft bill. *Id.* at 3. The historical record on an Australian request for reciprocity is very scarce, but the initial term of the Austl.–U.S. SOFA would have expired in 1988, which may have been a catalyst for consideration of a new, reciprocal agreement. Obviously, it was never completed, and indeed, there is no evidence of a draft reciprocal SOFA from that time. After extensive research, this author could not find an explanation in the historical record.

¹²² *Id.*

¹²³ *See id.* at 25 (stating that the changes in geopolitics make it more profitable for the U.S. to pursue reciprocal SOFA arrangements).

¹²⁴ *See id.* (indicating that the last time such an agreement was considered was in 1989).

¹²⁵ REPORT ON STATUS OF FORCES AGREEMENTS, *supra* note 94, at 6.

¹²⁶ *Id.*

¹²⁷ *Id.* at 23. (The reference is not directed at Australia in particular, but rather on an aggregate effect observed by the Department of State from various SOFA and SOFA-like negotiations.).

reciprocity “could help assuage host government concerns about incursions on sovereignty.”¹²⁸ Between and after these two noteworthy events—the 1989 draft bill and the 2015 report—the United States has continued to hold inflexible and non-reciprocal SOFAs with its closest allies across the Indo-Pacific.¹²⁹

III. AUSTL.–U.S. SOFA — THE START, NOT THE END

A. Background

The Australian and U.S. governments have over 200 extant legal agreements between their respective defense agencies.¹³⁰ Most of these agreements are targeted at a narrow set of activities, facilities, or positions.¹³¹ All of the agreements reference the legal foundation of the Australian–U.S. alliance, a 1952 mutual security assistance treaty known as the “ANZUS Treaty.”¹³² The ANZUS Treaty declares that each party will act to meet any armed attack on the other.¹³³ It has only been invoked once in its long history—following the attacks in the U.S. on September 11, 2001—but remains a binding agreement today.¹³⁴ The Austl.–U.S. SOFA is second only to the ANZUS Treaty in significance and chronology.¹³⁵

The Austl.–U.S. SOFA came into force in 1963 and remains unchanged since that date. It is often described as a comprehensive, bilateral agreement, modeled after the NATO SOFA,¹³⁶ excepting that it

¹²⁸ *Id.* at 24.

¹²⁹ BEN DOLVEN & BRUCE VAUGHN, *INDO-PACIFIC STRATEGIES OF U.S. ALLIES AND PARTNERS: ISSUES FOR CONGRESS* (2020).

¹³⁰ Telephone interview with Jim Waddell, Colonel in the Austl. Army, Dir. Legal at Headquarters Operations Command, in Canberra, Austl. (Oct. 6, 2020).

¹³¹ *Id.*

¹³² Security Treaty between Australia, New Zealand, and the United States of America, Apr. 29, 1952, T.I.A.S. No. 2493, 131 U.N.T.S. 83 [hereinafter ANZUS Treaty]. The ANZUS Treaty included New Zealand until the U.S. suspended its obligations to New Zealand in 1986, because of New Zealand’s strict prohibition of nuclear submarines. *Security Treaty Between Australia, New Zealand, and the United States of America*, DEP’T OF FOREIGN AFF. TRADE, <https://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/4D4287DDC882C3D6CA256B8300007B4B> (last visited Feb. 21, 2022). However, by exchange of letters on 11 August 1986, Australia and the U.S. reaffirmed their mutual commitment to each other under the Treaty. *Id.*

¹³³ ANZUS Treaty, *supra* note 132, art. IV.

¹³⁴ Peter J. Dean, *ANZUS Invoked: September 11 and Interpreting the Treaty*, AUSTL. OUTLOOK (Sept. 11, 2021), <https://www.internationalaffairs.org.au/australianoutlook/anzus-invoked-september-11-and-interpreting-the-treaty/>.

¹³⁵ *See generally* Austl.–U.S. SOFA, *supra* note 43.

¹³⁶ SUPERVIELLE, *supra* note 109, at 12 n.56.

is not reciprocal. The catalyst for the Austl.–U.S. SOFA was two-fold: (1) in 1956 the U.S. Congress reported a preference for creating a SOFA before sending regularly stationed U.S. forces into any country,¹³⁷ and (2) in 1960 the U.S. Navy sought to create a naval station in Western Australia as part of its global communications network.¹³⁸ The U.S. approached Australia in 1960 with requests for both a SOFA and permission to build the new U.S. Navy installation.¹³⁹ The Australian Government was initially uninterested, but in early March of 1963 the issue became central to Parliamentary elections.¹⁴⁰ After years of delay and inertia, the Austl.–U.S. SOFA was negotiated and completed over the course of one month in April of 1963.¹⁴¹

Among other things, the Austl.–U.S. SOFA creates generous entry privileges for U.S. DOD personnel,¹⁴² and protects U.S. personnel from various taxes, import, and custom duties and other domestic requirements.¹⁴³ Further, it ensures the U.S. Military maintains primary criminal jurisdiction for offences committed in the course of duty or where the victims are also U.S. DOD personnel.¹⁴⁴ Australian negotiators frequently emphasized that Australia would not place the U.S. “in a dominant position,” as in Japan and Korea.¹⁴⁵ However, a side-by-side

¹³⁷ Interview by Hanno Weisbrod with D.W. Douglass, Captain in the U.S. Navy, U.S. Sending Officer, in Austl. (Jan. 1966).

¹³⁸ See *id.* The Naval station would also become the subject of an international agreement. See *Naval Communication Station Harold E. Holt (North West Cape)*, NAUTILUS INST. FOR SEC. & SUSTAINABILITY, <https://nautilus.org/publications/books/australian-forces-abroad/defence-facilities/naval-communication-station-harold-e-holt-north-west-cape/> (last visited Feb. 25, 2022) (For many years, the Naval Station was a significant U.S. installation. Today, the station still functions but principally through remote means with only Australian contractors on site.).

¹³⁹ Interview with D.W. Douglass, *supra* note 137.

¹⁴⁰ Hanno Weisbrod, *Australia’s Security Relations with the United States 1957–1963 (1969)* (Ph.D. dissertation, Australian National University) (on file with Australian National University Open Research Library).

¹⁴¹ Interview with D.W. Douglass, *supra* note 137.

¹⁴² Austl.–U.S. SOFA, *supra* note 43, art. 1. Civilians do require a passport, but not a visa. *Passport & SOFA Requirements*, YOKOTA AIR BASE, <https://www.yokota.af.mil/About-Us/Units/337th-Air-Support-Flight/337-ASUF-Newcomers/Passport-SOFA-Requirements/#:~:text=However%2C%20U.S.%20Government%20civilian%20employees%20and%20all%20dependents,%28s%29%20and%20official%20passport%20%28s%29%20with%20SOFA%20stamp> (last visited Mar. 19, 2022).

¹⁴³ Austl.–U.S. SOFA, *supra* note 43, art. 3.

¹⁴⁴ *Id.* at art. 8(1)(a). More specifically, it grants primary jurisdiction to “the military authorities of the United States” over “persons subject to the military law of the United States.” *Id.* But this jurisdiction is limited to “offences solely against the property or security of the United States, or offences solely against the person or property of” U.S. DOD personnel in Australia. *Id.* art. 8(3)(a)(i). Additionally, it covers offenses “arising out of any act or omission done in the performance of official duty.” *Id.* art. 8(3)(a)(ii).

¹⁴⁵ Interview by Hanno Weisbrod with Garfield Barwick, Chief Just. of the High Ct. of Austl., in Austl. (May 11, 1966) [hereinafter Interview with Garfield Barwick].

comparison of the criminal jurisdiction provisions of the Austl.–U.S. SOFA with those in Japan and Korea reveal remarkable similarities.¹⁴⁶ Indeed, the single difference in criminal jurisdiction provisions is that the U.S. may not impose the death penalty in Australia.¹⁴⁷

1. Negotiation of 1963

Sir Garfield Barwick, then Minister for External Affairs, was the lead Australian negotiator for the Austl.-U.S. SOFA.¹⁴⁸ Less than one year after the Austl.–U.S. SOFA came into force, Sir Garfield became Australia’s Chief Justice of the High Court (equivalent to the U.S. Supreme Court), a position he held for seventeen years.¹⁴⁹ Sir Garfield described the Austl.–U.S. SOFA negotiation as “quite a wrangle,” with a flurry of messages passing between the two sides every day of April 1963.¹⁵⁰ The Australians insisted on reciprocity in these negotiations and the U.S. negotiators did not object in any meaningful way.¹⁵¹ Indeed, the *travaux préparatoires* reveal that both sides assumed the Austl.–U.S.

¹⁴⁶ See Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan art. XVII, Jan. 9, 1960, 11 U.S.T. 1652, T.I.A.S. No. 4510; see also 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 United States Armed Forces in the Republic of Korea art. XXII, July 9, 1966, T.I.A.S. 6127.

¹⁴⁷ Austl.–U.S. SOFA, *supra* note 43, art. 8(7)(a). The express prohibition of the death penalty in Article 8 of the Austl.–U.S. SOFA is a product of Australia’s strong objection to the capital punishment, in general, but also to the historical experience of World War II, wherein the U.S. Army executed, by hanging, Private Eddie Leonski in 1942. PETER PIERCE, *Leonski, Edward Joseph (1917-1942)*, in 15 AUSTRALIAN DICTIONARY OF BIOGRAPHY (2006), <https://adb.anu.edu.au/biography/leonski-edward-joseph-10814>. (Leonski had been convicted at U.S. court-martial for the murder of three Melbourne women and remains the only individual to be executed on Australian soil by a foreign authority.).

¹⁴⁸ Interview with Garfield Barwick, *supra* note 145; see also Austl.–U.S. SOFA, *supra* note 43.

¹⁴⁹ *The Rt Hon Sir Garfield Barwick*, HIGH CT. OF AUSTL., <https://www.hcourt.gov.au/artworks/portraits-of-chief-justices/the-rt-hon-sir-garfield-barwick> (last visited Feb. 21, 2022). Sir Garfield is the longest serving Chief Judge of the High Court in Australian history. *Id.* As an interesting side note, Sir Garfield was instrumental in the dismissal of Prime Minister Gough Whitlam by taking the unorthodox step of advising the Governor-General on the legality of the dismissal. See 4. *The Crisis of 1974–1975*, PARLIAMENT AUSTL., https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/platpar/c04 (last visited Feb. 28, 2022).

¹⁵⁰ Interview with Garfield Barwick, *supra* note 145.

¹⁵¹ *Id.*

SOFA would apply in both countries.¹⁵² Ultimately, however, pressure within the Australian Government compelled negotiators to complete the Austl.–U.S. SOFA before the 1963 election.¹⁵³ This pressure, coupled with the difficulty of U.S. ratification, forced the Australians to accept a promise for future reciprocity, rather than a reciprocal agreement that year.¹⁵⁴

B. Protocol — Reciprocity Reserved for Another Day

The Austl.–U.S. SOFA has one protocol, which came into force the same day as the Austl.–U.S. SOFA.¹⁵⁵ It deserves to be quoted in full:

The Government of the Commonwealth of Australia and the Government of the United States of America, having this day signed an Agreement concerning the Status of United States Forces in Australia, agree that at a future date they will enter into negotiations for the conclusion of a reciprocal agreement which would govern the status of the forces of each Government in the territory of the other.¹⁵⁶

The Austl.–U.S. SOFA was initially set to last for a term of twenty-five years but does not terminate until either side provides 180 days written notice.¹⁵⁷ It has now been nearly sixty years since the Austl.–U.S. SOFA's Protocol came into force, but the parties have made no progress¹⁵⁸ toward the commitment for a reciprocal agreement.¹⁵⁹

¹⁵² *Id.* (U.S. negotiators frequently declined certain provisions based on the belief that U.S. authorities would not permit it for Australian personnel in the U.S.).

¹⁵³ Interview with D.W. Douglass, *supra* note 137.

¹⁵⁴ *Id.*

¹⁵⁵ Austl.–U.S. SOFA, *supra* note 43, Protocol.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* art. 24(2).

¹⁵⁸ It may be noted that in 1995 the two Governments entered a Chapeau Agreement, by way of diplomatic notes. See *Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the United States of America Concerning Certain Mutual Defence Commitments*, [1995] ATS 35 (entered into force 1 December 1995). The Chapeau Agreement is intended to supplement the Austl.–U.S. SOFA by creating more specific terms of civil liability, but it is not relevant to the Protocol.

¹⁵⁹ In the mid-1990s there was some reporting about efforts to create a “counterpart agreement” with Australia, similar to that created with Israel, Singapore and others. See Erickson, *supra* note 119, at 134. This may have reference to the creation of the Chapeau Agreement, created through exchange of notes in 1995, referenced above. However, there is no other indication in the historical record of U.S. efforts to create a reciprocal agreement which would grant protection to Australian Forces under U.S. law.

1. Non-reciprocity — The Lasting Approach

The Australian Government does not appear to be ostensibly offended by the non-reciprocity, but the effect of non-reciprocity imposes burdens of both tangible and symbolic significance. The absence of a reciprocal SOFA requires Australians to, among other things, obtain a Foreign Government Official or “A-2” Visa to secure entry to the U.S. for training, exercises, or assignments.¹⁶⁰ Australian Force members are also fully subject to U.S. criminal jurisdiction while in the U.S., with no Australian policing authority.¹⁶¹ Australia has a strong interest in maintaining jurisdiction over its personnel and the extraterritorial application of its *Defence Force Discipline Act 1982* (Cth), which operates similarly to the Uniform Code of Military Justice.¹⁶² Non-reciprocity is also inconsistent with the treatment Australia receives from many of its other allies.¹⁶³ These are just some examples of concrete privileges and protections that U.S. DOD receives in Australia, but Australians do not receive in the U.S.¹⁶⁴

On a less tangible, but perhaps more significant level, a non-reciprocal SOFA also tends to feed into a latent sentiment¹⁶⁵ that resents U.S. exploitation of superior bargaining power. The sentiment expressed long ago by the great Australian scholar and historian Gordon Greenwood remains relevant today: “Australians are inclined to wonder whether . . .

¹⁶⁰ Telephone Interview with Elizabeth Power, Country Consular Coordinator for the U.S. Mission to Austl., U.S. Consulate in Sydney, Austl. (Dec. 10, 2020). The A-2 Visa requires significant lead time and fees, and often results in Australian Force Personnel missing out on training or operational visits to the U.S. due to insufficient advance time. *Id.*

¹⁶¹ REPORT ON STATUS OF FORCES AGREEMENTS, *supra* note 94, at 23 (noting that under U.S. SOFA agreements host forces in the U.S. are fully subject to U.S. law).

¹⁶² See generally *Military Justice System*, AUSTL. GOV'T DEP'T OF DEF., <https://defence.gov.au/mjs/mjs.asp> (last visited Jan. 30, 2022). See also U.S. ARMY JUDGE ADVOCATE GENERAL'S SCHOOL, *THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE* 11 (1970).

¹⁶³ *Agreement Between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, signed 29 October 1998, [2005] ATS 12 (entered into force 27 May 2005) art 2; Press Release, Prime Minister of Australia, Reciprocal Access Agreement (Nov. 17, 2020), <https://www.pm.gov.au/media/reciprocal-access-agreement>; Agreement Between Japan and Australia Concerning the Facilitation of Reciprocal Access and Cooperation Between the Self-Defense Forces of Japan and the Australian Defence Force, Jan. 5, 2022, <https://www.mofa.go.jp/files/100283786.pdf>.

¹⁶⁴ Some practitioners have argued that the historical approach of relying on close diplomatic relations to resolve issues case-by-case has been sufficient. SUPERVIELLE, *supra* note 109, at 20. But others point out that legal ambiguity heightens the risk of disagreement and “bad feelings.” *Id.* at 14.

¹⁶⁵ Australia does not express the idea held by some countries that the U.S. is “behaving like a neocolonial superpower” in its insistence on receiving favorable jurisdiction but refusing to grant it to others. See *Id.* at 17. But the inequality does not go unnoticed.

[a]t times there has been a tendency in the United States to assume that the essential function of an ally . . . is to accept unquestioningly the American outlook.¹⁶⁶ In January 2021, Australia’s Leader of the Opposition harshly criticized the Australian Prime Minister for “pandering” to the U.S. in foreign policy.¹⁶⁷ He did this only months after Morrison conspicuously argued for Australia’s independence from U.S.-China competition.¹⁶⁸

Allies and partners of the U.S. accept non-reciprocal agreements because they determine it is worth the tradeoff. But arrangements of unilateral protection fail to provide two foundational elements of a strong alliance: (1) mutual respect¹⁶⁹ and (2) the symbolic recognition of equality among sovereign states.¹⁷⁰ In 2015, the Department of State expressed concern for these missing elements, and stated that, among other things, “the absence of reciprocity raises issues of pride and sovereignty.”¹⁷¹ Those issues present a barrier to a deeper, stronger alliance between the U.S. and Australia.

IV. THE STRATEGIC EFFORT TOWARD A RECIPROCAL AUSTL.–U.S. SOFA

A. *General Objections—Barriers on Both Sides*

Many U.S. officials hold general objections to SOFA reciprocity. Much has been written on this subject,¹⁷² and a series of arguments have been presented to oppose reciprocity in general. Most of these policy arguments do not apply or sound disingenuous when directed at Australia. For example, some commentators have argued non-reciprocal

¹⁶⁶ Gordon Greenwood, *Australia’s Triangular Foreign Policy*, 35 FOREIGN AFF. 689, 697 (1957).

¹⁶⁷ Stephen Dziedzic, *Labor Leader Anthony Albanese Accuses Scott Morrison of Pandering to Donald Trump*, ABC NEWS (Jan. 19, 2021, 8:33 PM), <https://www.abc.net.au/news/2021-01-19/albanese-calls-for-australia-to-be-assertive-in-us-relations/13071046>.

¹⁶⁸ Austl. Associated Press, *supra* note 34.

¹⁶⁹ Mutual respect is expressly identified by the National Defense Strategy as foundational to strengthening alliances, one of the distinct lines of effort in strategic competition. NATIONAL DEFENSE STRATEGY, *supra* note 4, at 9.

¹⁷⁰ See Jaime M. Gher, *Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to be Learned from the United States-Japan Agreement*, 37 U.S.F. L. REV., 227, 236–37 (2002) (explaining how the U.S. justifies the inequality of states that results from the implementation of a unilateral reciprocal agreement).

¹⁷¹ REPORT ON STATUS OF FORCES AGREEMENTS, *supra* note 94, at 23.

¹⁷² See, e.g., Youngjin Junt & Jun-Shik Hwang, *Where Does Inequality Come From*, 18 AM. U. J. INT’L L. REV. 1103 (2003) (arguing that a reciprocal NATO SOFA, vice non-reciprocal Korean and Japan SOFAs is evidence of American discrimination against Asians).

agreements are justified by the fact that the U.S. sends far more personnel overseas than allied countries send to the U.S.¹⁷³ This argument may have some persuasive value in countries with large U.S. installations, such as Japan or Korea, but there are no significantly large U.S. installations in Australia.¹⁷⁴ Further, in 2018 alone the U.S. consulates in Australia issued approximately 4,000 A-2 visas to Australian Defence Force personnel for official travel to the U.S.¹⁷⁵ That number represents near parity to the number of U.S. forces that entered Australia the same year.¹⁷⁶

Another argument—aimed at criminal jurisdiction—holds that there exists a disparity in perceived fairness between the two legal systems.¹⁷⁷ The argument essentially advances the idea that U.S. courts are more likely to provide a fair trial; therefore, foreign forces in the U.S. have less need for jurisdiction.¹⁷⁸ Aside from the obvious counterargument that foreign forces may prefer to be tried at home, there is no disparity for Australians. Australian criminal law and procedures generally meet or exceed U.S. standards of fair trial.¹⁷⁹

However, apart from these and other less persuasive arguments, two common objections have direct application to Australia: (1) the extreme difficulty of implementing a SOFA in U.S. law, and (2) the risk that creating a reciprocal SOFA with Australia will be a catalyst for other allies to request similar treatment.¹⁸⁰

B. SOFAs — *Binding in the U.S.*

The U.S. Constitution includes a specific Treaty Clause at Article II, Section 2, which grants power to the President to make treaties, “provided two[-]thirds of the Senators present concur.”¹⁸¹ The barrier of

¹⁷³ SUPERVIELLE, *supra* note 109, at 15.

¹⁷⁴ *Contra* David Vine, *Not Just About Subs, AUKUS Expands U.S. Military Footprint in Australia, Too*, RESPONSIBLE STATECRAFT (Sept. 20, 2021), <https://responsiblestatecraft.org/2021/09/20/not-just-about-subs-aukus-expands-us-military-footprint-in-australia-too/>.

¹⁷⁵ Telephone Interview with Elizabeth Power, Country Consular Coordinator for the U.S. Mission to Austl., U.S. Consulate in Sydney, Austl. (Dec. 10, 2020).

¹⁷⁶ This excludes the large number of U.S. personnel (sometimes as high as 20,000) that visit on a bi-annual basis (not in 2018) for the multilateral exercise in Australia known as Talisman Sabre. Telephone Interview with Colonel Raymond Powell, U.S. Def. Attaché to Austl., in Canberra, Austl. (July 1, 2020).

¹⁷⁷ *See* JOHN WOODLIFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW* 182 (1993).

¹⁷⁸ *See id.*

¹⁷⁹ *See generally* Major R. Scott Adams, U.S. Dep’t of Def. Country Law Study: Australia (Dec. 2020) (unpublished manuscript) (on file with author).

¹⁸⁰ *See* SUPERVIELLE, *supra* note 109, at 14–15.

¹⁸¹ U.S. CONST. art. II, § 2.

two-thirds Senate concurrence has famously defeated many significant treaties throughout U.S. history, including the Versailles Treaty, the Nuclear Test-Ban Treaty,¹⁸² and the United Nations Convention on the Law of the Sea,¹⁸³ among others. The only SOFA to have run through the Treaty Clause is the NATO SOFA.¹⁸⁴

1. NATO SOFA — A Rare Example

President Dwight D. Eisenhower presented the NATO SOFA to the U.S. Senate at an unusual time in U.S. history.¹⁸⁵ The U.S. had recently fought in the Korean War and had just begun its policy of “active diplomacy . . . in meeting the threat of Soviet power.”¹⁸⁶ Shortly after the completion of the NATO Treaty, but before the 1949 Geneva Conventions were ratified, Eisenhower presented the NATO SOFA to the Senate in 1953.¹⁸⁷ A minority of Senators were reluctant to support the NATO SOFA, including Senator John W. Bicker of Ohio.¹⁸⁸ After watching the Senate deliberate with some angst, Eisenhower sent a public letter to the Senate on July 14, 1953.¹⁸⁹ The letter, written personally by the former Supreme Allied Commander, stated that failure to provide a timely ratification “could undermine the entire United States military position in Europe.”¹⁹⁰ One day later the Senate voted in favor of ratification, 72-15.¹⁹¹

The NATO SOFA differs significantly from the Austl.–U.S. SOFA in that the NATO SOFA is multilateral.¹⁹² Further, it must be noted that the NATO SOFA did not establish precedent for future SOFAs, and indeed, many commentators note it was instead “a sharp break from

¹⁸² See Sen. Jon Kyl, Maintaining “Peace Through Strength”: A Rejection of the Comprehensive Test Ban Treaty, 37 *Harv. J. on Legis.* 325, 325 (2000).

¹⁸³ Roncevert Ganon Almond, *U.S. Ratification of the Law of the Sea Convention*, THE DIPLOMAT (May 24, 2017), <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>.

¹⁸⁴ Although it is difficult to state with confidence, the author’s research indicates the NATO SOFA is also the only SOFA to have been submitted to the Senate for ratification.

¹⁸⁵ See 83 CONG. REC. 8779 (1953) (letter from President Eisenhower to Senator Knowland) [hereinafter Congressional Record].

¹⁸⁶ Arthur H. Dean, *The Bricker Amendment and Authority Over Foreign Affairs*, 32 FOREIGN AFF. 1, 3–5 (1953).

¹⁸⁷ See Congressional Record, *supra* note 185.

¹⁸⁸ See *id.* Senator Bicker was not fully opposed to the SOFA as a whole, but rather wanted a robust set of reservations to accompany the ratification.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 99 CONG. REC. D508 (daily ed. July 15, 1953).

¹⁹² R. CHUCK MASON, CONG. RSCH. SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1–2 (2012).

previous practice.”¹⁹³ The resolution of ratification included some reservations, often referred to as the “sense of the Senate.”¹⁹⁴ The reservations included an attempt to prevent any inference of precedent from the shared criminal jurisdiction provisions (“Article VII do[es] not constitute a precedent for future agreements.”).¹⁹⁵ Some commentators have relied on this reservation to argue it is a bar to reciprocity,¹⁹⁶ but a close reading does not support such a broad conclusion. In 2015, the U.S. Department of State expressly rejected the idea that the Senate resolution bars future reciprocity,¹⁹⁷ and further, the Austl.–U.S. SOFA Protocol was created after the NATO SOFA resolution.¹⁹⁸ A reciprocal SOFA may be created again, but it is likely that treaty ratification will be more difficult today than it was in 1953.

2. Treaty Alternatives — Executive and Congressional Action

Notwithstanding Article II’s Treaty Clause of the U.S. Constitution, more than ninety percent of international agreements with the U.S. have been concluded through a nontreaty mechanism.¹⁹⁹ These non-treaty agreements come in one of two forms: (1) an executive agreement, concluded under the President’s plenary executive authority, or (2) a congressional-executive agreement.²⁰⁰ The second of these is generally understood as an international agreement which receives a form of approval from a majority of both houses of Congress.²⁰¹ It is beyond the scope of this Article to discuss the constitutional authorities and other nuances of these different forms of agreement.²⁰² However, stated simply, a SOFA concluded through executive agreement alone, unlike a treaty or congressional-executive agreement, will not have sufficient authority to

¹⁹³ WOODLIFE, *supra* note 177, at 172. It was, however, consistent with U.S.–UK relations during World War II.

¹⁹⁴ North Atlantic Treaty Status of Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. 2846 [hereinafter NATO SOFA]; *see also* 32 C.F.R. § 151.6 (2002).

¹⁹⁵ *Id.*

¹⁹⁶ REPORT ON STATUS OF FORCES AGREEMENT, *supra* note 94, at 24.

¹⁹⁷ *Id.*

¹⁹⁸ *See* Austl.–U.S. SOFA, *supra* note 43; *see also* NATO SOFA, *supra* note 194.

¹⁹⁹ *See* S. REP. NO. 106-71, at 58 (2001) [hereinafter SENATE REPORT].

²⁰⁰ John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 765 (2001).

²⁰¹ *Id.*

²⁰² For additional information on constitutional questions of international agreement implementation into U.S. law, *see* Oona Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

override conflicting U.S. law, including state criminal jurisdictions.²⁰³ Therefore, a reciprocal SOFA must be at least a congressional-executive agreement.

Congressional-executive agreements include three types: (1) congressional *ex ante* authorization, (2) legislation on foreign relations, and (3) *ex post* congressional approval of an international agreement negotiated by the President.²⁰⁴ *Ex post* congressional approval has long since supplanted the Treaty Clause as the primary method of concluding binding international agreements in U.S. law.²⁰⁵ However, the Senate has made clear through various advice and consent resolutions that agreements falling under certain subject matters must be submitted to the Senate under the Treaty Clause.²⁰⁶ Consequently, arms control and human rights agreements, for example, are usually submitted as a treaty, rather than congressional-executive agreement.²⁰⁷

Senate preference is not a constitutional barrier to enacting an agreement, but it may affect congressional review.²⁰⁸ In the 1990s in particular, the Senate consistently insisted on use of the Treaty Clause for “militarily significant” agreements.²⁰⁹ Since that time, a number of defense related agreements have been approved through the congressional-executive agreement process, including some unilateral SOFAs.²¹⁰ In the recent past, an average of more than 17 congressional-executive agreements have been made every year for defense purposes.²¹¹ Consistent with this normalized practice, the best vehicle for a reciprocal Austl.–U.S. SOFA would be by majority vote in both houses of Congress on *ex post* review of a concluded executive agreement.²¹²

²⁰³ See *United States v. Pink*, 315 U.S. 203, 230–31 (1942) (explaining the general view of experts on this area of law: that a sole executive agreement may override inconsistent state law, but only if the agreement falls within the President’s plenary powers). State criminal jurisdiction would not fall within that power. See U.S. CONST. art. II, § 2, cl. 1.

²⁰⁴ See Yoo, *supra* note 200, at 765–66.

²⁰⁵ See SENATE REPORT, *supra* note 199, at 42 tbl.2 (noting that between 1939 and 1989 the US entered 11,698 nontreaty agreements and 702 treaties, and the overwhelming majority of these identified nontreaty agreements took a statutory form).

²⁰⁶ See generally Philip R. Trimble & Alexander W. Koff, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 BERKELEY J. INT’L L. 55, 56 (1998).

²⁰⁷ See Yoo, *supra* note 200, at 806.

²⁰⁸ See SENATE REPORT, *supra* note 199, at 66 (explaining that the preference of Congress as to a particular agreement is one of several factors that should be considered when negotiating or signing a treaty).

²⁰⁹ See Trimble & Koff, *supra* note 206, at 62–63; see also Yoo, *supra* note 200, at 806.

²¹⁰ See Hathaway, *supra* note 202, at 1266–67.

²¹¹ *Id.* at 1260 tbl.2.

²¹² This conclusion may come because a Austl.–U.S. SOFA is not likely to be seen as “military significant” or because the Senate is now less protective of Defense agreements

C. Australian Domestic Law and the SOFA

Absent ratification or congressional-executive agreement, opponents of reciprocity correctly point out that many SOFA provisions will conflict with existing federal and state law.²¹³ Indeed, the same is true of the Austl.–U.S. SOFA in Australian law.²¹⁴ Under the Australian Constitution, treaties and international agreements fall within the authority of the Executive.²¹⁵ The exercise of this authority falls on the Department of Foreign Affairs, which has primary responsibility to negotiate and finalize treaties and other international agreements.²¹⁶ However, because the Australian Constitution separately gives Parliament the exclusive power to create legislation, international agreements do not have independent force of law within Australia.²¹⁷ They must be implemented through domestic legislation.²¹⁸

In some cases, Australia will implement an international agreement by adopting the full agreement into an act of Parliament, as it did with the Vienna Convention on Diplomatic Relations.²¹⁹ Alternatively, and far more commonly, Australia's Attorney-General and relevant ministers will review existing legislation for consistency with proposed treaties, followed by individually tailored amendments to impact statutes and regulations.²²⁰

than it was in the past. Even if the Senate were to insist on use of the Treaty Clause, it is by no means certain that one third of the Senate would reject a reasonably drafted reciprocal SOFA with Australia. It should also be noted that a congressional-executive agreement would not be a *fait accompli*. Should the present Austl.–U.S. SOFA be copied, without change, into a new reciprocal SOFA, it would have effect on a variety of federal and state statutes, including the Immigration and Nationality Act (INA). A congressional-executive agreement would be sufficient exception to 8 USC § 1182(a)(7)(B), for example, which requires nonimmigrants to be in possession of a valid passport and visa to enter the U.S. However, an amendment to 22 C.F.R. § 41 would also be required to ensure all appropriate Agencies acted consistent with the terms of the SOFA.

²¹³ SUPERVIELLE, *supra* note 109, at 15.

²¹⁴ See *Minister of State for Immigr & Ethnic Affs v. Teoh* (1995) 183 CLR 273, ¶ 25 (Austl.).

²¹⁵ See *Australian Constitution* s 61.

²¹⁶ *Treaties*, AUSTL. GOV'T DEP'T OF FOREIGN AFFS. & TRADE, <https://www.dfat.gov.au/international-relations/treaties#:~:text=> (last visited Feb. 26, 2022) (The power to enter into treaties is with the Department of Foreign Affairs and Trade.).

²¹⁷ *Teoh* (1995) HCA at 20.

²¹⁸ *Id.*

²¹⁹ See *Diplomatic Privileges and Immunities Act 1967* (Cth) (Austl.).

²²⁰ See *Statements of Compatibility*, AUSTL. GOV'T ATTY-GEN'S DEP'T, <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility#will-a-statement-of-compatibility-need-to-be-approved-by-the-attorneygenerals-department> (last visited Feb. 26, 2022).

In the case of the Austl.–U.S. SOFA, Australia did not adopt the full agreement into legislation.²²¹ Most, but not all of the Austl.–U.S. SOFA criminal jurisdiction provisions are implemented through the *Visiting Forces Act*, a federal statute, which was created shortly after the Austl.–U.S. SOFA came into force.²²² The *Defence Visiting Forces Act* creates a certification process to ensure Australian state authorities will not impose on U.S. primary criminal jurisdiction.²²³ On request of the relevant commander, the Attorney-General certifies to the appropriate Australian state court that the individual in question is to be transferred to foreign military authorities.²²⁴ Australian law is aided in this process in that, similar to the U.S. Supremacy Clause, the Australian Constitution makes Commonwealth legislation superior to contrary state or territory law.²²⁵ Other provisions of the Austl.–U.S. SOFA were implemented through minor amendments to Australia’s *Migration Regulations*, *Customs Tariff Act*, *Duties Act*, *Income Tax Assessment Act*, *National Transport Commission Regulations*, *Australian Postal Corporation Act*, and *Firearms Act*, among others.²²⁶ All this to say that, similar to the U.S. law, it is extremely difficult for the Australian Government to create an international agreement with domestic effect. But Australia has, nonetheless, fully implemented all Austl.–U.S. SOFA privileges and protections for U.S. forces in Australia.²²⁷ Similarly, the difficulty of implementing a reciprocal SOFA into US law is not a sufficient bar to preclude effort, especially where reciprocity may be obtained through the nontreaty mechanism, such as a congressional-executive agreement.²²⁸

²²¹ See Diplomatic Privileges and Immunities Act 1967 (Cth) (Austl.).

²²² See generally *Defence (Visiting Forces) Act 1963* (Cth) (Austl.) (The Defence (Visiting Forces) Act 1963 applies to dozens of foreign forces, not just the U.S., and it is drafted broadly to reflect this fact.).

²²³ See *id.* at § 18.

²²⁴ *Id.* § 12(4) (Notably, the foreign force must initiate the certification process, and under a strict reading of the legislation, state courts are not strictly bound by the Attorney-General’s certification.).

²²⁵ *Australian Constitution* s 109.

²²⁶ See *Migration Regulations 1994* (Cth) Div 5.6A; *Customs Tariff Act 1995* (Cth) pt 1 s 13A; *Duties Act 1997* (NSW) ch. 2 pt 8 div 1A; *Income Tax Assessment Act 1997* (Cth); *National Transport Commission (Road Transport Legislation – Driver Licensing) Regulations 2006* (Cth) sch 1 s 31; *Australian Postal Corporation Act 1989* (Cth) s 28A; *Firearms Act 1996* (NSW) sch 2 pt 2.2 s 1.

²²⁷ See *id.*

²²⁸ Cf. *ArtII.S2.C3.2.2.1.1.3 Congressional Executive Agreements*, U.S. CONGRESS, https://constitution.congress.gov/browse/essay/artII-S2-C3-2-2-1-1-3/ALDE_00001151/ (last visited Feb. 27, 2022).

D. Additional Reciprocity Requests—A Potential Slippery Slope

Another common objection to reciprocity has been that a new reciprocal SOFA will open the proverbial floodgates to other partner requests for reciprocity.²²⁹ This Article does not advocate open acceptance of all such requests. But the Australia–U.S. alliance is worth special consideration²³⁰ for several strategic reasons. Primary among these is that the U.S. is already committed to creating a reciprocal SOFA with Australia. Further individuation is justified by Australia’s status as a critical strategic ally in a crucial region, with whom the U.S. has exceptionally close connections.²³¹ The risk of additional requests is not a valid justification for rigid refusals to grant any reciprocity to anyone. On the contrary, all requests deserve individual consideration and should be given proper weight under the strategic impact of accepting or denying each one. More flexibility in assessing requests would be consistent with Department of State recommendations, and a prudent change of policy.²³² Indeed, a flexible approach to reciprocity would merely add another tool to the U.S. toolbox in efforts to strengthen alliances and attract new partners.

CONCLUSION

This Article advocates the creation of a reciprocal Austl.–U.S. SOFA as a concerted effort to strengthen the key strategic alliance with Australia, in the face of competition from revisionist powers—particularly China. A reciprocal SOFA will have a positive impact on strategic competition for three simple reasons of legal, symbolic, and practical significance. First, creating and adopting a reciprocal Austl.–U.S. SOFA will satisfy an unfulfilled legal commitment to a strategic partner. Second, reciprocity will reaffirm the alliance by symbolically conveying mutual

²²⁹ See REPORT ON STATUS OF FORCES AGREEMENT, *supra* note 94, at 23.

²³⁰ There may be a marginal concern that granting reciprocity to Australia, and no one else, may generate a perception of cultural bias from those seeking reciprocity with Korea, Japan, or others.

²³¹ BUREAU E. ASIAN PAC. AFF., *US Relations with Australia: Bilateral Relations Fact Sheet*, U.S. DEPARTMENT OF STATE (Jan. 21, 2020), <https://www.state.gov/u-s-relations-with-australia/>.

²³² Antony J. Blinken, *Secretary Antony J. Blinken, Secretary of Defense Lloyd Austin, Australian Foreign Minister Marise Payne, and Australian Minister Peter Dutton at a Joint Press Availability*, U.S. DEPT OF STATE (Sept. 16, 2021), <https://www.state.gov/secretary-antony-j-blinken-secretary-of-defense-lloyd-austin-australian-foreign-minister-marise-payne-and-australian-defence-minister-peter-dutton-at-a-joint-press-availability/>.

respect. Finally, reciprocity will facilitate further integration and interoperability between the two militaries.²³³

Commitment. The National Defense Strategy states “we will uphold our commitments” to allies.²³⁴ However, for a variety of reasons the commitment for a reciprocal Austl.–U.S. SOFA remains unfulfilled. It must be noted that this commitment is not a clear mandate. The Protocol language requires a “negotiation” for a reciprocal SOFA at an unspecified “future date.”²³⁵ Similar to the language from Article VI of the Treaty of the Non-proliferation of Nuclear Weapons,²³⁶ it will always be difficult to identify specific non-compliance with such a vague requirement. But ambiguity in the Austl.–U.S. SOFA Protocol does not justify indefinite inertia. Viewing the commitment through the lens of strategic shift or accelerated change, the commitment presents more than an imprecise legal requirement to uphold. It is rather an opportunity to be seized; a chance to reaffirm a key strategic alliance.²³⁷

Symbolism. The U.S. has often taken a Hobbesian worldview with its allies in the past.²³⁸ It has, from time to time, relied on its superior bargaining power to meet U.S. interest overseas, while denying those same interests to allies. China clearly intends to continue on a similar Hobbesian path, with regional hegemony or a neo-Tributary system as its goal—to include strategic competition for influence in Australia. As if to illustrate the point, China’s former Foreign Minister Yang Jeichi argued for special privileges to the Association of Southeast Asian Nations by arguing, “China is a big country and [you] are small countries; that’s just a fact.”²³⁹ Where the U.S. holds firm to non-reciprocal arrangements, it

²³³ This final point will not be further explained in this Article. It is provided here on the natural assumption that a reciprocal Austl.–U.S. SOFA would facilitate additional interaction between U.S. Department of Defense and Australian Defence Force personnel. Additional shared exercises, training and exchange positions would serve to deepen interoperability, develop tactical relationships and further improve relations between the two militaries.

²³⁴ NATIONAL DEFENSE STRATEGY, *supra* note 4, at 9.

²³⁵ Austl.–U.S. SOFA, *supra* note 43, Protocol.

²³⁶ Treaty on the Non-Proliferation of Nuclear Weapons art. VI, July 1, 1968, 729 U.N.T.S. 161 (Article VI of the Non-proliferation Treaty obligates each nuclear state to undertake “to pursue negotiations in good faith . . . to nuclear disarmament, and on a treaty on general and complete disarmament.”) The ambitious and ambiguous goal is, obviously, not approaching completion over 50 years later.

²³⁷ INTERIM STRATEGIC GUIDANCE, *supra* note 17, at 9–10.

²³⁸ The term “Hobbesian” has reference to Hobbesian Realism in international relations, which generally holds that self-interest is not constrained by international law, though specific agreements may help clarify and refine bilateral relations. See Michael M. Doyle, *Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant and Locke*, 46 COLUM. J. TRANSNAT’L L. 648, 652–53 (2008).

²³⁹ Ben Lowsen, *China’s Diplomacy Has a Monster in its Closet*, THE DIPLOMAT (Oct. 13, 2018), <https://thediplomat.com/2018/10/chinas-diplomacy-has-a-monster-in-its-closet/>.

may maximize U.S. legal rights in transactions, but it also undermines a more meaningful alliance.

While key allies attempt to balance connections to both the U.S. and China, the U.S. must demonstrate it is not a “wounded super power,”²⁴⁰ but a principles-based partner.²⁴¹ Those principles must “uphold a foundation of mutual respect” that symbolically recognizes the equality of sovereign nations.²⁴² The U.S. is a fair and equitable nation that provides a more principled alternative to China. A concerted move toward SOFA reciprocity will broadly demonstrate that fact. The best and easiest way to begin this demonstration is to start negotiations on a reciprocal Austl.–U.S. SOFA.

²⁴⁰ KISSINGER, *supra* note 3, at 533–34.

²⁴¹ SUPERVIELLE, *supra* note 109, at 19.

²⁴² *Id.* For most foreign governments, the issue of reciprocity is a significant matter of principle and symbolism.