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A COMPREHENSIVE LOOK AT
The NORTH ATLANTIC TREATY ORGANIZATION
MUTUAL SUPPORT ACT OF 1979

A Thesis
Presented to
The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

by Captain Fred T. Pribble, JAGC
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A COMPREHENSIVE LOOK AT
THE NORTH ATLANTIC TREATY ORGANIZATION
MUTUAL SUPPORT ACT OF 1979

by Captain Fred T. Pribble

ABSTRACT: This thesis examines the NATO Mutual Support Act of 1979. A review of the legislative history raises serious questions concerning DOD's implementation of the special authorities for acquisition and transfer of logistic support created by Congress through passage of the Act. This thesis concludes that DOD implementation has been confusing and overly restrictive and recommends that some statutory, regulatory, and policy changes are warranted.

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I. INTRODUCTION

Beginning in the 1970's, Congress pressed the Department of Defense (DOD) to reduce the number of United States (U.S.) forces deployed in the European theater. DOD efforts to improve the logistics "tooth-to-tail" ratio resulted in significant reductions in the number of combat service support troops stationed in North Atlantic Treaty Organization (NATO) countries. This decrease in U.S. support capability resulted in a corresponding increase in reliance by U.S. forces on our NATO allies for logistic support.

During this same time frame, U.S. forces acquired and transferred support through the use of highly formalized procedures. Logistic support, supplies, and services were acquired, both from foreign government and commercial sources alike, by resort to commercial contracting methods and the application of U.S. domestic procurement laws and regulations. On the transfer side, provision of support by U.S. forces in response to allied requests required processing a formal Foreign Military Sales case under the Arms Export Control Act.

In practice, use of these formalized procedures resulted in some untenable situations for U.S. forces in training and on exercises with their NATO counterparts. For example, if an American unit on maneuvers needed a tankful of gasoline from a Dutch unit, a formal contract was required. Conversely, if a Dutch unit was attached to an American battalion for a couple

days training, a formal Foreign Military Sales case had to be processed to provide food and billeting to the Dutch.

As the frequency of U.S. requests grew, NATO countries began to object to the contracting format used by U.S. forces to acquire support. Their objections were based upon the inclusion of several "offensive" clauses in the contract documents and the U.S.'s rather dogmatic insistence on applying domestic procurement laws and regulations to transactions conducted in the European theater. As support was requested at the government-to-government level, the allies felt that agreements not contracts were the proper document format. Further, sovereignty considerations dictated that international agreements, not U.S. domestic law, should govern these transactions. Application of formal U.S. Foreign Military Sales procedures to Alliance requests for routine logistics support caused further friction. The situation deteriorated to the point that, in the months just prior to Return of Forces to Germany (REFORGER) 1980, the Netherlands, the Federal Republic of Germany, Belgium, Italy and Norway indicated a refusal to provide support to U.S. forces if commercial contracting methods were to be used.

Faced with such widespread rejection to these traditional methods of acquiring and transferring support from our allies, DOD made several requests to Congress for legislative relief. Congress responded

and, on August 4, 1980, President Carter signed into law The NATO Mutual Support Act of 1979 (hereinafter "NMSA" or "the Act").

The NMSA, as originally enacted, represented a specific grant of authority to DOD to acquire and transfer logistic support, supplies, and services for the benefit of U.S. forces in the European theater. In particular, Congress granted DOD special authority to acquire NATO host nation support without the need to resort to complex contracting procedures. In addition, it authorized DOD, after consultation with the Department of State, to enter into cross-servicing agreements with our allies for the reciprocal provision of support. This enabled U.S. forces to transfer routine logistic support outside Foreign Military Sales channels and, again, to acquire support without the need to resort to formal contracting procedures.

In passing the NMSA, Congress clearly authorized DOD to create a separate, two-tracked system for acquiring and transferring routine logistic support for European based forces. Congress envisioned that this would be a system parallel to, yet work in tandem with, existing formalized procurement and transfer procedures.

For reasons largely unknown, DOD failed to fully seize upon the initiatives provided by Congress through passage of the NMSA. Instead, DOD implementing regulations proved confusing and overly restrictive. Tragically, the NMSA authority was "wed" to existing acquisition and logistics principles and procedures.

Service usage of the NMSA, as a result, suffered greatly from this confusion and these unnecessary restrictions.

This paper presents a three-part, in-depth examination of this most important piece of legislation. Starting with post World War II Europe, the first section of the thesis concentrates on the changing relationship between the U.S. and its European allies, and traces the events leading up to passage of the Act.

The second part of the paper focuses on the Act. All applicable DOD and Department of the Army (DA) implementing guidance is incorporated in an attempt to present a comprehensive yet workable picture of the Act for the field practitioner.

The final section of the paper is devoted to a critical analysis of the Act. This section focuses on the major problems created by the DOD implementing guidance and addresses some of the current problems encountered in service usage of the NMSA. Emphasis is on the problems and experiences of the U.S. Army Europe and Seventh Army (USAREUR), the primary service user of NMSA authority. Included, wherever appropriate, are suggestions for legislative, regulatory, or policy changes.

II. HISTORICAL BACKGROUND

A. POST WORLD WAR II EUROPE

1. Offshore Procurement Agreements

Between 1952 and 1955, the U.S. concluded a series of formal agreements with thirteen European countries (memo countries)¹ governing U.S. procurement of services, supplies, and construction within their respective countries.² These agreements were executed with countries participating in the Military Assistance Program³, and were part of the U.S. Offshore Acquisition Program⁴. They were designed to further foreign assistance and to provide direct support to U.S. forces either deployed or conducting exercises in these countries.⁵

These agreements are generally referred to as Offshore Procurement Agreements⁶, and were designed to "spell out the parameters of the host nations' consent under public international law to allow the United States to exercise its sovereignty, i.e., authority to contract, within the host nation's territorial jurisdiction."⁷ Subject to any country specific limitations, Offshore Procurement Agreements authorized the U.S. to acquire goods and services, within those countries, through reliance on U.S. domestic laws, regulations and procedures.⁸

In addition to providing the legal authority to contract, these agreements were also an attempt by the U.S. to assist rebuilding nations after the second world war⁹. In the early 1950's, the European economies were in complete disarray. These countries were, for the most part, "actively seeking United States military procurement due to the poor economic situation existing in their own countries and desire for hard currency and aid under the Marshall Plan."¹⁰

Offshore Procurement Agreements differed in form and content from country to country.¹¹ Typically, however, they defined the extent to which the U.S. could exercise its power to contract.¹² The agreements covered areas such as applicable contracting law; standard contract terms and clauses; contract placement; parties; assistance and enforcement; customs and duties; and taxes.¹³ Offshore Procurement Agreements typically provided two methods by which the U.S. could acquire goods, services, and construction: direct and indirect procurement. Direct procurement authorized the U.S. to contract directly with a host nation commercial firm or individual for the support required.¹⁴ Indirect procurement procedures required the U.S. to make a request for support with host nation government. The host nation would then either provide the goods or services from its own inventories or resources or subcontract with a commercial firm on behalf of the U.S. Under the latter method, privity of contract

generally remained with the host nation and the commercial contractor.¹⁵

In the case of indirect procurements, the Offshore Procurement Agreements, while providing the underlying legal authority for the U.S. to contract, did not operate as contractual instruments. Instead, the U.S. and the host nation country negotiated standardized contract documents known as "model contracts."¹⁶ These documents contained U.S. statutorily and regulatorily required contract provisions and were used to contract with the memo countries for all indirect acquisitions.¹⁷

2. Foreign Military Sales Procedures

During this same period, all transfers or sales of logistic support, supplies, and services by U.S. forces to NATO forces required full compliance with the formalized procedures for executing Foreign Military Sales contained in the Arms Export Control Act.¹⁸ Under the Arms Export Control Act, military sales are construed to be an instrument of U.S. foreign policy.¹⁹ In order for a country to be eligible for Foreign Military Sales, the following four conditions must be met:

1. The sale in question would strengthen U.S. security interests and promote world peace;
2. The President consents to the transfer;

3. The country receiving the item must agree to maintain the security of the item (so-called third party transfer concerns); and

4. The receiving country is otherwise eligible for transfer of the item.²⁰

Procedurally, Foreign Military Sales occur through the negotiation and execution of formal government-to-government agreements that are quasi-contractual in nature. These agreements, embodied within the DD Form 1513, Letter of Offer and Acceptance, identify the items or services involved, the general and specific terms and conditions governing the sale, and the estimated price.²¹ Of particular note is the pricing requirement. A key element of DOD Foreign Military Sales policy is the requirement that the price represent the full cost to the U.S. Government of the sale.²² Full cost within the meaning used here includes the actual cost of the military item and all defense services to include all administrative costs as well as a proportionate share of nonrecurring research and development and production costs.²³

The general conditions (or "boilerplate") set out in the DD Form 1513 contain several provisions, required by U.S. law, which reserve certain rights to the U.S. Taken in the aggregate, these reservations necessitate characterizing the relationship created as quasi-contractual.²⁴ For example, on its part, the U.S. only agrees to exert its "best efforts" to comply with the terms of the agreement regarding costs, payment schedules

and delivery dates.²⁵ In addition, the U.S. reserves the right to unilaterally terminate the sale in the event of unusual or compelling circumstances.²⁶ Finally, the prices listed in the agreement are only estimates. The receiving country, on the other hand, agrees to open-ended liability, that is, to compensate the U.S. for all costs associated with processing of its Foreign Military Sales case.²⁷

The Arms Export Control Act required the U.S. to open a Foreign Military Sales case in each instance supplies or services from U.S. forces was requested. Of particular concern to both U.S. and allied forces was the requirement for full compliance with Foreign Military Sales procedures during the conduct of NATO training exercises.²⁸ For example, the provision of routine support requirements such as food, billeting, or medical care to German or Dutch troops during a combined field training exercise required full compliance with Foreign Military Sales procedures outlined above.

B. THE PERIOD 1970 TO 1980

1. A Shift in Emphasis from "Tail-to-Teeth"

Prior to the 1970's, U.S. forces stationed in Europe had little need for host nation support.²⁹ The logistic "tail" of the U.S. force structure provided the bulk of supplies and services. This situation changed dramatically in the 1970's as Congressional

pressure to improve the "tooth-to-tail" ratio in the European theater resulted in serious reductions in the numbers of U.S. support troops committed to NATO.³⁰ As a result, U.S. reliance on host nation support increased as its own support capacity diminished.³¹

In addition to reductions in deployed forces, the 1970's saw an increased emphasis on the need for greater allied cooperation within the Alliance and a corresponding emphasis on the development of more efficient ways for NATO forces to achieve interoperability.³²

The increase in U.S. support requirements resulted in greater use and reliance on the Offshore Procurement Agreements and the model contract formats.³³ Problems began to surface involving use of these documents "which could seriously impact U.S. force readiness."³⁴ NATO countries voiced strong objections to U.S. use of commercial contracting methods for the acquisition of supplies and services and to U.S. insistence on formal Foreign Military Sales procedures under the Arms Export Control Act for sales or transfers of like items.³⁵ The U.S. soon learned that, to satisfy the increased support requirements, it could not expand the use of nor otherwise continue to rely on Offshore Procurement Agreements and the model contract formats established in the 1950's.³⁶

2. NATO Country Objections

As post World War II Europe rebuilt, the European member nations recovered both economically and politically. These recoveries were characterized by intense feelings of nationalism.³⁷

NATO country objections and their combined resistance to the use of Offshore Procurement Agreement contracting methods grew during this time of increased U.S. need for host nation support.³⁸ Objections were voiced for a variety of reasons. As a central point, there was a universally held belief by the NATO nations involved that political, economic and military conditions which obtained in the 1950's were no longer valid.³⁹ The Alliance countries viewed the Offshore Procurement Agreements as holdovers from the post World War II recovery era, a time when their economies were in too poor a condition to object to the methods which the U.S. used to acquire support, supplies, and services.⁴⁰

At the heart of these objections were, of course, dramatically improved economies and restored feelings of nationalistic pride, country independence, and sovereignty.⁴¹ NATO countries asserted that model contract types were intended for use in strictly commercial relationships. As between sovereigns, they were viewed as objectionable *per se*.⁴² The general feeling was that sovereigns should sign agreements, not contracts.⁴³ Moreover, it was particularly offensive for a sovereign nation to be made subject to U.S.

domestic procurement law which dictated terms and conditions to the host nation.⁴⁴ It was also widely felt among our allies that incorporation of domestic statutory and regulatory provisions included in the model contract format unilaterally favored the U.S.⁴⁵ Of particular interest, both the Federal Republic of Germany and the Kingdom of the Netherlands went so far as to refuse to accept even the terms "contract" and "contracting officer" because of their increased feelings of nationalism and their objections to the concept of contracting between sovereign nations.⁴⁶

Some discussion of the nature and content of the contract provisions found so objectionable by our NATO allies is appropriate. The clauses contained in these model contracts were drafted for use with American commercial firms in the highly competitive U.S. markets.⁴⁷ Out of necessity, these clauses were drafted with the intention of protecting U.S. Government interests and, to a large degree, insulated the government from the rigors of those same markets. The legislative history of the NMSA correctly characterized U.S. adherence to commercial contracting methods as "arrogant."⁴⁸

Of those clauses required by U.S. procurement law to be included in the model contract format, three proved to be the most troublesome: United States Officials Not to Benefit; Covenant Against Contingent Fees; and Gratuities.⁴⁹

Title 41, United States Code, section 22, requires the inclusion in every government contract of a clause

stating that no member of the U.S. Congress shall benefit from the contract.⁵⁰ In addition to the obvious negative reflection on the integrity of the host nation officials involved, European countries simply failed to see the relevance of this provision.⁵¹ From their perspective, members of the U.S. Congress simply did "not have the leverage to influence European national procurements."⁵²

Title 10, United States Code, section 2306(b), requires that all government contracts include a clause in which the contractor warrants that a commission has not been paid to an agent hired for the specific purpose of securing the contract award.⁵³ NATO host nations objected to making these warranties on the grounds that "in dealings between nations such warranties imply that the nation making the warranty is inferior to the other and that dealings between them are not based on a concept of equality."⁵⁴

Title 10, United States Code, section 2207, directs that DOD put in all contracts, except those contracts for personal services, a clause permitting the U.S. Government to terminate the contract if it is found that gratuities were offered to U.S. employees involved in the contracting process.⁵⁵ Again, the Alliance countries generally felt the clause impugned their integrity and that it was designed for commercial contracts, not for support agreements at the government-to-government level.⁵⁶

Some of these restrictive clauses had been subject to waiver but only on a case-by-case basis. Each request for waiver and supporting documentation had to be forwarded through channels from Europe to Washington for approval.⁵⁷ In light of the ever increasing reliance on host nation support, this process was generally considered impractical, time consuming, cumbersome, and nonresponsive to field commanders' needs.⁵⁸

Particularly vexing to our NATO allies was the fact that NATO had developed and implemented its own system for the acquisition and transfer of logistic support, supplies and services.⁵⁹ NATO Standardized Agreements (STANAGS) permitted member forces to provide and acquire logistic support through use of a simplified requisition/voucher system.⁶⁰ At this time, the U.S., a principal member of NATO, rather incongruously continued to use commercial contracting methods and formal Foreign Military Sales procedures, while espousing the increased need for greater cooperation and interoperability between Alliance forces.⁶¹

As a final note, the provision of logistic support, supplies, or services to U.S. forces is a discretionary act on the part of the host nation involved. It was and remains today, unrealistic to require each NATO country to become familiar with and be able to employ different procedures for each sending state.⁶² An all too common complaint from host nation officials was their inability to efficiently satisfy these requirements,

largely because of unfamiliarity with unique U.S. procedures.⁶³ Unfamiliarity with U.S. procedures also resulted in higher administrative costs to the U.S.⁶⁴

3. Congressional Response to European Forces Concerns

Return of Forces to Germany (REFORGER), 1976, provided the first real incident where allies objected to offshore procurement contracting methods.⁶⁵ The problems arose when the U.S. attempted to exercise its BENELUX⁶⁶ Line of Communication agreements:⁶⁷ "[N]ATO Allies balked at accepting required U.S. clauses and threatened future refusal unless the United States ceased its insistence on using specific objectionable clauses."⁶⁸

Subsequent annual REFORGER exercises presented similar problems.⁶⁹ The situation degenerated to the point that, for REFORGER 1980, the Governments of the Netherlands, the Federal Republic of Germany, Belgium, Italy, and Norway indicated that, unless formal contract requirements were waived, no logistic support would be forthcoming.⁷⁰

In August 1980, Congress responded to repeated requests for legislative relief by U.S. forces in Europe by passing The North Atlantic Treaty Organization Mutual Support Act of 1979.⁷¹ The Act responded to the concerns of NATO countries and European based U.S. forces by authorizing the acquisition of NATO host

nation logistic support, supplies, and services without the need to resort to complex contracting procedures.⁷² The NMSA also allows our allies to acquire similar support without having to apply for Foreign Military Sales and comply with those formalized procedures.⁷³

Through passage of the NMSA, Congress intended to provide DOD with sufficient authority to facilitate the exchange of logistics support between U.S. and allied military in training and exercises, thereby fostering NATO readiness.⁷⁴ In addition, the authority provided in the NMSA was drafted in such a manner so as to promote more and better use of host nation resources in support of U.S. forces stationed in the European theater.⁷⁵

III. THE NORTH ATLANTIC TREATY ORGANIZATION (NATO) MUTUAL SUPPORT ACT OF 1979 (NMSA)

A. OVERVIEW

Simply stated, the NMSA is a unique grant of authority by Congress to the Secretary of Defense, providing for the simplified acquisition and transfer of routine logistic support, supplies, and services between the armed forces of the U.S. and the armed forces of the governments of NATO countries, NATO subsidiary body organizations, and the armed forces of the governments of other NMSA eligible countries.⁷⁶

The Congressional grant of authority contained within the NMSA is, in fact, three distinct, although not entirely separate, legal authorities. The first authority, termed "acquisition only" authority (or 2341 authority), empowers U.S. forces to acquire logistic support directly from certain foreign governments and international organizations.⁷⁷

The second grant of authority is cross-servicing authority (or 2342 authority).⁷⁸ It authorizes the Secretary of Defense, after consultation with the Secretary of State, to enter into agreements with the armed forces of the governments of NATO countries, NATO subsidiary body organizations, and the armed forces of the governments of other NMSA eligible countries for the reciprocal provision of logistic support.⁷⁹ It is therefore authority for U.S. forces to both acquire and transfer logistic support, supplies, and services. It authorizes U.S. forces to conduct transfers of military supplies and services outside of the Foreign Military Sales arena and outside the requirements of the Arms Export Control Act.⁸⁰ As a precondition to its use, however, cross-servicing authority requires the existence of a mutual support agreement (also called a cross-servicing or umbrella agreement) between the U.S. and the intended supplying or receiving country.⁸¹

The third and final legislative grant of authority contained within the Act is waiver authority (or 2343 authority).⁸² This grant of authority provides for the waiver of nine specific statutory provisions relating

to the acquisition and transfer of logistic support, supplies, and services.⁸³ Waiver authority is normally used in conjunction with acquisition only or cross-servicing authority. It provides the legal basis necessary to conclude acquisition and cross-servicing agreements free from these statutory and regulatory requirements which have proven so troublesome to our allies in the past.⁸⁴

In addition to the three authorities cited above, the NMSA also establishes pricing and reimbursement procedures which govern the acquisition and transfer of goods and services;⁸⁵ prohibits the increase in inventories and supplies of U.S. forces for the purpose of transferring support to a qualifying country or NATO subsidiary body;⁸⁶ prescribes annual ceilings on reimbursable credits and liabilities which may be accrued by the U.S.;⁸⁷ and establishes annual reporting requirements to Congress for agreements and transactions made under its authority.⁸⁸

As originally enacted, the NMSA was limited in its application, geographically, to "Europe and adjacent waters."⁸⁹ In 1986, Congress expanded the NMSA's application to military forces of non-NATO qualifying countries outside the European theater (NMSA eligible countries).⁹⁰ These 1986 amendments also provided for application of the NMSA to the armed forces of NATO countries, NATO subsidiary body organizations, and the armed forces of NMSA eligible countries while they are

stationed in, conducting training, or are otherwise performing exercises in North America.⁹¹

B. DEFINITION OF TERMS

A basic understanding of the terms used in NMSA transactions is critical to a mastery of the area. As will be discussed in later sections of this paper, many problems in NMSA usage have been generated by inconsistent application and inartful use of the terminology in this specialized area of acquisition law.⁹²

Transactions under the NMSA may take one of two basic forms: acquisitions or transfers. An "acquisition" is defined as the U.S. obtaining logistic support, supplies, or services from a NATO country, NATO subsidiary body organization, or other NMSA eligible country.⁹³ Acquisitions occur under either an acquisition agreement made pursuant to the acquisition only authority⁹⁴ or under the terms of a mutual support agreement concluded under the cross-servicing authority.⁹⁵ An acquisition may involve either the purchase, rental, or lease of the desired logistic support, supplies, or services.⁹⁶

The term "transfer" denotes the provision of logistic supplies, support, or services by U.S. forces to a NATO country, NATO subsidiary body organization, or other NMSA eligible country.⁹⁷ Under the NMSA, transfers may only be made using cross-servicing authority, subject to the terms and conditions of the relevant mutual support agreement.⁹⁸

The Act provides that compensation for an acquisition or transfer may be made on either a reimbursable or a nonreimbursable basis.⁹⁹ A reimbursable transaction is one where cash payment is made in the currency of the supplying country.¹⁰⁰ A nonreimbursable transaction may take one of two forms:

1. Replacement-in-kind -- replacement by the receiving nation of supplies or services of an identical nature to those received; or

2. Exchange -- replacement of supplies or services of a substantially identical nature. Exchanges require a determination by the issuing or receiving U.S. organization that the replacement supplies or services have the same "form, fit or function" as those originally supplied.¹⁰¹

C. PURPOSE

The NMSA has two primary peacetime purposes. The first is training and exercise related. In this regard, NMSA was passed to facilitate the interchange of logistic support, supplies, and services between U.S. military forces in training and exercises with allied countries, thereby promoting common readiness in the event of war.¹⁰²

The second purpose relates to the increased reliance by U.S. forces on host nations for combat support services. NMSA permits better use of host nation resources for logistic support, supplies, and

services by providing U.S. forces the ability to acquire supplies and services without the need to resort to "complex contracting procedures."¹⁰³

Congress also passed the NMSA as part of a larger plan to strengthen the NATO Alliance.¹⁰⁴ As such, NMSA provides DOD with a measure to improve standardization and cooperation within the NATO alliance.¹⁰⁵ Further, the Act operates as a readiness enhancing measure by facilitating mutual planning, interoperability training, the conduct of multinational exercises and the overall NATO deterrent posture.¹⁰⁶ The Act also provides DOD with the authority needed to fully implement NATO STANAGS, thereby facilitating mutual logistic support within the NATO alliance.¹⁰⁷ Finally, the Act also gives DOD a clear-cut replacement-in-kind authority which, heretofore, it lacked.¹⁰⁸

In summary, the NMSA was originally enacted to alleviate the various problems that U.S. forces were experiencing in acquiring NATO host nation logistic support by simplifying acquisition procedures.¹⁰⁹ The 1986 amendments expanded the geographical application of the NMSA beyond "Europe and adjacent waters" by specifically providing for U.S. support to NATO countries, NATO subsidiary body organizations, and other NMSA eligible countries stationed in, performing exercises, or otherwise training in North America.¹¹⁰ This amendment is indicative of a clear Congressional intent to provide the authority for meaningful reciprocal

provision of logistic support, supplies, and services to allied countries and NATO organizations.¹¹¹

D. CONGRESSIONAL SAFEGUARDS

1. Generally

The legislative history indicates that Congress had serious reservations about the extent of the authority DOD was requesting in two earlier versions of proposed legislation submitted by DOD for Congressional consideration.¹¹² Congress responded to both versions with concern about the scope of the authority proposed by DOD: "[T]he Department of Defense proposed to 'wipe the books clean' of legislation in pursuit of vague, undefined and unlimited objectives without any identification of specific statutory provisions that were disabling."¹¹³

In response to what was perceived by Congress as an attempt by DOD to secure authority far in excess of what was actually needed, Congress included in the Act certain "safeguard" provisions designed to both limit the authority it granted and to monitor DOD compliance with both the letter and spirit of the new legislation.¹¹⁴ Toward these ends, the NMSA, as originally enacted, provided for the following:

1. Annual reports to Congress detailing the nature and amount of all transactions under the authority of this legislation;¹¹⁵

2. Prior review by Congress of implementing regulations issued by DOD;¹¹⁶

3. A ceiling on the dollar amount of the transactions which may be conducted, in a fiscal year, involving the acquisition and transfer of logistic support;¹¹⁷

4. Pricing principles to guarantee reciprocity or, in the alternative, the application of Arms Export Control Act pricing principles for non-reciprocal sales or transfers;¹¹⁸

5. A limitation on the provisions of law which may be waived by U.S. forces in acquisitions to only those provisions absolutely essential to meeting the purpose of the legislation.¹¹⁹

The following two sections discuss the major legislative restrictions, placed on DOD by Congress in using the NMSA authority. The final section focuses on Congressional limitations placed upon the types of support, supplies, and services which may be acquired or transferred under NMSA authority.

2. NMSA "Ceiling" Authority

(a) Generally

Prior to enactment of the NMSA, Congress expressed concern that DOD, if given the chance, would use this new authority to "acquire virtually unlimited quantities of military equipment from European sources in pursuit

of abstract political objectives such as the 'two-way street' in defense trade."¹²⁰ As a result, the Act contains limiting language and various control mechanisms designed to prevent such an occurrence.

One such limitation imposed by Congress is contained in section 2347 of the Act,¹²¹ which places limitations or "ceilings" on the amounts that may be obligated or accrued for reimbursable transactions by the U.S. in any fiscal year. The ceilings do not apply to non-reimbursable transactions unless converted to a reimbursable transaction because of nonreplacement during the allotted 12-month period.¹²² In addition, these limitations only apply during peacetime operations; they do not apply during periods of active hostilities.¹²³ The limitations provided for NATO countries and subsidiary bodies differ from those provided for NMSA eligible non-NATO countries.¹²⁴

The imposition of limitations on the amounts that may be expended by DOD on reimbursable NMSA acquisitions and transfers in a given fiscal year, coupled with the annual reporting requirements discussed earlier, has necessitated the development of elaborate systems within the service components for both requesting NMSA ceiling authorization prior to entering into such a transaction, as well as detailed post transaction reporting requirements.¹²⁵ The individual workings of these systems are beyond the scope of this paper. Suffice it to say, however, that any organization planning to use NMSA authority should do so only after

fully consulting and complying with individual service requirements in this regard.¹²⁶

(b) Reimbursable Acquisitions

The NMSA limits the total amount of reimbursable liabilities (purchases) involving NATO that the U.S. forces may accrue in a given fiscal year to \$150,000,000.¹²⁷ Of that amount, the amount of supplies that may be purchased, excluding petroleum, oil, and lubricants (POL), is limited to \$25,000,000.¹²⁸ The purpose for the ceiling on reimbursable transactions is to ensure that the emphasis of acquisitions under NMSA authority continues to remain on support services, as opposed to hardware "where emotions and dollars run high."¹²⁹

Regarding NMSA eligible non-NATO countries, the Act places limits on the amounts of reimbursable acquisitions which may be made within each country. The total amount of reimbursable liabilities which can be made by U.S. forces in a given fiscal year may not exceed \$10,000,000. Of that amount, only \$2,500,000 may be expended for supplies, excluding, again, POL.¹³⁰ The \$10,000,000 per country limit is in addition to the \$150,000,000 limit specified above for NATO.¹³¹

The Army NMSA implementing regulation¹³² adds further funding restrictions on NMSA usage. Reimbursable acquisition of logistics support chargeable to an appropriation or fund for which the acquiring command is not authorized to incur obligations is prohibited.¹³³

Further, reimbursable acquisitions and transfers will not be made unless the following conditions are met:

1. Funds are available; and
2. Adequate acquisition or transfer ceiling authority is available.¹³⁴

(c) Reimbursable Transfers

The NMSA limits the total amount of reimbursable credits (sales) involving NATO that the U.S. forces may accrue in a given fiscal year to \$100,000,000.¹³⁵ The amount of supplies that may be transferred is not restricted further by the NMSA.¹³⁶

Regarding NMSA eligible non-NATO countries the Act also places limits on the amounts of reimbursable credits which may be made on a per country basis.¹³⁷ The total amount of reimbursable credits which can be accrued by U.S. forces in a given fiscal year may not exceed \$10,000,000. Again, the amount of supplies that may be transferred is not restricted further.¹³⁸ The \$10,000,000 per country limit is in addition to the \$100,000,000 limit, specified above, for NATO.¹³⁹

3. Reporting Requirements

An additional safeguard built into this legislation is the requirement for a detailed annual report to Congress.¹⁴⁰ The reporting requirement is intended to give Congress a yearly opportunity to review DOD usage

of NMSA authority.¹⁴¹ Of particular concern is that DOD "does not expand the scope of the legislation by 'interpretation'."¹⁴²

Specifically, section 2349 of the Act requires that the Secretary of Defense submit to Congress not later than February first of each year, a report containing:

1. A description of the agreements entered into using NMSA authority during the fiscal year preceding the year the report is submitted;

2. The dollar value of each reimbursable acquisition or transfer by the U.S. for the agreements and fiscal year in question;

3. A report of the nonreimbursable acquisitions and transfers by the U.S. for the agreements and the fiscal year in question; and

4. A description of the agreements entered into (and expected to be concluded) under NMSA authority expected to be in effect for the fiscal year in which the report is submitted, together with an estimate of the total dollar value of all acquisitions and transfers expected to be concluded for the fiscal year in which the report is submitted.¹⁴³

4. Limited Definition of Logistic Support, Supplies and Services

In addition to concern over what it perceived as a DOD initiative to exempt itself from all procurement

related legislation,¹⁴⁴ Congress also saw the originally proposed DOD drafts of the NMSA as an attempt to have authority to acquire "virtually unlimited quantities of military equipment from European sources."¹⁴⁵ In response, the Act includes a limited definition of logistic supplies, support, and services: "The term 'logistic support, supplies, and services' means food, billeting, transportation, petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, and port services."¹⁴⁶

Acquisitions and transfers under the NMSA are limited to the routine logistic support, supplies, and services set out above. The legislative history, as well as the Army regulation, specify additional items which are excluded from coverage by NMSA authority:

1. major end items of organizational equipment;
2. guided missiles;
3. chemical and nuclear munitions;
4. formal courses of military instruction;
5. distinctive military uniforms and insignia;
6. major construction; and
7. guidance kits for bombs and other munitions.¹⁴⁷

Initial quantities of replacement parts and spares for major items of organizational equipment may also not be acquired or transferred under the Act.¹⁴⁸

E. FORMS OF NMSA AUTHORITY

1. Acquisition Only Authority

(a) Generally

The rationale underlying both the acquisition only and the cross-servicing authorities is "that the traditional seller-customer concept is not appropriate to the relationship between sovereign nations of an alliance seeking to enhance military readiness through cooperative arrangements to provide reciprocal logistical support of a routine nature."¹⁴⁹

Subject to the availability of funds,¹⁵⁰ acquisition only authority enables DOD to enter into agreements for the acquisition of logistic support, supplies, and services directly from governments of NATO countries, NATO subsidiary body organizations, and governments of NMSA eligible countries.¹⁵¹ This authority is limited to acquisitions.¹⁵² It does not, however, require the existence of a mutual support agreement as a prerequisite to its use.¹⁵³

Transactions under acquisition only authority will occur through negotiation and conclusion of an acquisition agreement.¹⁵⁴ When signing this agreement,

section 2343 of the Act authorizes the Secretary of Defense to waive nine provisions of law generally applicable to procurements.

Compensation for an acquisition only transaction may be on either a reimbursable or a nonreimbursable basis.¹⁵⁵ Use of the acquisition only authority is also subject to the policies and limitations imposed on the waiver authority contained in section 2343 of the Act.¹⁵⁶

(b). Applicability

As originally enacted, use of the NMSA was confined to "Europe and Adjacent Waters." That term is defined as:

The territories of those NATO countries and subsidiary bodies and those waters within the 'North Atlantic Treaty Area' as defined in the North Atlantic Treaty (amended by the Protocols on the Accession of Spain, Greece, Turkey, and the Federal Republic of Germany), excluding North America. The NATO European countries include Belgium, Denmark, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, and the United Kingdom, and Canada when her forces are

operating in Europe and adjacent
waters.¹⁵⁷

Congress expanded the applicability of the acquisition only authority in the 1986 amendments to the Act.¹⁵⁸ This authority was extended to countries which:

1. have a defense alliance with the U.S.;
2. permit the stationing of U.S. forces or the homeporting of U.S. Naval vessels in such country;
3. have agreed to preposition U.S. materiel in such country; or
4. serve as the host country to U.S. military exercises or permit other military operations by U.S. forces in such country.¹⁵⁹

Unlike cross-servicing authority, use of the acquisition only authority with NATO countries and subsidiary bodies, as well as NMSA eligible countries, does not require Department of State consultation or prior Congressional notification.¹⁶⁰

(c) Policies and Limitations

The legislative history clearly indicates that the NMSA was intended to facilitate the acquisition by U.S. forces of support, supplies, and services from host nation sources.¹⁶¹ Specifically, the Act is designed to aid in the acquisition of routine support such as "base operations, including perimeter security, food

services, maintenance and minor construction, transport, dock-side services, and a host of other support services which now draw off United States manpower from combat and direct combat support." ¹⁶²

The Act identifies the nine statutory provisions relating to the acquisition of logistic support, supplies, and services which have proved troublesome in the past and may be waived. ¹⁶³ Acquisitions under the authority of NMSA, however, must comply in all respects with other provisions of law, including any newly enacted provisions. ¹⁶⁴ In addition, acquisitions under NMSA must be conducted in accordance with "general principles of prudent procurement practice" and must use existing DOD acquisition and logistics principles. ¹⁶⁵ As will be shown in the analysis portion of this paper, this requirement has generated serious questions about the applicability of DOD procurement regulations to NMSA transactions. ¹⁶⁶

The DOD implementing directive encourages use of the acquisition authorities contained within the NMSA whenever acquisition of host nation support is advantageous to the U.S. ¹⁶⁷ The NMSA applies to logistic support, supplies, and services acquired from or provided directly to foreign governments. NMSA does not apply to logistic support, supplies, and services acquired by U.S. forces from U.S. and foreign commercial sources. ¹⁶⁸ Finally, U.S. forces may not use the NMSA "to procure from any foreign government as a routine or

normal source any goods or services reasonably available from United States commercial sources."¹⁶⁹

In its implementing guidance, DOD has restricted use of the acquisition only authority.¹⁷⁰ Apparently for policy reasons, DOD has made cross-servicing authority the preferred method U.S. forces should use in both acquiring and transferring logistic support, supplies, and services. Further, DOD has relegated the acquisition only authority to use as an interim measure, until a mutual support agreement can be concluded with the supplying country or NATO subsidiary body organization.¹⁷¹

(d) Documentation Requirements

Under the NMSA, all acquisitions and transfers of logistic support, supplies, and services must be documented.¹⁷² Documentation can take many forms, and, depending on the authority used, may involve a type of "tiering"; that is, reference to and compliance with one or more agreements previously executed at a higher level.

All documentation of NMSA transactions, regardless of the form or the level at which they are negotiated and concluded, must meet minimum information or data requirements.¹⁷³ Information which must be covered in the acquisition or transfer document includes: identification of the parties; an identifying agreement number; transaction type; a U.S. Treasury appropriation

account symbol; description of the supplies or services involved; and the unit and total prices to be charged.¹⁷⁴

Documentation is lacking for acquisition only transactions because of the expressed preference of DOD for use of the cross-servicing authority¹⁷⁵ and for other reasons which will be discussed in the analysis portion of this thesis,¹⁷⁶ DOD use of acquisition only authority has been severely restricted. As a result, the types of guidance and examples ("lessons learned") normally gleaned from concluded agreements does not exist.

2. Cross-Servicing Authority

(a) Generally

Cross-servicing authority was intended by Congress to provide the statutory basis for simplified logistics procedures during the course of combined training and exercises.¹⁷⁷ The NMSA authorizes DOD, after consultation with the Department of State, to enter into mutual support agreements with designated countries and NATO subsidiary bodies for the reciprocal provision of logistic support, supplies, and services.¹⁷⁸ Cross-servicing authority is also combined with the waiver authority to provide for the negotiation and conclusion of mutual support agreements which provide for acquisitions of logistic support free from the statutorily required provisions which have proved troublesome to

the Alliance countries.¹⁷⁹ Transactions conducted using cross-servicing authority are also limited by the availability of appropriations.¹⁸⁰

The requirement to consult with the Secretary of State prior to conclusion of cross-servicing agreements was added by an amendment proposed by the House of Representatives Committee on Foreign Affairs.¹⁸¹ The purpose of this amendment was to provide an additional control mechanism on the implementation of the transfer aspects of the cross-servicing authority. Congress felt that the consultation requirement would ensure that cross-servicing authority would "be implemented in a manner consistent with the worldwide arms transfer and security assistance policies of the United States."¹⁸²

Under the terms and conditions of these country specific mutual support agreements, U.S. forces may both acquire and transfer logistic support.¹⁸³ It is important to restate, at this point, that DOD has expressed a preference for the use of cross-servicing authority in all transactions conducted by U.S. forces under the NMSA.¹⁸⁴

Finally, compensation for acquisitions and transfers under cross-servicing authority may be on a reimbursable (cash payment) or a nonreimbursable basis (replacement-in-kind or exchange).¹⁸⁵

(b). Applicability

As originally enacted, the NMSA also restricted use of cross-servicing authority to "Europe and adjacent waters." The 1986 amendments to the NMSA expanded the scope of this authority to provide for cross-servicing agreements with the governments of non-NATO countries where the U.S. agrees to provide logistic support, supplies, and services to the military forces of such country in return for the reciprocal provision of support to U.S. forces deployed in that country or in the military region in which such country is located.¹⁸⁶

Procedurally, the 1986 amendments require the Secretary of Defense to "designate" non-NATO countries as eligible for a cross-servicing agreement. This designation, however, cannot occur until after prior consultation by DOD with the Department of State and a joint determination made that such a designation promotes U.S. national security interests.¹⁸⁷ In addition, the Act, as amended, also requires a minimum 30 days prior notification of an intended NMSA eligibility designation by DOD to the Senate Committees on Armed Services and Foreign Relations and the House of Representatives Committees on Armed Services and Foreign Affairs.¹⁸⁸

The 1986 amendments to the Act also expanded the cross-servicing authority of the Act.¹⁸⁹ It provided for agreements with NATO countries, NATO subsidiary bodies and other NMSA eligible countries wherein the

U.S. agrees to the reciprocal provision of logistic support, supplies, and services with such country while its military forces are stationed in North America or are performing military exercises or are otherwise training in North America.

(c) Policies and Limitations

Cross-servicing authority was originally intended by Congress to provide a statutory basis for DOD to both acquire and transfer support in a field environment. Policies and limitations which apply to use of the acquisition only authority would generally apply to acquisitions of support here as well.¹⁹⁰

The basic advantage NMSA provides U.S. forces in the area of transfers is the authorization to provide logistic support, supplies, and services to qualified foreign governments without having to treat each case as a Foreign Military Sales transaction subject to the rigors of the Arms Export Control Act¹⁹¹ This is not to say, however, that Congress intended that the transfer authority be implemented in a manner inconsistent with "overall U.S. arms transfer and security assistance policies."¹⁹²

The major Congressional safeguards designed to prevent abuse of transfer authority include a ceiling on the amount of transfers that may be made in a given fiscal year;¹⁹³ the requirement for transfer documentation to specify U.S. written consent to minimize

third-country transfers;¹⁹⁴ and DOD assurances that, because of the routine nature of the supplies and services involved, no major end items of equipment or single transfer transactions will occur triggering the Congressional notification procedures of the Arms Export Control Act.¹⁹⁵

As a further safeguard, transfers by U.S. forces using NMSA authority may only take place under a mutual support agreement, using cross-servicing authority.¹⁹⁶ Further, it is DOD policy that transfers by U.S. forces should be designed to "facilitate mutual logistic support between the United States and designated countries and NATO subsidiary bodies."¹⁹⁷ Additionally, transfers of logistic support should most commonly occur "during combined exercises, training, deployments, operations, or other cooperative efforts and for unforeseen circumstances or exigencies when the recipient may have a temporary need of logistic support, supplies, and services."¹⁹⁸

The NMSA may not be used to permit allied governments to use U.S. forces as normal or routine sources for logistic support, supplies, and services available from U.S. commercial sources or through Foreign Military Sales procedures.¹⁹⁹ Moreover, inventory levels of U.S. forces may not be increased "in anticipation of orders to be made by other countries pursuant to agreements negotiated under the NMSA."²⁰⁰ U.S. military supply inventories are to be maintained at those levels necessary to meet only our national security

interests, and the NMSA is not designed to impact on that standard.²⁰¹ The reason for this restriction is the Congressional perception that a potential exists for allied countries:

to allow reductions in their stock levels by relying on the U.S. supply system instead of investing in their own inventory. Such a practice would obviously have a negative rather than a positive effect on overall alliance readiness and would constitute a form of U.S. subsidy to NATO European military forces.²⁰²

The NMSA authorizes transfers of supplies and services to eligible countries and organizations outside of Foreign Military Sales channels. The NMSA does not, however, waive the requirements for controls on third party transfers and item end use.²⁰³ As a consequence, transfers will only occur under the authority of a mutual support agreement. All mutual support agreements contain a provision requiring that each transfer of logistic support, supplies, or services by U.S. forces must be documented and that the basic transfer document must stipulate that the support, supplies or services provided may not be retransferred without the prior written consent of the U.S.²⁰⁴

For transfers of logistic support conducted in the European theater, only logistic support, supplies, and services in the inventory of U.S. forces (or otherwise

under their control) may be used.²⁰⁵ For transfers between U.S. forces and the armed forces of other NMSA eligible countries, which occur outside of North America, the logistic support, supplies, and services transferred must come from the inventories (or control) of U.S. forces deployed in that country or the military region of the receiving country.²⁰⁶ Transfers occurring in North America must involve logistic support, supplies, and services from the inventory (or control) of U.S. forces in North America, and must be limited to satisfying receiving country requirements while they are in North America.²⁰⁷

(d) Documentation

There are normally three types of documents, negotiated and concluded at different tiers or levels, associated with a transaction conducted using the cross-servicing authority of the NMSA. These documents are: (1) the mutual support agreement (also called a cross-servicing or "umbrella" agreement);²⁰⁸ (2) an implementing arrangement (two types--general and specific);²⁰⁹ and (3) orders or requisitions.²¹⁰

As stated earlier, cross-servicing authority requires the existence of a mutual support agreement as a precondition to its use.²¹¹ A mutual support agreement is best described as a bilateral government-to-government agreement, between the U.S. and the government of a NMSA qualified country or organization under which

the parties agree to the reciprocal provision of logistic support, supplies and services between their respective military forces (or for the sole benefit of U.S. forces in the case of a NATO subsidiary body organization).²¹²

The mutual support agreement provides the legal basis for and sets forth the principles by which support, supplies, and services will be acquired and transferred between the U.S. forces and the country or organization involved. They are general in nature and, as a rule, do not involve the request for either supplies or services. Because they do not involve the obligation of funds, mutual support agreements may extend for an indefinite period of time.²¹³ Mutual support agreements are best understood by analogy to a "basic ordering agreement" as that term is commonly used in contracting circles.²¹⁴

Mutual support agreements, although similar in character and content, differ from country-to-country. For example, the mutual support agreement concluded with the Federal Republic of Germany²¹⁵ is unique in that it only authorizes the U.S. to acquire logistic support, supplies and services from one governmental agency--the Federal Ministry of Defense.²¹⁶ In addition, unlike the waiver provisions of other mutual support agreements, the German agreement authorizes the charging of administrative and handling fees in the processing of U.S. requirements.²¹⁷

Mutual support agreements are negotiated and concluded at the highest governmental levels. As such, they are international agreements within the meaning of DOD Directive 5530.3.²¹⁸ The Congressional reporting requirements of the Case Act²¹⁹ also apply.

The mechanics by which supplies and services are acquired or transferred under a specific mutual support agreement involve the execution of an implementing arrangement or an order or requisition.²²⁰ An implementing arrangement is an agreement which supplements a mutual support agreement. By necessity, then, it is negotiated and concluded pursuant to (or under) the authority of the mutual support agreement and must comply with its terms and conditions.²²¹

In the course of its NMSA practice, the Army has further refined the term implementing arrangement to provide for two different types: "specific" and "general." Specific implementing arrangements are "used to satisfy requirements for support of a particular project or event."²²² They are funded documents, very much like an order or requisition. A common situation where use of a specific implementing arrangement would be appropriate is a joint NATO exercise. Specific implementing arrangements, thus, are often the document format used when the U.S. or its allies have support requirements of an operational nature, involving some aspect of field support.²²³

A general implementing arrangement provides "a framework for conducting transactions for recurring

logistic support requirements with other NATO armed forces and NATO subsidiary bodies."²²⁴ Typically, general implementing arrangements focus on a particular area of recurring support such as base operations or storage services.²²⁵ General implementing arrangements are usually unfunded and may therefore be concluded for an indefinite period.²²⁶

As both specific and general implementing arrangements are concluded under the authority of a mutual support agreement, they are not considered international agreements for purposes of DODD 5530.3 and the Case Act.²²⁷

Orders or requisitions represent the NMSA version of the offer and acceptance document for specific logistic support, supplies or services.²²⁸ They are funded documents, usually executed subject to the terms and conditions of both an implementing arrangement and a mutual support agreement.²²⁹ Most mutual support agreements, however, allow for the direct placement of orders or requisitions for emergency situations.²³⁰

Transfers conducted under NMSA authority which involve a NATO country or NATO subsidiary body organization will specify in the basic transfer document that the goods or services provided by the U.S. forces may not be retransferred by the receiving entity to any country outside NATO without first receiving the written consent of the U.S. Government.²³¹ Transfers of logistic support, supplies, and services from U.S. forces to NMSA eligible non-NATO countries will include

a similar stipulation in the basic transfer document limiting retransfer of the goods or services to those situations where prior written consent of the U.S. Government is obtained.²³²

3. Waiver Authority

(a). Generally

Examination of the legislative history behind the NMSA clearly indicates that waiver authority was meant as a direct Congressional response to the concerns voiced by our NATO allies concerning U.S. forces using formal commercial contracting methods to acquire logistic support.²³³ Under section 2343 of the Act,²³⁴ Congress granted DOD the power to waive the following nine provisions of law when conducting acquisitions under NMSA acquisition only or cross-servicing authority:

(a) title 10, United States Code, section 2207; requires that DOD include in all contracts, except those for personal services, a provision reserving to the government the right to terminate the contract if it is later found that gratuities were offered to government employees involved in the acquisition process. This clause also provides that, in addition to breach of contract remedies, the government may seek exemplary damages in an amount of between three and ten times the amount of the gratuity.²³⁵

(b) title 10, United States Code, Section 2304(a); contains a the requirement to maximize the number of sources in acquisitions in excess of \$25,000.²³⁶

(c) title 10, United States Code, Section 2306(a); prohibits entering into contracts on a cost-plus-percentage-of-cost basis.²³⁷

(d) title 10, United States Code, Section 2306(b); the requirement to include a provision in all negotiated contracts wherein the contractor warrants that no person or agency was retained by the contractor to obtain award of the contract for a commission or contingent fee. If the warranty is violated, the U.S. reserves the right to nullify the contract.²³⁸

(e) title 10, United States Code, Section 2306(e); the requirement to include in all cost contracts a clause requiring notification to DOD when fixed price subcontracts are issued in excess of \$25,000 or 5% of the prime contract.²³⁹

(f) title 10, United States Code, Section 2306(a); the requirement for contractors to submit certified cost and pricing data on contract actions expected to be in excess of \$100,000.²⁴⁰

(g) title 10, United States Code, Section 2313; the requirement to include in all cost-type contracts a provision which guarantees government access to contractor records involving the contract until three years after final payment.²⁴¹

(h) title 41, United States Code, Section 22; directs that every government contract include a

provision specifying that no member of Congress shall benefit from the contract.²⁴²

(i) title 50, United States Code, Appendix 2168; establishes a Cost Accounting Standards Board and directs that in every negotiated contract or subcontract, a provision be included requiring adherence to accounting standards and practices set by the Board.²⁴³

Except for these nine statutory provisions specifically excluded from application to NMSA transactions by the Act, acquisitions by U.S. forces of logistic support, supplies, and services are subject to the remaining requirements of the Armed Services Procurement Act²⁴⁴ and all other statutory requirements.²⁴⁵

(b) Policies and Limitations

In addition to applicable statutory requirements, acquisitions under the authority of NMSA must comply with "general principles of prudent procurement practice" and, existing DOD acquisition and logistics principles.²⁴⁶ These two vague limitations are the source of the much heated controversy concerning applicability of the Federal Acquisition Regulation (FAR) to NMSA transactions.²⁴⁷

Similarly, questions have arisen concerning which personnel are authorized to execute NMSA transactions on behalf of the government, particularly transactions of a fund obligating nature (e.g., reimbursable acquisitions). The controversy revolves around whether

Congress, in limiting the NMSA waiver authority to nine specific statutory provisions and otherwise requiring that acquisitions conducted under NMSA authority comply with the requirements of the Armed Services Procurement Act, intended only warranted contracting officers (or some recognized substitute such as an ordering officer) to execute NMSA transactions involving the obligation of funds. This issue and the controversy concerning whether acquisitions conducted under NMSA authority must comply with the FAR are issues which will be dealt with, in depth, in the analysis portion of this thesis.²⁴⁸

F. FINANCIAL POLICY

1. Compensation

(a). Generally

This section discusses the three methods of compensation provided for by the Act. Under the NMSA, compensation²⁴⁹ may be on either a reimbursable or a nonreimbursable basis.²⁵⁰ Reimbursement as a method of compensation simply means that cash payment for supplies or services will be made in the currency of the supplying country.²⁵¹ Compensation on a nonreimbursable basis involves replacement-in-kind or exchange as a method of compensation. Replacement-in-kind is compensation by replacement of supplies or services of an identical nature to those provided.²⁵² Exchange as a method of

compensation denotes the replacement of supplies or services of a "substantially" identical nature.²⁵³

(b) Reimbursable Transactions

Reimbursable transactions are those acquisitions and transfers which involve currency payments.²⁵⁴ Section 2345(b) of the Act²⁵⁵ describes the methods for calculating currency payments. The key feature of this section is the emphasis it places on reciprocal pricing principles.²⁵⁶

In narrowing its focus on reciprocal pricing, Congress was cognizant of U.S. pricing principles for Foreign Military Sales cases under the Arms Export Control Act.²⁵⁷ As you will recall, these pricing principles require that the U.S. recoup all the costs associated with the item involved.²⁵⁸ This routinely requires adding "administrative surcharges, prorated retirement costs, and so forth, into the price."²⁵⁹ The end result is that the U.S. charges the receiving country substantially more than U.S. forces would pay for like items or services.²⁶⁰

Congress realized that adhering to this pricing mechanism for NMSA transactions invited the retaliatory application of similar pricing methods by our allies to the goods or services acquired by U.S. forces. The authority to negotiate agreements reflecting reciprocal pricing principles was calculated to avoid this problem.²⁶¹ In addition, Congress reasoned that if the

supplying country charged the receiving country the same price charged its own armed forces for similar goods and services, the resulting price should be the "lowest possible cost."²⁶² Alternatively, the NMSA also provides that U.S. transfers (sales) of supplies or services to a receiving country which has not agreed to reciprocal pricing principles requires application of the Arms Export Control Act pricing principles.²⁶³

Finally, agreements involving reimbursable transactions entered into by U.S. forces must also provide that, for these transactions, credits and liabilities accrued by the U.S. will be liquidated not less often than once every three months by direct payment to the supplying entity.²⁶⁴

(c) Nonreimbursable Transactions

Congress also had a specific purpose in mind in providing that compensation for goods or services acquired or transferred under NMSA authority may be made on a replacement-in-kind or an exchange basis. These two methods of compensation relate to operational support requirements and "are intended to provide military field commanders with the flexibility to accomplish mutual support on a basis of equitable compensation while maximizing joint effectiveness through the utilization of available supplies and services."²⁶⁵

DOD policy encourages the use of NMSA replacement-in-kind or exchange procedures where "such transactions enhance operational readiness, foster mutual planning, advance cost-effective alternative means of support, promote interoperability, or otherwise offer advantages to the United States or are of mutual benefit to the United States and other participating countries."²⁶⁶

Replacement-in-kind or exchange entitlements will be satisfied by the issuance or receipt of replacement supplies or services within 12 months from the date of the original transaction.²⁶⁷ If compensation on a nonreimbursable basis is not effected within this 12 month period, then the transaction must be converted to a reimbursable (cash) one, and payment made within the time periods specified for reimbursable transactions.²⁶⁸

(d) Crediting of Receipts

Any receipt of payment by the U.S. shall be credited to the applicable appropriation, account, and DOD fund.²⁶⁹ Payments for logistic support, supplies, and services provided by U.S. forces initially as a reimbursable transaction will be credited to the DOD fund or appropriation current at the time the material was dropped from the inventory or when the services were performed.²⁷⁰ Where compensation for a given transaction was initially recorded as being on an exchange or replacement-in-kind basis, but is subsequently converted to a reimbursable transaction (i.e.,

because it has not occurred within the designated 12 month period), it shall be credited to the DOD fund or appropriation current at the time of conversion to a reimbursable transaction.²⁷¹

2. Pricing

(a) Generally

In reimbursable transactions involving cash payments, the NMSA requires that the U.S. officials involved in the acquisition or transfer give some consideration to pricing before conclusion of the transaction.²⁷² In the reimbursement situation, the preference of the NMSA is first for an agreement based on reciprocal pricing principles.²⁷³ In the event that reciprocal pricing cannot be obtained, the Act then requires that a price analysis be conducted and a determination made that the prices to be charged under the agreement are fair and reasonable.²⁷⁴

Pricing for nonreimbursable transactions becomes necessary only for those transactions conducted on an exchange basis; that is to say, where identical supplies or services are not available, and supplies or services of a substantially identical nature are proposed as compensation. In that situation, the Act requires that a determination be made that the replacement supplies or services have the same "form, fit and function" as those originally provided.²⁷⁵

(b) Reimbursable Transactions

(1) Generally

Section 2344(b)(1) of the Act²⁷⁶ establishes the pricing principles to be followed in acquisitions or transfers where compensation is to be made on a reimbursable basis. Although the terminology used seems to be directed to transactions made pursuant to a cross-servicing agreement, the legislative history indicates that Congress intended the reciprocal pricing principles contained in this section to be applicable to transactions using the acquisition only authority as well.²⁷⁷ Accordingly, the pricing principles set out in the Act should be used for all acquisitions and transfers made under NMSA authority.

Regarding the pricing of reimbursable transactions, the primary focus of the Act is on reciprocal pricing.²⁷⁸ Simply stated, reciprocal pricing means that the prices charged for the support, supplies, or services provided by the supplying country to the receiving country are in parity with those prices charged to the supplying country's own armed forces, regardless of whether the supplies or services are procured by the supplying country from a private contractor (indirect method) or are provided directly from the supplying country's own inventories or resources (direct method).²⁷⁹

In the event that reciprocal pricing is not provided for under the terms of the cross-servicing

agreement or is otherwise not applicable to the transaction in question,²⁸⁰ the Act requires that non-reciprocal pricing principles be followed. That is to say, a price analysis must be conducted and a determination made that the prices to be charged are fair and reasonable.²⁸¹

(2). Reciprocal Pricing Principles

The NMSA requires that for reimbursable acquisitions, an attempt must first be made to secure certification from the supplying country that reciprocal pricing principles will apply to the transaction.²⁸² As stated earlier, reciprocal pricing is essentially parity or equality in pricing. Inherent in the concept of reciprocal pricing, and the rationale for the legislative preference for this pricing method, is the assumption that the reciprocal price is both the best price obtainable by the supplying country and that it is also a fair and reasonable price for the goods or services involved.²⁸³ Consequently, if the supplying country certifies that the prices to be charged the receiving country are the same prices paid by its own armed forces for identical supplies or services, then the assumption can be made that these same prices are fair and reasonable. The NMSA pricing requirements, therefore, have been met and there is no further need to perform a price analysis or make an independent

determination as to the fairness or reasonableness of the proposed price.²⁸⁴

The Congressional viewpoint concerning the inherent reliability of reciprocal pricing as a guarantor of price reasonableness appears to have been modified by a recent change to the DOD implementing guidance regarding the NMSA.²⁸⁵ This change limits use of the NMSA authority to emergency situations when use of reciprocal pricing in a given situation would result in the U.S. paying a higher price for the goods or services than through use of an available alternative method of acquisition.²⁸⁶

The implication of this new provision is that DOD no longer considers it "prudent procurement practice" to rely solely on reciprocal pricing guarantees for the attainment of a fair and reasonable price for a given transaction. Rather, this shift in policy suggests that for every reimbursable transaction, regardless of the pricing method, a price analysis should be conducted and an independent determination of price reasonableness should be made.²⁸⁷

As contemplated by the Act, reciprocal pricing for the acquisition of support, supplies, or services may take one of two forms, depending on the source of the goods or services:

1. Where supplies or services are acquired indirectly; that is where the supplying country acquires the supplies or services from a private contractor for the benefit of the receiving country;²⁸⁸ or

2. Where the required supplies are furnished from the inventory of the supplying country or where support or services are provided by officers, employees, or governmental agencies of the supplying country.²⁸⁹

Where the goods or services are supplied indirectly by a private contractor, the price to be charged the receiving country must be equal to the price charged by the contractor to the armed forces of the supplying country.²⁹⁰ Prices charged in this situation may differ slightly to account for differences due to varying delivery schedules, points of delivery, and other similar considerations.²⁹¹ Where supplies or services are provided directly from the inventories or resources of the supplying country, the prices charged will be identical to those prices charged by the supplying country to its own armed forces.²⁹² When U.S. forces act as the supplier, prices charged shall be equal to rates charged for the provision of logistic support, supplies, and services to DOD component services.²⁹³

Finally, certification of reciprocal pricing requires proper documentation. Where a guarantee of reciprocal pricing is given in a transaction, a statement to that effect should be included in the agreement, implementing arrangement, order, or other fund obligating document. In addition, some consideration should be given to including a provision allowing U.S. Government access to records to verify price reciprocity.²⁹⁴

(3) Nonreciprocal Pricing Principles

As stated earlier, the NMSA expresses a clear preference for negotiation and adoption of reciprocal pricing principles in acquisitions and transfers. Failure to achieve a certification of reciprocal pricing requires that, for an acquisition of logistic support by U.S. forces, a price analysis must be conducted and a determination made by the U.S. commander delegated this responsibility²⁹⁵ that the prices to be charged for the logistic support, supplies, or services are fair and reasonable.²⁹⁶ If a price analysis is conducted and a determination of a fair and reasonable price cannot be made, then the proposed acquisition cannot take place.²⁹⁷

The Act is silent as to guidance concerning what form an acceptable price analysis must take. The implementing DOD guidance states only that a price analysis should be "based on prior experience and supporting data and consider all applicable circumstances."²⁹⁸ A great degree of flexibility is accorded to the practitioner in this area. The method and degree of the price analysis should vary depending on the circumstances of the particular acquisition, to include consideration of the dollar value involved and the complexity of the particular transaction.²⁹⁹

The Act specifically provides for situations involving transfers by the United States to a qualified country which are not covered by reciprocal pricing

principles. In all such cases, the pricing principles contained within the Arms Export Control Act must be applied.³⁰⁰

(c) Nonreimbursable Transactions

As stated earlier, pricing for nonreimbursable transactions becomes necessary only in the event identical supplies or services are not available and supplies or services of a substantially identical nature are proposed as compensation for those supplies or services provided.³⁰¹ In that situation, the Act requires that a determination be made that the intended replacement supplies or services have the same "form, fit and function" as those originally provided.³⁰² It is important to note that the replacement items must be of equal value to those provided. They need not, however, be of equal cost.³⁰³

G. ALTERNATE METHODS FOR THE ACQUISITION OF LOGISTIC SUPPORT, SUPPLIES AND SERVICES

1. NATO STANAGS

A STANAG "is the record of an agreement among several or all NATO nations to adopt like or similar military equipment, ammunition, supplies and stores, and operational, logistical, and administrative procedures."³⁰⁴ STANAG's, then, are very much like a mutual

support agreement or general implementing arrangement in that they set forth pre-agreed terms, conditions, and procedures. They differ from NMSA agreements in several key respects. First, STANAGS are generally multilateral agreements (as opposed to bilateral) that cover a wider range of subject matter areas than logistical support, supplies, or services.³⁰⁵ More importantly, a STANAG does not, by itself, constitute legal authority for U.S. forces to acquire or transfer support.³⁰⁶ This requires a basis in U.S. law.³⁰⁷

The policy of DOD is to encourage and support the development and use of NATO STANAGS.³⁰⁸ Moreover, implementation of the NMSA should not discourage or replace the use of NATO STANAGS.³⁰⁹ Whenever possible, NATO STANAG procedures and forms that meet minimum essential data requirements should be used for NMSA transactions.³¹⁰ STANAG's and STANAG procedures (in particular, pricing or repayment policies) may not be used, however, if inconsistent with the NMSA. Minor procedural differences should not preclude use of STANAGS.³¹¹

As a final point, NMSA provides a legal basis for U.S. ratification and use of STANAGS.³¹² If another authority can be used to ratify a STANAG, however, DOD policy is to use such other authority.³¹³ If the NMSA is used as the legal authority to ratify all or a part of a STANAG, ratification by the U.S. shall indicate clearly which portion of the STANAG is ratified using NMSA authority.³¹⁴

2. NMSA/FAR Acquisitions

(a) Background

Congressional pressure in the 1970's to reduce the force structure in Europe saw major cuts in the number of support troops, resulting in greater reliance by U.S. forces on NATO host nation countries for logistic support, supplies and services.³¹⁵ Rigidly employed methods for both acquiring support (commercial contracts) and providing support (Foreign Military Sales procedures) caused friction between the U.S. and its NATO allies.³¹⁶ The situation in the European theater of operations deteriorated to the point that, for REFORGER 1980, several key NATO countries refused to supply support under commercial contracts.³¹⁷ The friction was relieved and the support was provided largely through promises by U.S. officials to our NATO allies that legislative relief was imminent.³¹⁸

Congress provided that relief through passage of the NMSA. In its original form, the Act contained several safeguard provisions designed to monitor implementation and prevent an overly broad interpretation by DOD.³¹⁹ One such provision required that both the acquisition only and cross-servicing authorities would not be self-executing.³²⁰ Rather, it required the Secretary of Defense to prescribe regulations implementing these NMSA authorities and forward them to

Congress for review at least sixty days prior to their effective date.

The original DOD implementing regulations contained confusing and limiting language which the services interpreted as DOD policy to confine field use of the NMSA to the cross-servicing authority of the Act.³²¹ The Army regulations reflected this perceived constraint on NMSA implementation: "The acquisition and transfer of logistic support under this regulation will be accomplished under the terms of a support agreement or implementing arrangement."³²²

DOD policy to implement only the cross-servicing authority was problematic in several respects. In response to field concerns, DOD approached Congress with two separate problems: (1) its inability to acquire host nation support because of formal contracting procedures; and (2) the inability to easily acquire and transfer support in a field setting.³²³ Each authority, then, was enacted for a specific purpose. Acquisition only authority was designed to alleviate problems in acquiring host nation support; cross-servicing authority would facilitate the reciprocal provision of support in training and exercises.³²⁴ The fact the field needed both authorities is best illustrated by development of the NMSA/FAR acquisition format.

Use of cross-servicing authority requires, as a precondition, the existence of a mutual support agreement.³²⁵ Further, mutual support agreements are

negotiated at the government-to-government level, having the full status of international agreements. Largely because of their international status, negotiation and conclusion of mutual support agreements was a slow process. By April 1981 (a key planning time for REFORGER), no agreements had been signed.³²⁶ Discussions were ongoing, however, with the Federal Republic of Germany, the Netherlands, Belgium, and the United Kingdom.³²⁷ Only Belgium indicated that it might be possible to conclude an agreement in time for REFORGER 1981.³²⁸

USAREUR officials were faced with a very serious problem. It looked like REFORGER 1981 would have to be cancelled due to the lack of host nation support.³²⁹ With the aid of USEUCOM officials (and with some creative lawyering), however, a solution was soon forthcoming.

Faced with the fact that the acquisition only and cross-servicing authorities were not self-executing, U.S. officials focused their attention on the waiver authority of the Act.³³⁰ With regard to the waiver authority, the view was formulated that Congress, in passing this portion of the Act, meant to create a third, separate, "stand alone" authority. That is, an authority which by the terms of the statute was self-executing and which could therefore be used immediately, without the need for Congressionally reviewed implementing regulations.³³¹

The Head of the Contracting Activity (HCA) in USAREUR was the Deputy Commander In Chief (DCINC). As the HCA, he exercised general contracting authority and was authorized to negotiate and conclude contracts conforming to the Armed Services Procurement Act.³³² At this same time, there existed in USAREUR, an approved deviation from all Defense Acquisition Regulation regulatory requirements when U.S. forces contracted with NATO host nations for services (and incidental supplies) and for construction contracts.³³³

U.S. officials combined the authority of the NMSA to waive the nine most troublesome statutory provisions, the general contracting authority of the DCINC, and the DAR deviation from regulatory requirements and formed the "hybrid" NMSA/DAR (now NMSA/FAR) acquisition authority. A message was formulated and sent back to Headquarters, Department of the Army (HQDA), indicating the intent to use this new approach.³³⁴ USAREUR officials received no negative response from HQDA so the NMSA/DAR acquisition format was implemented in time for use in REFORGER 1981.³³⁵

(b) Procedures

The creators of the NMSA/FAR acquisition format felt that its use of the NMSA waiver authority made it subject to all the limitations and requirements imposed by the NMSA.³³⁶ Consequently, NMSA/FAR acquisitions are subject to the \$150 million obligational ceiling

and they are reported to Congress annually.³³⁷ Further, use of the NMSA/FAR transaction is limited to reimbursable acquisitions, because replacement-in-kind or exchange transactions can only occur under acquisition only or cross-servicing authority of the NMSA.³³⁸

Because of the scope of the DAR deviation,³³⁹ use of the NMSA/FAR authority is limited to acquisitions of services (and incidental supplies). Supply acquisitions are not covered by this approach. As an additional safeguard, the file must contain a Determination and Finding (D&F) supporting the decision to use this format, a price analysis must be conducted, and a determination as to a fair and reasonable price must also be made.³⁴⁰

IV. ANALYSIS

A. NMSA IMPLEMENTATION PROBLEMS

1. Overly Restrictive and Confusing Implementing Regulations

The NMSA was passed with an effective date of August 4, 1980.³⁴¹ By the original terms of this legislation, the acquisition only and cross-servicing authorities contained within the Act were not self-executing; they required that DOD prescribe implementing regulations, reviewed by Congress, prior to use of the authority.³⁴² In promulgating these regulations,

however, DOD failed "to fully recognize or embrace the intent of Congress with regard to certain statutory provisions and, therefore, did not reflect that intent in its implementing documents and procedures."³⁴³

The original DOD regulation became effective in August 1980.³⁴⁴ Almost a full year later, none of the services had promulgated their implementing guidance. By the summer of 1981, it became clear that NMSA authority would not be available in time for REFORGER. DOD's implementing guidance was seen as the major reason for the holdup:

The primary deterrent to a speedy implementation has been the DOD guidelines, which served to confuse rather than clarify the statutory authority. The DOD implementing guidelines created delays by including provisions more restrictive than the Act, as well as by poorly defining certain terms which have only served to confuse the two statutory authorities.³⁴⁵

The DOD implementing regulation has been revised twice since it became effective in August 1980. In its present form, it is still overly restrictive, vague, and confusing. This section will examine some of the major problems created for the field by DOD's implementing policies and guidance.

The NMSA clearly provided DOD with two distinct acquisition authorities: (1) the authority to acquire

goods and services through acquisition agreements (acquisition only authority); and (2) the authority to enter into cross-servicing agreements, after consultation with the Department of State, for the acquisition and transfer of logistic support, supplies, and services. When first published, however, the DOD regulation blurred this distinction by introduction of a new term, "support agreements,"³⁴⁶ which was inartfully defined and served to confuse the two authorities.³⁴⁷ One reason the distinction between the two authorities was important involved its impact on the appropriate level of authority for concluding agreements in the European theater.³⁴⁸ Implementation of the Act within USAREUR was delayed as a result.³⁴⁹

In the July 1984 revision to the DOD regulation, DOD eliminated the term "support agreements."³⁵⁰ In an attempt to clarify DOD's position, the revised regulation stated, unequivocally, that the NMSA created two separate forms of authority. It then described each and declared DOD's intention to implement both.³⁵¹ DOD's implementation of the acquisition only authority was, however, for unknown reasons, overly restrictive. It prescribed a clear preference for use of the cross-servicing authority and limited use of the acquisition only authority as an interim measure; that is, only until a cross-servicing agreement could be negotiated and concluded.³⁵²

As an aside, the July 1984 revision contained a reference to and authorization for publication of a

manual to provide guidance for acquisition only transactions.³⁵³ January 1, 1985 was listed as the date by which the manual would be published.³⁵⁴ To date, however, no manual has been forthcoming. The current revised regulation has dropped any reference to the acquisition manual.

The current regulation also continues to limit use of the acquisition only authority to situations of an interim nature, until a cross-servicing agreement can be concluded.³⁵⁵ Mutual support agreements have been negotiated and concluded with Belgium, Canada, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the NATO Maintenance and Supply Activity.³⁵⁶ Significantly, by limiting acquisition only authority to interim use, DOD has, in effect, all but prohibited its use by the services. That the services need acquisition only authority is evidenced by the continued viability of the NMSA/FAR format.³⁵⁷

Finally, the current revised regulation continues to provide problematic guidance to the field. Its use of the term "acquisition," for example, is confusing from the standpoint that the distinction between acquisition only and cross-servicing authorities is often merged. In some provisions the term is used to apply to acquisitions conducted under acquisition only authority³⁵⁸ and in still others the term refers to both authorities.³⁵⁹

Additional examples of the problems generated by the confusing and restrictive implementation by DOD of the NMSA are discussed in succeeding sections.³⁶⁰ Clearly, what is needed is a statement of DOD policy which provides clear and concise guidance to the field on NMSA usage. In addition, removal of the restrictions on use of the acquisition only authority and publication of an instructional manual on use of NMSA authority in general would be of significant benefit to the services.

2. Different Support Requirements Warrant Different Procedures

Many of the problems associated with implementation of the NMSA stem from DOD's failure to recognize that U.S. forces logistic support requirements are of two fundamentally different kinds and the concomitant failure to provide for separate procedures to accommodate these differences. The fact that there are two different types of support requirements is reflected both in the two different peacetime purposes of the NMSA and the two different Congressional grants of acquisition authority contained within the Act.

As you will recall, the two peacetime purposes of the NMSA are to provide for simplified procedures to facilitate the interchange of logistic support between U.S. forces and the military forces of allied countries in training and exercises and to permit better use of host nation resources by providing U.S. forces with the

means to acquire support services without the need to resort to "complex contracting procedures."³⁶¹ Congress granted DOD cross-servicing authority to provide for support requirements of an "operational" nature.³⁶² It granted acquisition only authority to resolve problems faced by U.S. forces in acquiring "host nation support."³⁶³

It is at once axiomatic that U.S. forces operational and host nation support requirements are fundamentally different. Operational support requirements are typified by the exigent circumstances encountered by troops in a field environment. Accordingly, they are driven by field conditions which require simplified, mobile, and flexible procedures to accommodate the exigencies involved. Operational support requirements are characterized by one-of-a-kind, low dollar value transactions. Examples of this type of support are food, clothing, billeting, POL, transportation services, ammunition, communication services, spare parts, medical services, and training services.³⁶⁴

Host nation support, on the other hand, is support of a static and a recurring nature. The acquisition of host nation support often necessitates the execution of acquisition agreements of a highly complex nature, applying over a long period of time, and involving a large dollar amount. Examples of host nation support include base operations support (including incidental minor construction), storage services, use of facilities, and repair and maintenance services.³⁶⁵

As has already been shown, the original DOD implementing regulation merged the distinction between these two types of support requirements and their corresponding NMSA authorities as well. In so doing, DOD restricted NMSA usage to cross-servicing authority, causing the birth of the hybrid NMSA/FAR authority. Tragically, DOD failed to take full advantage of the momentum generated by these legislative initiatives. As a result, the NMSA has not and probably never will realize its full potential.

An examination of the legislative history predating passage of the NMSA clearly indicates that Congress was aware of the differences in these support requirements.³⁶⁶ Moreover, it is equally clear that Congress, by including two separate authorities in the NMSA, intended each to respond to a specific need: cross-servicing for operational support; acquisition only for host nation support.³⁶⁷ The fact that U.S. forces in the field needed acquisition only authority is clearly evidenced by the birth and subsequent growth of the NMSA/FAR hybrid approach. The continued viability of the NMSA/FAR approach is, again, proof of a present need for a stand alone acquisition only authority.

The two sections that follow will examine each of these different support requirements, focusing on the problems unique to each. Special emphasis is placed on the continued need for separate policies and procedures responsive to the unique problems generated by each form of support.

B. OPERATIONAL SUPPORT REQUIREMENTS

1. Introduction

Operational support concerns, as reflected in NMSA's legislative history, focus on the need to resort to Foreign Military Sales procedures to transfer support to our allies in combined training and exercises and the need for U.S. forces to resort to formal, time-consuming contracting procedures to meet emergency logistics requirements under field conditions.³⁶⁸ In short, what the U.S. forces in the field needed was (and is) a simplified, flexible, and deployable system by which to acquire and transfer operational support. What they received were traditional contracting procedures, minus the nine statutory provisions waived by operation of the Act.

Once again, confusing and restrictive DOD policy was the source of the problem. The legislative history expressed concern that acquisitions under NMSA authority should comply with "general principles of prudent procurement practice."³⁶⁹ This concern was liberally interpreted by DOD officials as evidence of an expressed intent to "graft" the newly enacted NMSA authority onto the existing DOD procurement system, as implemented by the then DAR. What this did, in effect, was "wed" implementation and usage of the NMSA to the contracting community, with only secondary involvement by the logistics community. This is not to suggest that

overall responsibility for the NMSA belongs entirely in either camp. Rather, for purposes of operational support requirements, primary responsibility should reside with the logisticians. As will be shown in the next section, because of its complexities and high dollar value, responsibility for host nation support quite correctly requires the involvement of the contracting community.³⁷⁰

As a result of DOD's adherence to established contracting channels in implementation of the NMSA, questions concerning DAR/FAR applicability have plagued NMSA usage since its inception. The following sections examine this controversy. The concluding section discusses the unique opportunity for field usage presented by the NMSA, with suggestions for establishment of a procedure to create a truly deployable cross-servicing system.

2. FAR Applicability

The question of FAR applicability to NMSA transactions is essentially a question of Congressional intent. More specifically, in passing the NMSA, did Congress intend it to be an extension of the Armed Services Procurement Act (ASPA) and, therefore, subject to the existing system of implementing regulations? Or did Congress, in enacting this new legislation, intend to create a truly separate authority, requiring the creation of its own, parallel system, drawing on the

DAR only for its experience and expertise on an as needed basis? This question and those corollary to it have been among the most intensely debated questions surrounding passage of the Act.³⁷¹

Those individuals advocating the NMSA as an extension of the ASPA (and therefore subject to the FAR) argue that Congress intended the NMSA to be authority for DOD to use simplified contracting procedures to enter into agreements with qualified governments and NATO subsidiary body organizations for the acquisition or reciprocal provision of logistic support, supplies, and services. In support of this position, they point to section 2343(a) of the Act³⁷² which provides that, with the exception of the nine statutory provisions which may be waived, NMSA transactions must, in all other respects, comply with the ASPA. Since the ASPA applies to all NMSA transactions, and the FAR implements ASPA within DOD, then it necessarily follows that the FAR applies to all NMSA transactions.³⁷³

As further support for this proposition, proponents of this position point to evidence of DOD's intent to make the NMSA subject to the FAR in the implementing regulation. That regulation provides that acquisitions conducted under NMSA authority shall comply with "general principles of prudent procurement practice"³⁷⁴ and that when implementing the NMSA existing DOD acquisition and logistics principles will be used.³⁷⁵

Resolution of this question requires reference to the Act as originally passed.³⁷⁶ The Act provided that

the authorities conferred by the NMSA for DOD to enter into acquisition only and cross-servicing agreements were not self-executing. Rather, the Act required DOD to prescribe its own regulations, prior to use of either of these authorities. If Congress had intended to "graft" this new authority onto existing regulations then the requirement for newly promulgated regulations would be rendered meaningless.

Arguments that NMSA transactions are subject to the ASPA in all respects, with the exception of the nine waived provisions, also miss the mark. Apart from the six provisions included in the ASPA from which NMSA transactions are excluded, very few provisions remain which, because of the subject matter involved, are applicable to NMSA transactions.³⁷⁷ In addition, the sections in the ASPA from which the NMSA are exempted relate to basic contract functions as to competition, solicitation, award, cost and pricing data, and examination of records.³⁷⁸ Application of the FAR minus these provisions and contracting concepts, "would produce a fragmented set of requirements and procedures of questionable value."³⁷⁹

As a final note, the requirement to conduct NMSA transactions in consonance with "principles of prudent procurement practice" has its origin in House and Senate concerns expressed prior to passage of the Act.³⁸⁰ As such, these Congressional references to acquisition principles were a reference to the need to exercise good business judgment, not an imposition of

the very regulatory scheme on NMSA transactions³⁸¹
which Congress was enacting legislation to avoid.

3. Contracting Authority

An important corollary to that of FAR applicability is whether NMSA transactions involving reimbursable acquisitions require the involvement of a warranted contracting officer. Supporters of this position point, again, to the DOD regulation which provides, in part, that "Personnel implementing these agreements and arrangements by issuing and accepting requisitions or other forms shall be designated specifically and shall be selected so as to have the necessary knowledge and experience to carry out authorized transactions in accordance with applicable laws, this Directive, and other implementing regulations."³⁸²

Proponents of this position point to the fact that it is a well established principle of acquisition law and practice that the contracting officer is the single, responsible U.S. Government representative authorized to contract on behalf of the Government. As such, his or her position is one of special trust and independence which cannot or should not be compromised.³⁸³ Moreover, acquisition restrictions in annual DOD authorization and appropriation acts and other acquisition laws (e.g., fiscal laws) apply to NMSA transactions.³⁸⁴ In addition, the application of non-reciprocal pricing principles requires a price

analysis and a fair and reasonable price determination. Because of the broad and highly specialized range of knowledge, experience, and pricing expertise required, it is argued that only warranted contracting officers are able to adequately represent the Government's interests in NMSA acquisitions.

The argument that only warranted contracting officers may obligate the Government in NMSA transactions is equally specious. Although admittedly vague, the DOD policy to have only qualified personnel conduct NMSA actions was meant to restate Congressional emphasis on the need to have knowledgeable personnel conducting the issuance and acceptance of orders and requisitions for support. Emphasis by Congress on simplified procedures for pricing (reciprocal pricing) for example, indicates a preference for simplified procedures which do not require contracting officer involvement.

That is not to say, however, that all NMSA acquisitions should be conducted by non-contracting personnel. The circumstances of the individual acquisition should dictate the need for and the involvement of a contracting officer. Once again, the distinction between operational support and host nation support becomes important. For example, a high dollar value, complex, long term acquisition of storage services involving the POMCUS³⁸⁵ program, requiring specialized expertise in price analysis and negotiation as well as detailed knowledge of funding restrictions, may well necessitate use of a contracting officer and supporting personnel.³⁸⁶

The questions regarding FAR applicability and the need for warranted contracting officer involvement in NMSA transactions represent yet another example of the problems in NMSA implementation and usage created by vague and confusing DOD guidance. The present DOD regulation should be revised to clear up this controversy.

3. Fully Deployable Reciprocal Support Procedures

The legislative history of the NMSA is replete with references to a field functioning system for the mutual exchange of logistic support.³⁸⁷ The point was stressed in committee hearings time and again that NATO military operations must be conducted on the basis of a coalition approach.³⁸⁸ American forces will be required to fight alongside British, German, Dutch, Belgian, Italian and other allied military forces.³⁸⁹ With this in mind, the "important question"³⁹⁰ of mutual logistics support arises. The armed forces of each Alliance country "cannot all behave as if we were logistically independent when in the crunch we will all be dependent on each other. Hence the first purpose of the proposed legislation is to facilitate such mutual support, especially in peacetime training and exercises, to facilitate common readiness in event of war."³⁹¹ Moreover, the purpose of combined training and jointly held exercises is to "test the ability of

our forces, and those of our Allies, to function under wartime conditions. I submit, then, that our arrangements for mutual logistic support during exercises should be as close to realism as we can practically make them."³⁹²

A second reason for simplified procedures for mutual logistic support is the fact that U.S. forces operate in Europe "at the end of a logistic pipeline 3,000 miles long."³⁹³ The end result is therefore always "short-term demands" for support by U.S. forces.³⁹⁴ By this same token, our Allies, although operating under a shorter pipeline, often require short-term support during training and exercises. The NMSA was designed as a means for U.S. forces to acquire and transfer support quickly and efficiently under field operating conditions.³⁹⁵

The need for a deployable, field functioning system for the reciprocal provision of logistic support is easily established from a review of the legislative history. It also seems equally clear that Congress intended the cross-servicing authority to provide the statutory basis for the establishment of such a system.³⁹⁶ The question arises as to why such a system has not been forthcoming? The answer to that question lies, once again, in the confusing DOD guidance.

As discussed earlier, the DOD regulation requires that acquisitions under NMSA authority comply with "general principles of prudent procurement practice" and the use of existing DOD acquisition principles. In

addition, personnel empowered to conduct NMSA transaction must be specifically designated, having the requisite knowledge of applicable laws and regulations.³⁹⁷ These policies and guidance have, in the past, been interpreted as requiring that all NMSA acquisitions comply with FAR requirements and that reimbursable acquisitions be conducted by warranted contracting officers.³⁹⁸

To add to this confusion, the regulation also states that "when useful and applicable, DOD components are encouraged to establish simplified procedures under cross-servicing agreements, implementing arrangements, contracts, or other contractual instruments under the NMSA similar to those used in basic ordering agreements, with authority to place orders delegated to the lowest practical and prudent level."³⁹⁹ The implication of this provision is that DA is free to establish a system for fulfilling operational support requirements that does not require application of the FAR or the use of warranted contracting officers for reimbursable acquisitions. Still, DOD's intent in this regard is unclear. The HQDA response has largely been inertia. What is needed is a clear, unequivocal statement from DOD that acquisitions under the NMSA are, in fact, not subject to FAR requirements, although DOD components should continue to refer to the FAR for guidance. This statement should also clearly state that warranted contracting officers may, but need not, effect acquisitions under the Act.

On a more positive note, USAREUR has established extensive procedures covering NMSA transactions.⁴⁰⁰ Most importantly, they provide for delegation of the administration of certain specific and general implementing arrangements down to the command level. The authority to acquire and provide support is also in the delegation.⁴⁰¹

The problem with the USAREUR procedures is that they are decidedly vague, both with respect to FAR applicability and the need for contracting officer involvement in the acquisition process. Further, the USAREUR approach fails to provide standardized procedures for local command administration of these agreements. It leaves the establishment of internal procedures for re-delegation, selection of qualified personnel for placing and accepting orders, and the assurance of adequate NMSA ceiling authority and fund availability to each individual command tasked with administering an implementing arrangement.⁴⁰²

As stated earlier, the July 1984 DOD implementing regulation called for publication of an acquisition manual.⁴⁰³ In 1984, a draft version of such a manual was compiled by representatives of the DOD components, under the direction of the Special Assistant to the DCINC for Host Nation Negotiations, Headquarters, EUCOM.⁴⁰⁴ That draft included a provision for field acquisitions which could form the nucleus upon which a deployable system could be based. It was based on the DAR small purchase provisions and the concept of an

ordering officer. Under this procedure, called "simplified acquisition authority," a field commander of the rank of O-5/GS-14 or higher would be authorized to acquire logistic support, supplies, or services, of a value less than or equal to \$25,000, without the need of a warranted contracting officer. In addition, the O-5/GS-14 could designate, in writing, a subordinate to carry out the transaction. The O-5/GS-14 would, however, still have to approve the transaction, in advance, and would remain personally responsible for the acquisition. Specific training for designated personnel would also be provided.⁴⁰⁵

It is beyond the scope of this paper to delineate with any degree of specificity the procedures that should be used for a field functioning logistic support system. There are, however, certain basic requirements that such a system should meet. It should be deployable/mobile (making reliance on contracting officer support impractical); it should be flexible enough to adapt to changing conditions on today's integrated battlefield; and, finally, the procedures involved should be simple (for ease of use) and standardized (to present a common face to our Allies). Empowering field commanders with limited authority to acquire operational support is a positive step in this direction.

C. HOST NATION SUPPORT REQUIREMENTS

1. Introduction

Army requirements for host nation support, provided under NMSA authority, are many and varied. Most notably they include: storage services,⁴⁰⁶ base operations support,⁴⁰⁷ and repair and maintenance services.⁴⁰⁸ For fiscal year 1985, the total amounts expended for host nation support by the Army exceeded \$53 million, over half the NMSA ceiling allocation available for all DOD components.⁴⁰⁹ Interestingly, only 11 separate NMSA transactions were involved in these expenditures.⁴¹⁰

As might well be expected, these eleven acquisitions of logistic support and services involve very complex, high dollar value acquisition agreements. They also involve static, recurring, long term support requirements, some of an indefinite duration. Indeed, several of these agreements⁴¹¹ predate passage of the NMSA.

Unlike the problems experienced in acquiring and transferring operational support, the problems associated with the acquisition of host nation support do not, for the most part, stem from poor guidance or from the dogmatic adherence to traditional contracting methods. As a result, problems experienced by U.S. forces in the acquisition of host nation support involve traditional issues of Government contract law.

As will be shown in the succeeding discussion, they focus on formation issues, claims and disputes, and significant fiscal law concerns.

For purposes of illustration and discussion, reference will be made throughout this section to a case study involving an agreement between the U.S. and the Federal Republic of Germany (FRG), concluded under NMSA authority, for the acquisition of storage services. This agreement has proven to be a test case with the German government wherein many of the current problems and shortfalls in the acquisition of host nation support have surfaced.

Specifically, this agreement concerned a USAREUR requirement for war reserve storage of approximately 65,000 metric tons of U.S. Army owned stocks. Shortages in NATO infrastructure funding, which could have been used to construct storage facilities, required U.S. forces to seek an alternate means to meet this requirement. An agreement for storage services under NMSA authority was the chosen format.

U.S. officials approached the Federal Ministry of Defense (FMOD), FRG, to provide the required services. The FMOD indicated it did not have the resources to provide these services but referred the U.S. to the Federal Ministry of Finance, (FMOF), FRG, which provided similar services to the German armed forces. The FMOF was contacted and it expressed a willingness to perform the services.

An implementing arrangement was concluded under the Mutual Support Agreement between the U.S. and the FRG. That implementing arrangement provided that the FMOF would task a Government owned corporation, Industrierwaltungsgesellschaft (IVG), to perform the services. IVG provided petroleum and ammunition storage services for the German armed forces. The implementing arrangement also provided that the details of the support would be negotiated between IVG and U.S. contracting personnel in the form of an order. The order would be in the nature of a service contract, on a cost reimbursement basis. It would be funded with annual appropriations.

2. Funding

(a) Annual Funding for Multi-Year Commitments

A common thread running through all host nation support agreements is that they are funded with annual appropriations.⁴¹² U.S. officials are therefore prohibited, by law,⁴¹³ from making any commitments beyond the present fiscal year, save those "subject to the availability of funds."⁴¹⁴ These funding restrictions have created significant problems with our allies in securing much needed host nation support.

Agreements for host nation support such as base operations or storage services generally require the host nation to acquire facilities, hire personnel, and

enter into subcontracts on behalf of the U.S. Typically, these actions require the host nation to make long term commitments. U.S. problems in the area of funding center on the tension created between the need for these long term host nation commitments and the U.S.'s inability to commit itself to payment for support beyond the current fiscal year term.

A major host nation concern with regard to the U.S.'s inability to commit itself beyond the near term involves labor force concerns, long term employment contracts and associated termination costs. NATO host nation governments are working with a constant labor force, characterized by conditions of full employment and a non-mobile pool of workers.⁴¹⁵ In contrast, the American labor force is highly mobile and variant, with a relatively high percentage of unemployed workers.⁴¹⁶ In general, it is difficult, at the outset, for NATO host nations to find the personnel needed to fulfill long term U.S. support requirements. Added to the availability of manpower problem, is the problem of strong labor unions which require long term employment contracts with healthy severance pay penalties.⁴¹⁷ In addition, depending on the type of arrangement, personnel hired for use in performing work on U.S. support agreements are often hired as host nation government employees, making termination difficult if not impossible.

Besides labor force concerns, performance of a storage or base operations agreement may require the

host nation to enter into long term lease agreements to secure the facilities needed to perform the requested services. In the IVG arrangement, for example, German landlords were generally unwilling to accept less than a five year lease term. This unwillingness was due, in part, to local customs. It was also the result, however, of the need to make significant alterations to the physical configuration of the facilities in order to accommodate storage of large, heavy military equipment.

Performance of a complex agreement for host nation support typically requires the host nation to enter into a number of subcontracts with commercial firms to meet U.S. requirements. Services such as maintenance of facilities and guard services are prime areas for subcontracting. As is true with personnel contracts and lease agreements, long term host nation commitments are often required. Certainly from a cost effectiveness standpoint, long term arrangements prove more beneficial to U.S. interests.

These and other problems with regard to funding surfaced in negotiations with IVG for war reserve storage services.⁴¹⁸ The German position on these points is indicative of the response the U.S. will likely meet in future negotiations with our other Allies for long term host nation support. The German position was simply that questions and concerns generated by annual funding restrictions are strictly internal U.S. matters of no concern to the Germans. If

the U.S. has a requirement for long term support, then it is up to the U.S. to guarantee payment for the entire period support is required. This guarantee must extend to all costs associated with performance of the agreement, to include all costs incurred in the event the agreement is cancelled. In this same vein, it was clear from discussions with the German negotiators that IVG had been instructed by the FMOF to undertake no financial risks ("kein risiko") in performing this agreement.

When faced with such a Hobson's choice, it is surprising the kind of creative lawyering such a situation engenders. As might well be expected, several compromise measures were suggested to satisfy German concerns. With regard to time limitations, it was stressed that, although the order for services would be funded annually, the implementing arrangement would be renewed in five year increments, thus evidencing U.S. intent for a longer term arrangement. The downside of this approach to the Germans was the fact that the U.S. was not legally obligated beyond the current fiscal year.

It was not possible to obtain multi-year funding for this requirement. As an alternative, it was proposed that the agreement be structured to take advantage of the U.S. statutory exception to the Bona Fide Needs rule for depot maintenance contracts.⁴¹⁹ This exception makes current fiscal year appropriations available to fund a contract for depot maintenance

services for a period of twelve months beginning at any time during the fiscal year. The agreement for storage services could then be signed with an initial performance date between six to nine months after the beginning of the fiscal year. In this way, IVG would always have at least six months advance notice of the U.S. intent to fund or cancel the agreement for the succeeding year.

The structuring of agreements for storage services to cross fiscal year lines and empty gestures of good faith regarding the duration of support agreements are acts of desperation on the part of U.S. forces that skirt the real issue. What is really needed if the U.S. is to have any hope of acquiring continued long term support from Alliance countries, is a specific line item appropriation for host nation support under the NMSA, with a five year period of availability. Appropriated amounts should parallel those presently in place for the artificial NMSA ceiling authority (i.e., \$150 million).

(b) Advance Payment Authority

Another funding issue related to host nation support acquisitions relates to the often repeated request by host nations for advance payments by the U.S. to cover start-up costs and the costs of initial commitments. In the IVG agreement, for example, IVG proposed to establish a daughter company, MDBG,⁴²⁰ for

the singular purpose of performing the services required by the U.S. forces. The FMOF committed itself to providing DM 100,000 as formation capital under German law. The new company would, however, have no operating capital to meet start-up costs and make initial commitments.

In general, advance payments in connection with Government contracts are prohibited by title 31, United States Code, section 3324. Title 10, United States Code, section 2396, however, provides limited authority for U.S. forces to make advance payments under certain situations. Most relevant to this discussion is the situation where advance payments are required by the laws or ministerial regulations of a foreign country, an exception that did not apply to the IVG arrangement. Approval for advance payments must be specifically applied for by contracting personnel and is only granted on a case-by-case basis.⁴²¹

At the time the U.S. military approached Congress for legislative relief (resulting in passage of the NMSA) it had very little experience with regard to the problems acquisition of long term support would create. Had U.S. forces been aware of the problem regarding advance payments, it would have resulted in a request for waiver of a tenth statutory provision. What is needed then is an amendment to the Act providing for relief from this prohibition.

(c) The Concept of "Full Funding"

In the course of acquiring host nation support, another major funding issue arises that, by either design or happenstance, is patterned after U.S. pricing policy for Foreign Military Sales cases under the Arms Export Control Act. As you will recall, U.S. policy in this regard is that prices cited in the DD Form 1513 were estimates only.⁴²² The receiving country must agree to open-ended liability, remaining responsible for all costs associated with filling its request for supplies or services.

Increasingly, our allies have taken a similar approach to U.S. requests for host nation support. As a result, host nations have begun to object to U.S. attempts to place funding ceilings on its liability for payment under specific support agreements. The host nation position is simple: although it may be willing to undertake to meet U.S. forces support requirements, it will not assume any financial risks in the process.

This host nation "full cost" position is particularly troublesome when viewed in terms of termination or cancellation charges in connection with long term commitments made in the performance of a support agreement. From a U.S. fiscal law standpoint, the U.S. cannot commit itself to an open-ended, indeterminate liability.⁴²³ U.S. liability for contingencies must be

limited in order to avoid potential Antideficiency Act violations.

The problems surrounding the use of annual funds for multi-year agreements are not new. The legislative history of the Act mentions DOD concerns in this regard.⁴²⁴ Indeed, the predecessor bill to the NMSA,⁴²⁵ submitted by DOD, contained a specific provision that dealt with multi-year agreements.⁴²⁶ The focus of that provision was on agreements entered into under NMSA authority "for base operations support or use of facilities (and related services)."⁴²⁷ Under this proposal, such agreements would be allowed to extend for periods in excess of one year. Obligations incurred under these agreements would be recorded during the period (fiscal year) the support or service was provided. Special provisions were included for contingent liabilities such as "personnel separation allowances" and "costs of cancellation or termination of the agreement."⁴²⁸ As an alternative to a specific line item appropriation for host nation support, Congress could provide general legislative relief through incorporating such a provision, or a similar provision, as an amendment to the NMSA.

From the host nation perspective the equation is a simple one. If the U.S. desires support on a long term basis, then the U.S. should be able to provide guarantees that it will compensate the host nation for the entire period support is required. Moreover, as the support is entirely for the benefit of the U.S.,

the U.S. must agree to open-ended liability and agree to pay all costs associated with operation and termination of these support agreements.

Finally, provision of logistic support by the host nation is a discretionary act. Esoteric references to alliance cooperation are not always controlling. What matters, essentially, is the concept of "goodwill." This is a finite commodity which is quickly expended by an inflexible attitude and corresponding references to domestic funding restrictions. What is really needed are funds specifically appropriated for use in NMSA acquisitions which have a multiple year period of availability. Alternatively, amendments to the Act to facilitate acquisition of host nation support are required.

2. Government Owned Corporations

The NMSA is authority for U.S. forces to acquire and transfer support at the government-to-government level. As such, host nation support can be acquired under the NMSA in one of two basic ways: a direct acquisition from the resources of the host nation; or an indirect acquisition of support through the host nation from a private source.⁴²⁹ In the case of the direct approach, it is permissible for U.S. forces to make arrangements to acquire the support directly from the host nation agency tasked to provide it. In the case of the indirect approach, however, in order for

the transaction to retain its nation-to-nation character, all arrangements should be made through the host nation. U.S. forces should not deal directly with the private source.

Unfortunately, in practice, the methods of acquisition and the lines of authority are not so clear cut. Moreover, U.S. acquisitions, in the future, will see more merging between these two methods. This is largely due to the unique, complex, and long term nature of the U.S. forces requirements for host nation support. These are requirements that typically involve substantial commitments of personnel, leases of facilities, and the need for capital to fund start-up costs. Most allied countries do not have the direct resources to meet such requirements. As an alternative, host nations will turn increasingly to whole or partly owned (or funded) government corporations to meet U.S. support requirements.

In the case study involving the acquisition of war reserve storage services by U.S. forces from the FRG, the implementing arrangement was concluded between USAREUR, the FMOF, and the FMOD. The implementing arrangement then designated IVG to perform the the services and provided for conclusion of an order for the services between U.S. contracting personnel and IVG representatives. IVG, in turn, proposed to establish a subsidiary company (MDBG) which would actually be required to perform the storage services.

During negotiations with IVG, serious questions arose concerning its status as either a private corporation or an agency of the FMOF and consequently the FRG. The distinction as to status was critical for several reasons. First and foremost was the obvious effect IVG's status as a private firm would have on USAREUR's ability to proceed with this acquisition under the authority of the NMSA. If IVG was, in fact, a commercial business entity then more direct involvement by the FMOF or the FMOD in the acquisition was required to preserve the government-to-government character of this arrangement. Alternatively, if this could not be accomplished, commercial contracting methods would have to be used. A primary concern in this regard was the U.S.'s ability to justify IVG as a sole source for this acquisition.

IVG's private or public status had additional ramifications. Most important for the purposes of this discussion were the payment by the U.S. to IVG of a profit or fee and the requirement for the U.S. to pay taxes of a corporate nature. Regarding the question of profit or a fee, in its initial proposal, IVG sought a fee of between 5% and 6% of total costs incurred. The method for calculating the fee would therefore be on a cost-plus-a-percentage-of-cost basis where the incentive is on the contractor to drive-up not hold down costs.

There is a statutory prohibition against using the cost-plus-a-percentage-of-cost contract type.⁴³⁰ This

provision, however, is one of the nine statutory provisions waivable in NMSA transactions. Waiver of this provision is based upon the understanding that, because NMSA transactions would be concluded at the government-to-government level, profit or fee would not be a factor.⁴³¹ As a result, the statutory prohibition could be waived to allow the host nation to impose a charge in the form of an administrative surcharge to cover expenses incurred in administration of the agreement.

It was obvious from IVG's written submittals and from statements made in negotiations that both IVG and MDBG were commercial firms, organized on a profit making basis. This illustrates two key points. The first involves the complex, multifaceted corporate status of IVG (and MDBG), a phenomenon which might be termed the "chameleon effect." It seems that for certain purposes (i.e., eligibility to perform the services as a directed source) IVG was a government agency, for other purposes, such as charging a profit and tax liability, it was a private concern.

The second point illustrated by IVG's dual nature involves certain assumptions made by Congress concerning the nature of the relationship between the parties to a NMSA transaction. Of paramount concern here is the assumption that NMSA transactions would be noncommercial in nature. Clearly, the learning point from the IVG experience in this regard is that NMSA transactions involving participation by a government

owned corporation will retain some commercial aspects. As a result, "blanket" application of the NMSA waiver provision may not always be in the government's best interests. Further, involvement by contracting professionals in a transaction of this nature is absolutely necessary to adequately protect governmental interests.

Another issue raised by host nation involvement of a government owned corporation to perform services for the U.S. forces is the question of taxes. Typically, an agreement for host nation support will be on a cost-reimbursement basis. As such, the U.S. Government is obligated to reimburse the corporation for all costs it incurs in the performance of this agreement. While the corporation may enjoy the financial backing of the country involved, in general, it receives no special status with regard to taxes. Of particular concern are real estate, business, and municipal taxes.

It is DOD policy to secure relief to the maximum extent practicable from payment of foreign taxes with appropriated funds.⁴³² Toward this end, DOD has established a Foreign Tax Relief Program.⁴³³ This program involves designation of a single military commander as responsible for a given country. That military commander then has the following responsibilities: maintain a current country tax law study; serve as a single point of contact for U.S. contracting officers to investigate and resolve specific foreign tax relief matters; and to serve as liaison with

responsible Department of State and local foreign tax authorities.

Problems of tax liability involving a foreign corporation, such as in the IVG case, are complicated and involve highly sensitive issues. If questions of this nature should arise, it is important that they be surfaced early on in the negotiations. Ideally, the corporation's status and the U.S. Government's liability for payment of taxes should be agreed upon, in writing, in advance of concluding the NMSA transactions. If agreement cannot be reached, compliance with the DOD Foreign Tax Relief Program is required.

The questions raised by host nation use of government owned or financed corporations to provide support to U.S. forces are important in several respects. Because of the resource intensive and complex nature of the support involved (i.e., storage services) future U.S. requirements for host nation support should see increased use of government corporations. In this vein and, again, drawing on the problems encountered in the IVG experience, how U.S. officials resolve these problems will have a decidedly precedent setting effect. Experience dictates that our allies have long term memories. Concessions and deviations from U.S. procedures made in the course of concluding an agreement for one acquisition, will undoubtedly change future acquisitions with that country as well, particularly if the change or deviation proved

beneficial to the host nation. Perhaps more importantly, however, is a corollary to the idea of intra-country precedence. Experience also dictates that there is continuing dialogue or a process of "networking" between Alliance countries. Concessions and deviations from U.S. procedures with regard to a particular acquisition may very well necessitate across-the-board changes in U.S. policies and procedures within the European theater.

D. FINANCIAL POLICY

1. Reciprocal Pricing

The Act, the implementing regulation⁴³⁴ and the financial policy Instruction⁴³⁵ all emphasize reciprocal pricing as the preferred pricing arrangement for reimbursable NMSA transactions. Reciprocal pricing, as you recall, is based essentially on the concept of parity or equality in pricing. Under this form of financial arrangement, the host nation agrees to charge prices identical to those charged its own armed forces for supplies and services from host nation resources.⁴³⁶ For supplies and services acquired from a host nation contractor, by the host nation for the U.S., the price charged will be equal (with some minor adjustments) to the price charged by the contractor to the armed forces of the supplying country.⁴³⁷

The assumption underlying the concept of reciprocal pricing, is that, because the supplying country has paid the same price for the goods or services, then that price is the best obtainable and is also a fair and reasonable one. Implied in this notion is that the supplying country undertook some efforts (i.e., competed its requirements) to obtain at least a fair and reasonable price.

The question arises as to whether, in light of differing commercial markets, the requirement of many defense ministries to pay taxes on goods and services acquired and the promotion by host nations of internal "domestic" policies, the assumptions underlying reciprocal pricing are indeed valid ones.

The quickest and easiest way to analogize the potential problem in reliance on reciprocal pricing is by reference to the DOD procurement system. DOD does not always get the best price obtainable for goods and services. Some would argue, in light of recent procurement fraud scandals, that DOD does not always get a price that is fair and reasonable. The potential exists then that the procurement systems in use by the armed forces of our NATO allies are equally problematic.

Apart from speculation as to the validity of a given country's procurement system, some very real, concrete differences exist between U.S. markets and business practices and their European counterparts. These differences impact directly on the concept of

reciprocal pricing. A prime example of these differences is the idea of competition, a cornerstone of both the U.S. marketplace and the Federal procurement system. Based largely on the uniquely European views of a guild mechanism, European concepts of competition differ radically from American held beliefs:

large parts of the European population are raised in a quasi-protective, non-competitive environment. Hence, the concept of competition as we know it in the United States is essentially unknown to the European mentality. . . . You may like or dislike the European attitude toward competition. The fact remains, however, that no fierce competition exists among the Europeans, and most definitely not in the defense market.⁴³⁸

Differing views on competition are not the only factors which distinguish the two business markets. In the U.S., Government-industry relations are typically cast in terms of a laissez faire light. Relationships between European governments and private business, particularly in the defense trade, are, almost as a rule "cozy."⁴³⁹ Moreover, European governments place a premium on full employment and a stabilized work force.⁴⁴⁰ Private business is seen as a source of employment and European governments are:

willing to give a business anything and everything that is necessary to make it flourish: tax incentives, protection, and the right to make decisions with a minimum of legislative constraints. In return for those incentives the governments expect private industry to carry a considerable amount of social burdens as a quid pro quo.⁴⁴¹

As a final note, U.S. experience with some NATO governments (i.e., Federal Republic of Germany and Government of Luxembourg) has indicated that their armed forces regularly pay taxes (including value added taxes (VAT)) on goods and services. The countries involved have argued that, because the armed forces pay the taxes, under reciprocal pricing principles, these taxes must be passed on to U.S. forces. The alternative is for the host nation country armed forces to "eat" the taxes, which they, as a rule, are unwilling to do. The question then becomes whether the U.S. can and, in light of existing tax agreements, should pay them?

Most of the taxes at issue are of a revenue raising nature (i.e., VAT). As such, they are used to fund the operation of government and government sponsored programs. Traditionally, NATO countries do not pay taxes of a revenue raising nature as between nations.⁴⁴² This principle forms the basis of most tax

agreements.⁴⁴³ The odds are, therefore, good that the tax treaty between the U.S. and the country in question would allow for the exclusion of the questioned taxes.

As stated earlier,⁴⁴⁴ recent changes to the DOD implementing regulation appear to indicate a change in the DOD's views on acceptance of reciprocal pricing without requiring a price analysis and independent determination of fairness and reasonableness as to price. It is, however, unclear what DOD's current policy is in this regard. It is suggested that the matter be resolved in favor of requiring a price analysis for all acquisitions of host nation support and for acquisitions of operational support above a certain dollar threshold. In this way, reciprocal pricing could still be used in a field environment for the acquisition and transfer of operational support.

2. Continuing Congressional Requirements

When Congress passed the NMSA, it included a number of safeguards and limitations designed to monitor usage of the Act by DOD. The NMSA includes a prohibition against increasing U.S. inventories to meet European demands on the supply system;⁴⁴⁵ a limited definition of logistic support, supplies, and services;⁴⁴⁶ a detailed annual reporting requirement to Congress; use of the NMSA was made subject to the availability of funds;⁴⁴⁷ and a \$150 million limit or ceiling was placed on the amount of reimbursable

acquisitions that could be made in a fiscal year (\$25 million for supplies, excluding POL).⁴⁴⁸

Review of the legislative history concerning the NMSA suggests that, of those limitations and safeguards listed above, the annual reporting requirement and the \$150 million ceiling were designed "as a means of assisting the Congress in identifying activity taking place under the new statutory authority."⁴⁴⁹ Arguably, as such, these safeguards were meant as temporary measures.

The legislative history also suggests that the ceiling amounts were designed as a means to limit NMSA transactions to support and services, as opposed to supplies.⁴⁵⁰ Since imposition of these restrictions, some U.S. officials have thought them "unnecessary as a control mechanism" and "overly burdensome."⁴⁵¹ The original amount (\$100 million), although not arbitrary, was based upon information and projections in 1979 as to NMSA usage. At the time the ceiling was set, USAREUR officials anticipated a rate of NMSA usage sufficient enough to require a change in the ceiling amount by 1982.⁴⁵² Granted, primarily because of problems encountered in implementation of the Act, NMSA usage has not kept pace with these expectations. In 1988, however, the ceiling was raised to \$150 million.⁴⁵³

The fact is that the costs to DOD in terms of management and accounting efforts necessary to apportion and account for these ceiling amounts far

exceed their benefits in terms of a control mechanism. The annual reporting requirement to Congress, setting forth the details of each NMSA transaction, provides sufficient information to monitor NMSA use, and also acts as a sufficient deterrent to prevent abuse of the authority.⁴⁵⁴ Further, the existing planning, programming and budget process provides additional controls over NMSA transactions.⁴⁵⁵ The NMSA ceiling requirement should therefore be eliminated.

Part of the problem with the ceiling requirement is that it carries no funding and is therefore artificial in nature.⁴⁵⁶ As an alternative to eliminating the ceiling requirement, Congress should give some careful consideration to providing special funding for NMSA transactions. Again, a specific line item appropriation with a five year period of availability would go a long way toward resolving funding problems that continue to hamper U.S. efforts to obtain logistic support and strain relations with our allies.

CONCLUSION

The NMSA was enacted by Congress in direct response to the needs of U.S. forces for simplified procedures to facilitate the interchange of operational support in training and exercises with allied forces and to resolve problems created by the use of commercial contracting methods in the acquisition of host nation support from our allies. Congress granted

DOD cross-servicing authority to provide for a simplified system for the reciprocal provision of logistic support. It granted DOD acquisition only authority to provide a special authority to acquire host nation support without the need to use established, complex contracting procedures.

Since passage of the NMSA, DOD has failed to fully embrace these authorities provided by Congress. Implementation of the Act has been, and still remains, confusing and overly restrictive. As a result, the distinction between these authorities has been lost and the NMSA "wed" to the existing procurement system.

Several actions on the part of DOD are needed to correct these problems and regain the initiatives provided by Congress. First, the DOD implementing regulation should be revised to clearly reflect the differences between operational and host nation support requirements and the corresponding distinction between the acquisition only and cross-servicing authorities. Second, DOD should clearly indicate that U.S. personnel conducting NMSA transactions are not bound by FAR requirements. The FAR should be consulted only for guidance, particularly with regard to large dollar value acquisitions of host nation support. Similarly, DOD should clearly indicate that a warranted contracting officer is not required to execute reimbursable acquisitions under the NMSA. Third, all restrictions on the use of acquisition only authority should be removed and, in order to effect full

implementation of that authority, an instructional manual should be published. Finally, DOD should provide clear authorization to the services to create simplified, flexible, and deployable systems for the acquisition and transfer of operational support under field conditions.

Apart from questions of policy, problems have been encountered by U.S. forces in the acquisition of host nation support which require legislative enactment for resolution. Simply stated, the U.S. policy of recovering full costs in Foreign Military Sales cases under the Arms Export Control Act has come full circle. Increasingly, our allies are insisting on long term commitments for host nation support requirements and open-ended liability on the part of U.S. forces for all costs associated with performance of these services. If U.S. forces are to continue using the resources of allied countries for long term support, a specific line item appropriation with a five year period of availability for acquisition of host nation support under NMSA authority is needed.

FOOTNOTES

1

See United States European Command Defense Acquisition Reg. Supp. 6-902.1(b) (Apr. 1965) [hereinafter EUDARS]. The countries involved and the dates of those agreements are as follows:

- (1) The Kingdom of Belgium, 3 September 1953
- (2) The Government of Denmark, 8 June 1954
- (3) The Republic of France, 12 June 1953
- (4) The Federal Republic of Germany, 7 February 1957
- (5) The Kingdom of Greece, 24 December 1952
- (6) The Republic of Italy, 31 March 1954
- (7) The Grand Duchy of Luxembourg, 17 April 1954
- (8) The Kingdom of the Netherlands, 7 May 1954
- (9) The Kingdom of Norway, 10 March 1954
- (10) The Government of Spain, 30 July 1954
- (11) The Republic of Turkey, 29 June 1955
- (12) Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, 30 October 1952
- (13) The Federal People's Republic of Yugoslavia, 18 October 1954

The full texts of these agreements are reprinted at EUDARS TABS 1-13. A copy of the Offshore Procurement Agreement between the United States and the Federal Republic of Germany is at Appendix A-1.

2

See EUDARS 6-902.1(a).

3 See EUDARS 6-902.1(b).
4 Id.
5 Id.
6 See Thrasher, Offshore Procurement: Contracting
 Outside the Continental United States, 29 A.F.L.
 Rev. 255, 256 (1988).
7 Id.
8 Roberts, Private and Public International Law
 Aspects of Government Contracts, 36 Mil. L. Rev.
 1, 12 (1967).
9 See S. Rep. No. 842, 96th Cong., 2d Sess. 12,
 reprinted in 1980 U.S. Code Cong. & Admin. News
 2420, 2441 [hereinafter Senate Report].
10 Roberts, supra note 8, at 12.
11 Thrasher, supra note 6, at 256.
12 Id.
13 EUDARS 6-902.1(c).
14 Roberts, supra note 8, at 22.
15 See id. at 13.
16 See id. at 23. A copy of the model contract for
 use in acquisitions with the Federal Republic of
 Germany is at Appendix B-1.
17 H.R. Rep. No. 612 Part 1, 96th Cong., 1st Sess. 5
 (1979) [hereinafter House Report].
18 22 U.S.C. secs. 2751-2796(c).
19 See 22 U.S.C. sec. 2751.
20 See 22 U.S.C. sec. 2753.

21 Dep't of Defense Form 1513, United States
Department of Defense Offer and Acceptance (Mar.
1979) [hereinafter DD Form 1513].
22 See DD Form 1513, General Conditions A.5, B.1.
23 Id.
24 See DD Form 1513, General Conditions.
25 DD Form 1513, General Condition A.5b.
26 DD Form 1513, General Condition A.6.
27 DD Form 1513, General Conditions A.5, B.1.
28 See House Report, supra note 17, at 5.
29 See NATO Mutual Support Act of 1979: Hearings on
H.R. 4623 and H.R. 5580 Before the Special
Subcomm. on NATO Standardization, Interoperability
and Readiness of the House Comm. on Armed
Services, 96th Cong., 1st Sess. 25 (1979)
[hereinafter Hearings] (statement of Gen. James R.
Allen, Deputy Commander in Chief, U.S. Army
European Command).
30 See House Report, supra note 17, at 5.
31 Id.
32 Id.
33 Id.
34 Id.
35 See Hearings, supra note 29, at 51 (statement of
Gen. James R. Allen, Deputy Commander in Chief,
U.S. Army European Command).
36 Id.
37 See generally Thrasher, supra note 6, at 256; see
also Hearings, supra note 29, at 66 (statement of

Benjamin Forman, Office of the General Counsel,
Dep't of Defense).

38 See 125 Cong. Rec. 34,365 (1979) [hereinafter
Record] (statement of Rep. Daniel).

39 See NATO Support Agreements: Hearing on H.R. 5580
Before the Subcomm. on Procurement Policy and
Reprogramming of the Senate Comm. on Armed
Services, 96th Cong., 2d Sess. 12 (1980)
[hereinafter Senate Hearing].

40 See Senate Report, supra note 9, at 12.

41 See generally Thrasher, supra note 6, at 256; see
also Hearings, supra note 29, at 60 (statement of
Thomas S. Hahn, Special Subcomm. Counsel).

42 See Record, supra note 38, at 34,366 (statement of
Rep. Dickinson).

43 See Senate Hearing, supra note 39, at 13.

44 See id. at 34,365.

45 See generally id. 16

46 See Hearings, supra note 29, at 46 (statement of
Brig. Gen. Wayne Alley, Judge Advocate General,
U.S. Army, Europe).

47 See Senate Report, supra note 9, at 2.

48 Record, supra note 38, at 34,366-34,367 (statement
of Rep. Dickinson).

49 Senate Hearing, supra note 39, at 11 (statement of
Lt. Gen. Richard H. Groves, U.S. Army, Office of
the Secretary of Defense, Deputy Advisor on NATO
Affairs).

50 See generally, Fed. Acquisition Reg. 3.102 (1 Apr.
1984) [hereinafter FAR].

51 See NATO Mutual Support Act of 1979: Hearings and
Markup on H.R. 5580 Before the Subcomm. on
International Security and Scientific Affairs, the
Subcomm. on Europe and the Middle East, and the
House Comm. on Foreign Affairs, 96th Cong., 1st
Sess. 8 (1979) [hereinafter Hearing] (statement of
Lt. Gen. Arthur J. Gregg, Deputy Chief of Staff
for Logistics, U.S. Army).

52 Record, supra note 38, at 34,365 (statement of
Rep. Daniel).

53 See generally FAR 3.4.

54 Record, supra note 38, at 34,365 (statement of
Rep. Daniel).

55 See generally FAR 3.2

56 See Hearing, supra note 51, at 8 (statement of Lt.
Gen. Arthur J. Gregg, Deputy Chief of Staff for
Logistics, U.S. Army).

57 Hearings, supra note 29, at 34-35 (statement of
Brig. Gen. Wayne Alley, Judge Advocate General,
U.S. Army, Europe).

58 Senate Report, supra note 9, at 12-13.

59 See Hearing, supra note 51, at 5 (statement of
Hon. Robert W. Komer, Under Secretary of Defense
for Policy, Dep't of Defense).

60 See Senate Report, supra note 9, at 12; see
generally U.S. Army Europe Reg. 12-16, Mutual
Logistic Support Between the United States Army

and Other North Atlantic Treaty Organization
Forces, app. H (31 July 1985) [hereinafter ISABEL
Reg. 12-16].

61 See Senate Report, supra note 9, at 12-13.

62 See Hearings, supra note 29, at 38 (statement of
Gen. James R. Allen, Deputy Commander in Chief,
U.S. Army European Command).

63 Id.

64 House Report, supra note 17, at 5.

65 Hearing, supra note 51, at 8 (statement of Lt.
Gen. Arthur J. Gregg, Deputy Chief of Staff for
Logistics, U.S. Army).

66 An acronym for the countries of Belgium,
Netherlands and Luxembourg.

67 Hearing, supra note 51, at 8 (statement of Lt.
Gen. Arthur J. Gregg, Deputy Chief of Staff for
Logistics, U.S. Army).

68 Id.

69 See Hearings, supra note 29, at 25 (statement of
Gen. James R. Allen, Deputy Commander in Chief,
U.S. Army European Command).

70 See S. Rep. No. 795, 96th Cong., 1st Sess. 3,
reprinted in 1980 U.S. Code Cong. & Admin. News
2420, 2422 [hereinafter Senate Report].

71 10 U.S.C. secs. 2341-2350 (Supp. V 1987).

72 Record, supra note 38, at 34,368 (statement of
Rep. Broomfield)

73 H.R. Rep. No. 612 Part 2, 96th Cong., 1st Sess. 2
(1979) [hereinafter House Report].

74 See Record, supra note 38, at 34,366 (statement of
Rep. Dickinson).
75 Senate Report, supra note 9, at 3.
76 Senate Report, supra note 70, at 1.
77 10 U.S.C. sec. 2341 (Supp. V 1987).
78 10 U.S.C. sec. 2342 (Supp. V 1987).
79 Id.
80 Senate Report, supra note 9, at 1.
81 Dep't of Defense Directive 2010.9, Mutual Logistic
Support Between the United States and Governments
of Eligible Countries and NATO Subsidiary Bodies,
para. D.2(b) (Sep. 30 1988) [hereinafter DOD Dir.
2010.9].
82 10 U.S.C. sec. 2343 (1985).
83 Id.
84 See DOD Dir. 2010.9, para. D.6.
85 10 U.S.C. sec. 2344 (Supp. V 1987).
86 10 U.S.C. sec. 2348 (Supp. V 1987).
87 10 U.S.C. sec. 2347 (Supp. V 1987).
88 10 U.S.C. sec. 2349 (Supp. V 1987).
89 DOD Dir. 2010.9, para. D.1.
90 Id.
91 Id.
92 See infra notes 340-360 and accompanying text.
93 DOD Dir. 2010.9, encl. 3-1.
94 See infra notes 172-176 and accompanying text.
95 See infra notes 208-232 and accompanying text.
96 See generally Dep't of Defense Instruction
2010.10, Mutual Logistics Support Among the United

States, Governments of Other NATO Countries, NATO
Subsidiary Bodies, and Other Eligible Foreign
Countries -- Financial Policy (Oct. 20, 1987)
[hereinafter DOD Instr. 2010.10].

- 97 DOD Dir. 2010.9, encl. 3-2.
98 Id. at para. D.2.b.
99 10 U.S.C. sec. 2344(a) (Supp. V 1987).
100 DOD Instr. 2010.10, para. D.1.a.
101 Id. at para. D.1.b.
102 See Senate Report, supra note 9, at 3.
103 See Record, supra note 38, at 34,368 (statement of
Rep. Broomfield).
104 See id. at 34,366.
105 Id.
106 Id.
107 K. Allen, Early Difficulties in Implementing the
NATO Mutual Support Act of 1979 (unpublished
manuscript from GAO, European Office, to Maj.
David Zucker, HQ, USAREUR).
108 See 10 U.S.C. sec. 2344(a) (Supp. V 1987).
109 See supra notes 37-64 and accompanying text.
110 10 U.S.C. sec. 2342(a)(3)(B) (Supp. V 1987).
111 See generally DOD Dir. 2010.9., para. D.
112 See House Report, supra note 17, at 6.
113 Id.
114 Record, supra note 38, at 34,367 (statement of
Rep. Dickinson).
115 House Report, supra note 17, at 4.

116 Record, supra note 38, at 34,367 (statement of
Rep. Dickinson).
117 Id.
118 Id.
119 Id.
120 House Report, supra note 17, at 4.
121 10 U.S.C. sec. 2347 (Supp. V 1987).
122 DOD Instr. 2010.10, para. D.6.a.
123 Id.
124 Id. at para. D.6a(1)(b).
125 See generally DOD Instr. 2010.10.
126 Army Reg. 12-16, Mutual Logistics Support Between
the United States Army and Other North Atlantic
Treaty Organization Forces, para. 3-1 (7 Jun.
1985) [hereinafter AR 12-16]; see also USAREUR
Reg. 12-16, para. 16.
127 10 U.S.C. sec. 2347(a)(1) (Supp. V 1987).
128 Id.
129 Record, supra note 38, at 34,367 (statement of
Rep. Dickinson).
130 10 U.S.C. sec. 2347(a)(2) (Supp. V 1987).
131 Id.
132 See generally AR 12-16, ch. 3.
133 AR 12-16, para. 1-5a(3).
134 AR 12-16, para. 1-5j.
135 10 U.S.C. sec. 2347(b)(1) (Supp. V 1987).
136 Id.
137 10 U.S.C. sec. 2347(b)(2) (Supp. V 1987).
138 Id.

139. Id.
140. See 10 U.S.C. sec. 2349 (Supp. V 1987).
141. Record, supra note 38, at 34.367 (statement of
Rep. Dickinson).
142. Record, supra note 38, at 34.366 (statement of
Rep. Dickinson).
143. 10 U.S.C. sec. 2349 (Supp. V 1987).
144. Hearings, supra note 29, at 1 (statement of Rep.
Daniel).
145. House Report, supra note 17, at 6.
146. 10 U.S.C. sec. 2350(1) (Supp. V 1987). The
legislative history contains a useful, detailed
description of the term "logistic support,
supplies, and services":

Food which includes: allied nations
serving meals to American troops in transit
on major exercises; U.S. forces feeding
allied troops from adjacent formations during
exercises, and vice versa; and acquisition or
transfer of rations on exercises.

Billeting which includes: allied
nations providing billeting for U.S. troops
passing in transit on major exercises;
temporary shelter for allied or U.S. units
during training exercises; and bath services
for both allied nations and U.S. troops
during exercises.

Transportation which includes: moving
personnel and equipment to front lines,

moving one nation's petroleum products in another nation's tankers; airlift of personnel within the Theater of Operations; one force providing another with temporary use of a vehicle and driver during a training exercise.

Petroleum, oils and lubricants which includes: refueling of ground vehicles of another force while temporarily in the territory of allied nation; refueling of aircraft of another force while temporarily on the base of an allied nation; replacement-in-kind fuel agreements with allies and emergency fuel assistance on exercises.

Clothing which includes: cold weather items (such as gloves, thermal underwear, and socks) provided on an emergency basis during exercises involving adjacent formations of U.S. and allied units. This does not include provision of distinctive items of military uniform and insignia.

Communication services which includes: field radio operator support; use of base installation communications facilities and equipment.

Medical Services which includes furnishing or receiving health care services on exercises or joint training programs;

emergency provision of medical supplies; use of medical facilities of another nation on exercises or for mass casualties.

Ammunition which includes: transfers of small arms ammunition between forces on exercises when one side runs low and another has sufficient supplies with repayment in cash or kind; replacement-in-kind of ammunition expended at allied ranges; exchange unit firing to determine compatibility of ammunition between nations and its suitability for use in different weapon systems; emergency acquisition of provisions of conventional ammunition (small arms, mortar, automatic cannon, artillery, and ship gun ammunition; bombs (cluster, fuel air explosive, general purpose, and incendiary); unguided projectiles and rockets; riot control chemical ammunition; land mines (ground-to-ground and air-to-ground delivered); demolition material; grenades; flares and pyrotechnics; and all items included in the foregoing, such as explosives, propellants, chemical agents, cartridges, propelling charges, projectiles, warheads (with various fillers such as high explosives, illuminating, incendiary, antimaterial, and anti-personnel), fuzes, boosters, and safe and arm devices-in-bulk,

combination, or separately packaged items of issue for complete round assembly.

Specifically excluded are the following: guided missiles; naval mines and torpedoes; nuclear ammunition and included items such as warheads, warhead sections, projectiles, demolition munitions, and training ammunition; cartridge and propellant-actuated devices; chaff and chaff dispensers; guidance kits for bombs or other ammunition; and chemical ammunition (other than riot control).

Base operations support (and construction services incident to base operations support) which includes: host nation support of U.S. installations; maintenance of facilities, grounds keeping, perimeter security; laundry services; minor construction (construction under 10 U.S.C. 2673 and 2674, and emergency construction under authority provided to military service secretaries in the annual Military Construction Authorization Act) incident to host nation support agreements; support of Air Force augmentation units exercising Collocated Operating Base; and support for Air Force A-10 Squadron personnel operating at Forward Operating Locations on German Air Bases.

Storage services which includes: use of host nation storage, maintenance and security services on a contract basis; and temporary storage of assets belonging to another force during training exercises.

Use of Facilities which includes: one force receiving temporary use of a building on another's base for use during an exercise; temporary use of cold storage facilities during exercises; temporary use of mortuary facilities, but this does not include facilities provided free of charge by host nations under status of forces agreements.

Training Services which includes: use of training ranges; orientation visits between NATO combat units; training U.S. and allied forces in aircraft and vehicle cross-servicing (including uploading, fly away, and downloading of munitions), use of flight simulators, target services, and in-theater orientation/training of allied pilots in aerial refueling procedures (e.g., Training German Air Force F-4 pilots to take fuel from U.S. KC-135 aircraft), but does not include costs for attendance at formal schools.

Spare Parts and Components which includes: mutual spare parts support during

exercises; and replacement of defective radio equipment in aircraft or vehicles.

Repair and Maintenance Services which includes: servicing of aircraft and vehicles of one force temporarily at another force's base; preventive maintenance services; host nation providing vehicle maintenance services for weapons systems in the inventories of more than one NATO nation.

Port Services which includes: offloading U.S. equipment at host nation ports of embarkation during major exercises; temporary storage of offload equipment; and minor vehicle maintenance such as battery recharging, jump starting, etc.

Senate Report, supra note 70, at 8-9.

147 AR 12-16, para. 1-5a(2).

148 DOD Dir. 2010.9, para. D.7; see also AR 12-16, para. 1-5a(4).

149 Record, supra note 38, at 34,365 (statement of Rep. Daniel).

150 10 U.S.C. sec. 2341 (Supp. V 1987).

151 DOD Dir. 2010.9, para. D.2.

152 Id.

153 Id.

154 Id. at para. F.2.

155 Id. at para. D.2.

156 10 U.S.C. sec. 2341 (Supp. V 1987).

157 DOD Dir. 2010.9, encl. 3-1.

158 Pub. L. No. 99-661, 100 Stat. 3965 (1986).
159 10 U.S.C. sec. 2341(2) (Supp. V 1987).
160 DOD Dir. 2010.9, para. D.5.
161 See Senate Report, supra note 9, at 11.
162 Id.
163 10 U.S.C. sec. 2343(b) (Supp. V 1987).
164 DOD Dir. 2010.9, para. D.6.
165 Id.
166 See infra text accompanying notes 371-381.
167 DOD Dir. 2010.9, para. D.8.
168 AR 12-16, para. 1-5g.
169 DOD Dir. 2010.9, para. D.8.
170 DOD Dir. 2010.9, para. D.12.
171 Id.
172 DOD Dir. 2010.9, para. F.1.
173 DOD Instr. 2010.10, para. D.7.
174 Id.
175 DOD Dir. 2010.9, para. D.12.
176 See infra notes 340-360 and accompanying text.
177 See Hearing, supra note 51, at 5 (statement of
Hon. Robert W. Komer, Under Secretary of Defense
for Policy, Dep't of Defense); see also Hearings,
supra note 29, at 37 (statement of Brig. Gen.
Wayne Alley, Judge Advocate General, U.S. Army,
Europe).
178 DOD Dir. 2010.9, para. D.2.
179 DOD Dir. 2010.9, para. D.6.
180 10 U.S.C. sec. 2342(a) (Supp. V 1987).
181 See House Report, supra note 73, at 4.

182 Id.
183 Id.
184 DOD Dir. 2010.9, para. D.12.
185 DOD Dir. 2010.9, para. D.2.
186 Pub. L. No. 99-661, 100 Stat. 3965 (1986).
187 10 U.S.C. sec. 2342(b)(2) (Supp. V 1987).
188 Id.
189 Pub. L. No. 99-661, 100 Stat. 3965 (1986).
190 See generally DOD Dir. 2010.9.
191 See House Report, supra note 73, at 3.
192 See Senate Report, supra note 9, at 3.
193 10 U.S.C. sec. 2347 (Supp. V 1987).
194 DOD Dir. 2010.9, para. F.3.
195 22 U.S.C. sec. 2776(b) (1976).
196 DOD Dir. 2010.9, para. D.9.
197 Id.
198 Id.
199 Id.
200 10 U.S.C. sec 2348 (Supp. V 1987).
201 See House Report, supra note 17, at 12 (statement
of Rep. Daniel).
202 See Record, supra note 38, at 34,366 (statement of
Rep. Daniel).
203 See Senate Report, supra note 9, at 3, 13.
204 DOD Dir. 2010.9, para. D.6.
205 DOD Dir. 2010.9, para. D.15.
206 Id.
207 Id.

208 See DOD Dir. 2010.9, encl. 3-1; see also USAREUR
Reg. 12-16, para. 8b.
209 See DOD Dir. 2010.9, encl. 3-2; see also USAREUR
Reg. 12-16, para. 8c.
210 See DOD Instr. 2010.10, para. D.7; see also
USAREUR Reg. 12-16, para. 6d, app. B.
211 DOD Dir. 2010.9, para. D.2.b.
212 A copy of a "model" mutual support agreement used
by U.S. Government representatives in the
negotiation of cross-servicing agreements with
allied countries is at Appendix C-1.
213 AR 12-16, para. 1-5f.
214 See generally FAR 16.703.
215 Agreement between the Secretary of Defense of the
United States of America and The Federal Minister
of Defense of the Federal Republic of Germany
concerning Mutual Support in Europe and Adjacent
Waters, Jan. 21, 1983 [hereinafter Agreement]. A
copy is at Appendix D-1.
216 Id. at art. 4, para. 3.
217 Id. at art. 5.
218 Dep't of Defense Directive 5530.3, International
Agreements (June 11, 1987) [hereinafter DOD Dir.
5530.3].
219 1 U.S.C. sec. 112(b) (1972).
220 DOD Dir. 2010.9, para. F.1.
221 Id.
222 USAREUR Reg. 12-16, para. 8c(1).
223 See id.

224 USAREUR Reg. 12-16, para. 8c(2).
225 See id.
226 See AR 12-16, para. 1-5f; see also USAREUR Reg.
12-16, para. 8d(2).
227 DOD Dir. 2010.9, para. F.6.
228 See DOD Instr. 2010.10, para. D.7; see also
USAREUR Reg. 12-16, para. 8c(2)(b).
229 DOD Dir. 2010.9, para. F.1.
230 See e.g., Agreement, supra note 215, at art. 4,
para. 4.
231 DOD Dir. 2010.9, para. F.3.
232 Id.
233 See Record, supra note 38, at 34,368 (statement of
Rep. Broomfield).
234 10 U.S.C. sec. 2343 (Supp. V 1987).
235 Senate Report, supra note 70, at 4.
236 Id.
237 Id.
238 Id.
239 Id. at 4-5.
240 Id. at 5.
241 Id.
242 Id.
243 Id.
244 10 U.S.C. 2343(a) (Supp. V 1987).
245 DOD Dir. 2010.9, para. D.6.
246 Id.
247 See infra notes 371-381 and accompanying text.
248 See infra notes 371-388 and accompanying text.

249 See generally DOD Instr. 2010.10, para. D.
250 10 U.S.C. sec. 2344(a) (Supp. V 1987).
251 DOD Instr. 2010.10, para. D.1.a.
252 DOD Instr. 2010.10, para. D.1.b.
253 Id.
254 DOD Instr. 2010.10, para. D.1.a.
255 10 U.S.C. sec. 2344(b)(1) (Supp. V 1987).
256 See Record, supra note 38, at 34,365 (statement of
Rep. Daniel).
257 22 U.S.C. secs. 2751-2796(c).
258 See supra notes 22-27 and accompanying text.
259 See Record, supra note 38, at 34,365 (statement of
Rep. Daniel).
260 Id.
261 Id.
262 Id.
263 10 U.S.C. sec. 2344(b)(2)(B) (Supp. V 1987).
264 10 U.S.C. sec. 2345(a) (Supp. V 1987).
265 See House Report, supra note 17, at 11.
266 DOD Dir. 2010.9, para. D.10.
267 10 U.S.C. sec. 2345(b) (Supp. V 1987).
268 DOD Dir. 2010.9, para. D.4.
269 10 U.S.C. sec. 2346 (Supp. V 1987).
270 DOD Dir. 2010.9, para. D.5.
271 Id.
272 See generally 10 U.S.C. sec. 2344 (Supp. V 1987).
273 10 U.S.C. sec. 2344(b)(1) (Supp. V 1987).
274 10 U.S.C. sec. 2344(b)(2) (Supp. V 1987).
275 DOD Instr. 2010.10, para. D.1.b.

276 10 U.S.C. sec. 2344(b)(1) (Supp. V 1987).
277 See Senate Report, supra note 70, at 6; see also
House Report, supra note 17, at 4.
278 See Record, supra note 38, at 34,365 (statement of
Rep. Daniel).
279 10 U.S.C. sec. 2344(b)(1) (Supp. V 1987); see also
DOD Instr. 2010.10, para. D.3.
280 10 U.S.C. sec. 2344(b)(4) provides that reciprocal
pricing principles are inapplicable to NATO
subsidiary body organizations.
281 10 U.S.C. sec. 2344(b)(2) (Supp. V 1987).
282 10 U.S.C. sec. 2344(b)(1) (Supp. V 1987).
283 See Record, supra note 38, at 34,365 (statement of
Rep. Daniel).
284 See DOD Instr. 2010.10, para. D.3.
285 DOD Dir. 2010.9, para. D.18.
286 Id.
287 Id.
288 10 U.S.C. sec. 2344(b)(1)(A) (Supp. V 1987).
289 10 U.S.C. sec. 2344(b)(1)(B) (Supp. V 1987).
290 DOD Instr. 2010.10, para. D.3.a(1).
291 Id.
292 DOD Instr. 2010.10, para. D.3.a(2).
293 Id.
294 See DOD Instr. 2010.10, encl. 2-1.
295 See generally DOD Dir. 2010.9, para. E.
296 10 U.S.C. sec. 2344(b)(2)(A) (Supp. V 1987).
297 DOD Instr. 2010.10, para. D.3.b(1).
298 Id.

299

The term "price analysis" is very broad and all encompassing. Basically, it includes whatever actions are taken by the U.S. official responsible for the acquisition which are necessary to reach a decision concerning whether the price at issue is fair and reasonable. There is, however, one factor common to all price analyses; that is, that some form of price comparison must be conducted. This comparison may either be from established market prices, government estimates, or the prices charged for previous transactions. Price comparison is, however, the key to any valid price analysis.

A price analysis should include, as a first step, the gathering and verification of pricing data. This step is important and care should be taken that the data used for comparison is current and accurate, and to the extent other prices are used, these prices must also be fair and reasonable to provide an accurate standard for evaluation. The second step in the price analysis process should be the actual evaluation of the data compiled, to include price comparisons. The final step should be the determination decision, with the corresponding documentation required by the Act and the implementing guidance.

300

10 U.S.C. sec. 2344(b)(2)(B) (Supp. V 1987).

301

See supra note 275 and accompanying text.

302

DOD Instr. 2010.10, para. D.1.b.

303 Senate Report, *supra* note 70, at 6.
304 Army Reg. 34-1, International Military
Rationalization, Standardization, and
Interoperability, para. 5-1 (14 Mar. 1989)
[hereinafter AR 34-1].
305 D. Bowyer, International Logistics 8 (draft
Chapter 12 for Contract Law Practice Manual,
unpublished manuscript, HQ, USAREUR).
306 Id.
307 Id.
308 DOD Dir. 2010.9, para. D.14.a.
309 Id.
310 Id.
311 Id.
312 See DOD Dir. 2010.9, para. D.14.c.
313 DOD Dir. 2010.9, para. D.14.b.
314 Id.
315 See supra notes 29-31 and accompanying text.
316 See supra notes 38-58 and accompanying text.
317 See supra notes 65-70 and accompanying text.
318 See Hearings, supra note 29, at 51 (statement of
Gen. James R. Allen, Deputy Commander in Chief,
U.S. Army European Command).
319 See supra notes 112-119 and accompanying text.
320 10 U.S.C. sec. 2329 (1980), amended by 13 U.S.C.
sec. 1304(a)(6) (1985).
321 Dep't of Defense Directive 2010.9, Mutual Logistic
Support Between the United States and Other NATO
Forces, para. E.1.f (Aug. 25, 1980).

322 Army Reg. 12-16, Mutual Logistic Support Between
the United States and Other NATO Forces, para. 5f
(15 Aug. 1981).

323 See Senate Report, supra note 9, at 3.

324 See Hearing, supra note 51, at 6 (statement of Lt.
Gen. Arthur J. Gregg, Deputy Chief of Staff for
Logistics, U.S. Army).

325 See id. at 7.

326 Memorandum, AEAJA-KL, 15 Apr. 1981, subject: NATO
Mutual Support Act (PL 96-323).

327 See id.

328 Id.

329 Message, CINCUSAREUR, AEAGD-PS, 1760719Z July 81,
subject: USAREUR Use of NATO Mutual Support Act
of 1979 (NMSA PL 96-323)) for REFORGER 81 Support.

330 Id.

331 Id.

332 Id.

333 Id.

334 Id.

335 See Memorandum, AEAJA-KL, 24 July 1981, subject:
PL 96-323.

336 See generally USAREUR Reg. 12-16, para. 12.

337 USAREUR Reg. 12-16, para. 12a.

338 Id.

339 See Message, supra note 329.

340 See generally USAREUR Reg. 12-16, para. 12a(1).

341 126 Cong. Rec. 21,715 (1980).

342 10 U.S.C. sec. 2329 (1980), amended by 13 U.S.C.
1304(a)(6) (1985).
343 See K. Allen, supra note 107, at 1.
344 Dep't of Defense Directive 2010.9, Mutual Logistic
Support Between the United States and Other NATO
Forces (Aug 25, 1980).
345 K. Allen, supra note 107, at 4.
346 See supra notes 321-322 and accompanying text.
347 See K. Allen, supra note 107, at 4.
348 Id. at 7.
349 See Message, supra note 329.
350 See generally Dep't of Defense Directive 2010.9,
Mutual Logistic Support Between the United States
and Governments of Other NATO Countries and NATO
Subsidiary Bodies (June 7, 1984).
351 Id. at para. D.2.
352 Id. at para. E.2.
353 Id. at para. E.3.
354 Id.
355 See DOD Dir. 2010.9, para. 12.
356 USAREUR Reg. 12-16, app. A.
357 See generally USAREUR Reg. 12-16, para. 1b.
358 DOD Dir. 2010.9, para. D.3.
359 DOD Dir. 2010.9, paras. D.6, 8.
360 See e.g., notes 369-370 and accompanying text.
361 Record, supra note 38, at 34,368 (statement of
Rep. Broomfield).
362 See Senate Report, supra note 9, at 3.
363 See id.

364 See supra note 146.
365 Id.
366 See e.g., Hearings, supra note 29, at 37
(statement of Brig. Gen. Wayne Alley, Judge
Advocate General, U.S. Army Europe).
367 See e.g., Hearing, supra note 51, at 6-7
(statement of Lt. Gen. Arthur J. Gregg, Deputy
Chief of Staff for Logistics, U.S. Army).
368 Id. at 4 (statement of Hon. Robert W. Komer, Under
Secretary of Defense for Policy, Dep't of
Defense).
369 See DOD Dir. 2010.9, para. D.6.
370 See infra notes 408-413 and accompanying text.
371 See e.g., Memorandum for Arthur Daoulas, Deputy
Assistant Secretary of the Army (Acquisition) from
Col. Richard J. Womack, Principal Assistant for
Contracting (21 Oct. 1980) (discussing DA
Implementation of Public Law 96-323, the NATO
Mutual Support Act of 1979).
372 10 U.S.C. sec. 2343(a) (Supp. V 1987).
373 See Memorandum, supra note 371, at 1.
374 DOD Dir. 2010.9, para. D.6.
375 Id.
376 10 U.S.C. sec. 2329 (1980), amended by 13 U.S.C.
sec. 1304(a)(6) (1986).
377 See Comment 2, AEAJA-KL, 11 May 1987, subject:
Contracting Under NATO Mutual Support Act, Waiver
of FAR/DFARS.
378 Id.

379 Id.
380 See Senate Report, supra note 70, at 5; see also
House Report, supra note 17, at 11.
381 See id.
382 DOD Dir. 2010.9, para. F.7.
383 See FAR 1.602.
384 DOD Dir. 2010.9, para. F.4.
385 Prepositioned Organization Materiel Configured to
Unit Sets.
386 See infra notes 410-411 and accompanying text.
387 See e.g., Senate Report, supra note 9, at 12; see
also Hearing, supra note 51, at 4 (statement of
Hon. Robert W. Komer, Under Secretary of Defense
for Policy, Dep't of Defense).
388 Id.
389 Hearing, supra note 51, at 4 (statement of Hon.
Robert W. Komer, Under Secretary of Defense for
Policy, Dep't of Defense).
390 Id.
391 Id.
392 Id.
393 Id.
394 Id.
395 Hearing, supra note 51, at 6-7 (statement of Lt.
Gen. Arthur J. Gregg, Deputy Chief of Staff for
Logistics, U.S. Army).
396 See Senate Report, supra note 9, at 12.
397 DOD Dir. 2010.9, para. F.7.
398 See Memorandum, supra note 371, at 1.

399 DOD Dir. 2010.9, para. F.7.
400 See generally USAREUR Reg. 12-16.
401 See USAREUR Reg. 12-16, paras. 10j, 11b.
402 Id.
403 See supra notes 352-353 and accompanying text.
404 L. Aron, Acquisition of Logistic Support from
Governments of Other NATO Countries and NATO
Subsidiary Bodies (Mar. 15, 1984) (unpublished
manuscript, proposed draft acquisition manual).
405 Id.
406 An example is the agreement for storage services
between the United States and the Grand Duchy of
Luxembourg. Under that agreement, WSA (Warehouse
Services Agency), a government owned company
formed to perform these services, receives,
stores, preserves and maintains approximately
89,000 short tons of U.S. Army war reserve
materials requiring 200,000 square meters of
storage space. See S. Kasparian, Commander's
Briefing Book of Host Nation Agreements (May 31,
1985) (unpublished manuscript on file at the Host
Nation Support Branch, U.S. Army Contracting
Center, Europe) [hereinafter Briefing Book].
407 An example is the base operations agreement
between the United States and the Federal Republic
of Germany for operation of the Garlstedt
Cantonment Area. Under this agreement, the
Federal Ministry of Defense provides base
operation services in support of the 2d Armored

Division (Forward) at Lucius D. Clay Kaserne. See
Briefing Book, supra note 406.

408 An example is the agreement for repair and
maintenance services of U.S. army trucks provided
by the Ministry of Defense, Federal Republic of
Germany, at Juelich, Germany. See Briefing Book,
supra at 406.

409 See Briefing Book, supra note 406.

410 Id.

411 Id.

412 See Briefing Book, supra note 406.

413 10 U.S.C. sec. 1341(a).

414 See DOD Dir. 2010.9, para. F.4.

415 See Frisch,
European Overview Part I: Competition,
Education , and Taxation, 5 Concepts, Winter 1982,
at 7, 35.

416 See id.

417 See id.

418 It should be noted that, from November 1983 until
July 1985, the author was the legal advisor to the
U.S. contracting delegation responsible for
negotiating the order for storage services with
IVG. As such, much of the information expressed
in regards this acquisition is based upon personal
experience.

419 10 U.S.C. sec. 2410(a).

420 Materialdepot Betriebsgesellschaft mit
beschraenkter haftung.

421 10 U.S.C. sec. 2396.
422 See supra notes 22-27 and accompanying text.
423 10 U.S.C. sec. 1341.
424 See Hearings, supra note 29, at 28 (statement of
Brig. Gen. Wayne Alley, Judge Advocate General,
U.S. Army, Europe).
425 See id. at 2-12.
426 That provision is as follows:

(2) Agreements entered into pursuant to this section for base operations support or use of facilities (and related services) may extend for terms longer than one year. Obligations incurred under an agreement for a term longer than one year may be recorded during each reporting period in which the support or other service is provided, but--

(i) with respect to personnel separation allowances, may be recorded against applicable current appropriations in the full amount of the liability therefor that accrues during the reporting periods of each fiscal year, and shall remain obligated without fiscal year limitation until expended, or no longer required, to liquidate that liability; and

(ii) in the event funds are not made available for the continuation of such an agreement into a subsequent

fiscal year, may be recorded in the amount of the costs of cancellation or termination of the agreement during the reporting period in which the liability for such costs ceases to be contingent and becomes payable, and may be paid from--

(A) appropriations originally available for the performance of the agreement concerned;

(B) appropriations currently available for acquisition of the equipment, materials, goods, other supplies or services concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

See Hearings, supra note 29, at 4-5.

427 Id.

428 Id.

429 See U.S.C. sec. 2344(b)(1) (Supp. V 1987).

430 See supra note 237 and accompanying text.

431 See Hearings, supra note 29, at 32 (statement of Brig. Gen. Wayne Alley, Judge Advocate General, U.S. Army, Europe).

432 See Dep't of Defense Directive 5100.64, DOD Foreign Tax Relief Program (June 12, 1979) [hereinafter DOD Dir. 5100.64].

433 Id.

434 DOD Dir. 2010.9.
435 DOD Instr. 2010.10.
436 See supra notes 282-294 and accompanying text.
437 Id.
438 See Frisch, supra note 416, at 15.
439 Id. at 13.
440 See id. at 27.
441 Id.
442 See generally DOD Dir. 5100.64.
443 See id.
444 See supra notes 285-287 and accompanying text.
445 10 U.S.C. sec. 2348 (Supp. V 1987).
446 10 U.S.C. sec. 2350(1) (Supp. V 1987).
447 10 U.S.C. secs. 2341, 2342 (Supp. V 1987).
448 10 U.S.C. sec. 2347 (Supp. V 1987).
449 K. Allen, supra note 107, at 15.
450 See Record, supra note 38, at 34,367 (statement of
Rep. Dickinson).
451 See K. Allen, supra note 107, at 15.
452 Id.
453 Pub. L. 100-456, sec. 1001 (1988).
454 See Record, supra note 38, at 34,366 (statement of
Rep. Daniel).
455 See K. Allen, supra note 107, at 16.
456 Id.

TAB 4

**AGREEMENT BETWEEN THE UNITED STATES
OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY
RELATING TO OFFSHORE PROCUREMENT**

Article 1**Purpose**

The purpose of this Agreement is to set forth certain principles, policies and specific provisions which the United States of America (hereinafter called the United States) and the Federal Republic of Germany (hereinafter called the Federal Republic) have agreed shall govern procurement by the Armed Forces of the United States in the Federal Republic in the interests of the common defense. Such procurement is hereinafter referred to as offshore procurement. This Agreement shall apply to the contracts placed on and after the date hereof and also to uncompleted contracts placed prior to the date hereof; provided that this shall not impair the existing contract rights of private contractors.

Article 2**Definitions**

For the purpose of this Agreement the following terms shall have the following meanings:

(a) United States Armed Forces shall mean the United States Army, the United States Navy and the United States Air Force.

(b) Offshore procurement shall mean procurement by means of contracts, purchase orders, and other instruments awarded and sub-contracts approved by the United States Armed Forces for goods and services of any description for which payment is made by the United States Armed Forces, provided, however, the term offshore procurement shall not include procurement by the United States Armed Forces for which payment is made from funds made available by the Federal Republic in discharge of occupation costs or from defense support funds contributed by the Federal Republic for support of the United States Armed Forces, and shall not include procurement by the exchange systems of the Armed Forces and purchases by the individual members of the United States Armed Forces.

Article 3**Objectives**

(a) The primary objectives of the United States in instituting the offshore procurement program are (i) to provide the United States Armed Forces with needed materials, supplies and services, (ii) to provide equipment as rapidly as possible to meet defense requirements of countries participating in the Mutual Security Program, and (iii) to increase the ability of participating countries to equip and maintain their own forces.

(b) Procurement under this program is not intended as substitute for the Federal Republic's own defense production and it is understood that the program will be carried out in such a manner that it takes into account the capabilities of the German economy as well as essential domestic and export requirements of the Federal Republic and that it will not have harmful effect on other defense production undertaken by the Federal Republic.

Article 4**Conduct of Program**

The United States shall conduct the offshore procurement program in accordance with the laws of the United States governing military procurement and the mutual security program. It is also the intent of the United States that the offshore procurement program shall be carried out in the Federal territory in furtherance of the principles of the Mutual Security Act of 1954, the Mutual Defense Assistance Control Act of 1951 as amended, and the Economic Cooperation Agreement between the Federal Republic and the United States, signed at Bonn on 15 December 1949 as amended.

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TAB 4 (cont'd)**Article 5****Scope of the Offshore Procurement Program**

The goods and services which may be procured under the offshore procurement program include all types of military end items, materials, supplies, equipment, and services appropriate for United States military procurement which may be required either for the United States military assistance program or for the United States Armed Forces. Unless otherwise specified, the provisions of this Agreement are applicable to procurement for both categories.

Article 6**Exchange of Information**

The Governments of the parties to this Agreement, in order to achieve coordination, shall exchange information on a continuing basis with respect to procurement plans, available production facilities and progress in the achievement of the offshore procurement programs in the Federal Republic. The Government of the United States shall, insofar as feasible and appropriate, furnish to the Government of the Federal Republic information relating to the United States' procurement program in the Federal Republic and will inform the Government of the Federal Republic in due time of individual requests for bids. The Government of the Federal Republic shall be supplied by the Government of the United States with copies or other appropriate information of such orders as have been placed with German firms.

Article 7**Restrictive Business Practices**

The Governments of the Parties to this Agreement, each within its own competence, shall implement the offshore procurement program, insofar as feasible under German law in such a way as to:

- (a) eliminate the barriers to, and provide the incentive for, a steadily increased participation of free private enterprise in developing the resources of the Federal Republic consistent with appropriate international agreements;
- (b) discourage, as far as feasible, all cartel and monopolistic business practices which result in restricting production and increasing prices, and to encourage competition and productivity.

Article 8**Contract Placement by Contracting Officers**

It is understood that offshore procurement contracts will be awarded and administered on behalf of the United States by contracting officers of the United States Armed Forces or persons acting under their authority.

Article 9**Parties to Contracts**

It is understood that United States contracting officers will contract directly with individuals, firms or other legal entities in the Federal Territory or with the Government of the Federal Republic in accordance with the contracting officer's judgment.

Article 10**Assistance in the Selection of Contractors**

The competent United States agencies may consult the Government of the Federal Republic or its authorized offices for advice with regard to potential contractors. In furnishing such advice, in addition to considering the ability to produce within the time required, efficiency, technical ability and

TAB 4 (cont'd)

plant facilities, the Government of the Federal Republic shall be guided by the various principles, policies and provisions set forth in this Agreement, including, but not limited to, those concerning free competition and free private enterprise, availability of credit facilities and materials, and security considerations. Plants and sub-contractors selected by the Government of the Federal Republic or private contractors must be acceptable to the United States contracting officer who shall, however, when selecting contractors take into account, as far as possible, the recommendations made during such consultations as may be had with the Government of the Federal Republic.

Article 11

Assistance to Offshore Procurement Contractors

(a) The Government of the Federal Republic shall, subject to the relevant German legislation, grant the contractors and the subcontractors of offshore procurement orders of which it has been informed under Article 6 no less favorable treatment and assistance with regard to the supply of materials or production equipment and to the furnishing of manpower as will be granted to firms performing similar contracts for the Government of the Federal Republic.

(b) It is understood that no obligation with respect to assistance in obtaining materials or production equipment to contractors and sub-contractors shall be incurred by the United States by reason of entering into contracts under the offshore procurement program. Such assistance as the United States may be prepared to provide will be furnished through normal defense supply operations rather than through any special procedure or any special intercession in behalf of offshore procurement contractors.

Article 12

Credit Arrangements

The Government of the Federal Republic shall, subject to the relevant legislation, insure that contractors under the offshore procurement program receive Federal guarantees (*Bundesbuergschaft*) for the credits required to finance their operations under the same conditions as such guarantees are made available for the promotion of exports.

Article 13

Taxes, Duties and Licenses

(a) Relief from German taxes, levies and customs duties, insofar as they affect expenditures under offshore procurement programs, shall be granted in accordance with the "Agreement between the United States of America and the Federal Republic of Germany Concerning the Tax Relief to be Accorded by the Federal Republic to United States Expenditures in the Interests of the Common Defense", signed at Bonn on October 15, 1954.

(b) Subject to Article 3(b) of this Agreement, and the relevant German regulations, the appropriate agencies in the Federal Republic shall issue upon application all the prescribed licenses, including foreign exchange, import and export licenses, which may be necessary for the execution of offshore orders.

Article 14

Security

(a) In the case of procurement contracts placed by the Government of the United States with the Government of the Federal Republic, any classified material, including information, delivered by one government shall be given security protection by the recipient government corresponding substantially to that afforded by the originating government and shall be treated by the recipient government as its own classified material of a corresponding security grading. The recipient government shall not use such material, or permit it to be used, for other than military purposes and shall not disclose such material, or permit it to be disclosed, to another nation without the consent of the originating government.

TAB 4 (cont'd)

(b) In the case of procurement contracts placed by the Government of the United States with private contractors in the Federal territory, similar security arrangements for classified material shall be followed. Classified material of the United States needed by a contractor will be delivered to the appropriate Ministry of the Federal Republic. An authorized representative of that Ministry will transmit the material to the contractor in such a way as to make the provisions of the German Penal Legislation applicable to it. Such material shall, prior to transmittal, receive a security classification of the Federal Republic which shall afford to the material substantially the same degree of security as that afforded by the United States, and, at the time of transmittal, the Government of the Federal Republic shall notify the contractor that the classified material delivered to him is also classified material of the Federal Republic and subject to the provisions of the German Penal Legislation.

(c) The Government of the Federal Republic shall, upon request, conduct a security investigation of any prospective contractor in the Federal territory in the same manner as such investigations may in the future be conducted in accordance with German law in cases of defense procurement by the Federal Republic, and a recommendation resulting from such investigation shall be made to the Government of the United States. No charges shall be made by the Federal Republic for services rendered pursuant to this paragraph.

Article 15**Inspections**

(a) Inspections shall be made for the purpose of determining whether military end items, materials, services, supplies and equipment conform to contract specifications and other requirements. Such inspections covering such items procured by the Government of the United States either from the Government of the Federal Republic or from other contractors shall, when requested by the United States Armed Forces, be carried out without cost or charge to the Government of the United States by representatives of the Government of the Federal Republic. In connection with these inspections, the Government of the Federal Republic shall certify to the Government of the United States whether the supplies inspected meet the specifications and all of the terms of the contract. Inspections when so requested shall be performed in a professional manner and in good faith without any financial liability for defects. When the Government of the Federal Republic carries out such inspections, it nevertheless recognizes the right of the United States Armed Forces to make inspections in all appropriate places including plants of sub-contractors at any stage of production or manufacture and shall accord the United States inspectors necessary facilities and cooperation to allow them to make such inspections. However, it is not the intention of the Government of the United States generally to duplicate inspections made by the Government of the Federal Republic. Final acceptance of articles produced or services rendered under the contract, as a basis for payment of the contract prices, shall be made solely by the Government of the United States.

(b) The Government of the United States shall inform its representatives that they should respect the confidential nature of any knowledge of production secrets and trade secrets of contractors and sub-contractors gained in the course of the performance of their duties through inspection or from documentation and instruction.

Article 16**Standard Contract Clauses**

Standard clauses will be agreed to by the Governments of the parties to this agreement for use, as appropriate, in contracts between them. Other clauses, including, but not limited to, escalation, advance and progress payment clauses where appropriate, may be included in individual contracts. The Government of the Federal Republic shall render appropriate assistance to facilitate the performance of all contract provisions.

TAB 4 (cont'd)**Article 17****Protection of United States Property and Personnel**

(a) Rights and interests of the United States pertaining to property which has been acquired by offshore procurement contracts in the Federal Republic, or in property used in connection with such contracts, are not subject to seizure, attachment or other interference by German courts and authorities.

(b) The United States shall be immune from German jurisdiction with respect to legal liability which might arise out of an offshore procurement contract.

(c) United States Procurement Officers as well as other United States procurement personnel shall not be subject to German jurisdiction with respect to legal liability which might result from the execution of their official activity under the offshore procurement programs.

Article 18**No Profits Clause**

On offshore procurement contracts it is understood that no identifiable profit of any nature, including net gains resulting from fluctuations in exchange rates, shall be retained by the Federal Republic. The Government of the Federal Republic agrees to determine whether any such profit has been realized, in which event, or in the event that the Government of the United States considers that such profit may have been realized, the Government of the Federal Republic agrees that it shall immediately enter into conversations with the Government of the United States for the purpose of determining the existence and the amount of such profit. During these conversations the United States shall have access to such documents and accounting data as may be necessary to determine the facts. In the computation of net profits hereunder, the contracts shall be taken collectively, and total net losses under all contracts may be offset against total net profits under all contracts. If, as a result of conversations between the two Governments, it is established that profit has been realized by the Federal Republic on such contracts, it shall refund the amount of the profit to the Government of the United States under arrangements and procedure to be agreed upon between the two Governments. At the request of either Government, a refund adjustment shall be accomplished on completed contracts at the earliest practicable date, but this adjustment must be effected by the end of the year following the calendar year in which the contract concerned is completed. This article shall not be construed as affecting in any manner any profit-refunding provisions as may be contained in individual contracts. It is understood that there is in effect in the Federal territory legislation equivalent to the United States Renegotiation Act of 1951.

Article 19**Contract Terms**

(a) Since the statutes of the United States prohibit utilization of a contract upon which payment is based on cost plus a percentage of cost, it is understood that such a system of determining payment shall not be employed in contracts entered into between the Government of the United States and either the Government of the Federal Republic or German contractors. Further, the Government of the Federal Republic shall not utilize the type of contract in which payment is made on the basis of cost plus a percentage of cost in sub-contracts under any contract between the Government of the United States and the Government of the Federal Republic.

(b) Subject to the provisions of Article 18, contracts based on cost plus a fixed fee are not prohibited.

Article 20**Reporting of Sub-Contracts**

The Government of the Federal Republic shall furnish to the United States contracting officers such information as may be requested regarding contracts placed by the Government of the Federal

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TAB 4 (cont'd)

Republic under contracts entered into between the Government of the United States and the Government of the Federal Republic.

Article 21**Destination of End-Items**

Although the determination of specifications and other requirements of particular offshore procurement contracts may require a tentative identification of the recipient country to which the end-items are to be delivered, it is understood that the United States may subsequently amend any such tentative identification as to which country shall be the ultimate recipient of the end-items produced.

Article 22**Relationship to the Bonn Conventions**

It is understood that the arrangements as provided for in this Agreement would not be affected by the coming into force of the "Convention on Relations between the Three Powers and the Federal Republic of Germany", including related conventions, as amended by the relevant Schedules to the "Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany", signed at Paris on 23 October 1954.

Article 23**Application to Berlin**

(a) This Agreement shall also apply from the date specified in Article 25 to Land Berlin which, for the purposes of this Agreement, comprises those areas over which the Berlin Senate exercises jurisdiction.

(b) It is a condition to the application of this Agreement to Land Berlin, in accordance with the preceding paragraph, that the Federal Republic shall previously have furnished to the United States a notification that all legal procedures in Berlin necessary for the application of this Agreement therein have been complied with.

Article 24**Supplements and Amendments**

(a) The Government of the Parties to this Agreement shall, upon the request of either of them, consult regarding any question relating to the application of this Agreement or to the operations or arrangements carried out pursuant to this Agreement.

(b) Either Government may apply at any time for review of the Agreement. The two Governments shall enter into negotiations aiming at a mutually satisfactory solution based on the principles of this Agreement with respect to any problem that may arise.

(c) This Agreement may be amended at any time by agreement between the two Governments.

Article 25**Final Clauses**

This Agreement shall enter into force upon the deposit of an instrument of ratification by the Federal Republic with the Government of the United States.

In witness whereof the respective representatives, duly authorized for the purpose, have signed this Agreement.

Done at Bonn, in duplicate, in the English and German languages, both of which texts are authentic, this 4th day of April, 1955.

FOR THE UNITED STATES OF AMERICA:
JAMES B. CONANT

FOR THE FEDERAL REPUBLIC OF GERMANY:
ADENAUER

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COVER SHEET

Contract No. _____

NEGOTIATED CONTRACT for the Procurement of Supplies, Services and Materials in the Federal Republic of Germany

PREAMBLE

This contract is entered into pursuant to the provisions of Section 2(c) (1) of the Armed Services Procurement Act of 1947, as amended (41 U.S. Code 151 et seq.), and other applicable law.

Funds Chargeable: _____

Amount of Contract: _____

Fiscal Officer: _____

PAYMENT: to be made in United States Dollars

by _____

at _____

to _____

This contract is entered into this _____ day of _____ 19 _____

by and between the Government of the United States of America (hereinafter called the United States Government) represented by the Contracting Officer executing this contract and the Government of the Federal Republic of Germany (hereinafter called the Federal Government) represented by _____.

This contract is executed subject to the agreement and conditions included in the "Agreement between the United States of America and the Federal Republic of Germany Relating to Offshore Procurement" (hereinafter called the Agreement) dated _____, concerning the procurement of supplies, services and materials.

The parties hereto agree that the Federal Government shall furnish and deliver all of the supplies and perform all the services set forth in the Schedule for the compensation stated therein.

B-1

GENERAL PROVISIONS

1. DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "Secretary" means the Secretary, the Under-Secretary, or any Assistant Secretary of the United States Military Department concerned; and the term "his duly authorized representative" means any person or persons (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the United States Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(c) The term "Federal Government" means the Government of the Federal Republic of Germany or any agency (Dienststelle) duly authorized to act on behalf of the Federal Government in relation to this contract.

(d) Except as otherwise provided in this contract, the term "subcontract" means any agreement, contract or purchase order made by the Federal Government with any contractor in fulfillment of any part of this contract, and any agreement, contract, subcontract or purchase order thereunder.

2. CHANGES

(a) The Contracting Officer, after having contacted the Federal Government, may at any time, by a written order make changes, within the general scope of this contract, in any one or more of the following:

(i) Drawings, designs, or specifications, where the supplies to be furnished and the services to be performed are to be specially manufactured and/or executed for the United States Government in accordance therewith;

(ii) Method of shipment or packing; and

(iii) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be agreed upon in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Federal Government for adjustment under this clause must be asserted within thirty days from the date of receipt by the Federal Government of the notification of change; provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. The Federal Government shall continue to execute this contract as changed, and the United States Government will process claims arising therefrom as promptly as possible.

3. EXTRAS

Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor has been authorized in writing by the Contracting Officer.

4. VARIATION IN QUANTITY

No variation in the quantity of any items called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.

5. INSPECTIONS, ACCEPTANCE AND REJECTION

(a) Adequate inspections and tests of all supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) to insure conformity with drawings, designs and specifications of the contract shall be effected by the Federal Government.

(b) The Federal Government will furnish a certificate or certificates stating that the inspection has been made and that all supplies, services or materials covered by the certificate meet all requirements of the schedules, drawings, designs and specifications of the contract. United States Government

representatives shall have the right to verify the certifications and to verify that (1) the end items conform to standards and to drawings, designs and specifications and (2) the quantity of items specified is delivered.

(c) United States representatives will notify the Federal Government when they intend to conduct inspections and such inspections will, insofar as possible, be conducted promptly. The Federal Government shall have the right to be present during such inspections should the Federal Government so request.

(d) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the United States Government shall have the right either to require their correction, or to reject them (with or without making arrangements with the Federal Government as to their disposition) where the Contracting Officer determines that the national or mutual security interests require rejections. Supplies or lots of supplies which have been required to be corrected or rejected shall be removed, or corrected in place, as requested by the Contracting Officer, by or on behalf of, and at the expense of the Federal Government or its subcontractor, promptly after notice, and shall not again be tendered for acceptance unless the former tender and either the requirement for correction or rejection is disclosed.

(e) The Federal Government will provide and require its subcontractors to provide to the United States Government inspectors, without additional charge to the United States Government, reasonable facilities and assistance for the safety and convenience of the United States Government representatives in the performance of their duties.

(f) Except as otherwise provided in this contract, final acceptance or rejection of the supplies shall be made concurrently with, or shortly after, final inspection and before shipment or transportation; but failure of the United States Government to inspect and accept or reject articles to be delivered under the contract shall neither relieve the Federal Government from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the United States Government therefor; provided, however, that if the Federal Government considers that there is an undue delay by the United States Government in taking action on acceptance or rejection, it will so notify the United States Government and the two Governments will consult with a view towards amending the contract to provide to the Federal Government compensation for additional expenses occasioned by such delay of the United States Government.

(g) The inspection and test by the United States Government of any supplies or lots thereof does not relieve the Federal Government from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to final acceptance. Except as otherwise provided in this contract, no liability for defective supplies shall exist after final acceptance, except as regards latent defects. Claims arising out of latent defects shall be asserted within one year after final acceptance of the last delivery under the contract, unless otherwise agreed upon in the special provisions of this contract.

(h) The Federal Government shall provide and maintain an inspection system mutually acceptable to the two Governments covering the supplies hereunder. Records of all inspection work by the Federal Government shall be kept complete and available to the United States Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract.

6. RISK FOR LOSS OF OR DAMAGE TO SUPPLIES

Except as otherwise provided in this contract, the Federal Government (1) shall bear all risks for loss of or damage to the supplies covered by this contract until actual delivery and (2) shall bear all risks as to rejected supplies, except that, when rejection occurs while the supplies are not in the possession or control of the Federal Government or its subcontractors, the Federal Government shall not assume such risks until the 8th day after receipt of notice of rejection, or until such earlier time as the supplies come into the possession or control of the Federal Government or its subcontractors.

7. TERMINATION

(a) The performance of work under this contract may be terminated by the United States Government in accordance with this clause in whole, or, from time to time, in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the United States Government.

Any such termination shall be effected by delivery to the Federal Government of a Notice of Termination specifying to the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise authorized by the Contracting Officer, the Federal Government shall (1) cause the work under the contract on the date and to the extent specified in the Notice of Termination to be stopped; (2) place no further subcontracts for materials, services, or facilities except as may be necessary for completion of such portion of the work under the contract as is not terminated; (3) terminate or require to be terminated all subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination; (4) assign to the United States Government, in the manner, at the times, and to the extent requested by the Contracting Officer, all of the rights and titles of the Federal Government under the subcontracts so terminated; (5) settle or require to be settled all outstanding liabilities and all claims arising out of such termination of subcontracts, with the approval or ratification of the Contracting Officer to the extent he may request, which approval or ratification shall be final for all the purposes of this clause; (6) transfer or have transferred title and deliver or have delivered to the United States Government, in the manner, at the times, and to the extent, if any, requested by the Contracting Officer, (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (ii) the completed or partially completed plans, drawings, information and other property which, if the contract had been completed, would have been required to be furnished to the United States Government; (7) use its best efforts to sell, in the manner, at the times, to the extent and at the price or prices authorized by the Contracting Officer, any property of the types referred to in provision (6) of this paragraph, provided, however, that the Federal Government shall be under no obligation to extend credit to any purchaser; and may acquire any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer; and provided further that the net proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the United States Government to the Federal Government under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may authorize; (8) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and (9) take such action as may be necessary, or as the Contracting Officer may request, for the protection and preservation of the property related to this contract which is in the possession of the Federal Government and in which the United States Government has or may acquire an interest.

(c) After 60 days following receipt by the Contracting Officer of acceptable inventory schedules covering all items of a particular property classification, such as raw materials, purchased parts, and work in process of the termination inventory at any one plant or location, or such later date as may be agreed to by the Contracting Officer and the Federal Government, the Federal Government may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been requested or authorized by the Contracting Officer, and may request the United States Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the United States Government will accept title to such items and remove them or enter into a storage agreement covering the same, provided that the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or, if the items are stored, within forty-five (45) days from the date of submission of the list. Any necessary adjustment to correct such list as submitted shall be made prior to final settlement.

(d) After receipt of a Notice of Termination, the Federal Government shall submit to the Contracting Officer its termination claim, in a suitable form to be agreed upon. Such claim shall be submitted not later than two years from the effective date of termination, provided, however, (1) that the two Governments may agree, by written stipulation, to one or more extensions within such two-year period or agreed extension thereof; and (2) that if the Contracting Officer considers that the facts justify such action, he may receive and act upon any such termination claim at any time after the above-mentioned periods. If no such claim is submitted by the Federal Government within the said periods, the Contracting Officer may determine the amount, if any, due to the Federal Government by reason of the

termination and the amount so determined shall thereupon be paid to the Federal Government. In arriving at a determination of this amount the Contracting Officer may be guided to the extent applicable by the "Statement of Principles for Consideration of Costs" set forth in Part 4 of Section VIII of the Armed Services Procurement Regulation, as in effect on the date of this contract, or by any other sound principle of cost determination. Prior to payment, the Contracting Officer shall give the Federal Government written notice of the amount thus determined. The Federal Government shall have ninety (90) days from receipt of such notice within which to protest the amount of the determination. If the Federal Government does make such a protest to the United States Government, the two Governments shall, as promptly as possible, consult with each other with a view toward settling the amount due.

(e) In mutually arriving at a settlement hereunder, the Federal Government and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Federal Government as fair as compensation by reason of the total or partial termination of work. The contract shall be amended accordingly, and the Federal Government shall be paid the agreed amount.

(f) In arriving at the amount due the Federal Government under this clause there shall be deducted (1) all unliquidated payments on account theretofore made to the Federal Government, (2) any claim which the United States Government may have against the Federal Government in connection with this contract, and (3) the agreed price for, or the net proceeds of sale of, any materials, supplies, or other things acquired by the Federal Government or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the United States Government.

(g) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Federal Government may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(h) Upon notification to the United States Government by the Federal Government that the Federal Government is precluded from performing the contract in accordance with its terms and conditions due to circumstances beyond its control, the two Governments will consult with a view toward negotiating an amendment to this contract in the form of a reasonable extension of time for the performance of the contract (it being recognized, however, that there may be special cases where the United States Government's need for the end product will not admit of postponement) or an amendment to the contract in some other respect. If the Federal Government should fail to perform the contract in accordance with its terms, and such failure should be due to causes within the control of the Federal Government, then the United States Government may terminate this contract by reason of the failure of the Federal Government to perform it. Any such termination shall be without cost to the United States Government and without liability of either Government to the other; provided that the parties hereto may agree upon the transfer to the United States Government of any or all of the property of the types referred to in paragraph (b)(6) above, in which event the United States Government will pay to the Federal Government (1) the price provided in the contract for items completed in accordance with the contract requirements, and (2) a price mutually agreed upon for other items.

(i) Unless otherwise provided for in this contract, the Federal Government, from the effective date of termination and for a period of six years after final settlement under this contract, shall preserve and make available to the United States Government, at all reasonable times, at the offices of the Federal Government, but without direct charge to the United States Government, all its books, records, documents, and other evidence bearing on the costs and expenses of the Federal Government under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, micro-photographs, and other authentic reproductions thereof.

B. TAXES

(a) The contract prices do not include any tax or duty which the two Governments in accordance with the "Agreement between the United States of America and the Federal Republic of Germany Concerning Tax Relief to be Accorded by the Federal Republic to United States Expenditures in the Interest of Common Defense", signed at Bonn 15 October 1954, have agreed shall not be applicable to expenditures by the United States Government, or any other tax or duty not applicable to this contract under the laws of the Federal Republic. If any such tax or duty has been included in the contract prices through error or otherwise, the contract prices shall be correspondingly reduced.

(b) If, after the contract date, the United States Government and the Federal Government shall agree that any tax or duty included in the contract prices shall not be applicable to expenditures by the United States Government, the contract prices shall be reduced accordingly.

9. SUBCONTRACTING

(a) The Federal Government undertakes that in any subcontract made in connection with this contract it will employ the same procurement methods and procedures as it employs in contracting for its own requirements, insofar as the provisions of this contract do not cause deviations therefrom.

(b) The Federal Government agrees to indemnify and save harmless the United States Government against all claims and suits of whatsoever nature arising under or incidental to the performance of this contract, by any subcontractor against the Federal Government or the United States Government.

10. PAYMENTS

The Federal Government shall be paid, upon the submission of properly certified invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the United States Government when the amount due on such deliveries so warrants; or, when requested by the Federal Government, payment for accepted partial deliveries shall be made whenever such payment would equal, or exceed, either \$1,000 or 50% of the total amount of this contract. If the invoices when submitted are completely in order with respect to the amounts due and payable; if they make correct, unambiguous reference to the items invoiced so that they can be readily identified in the contract; and if they are prepared and certified by the Federal Government in accordance with the stated invoicing requirements of the contract, payment is customarily made without delay and in approximately thirty days after submission of the invoice.

11. UNITED STATES OFFICIALS NOT TO BENEFIT

No member of or delegate to the Congress of the United States, or resident commissioner of the United States, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

12. COVENANT AGAINST CONTINGENT FEES

The Federal Government warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Federal Government for the purpose of securing business. For breach or violation of this warranty, the United States Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

13. GRATUITIES

The Federal Government agrees to apply to this contract the principles embodied in Section 631 of Public Law 179 and Section 629 of Public Law 488, 82nd Congress of the United States.

14. FILING OF PATENT APPLICATIONS

While, and so long as, the subject matter of this contract is classified security information of the United States Government, the Federal Government agrees that it will not file, or cause to be filed, an application for patent, or other like statutory protection, disclosing any of said subject matter without referring the proposed application to the Contracting Officer for determination as to whether, for reasons of United States security, such applications shall be held in secrecy.

15. COPYRIGHT

(a) The Federal Government grants to the United States Government, (1) a royalty-free, non-exclusive and irrevocable license to publish, translate, reproduce, deliver, perform, use, and dispose of, and to authorize, on behalf of the United States Government or in the furtherance of mutual defense, others so to do, all copyrightable material first produced or composed and delivered to the United States Government under this contract by the Federal Government, its employees or any individual or concern specifically employed or assigned to originate and prepare such material; and (2) a license as aforesaid under any and all copyrighted or copyrightable work not first produced or composed by the Federal Government in the performance of this contract but which is incorporated in the material furnished under the

contract, provided that such license shall be only to the extent that the Federal Government now has, or prior to completion of final settlement of this contract may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(b) The Federal Government agrees that it will exert all reasonable effort to advise the Contracting Officer, at the time of delivering any copyrightable or copyrighted work furnished under this contract, of any adversely held copyrighted or copyrightable material incorporated in any such work and of any invasion of the right or privacy therein contained.

(c) The Federal Government agrees to report to the Contracting Officer, promptly and in reasonable written detail, any notice or claim of copyright infringement received by the Federal Government with respect to any material delivered under this contract.

(d) Nothing contained in this paragraph shall be deemed, directly or indirectly, to grant any license under any patent now or hereafter granted, or to grant any right to reproduce any copyrighted or copyrightable material, other than that referred to in subparagraph (a), above.

16. GUARANTEES

The Federal Government undertakes that the benefit of any guarantee obtained in respect of any subcontract shall be passed on to the United States Government.

17. SECURITY

(a) Any materials, documents, designs, drawings or specifications delivered by the United States Government to the Federal Government and any materials, documents, designs, drawings, specifications or supplies delivered by the Federal Government to the United States Government in the performance of this contract, which are classified by the originating government as "Top Secret", "Secret", or "Confidential", shall be given, as provided in Article 15 of the Agreement, security protection by the receiving government corresponding substantially to that afforded by the originating government and will be treated by the receiving government as its own classified material of a corresponding security grading.

(b) The receiving government will not use such material, including information, or permit it to be used, for purposes other than those in the interests of the common defense as envisaged by the Agreement and will not disclose such material, or permit it to be disclosed, to another nation without the consent of the originating government.

(c) The receiving government will, on request, give to the originating government an acknowledgment of receipt in writing for any such classified material.

(d) The Federal Government agrees to include appropriate provisions covering military security material including information in all subcontracts hereunder.

18. TECHNICAL INFORMATION

The Federal Government agrees that the United States Government shall have the right to duplicate, use and disclose, in behalf of the United States Government or in the furtherance of mutual defense, all or any part of the reports, drawings, blueprints, data and technical information, specified to be delivered by the Federal Government to the United States Government under this contract, provided that the granting of such rights shall be to the extent that the Federal Government is able to obtain and grant such rights. Nothing contained in this clause, in itself, shall grant any right or license to use, sell, or reproduce any patented article; it is strictly limited to reports, drawings, blueprints, data and technical information.

19. ASSIGNMENTS OF CLAIMS

(a) No assignment of any claim arising under this contract shall be made by the Federal Government except pursuant to mutual agreement between the two Governments.

(b) In the event of such assignment, no copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret", "Secret" or "Confidential", shall be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same; provided, that a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed to such assignee upon the prior written authorization of the Contracting Officer.

20. LABOR RELATIONS AND STANDARDS

The provisions of this contract and the performance hereunder shall be subject to, and in accordance with, the laws applicable in the Federal Republic, from time to time in effect, which govern the hours, wages, labor relations (including collective bargaining), workman's compensation, working conditions, and other matters pertaining to labor.

21. REPORTING OF ROYALTIES

If this contract is in an amount which exceeds \$10,000, the Federal Government agrees to report in writing to the Contracting Officer, during the performance of this contract, the amount of royalties paid, or to be paid, by it directly to others in the performance of this contract. The Federal Government further agrees (1) to furnish in writing any additional information relating to such royalties as may be requested by the Contracting Officer, and (2) to insert a provision similar to this clause in any subcontract hereunder which involves an amount in excess of the equivalent of ten thousand United States dollars.

22. EXAMINATION OF RECORDS

The following clause is applicable to the extent required by the laws of the United States:

(a) The Federal Government agrees that the Comptroller General of the United States, or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers and records of the Federal Government involving transactions related to this contract.

(b) The Federal Government further agrees to include in all its subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract with the United States Government, have access to and the right to examine any directly pertinent books, documents, papers and records of such subcontractor involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (1) purchase orders not exceeding \$1,000 and (2) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

(c) The Comptroller General of the United States or any of his duly authorized representatives shall notify the Federal Government if he intends to carry out such examinations. The Federal Government shall have the right to take part in such examinations if it so requests.

SIGNATURE SHEET

The rights and obligations of the parties to this contract shall be subject to and governed by the Preamble consisting of one page, the Schedule consisting of _____ numbered pages, the General Provisions consisting of _____ numbered pages and this Signature Sheet. To the extent of any inconsistency between the Schedule or the General Provisions, and any specifications or other provisions which are made a part of this contract by reference or otherwise, the Schedule and the General Provisions shall control. To the extent of any inconsistency between the Schedule and the General Provisions, the Schedule shall control. It is agreed that quotations and/or conversations leading up to, and during the negotiations of, this contract have been consummated by signing this contract which, together with the Agreement dated 7 February 1957, constitutes the entire agreement between the parties hereto. The provisions of this contract shall be interpreted on the basis of the laws of the United States and the English language version of the contract.

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

THE GOVERNMENT OF THE FEDERAL
REPUBLIC OF GERMANY

By _____

(Authorized Officer)

(Address)

For _____

THE GOVERNMENT OF THE UNITED STATES
OF AMERICA

By _____

(Contracting Officer)

(Address)

MODEL
NATO MUTUAL SUPPORT AGREEMENT

ARTICLE I

INTRODUCTION

The Government of the United States of America and the Government of _____, desiring to further the rationalization, standardization, interoperability, readiness, and effectiveness of their respective military forces through increased logistics cooperation, have resolved to conclude this Support Agreement between _____ and _____ (hereinafter referred to as the parties).

ARTICLE II

PURPOSE

This Agreement is entered into on the part of the United States pursuant to the authority of the North Atlantic Treaty Organization Mutual Support Act of 1979 for the purpose of acquisition and transfer of logistic support, supplies and services. It establishes basic terms and conditions for provision of mutual logistic support, supplies and services as defined in Article IV, paragraph a of this Agreement.

ARTICLE III

APPLICABILITY

1. This Agreement applies only to military forces deployed in Europe and adjacent waters, and in the case of United States Forces to logistic support, supplies and services in the inventory or otherwise under the jurisdiction and control of United States Forces deployed in Europe and adjacent waters.

2. United States Government commitments under this Agreement are subject to the NATO Mutual Support Act and to the availability of appropriated funds.

3. The parties understand that this Agreement will not be employed in a manner to serve as a routine and normal source for supplies and services reasonably available from United States commercial sources or from the United States through Foreign Military Sales procedures under the Arms Export Control Act.

ARTICLE IV

DEFINITIONS

1. As used in this agreement and in any implementing arrangements the following definitions apply:

a. Logistics Support, Supplies, and Services. Food, billeting, transportation, petroleum, oils, lubricants, clothing, communication services, medical services, ammunition, base operations support (and construction incident thereto), storage facilities, use of facilities, training services, spare parts and components, repair and maintenance services, and airport and seaport services.

b. Implementing Arrangement. An implementing arrangement is generally used in cases of continuing provision of mutual logistic support, supplies and services of a specific kind or relating to specific equipment or events, and sets forth further details, terms and conditions that define or facilitate this Agreement.

c. Orders or Requisitions. Orders or requisitions call for the provision of specific logistics support, supplies and services pursuant to the terms of this Agreement and the applicable implementing arrangements, if any.

d. Invoice. Invoices are those documents from the supplying party which request reimbursement or payment for specific logistic support, supplies and services rendered pursuant to this Agreement and the applicable implementing arrangements, if any.

e. United States European Command Component Commands. United States Army, Europe (USAREUR); United States Navy, Europe (USNAVEUR); and United States Air Forces in Europe (USAFE).

f. Europe and Adjacent Waters. The North Atlantic Treaty Area as defined in the North Atlantic Treaty (amended by the Protocol on the Accession of Greece, Turkey, and the Federal Republic of Germany), excluding North America.

ARTICLE V

BASIC TERMS AND CONDITIONS

1. Each party agrees to utilize its best endeavors, consistent with national laws and priorities, not only in peacetime but also in periods of emergency or active hostilities to provide the other party requested logistic support, supplies and services as defined in this agreement, and its implementing arrangements.
2. The transfer of logistic support, supplies and services between the parties shall be pursuant to orders or requisitions issued in conformity with the terms of this Agreement and any applicable implementing arrangement.
3. Compensation for the transfer of logistic support, supplies and services made under the authority of this Agreement may be accomplished by utilization of one of the following methods:
 - a. Reimbursement. Reimbursement in the supplying party's currency based upon reciprocal pricing principles.
 - b. Exchange (Replacement in kind.) Replacement of supplies or services with supplies or services of an identical or, as determined by the party supplying the item to be replaced, of a substantially identical nature.

4. In all transactions involving the transfer of logistic support, supplies or services, the recipient party agrees that such logistic support, supplies or services will not be retransferred, either temporarily or permanently, by any means to other than the forces of the receiving party or a NATO government, or a NATO subsidiary body or agent thereof, without the prior written consent of the supplying party.

5. Unless modified by an implementing arrangement, an order or requisition will contain the data elements in Annex A and will be in the format set forth by the supplying party and in the language of both parties. The parties will inform each other regarding any limitations which may be imposed upon a party's personnel to issue or accept orders or requisitions.

6. As evidence of receipt by the receiving party of the logistic support, supplies or services being billed, invoices will include a signed copy of the order, or requisition, or a line item listing, with total value matching the total value of the invoice. The invoice will contain an identification of any applicable implementing arrangements and will be in the format set forth by the supplying party.

7. Settlement for the transfer of logistic support, supplies or services will be made as follows:

a. Reimbursable Transactions. Credit and liabilities accrued from reimbursable transactions under this Agreement will be liquidated by direct payment not less often than once every three months. Payment is due no later than thirty days from the invoice date.

b. Exchange Transactions. Exchange transactions (replacement in-kind) shall be settled through the issuance or receipt, as applicable, of replacement supplies or services within three months of the original transaction. If not settled within this period, the exchange transaction shall be converted, as of the date on which the three months end, to a reimbursable transaction.

Implementing arrangements may set forth additional details concerning settlement, provided they are consistent with this Agreement.

8. The parties agree to use the following reciprocal pricing principles:

a. In the case of specific acquisition by the supplying party from its contractors for a receiving party, the price will be no less favorable than the prices charged the Armed Forces of the supplying party by its contractors for identical items or services, less any amounts excluded by paragraph 8c of this Article. The price charged will take into account differentials due to delivery schedules, points of delivery and other similar considerations.

b. In the case of transfer from the supplying party's own resources, the supplying party will charge the same price as the supplying party charges its own forces for identical logistic support, supplies or services, less any amounts excluded by paragraph 8c of this Article.

c. The parties agree that these reciprocal principles exclude the direct or indirect charging of indirect costs (including charges for

ment and production equipment), administrative surcharges and contract administration costs.

Provisions of tax and customs relief agreements applicable to the acquisition of materials, services, supplies and equipment by the receiving party will apply to logistic support, supplies and services transferred under this Agreement.

ARTICLE VI

INTERPRETATION AND REVISION

1. Any disagreement regarding the interpretation or application of this Agreement or concerning logistic support, supplies or services transferred pursuant to this Agreement will be resolved by consultation between the parties, and will not be referred to an international tribunal or third party for settlement.
2. Either party may, at any time, request revision of this Agreement. In the event such a request is made, the two parties shall promptly enter into negotiations.

ARTICLE VII

EFFECTIVE DATE AND TERMINATION

1. This Agreement will become effective upon signature. It shall remain in force for a period of five years, unless either party provides one year's written notice to the other of its intention to terminate this Agreement.

2. This Agreement may be renewed or extended by agreement of the parties in writing.

DONE AT _____

IN TWO ORIGINALS IN THE ENGLISH AND
TEXTS BEING EQUALLY AUTHENTIC.

LANGUAGES, BOTH

Agreement

between

The Secretary of Defense of the United States of America

and

The Federal Minister of Defense of the Federal Republic
of Germany

concerning

Mutual Support in Europe and Adjacent Waters
(Mutual Support Agreement - MSA)

The Secretary of Defense of the United States of America

and

The Federal Minister of Defense of the Federal Republic
of Germany

noting the provisions of Article IX of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (NATO SOFA) of 19 June 1951,

noting the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Supplementary Agreement to NATO SOFA) of 3 August 1959,

noting the pertinent NATO documents, in particular MC 14/3 of 16 January 1968 - Overall Strategic Concept for the Defence of the North Atlantic Treaty Organisation Area; MC 36/2 (Rev.) of 18 March 1960 - Division of Responsibilities in Wartime between the National Commanders and the Major and Principal Subordinate Allied Commanders, in conjunction with the Agreement between the Government of the Federal Republic of Germany and the Supreme Allied Commander Europe on the Division of Responsibilities and Cooperation between NATO Commanders and Territorial Commanders in Wartime (SACEUR Agreement) of 9 February 1977; and the relevant NATO Standardization Agreements (STANAGs), and

noting that the Secretary of Defense of the United States of America pursuant to the NATO Mutual Support Act of 1979 (Public Law 96-323) is authorized to enter into Agreements concerning transfer of logistic support;

desiring to further the rationalization, readiness, and effectiveness of their respective military Forces through increased logistics cooperation, mindful that logistics is a national responsibility, have resolved to conclude this Mutual Support Agreement:

Article 1

Purpose

The purpose of this Agreement is to establish basic terms and conditions for provision of mutual logistic support, supplies, and services.

Article 2

Definitions

As used in this Agreement and in any implementing arrangements, the following definitions apply:

- a. Logistic Support, Supplies, and Services. Supply of expendables and bulk expendables (food, petroleum, oils, lubricants, clothing, ammunition, spare parts and components), storage services, billeting, base operations support, training services, repair and maintenance services, communications services, medical services, transportation and related service, use of facilities.
- b. Implementing Arrangement. An implementing arrangement is the detailed arrangement which is concluded on the basis of this Agreement and sets forth the additional details, terms and conditions.
- c. Order. An order, when in its proper form and signed by an authorized official, is a request for the provision of specific logistic support, supplies or services.
- d. United States European Command (USEUCOM) Component Commands. United States Army, Europe (USAREUR); United States Naval Forces, Europe (USNAVEUR); and United States Air Forces in Europe (USAFE).
- e. Europe and Adjacent Waters. The North Atlantic Treaty Area as defined in the North Atlantic Treaty (amended by the Protocols on the Accession of Greece and Turkey), excluding North America.

Article 3

Applicability

1. This Agreement applies to military forces of the parties in Europe and adjacent waters and to logistic support, supplies and services which the United States Forces or the Federal Armed Forces can provide within their own competence.
2. This Agreement applies not only in peacetime, but also in periods of crisis or war. Unless otherwise agreed, support in crisis or war which is provided under the Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning Host Nation Support during Crisis or War (HNS Agreement), dated April 15, 1982, will not be affected by this Agreement and German civilian support in crisis or war will be governed by the HNS Agreement exclusively.
3. The parties understand that this Agreement will not be employed in a manner to serve as a routine and normal source for supplies and services reasonably available:
(a) from United States or German commercial sources or
(b) acquirable through normal military sales procedures.

Article 4

Basic Terms and Conditions

1. Each party agrees to utilize its best endeavors, consistent with national priorities, to enter into implementing arrangements and to satisfy requests of the other party for logistic support, supplies, and services. It is understood that in using best endeavors, neither party is required to agree to provide logistic support, supplies or services which would impair the support of their own requirements or other commitments.
2. The parties agree that the provision of logistic support, supplies, and services between them will be accomplished by orders issued and accepted under implementing arrangements to this Agreement, or in conjunction with applicable

STANAGs except as set forth in paragraph 4. The documentation for a transaction will include all necessary details, terms, and conditions to carry out the logistic support, supplies and services, including the data elements described in the Annex.

3. Implementing arrangements will be negotiated by USEUCOM or USEUCOM Component Commands and the Federal Minister of Defense of the Federal Republic of Germany or his designated subordinate authorities. Implementing arrangements will generally identify those authorized to issue and accept orders under the implementing arrangements. The competent authorities of the contracting parties will notify each other of specific authorization or limitations on those command authorities, agencies, or personnel able to issue or accept orders. In the case of the United States, these notifications will go directly to and from the USEUCOM Component Command concerned. In the case of the Federal Republic of Germany, these notifications will go directly to and from the designated authority.
4. In the absence of relevant implementing arrangements or implemented logistic support STANAGs, orders may be issued against this Agreement alone in times of crisis or war as well as in exceptional situations jointly approved by Headquarters USEUCOM or the applicable USEUCOM Component Command and the Federal Minister of Defense of the Federal Republic of Germany or his designated subordinate authorities.
5. Nothing in this Agreement shall serve as a basis for an increased charge for logistic support, supplies, or services if such logistic support, supplies, or services would be available without charge or at a lesser charge under terms of another agreement.
6. For any logistic support, supplies, or services, the contracting parties may negotiate for payment either in cash (a "reimbursable transaction") or payment in kind (an "exchange transaction"). Accordingly, the receiving party will pay the supplying party in conformance with either Articles 5 and 10 or Articles 6 and 10, below.

Article 5

Reimbursable Transactions

The supplying party will submit invoices to the receiving party after delivery or performance of the logistic support,

supplies, or services. Both parties will maintain records of all transactions, and the parties will pay outstanding balances not less frequently than quarterly. In pricing reimbursable transactions, the parties agree to the following principles:

a. In the case of specific acquisition by the supplying party from its contractors or other government agency for a receiving party, the price will be no less favorable than the prices charged the armed forces of the supplying party by its contractors for identical items or services. The price charged will take into account differentials due to delivery, scheduled points of delivery, and other similar considerations.

b. In the case of transfer from the supplying party's own resources, the supplying party will charge the price established or the same price as the supplying party charges its own forces as of the date the order or requisition is accepted for identical logistic support, supplies, or services. In the case where a price has not been established or charges are not made for one's own forces, the parties will agree to a price in advance.

c. When a definitive price is not agreed in advance on the order, the order will set forth a maximum limitation of liability for the requesting party pending agreement on a final price. The parties will promptly enter into negotiations to establish the final price.

d. Unless otherwise agreed, the parties waive indirect costs, administrative surcharges, and contract administration costs.

Article 6

Exchange Transactions

Both parties will maintain records of all transactions, and the receiving party will pay the supplying party in kind by transferring to the supplying party logistic support, supplies, or services that are identical or substantially identical to the logistic support, supplies, or services delivered or performed by the supplying party and which are satisfactory to the supplying party. If the receiving party does not pay in kind within the terms of a replacement schedule, agreed to or in effect at the time of the original transaction with timeframes which may not exceed six (6) months from the date of the original transaction, the transaction will be deemed a reimbursable transaction and governed

by Article 5, except that the price will be established based upon the date the replacement in kind was to take place. In exceptional circumstances the parties may agree to a timeframe up to one year.

Article 7

Invoices Access to Records

1. The invoice will contain an identification of the applicable implementing arrangements. The invoice will be accompanied by evidence of receipt by the party receiving the logistic support, supplies, or services.
2. The parties agree to grant each other access to records sufficient to verify, when applicable, that reciprocal pricing principles have been followed and prices do not include waived or excluded costs. Unless otherwise specified in an implementing arrangement, records only need be retained until the transaction is completed.

Article 8

Transportation

Unless otherwise agreed, supplies will be collected by the original receiving party which will also furnish the materiel required for the transportation. Any costs attributable to deviations from this rule will be borne by the receiving party. In the case of exchange transactions, transportation for replacement will be in accordance with the agreement at time of original transaction.

Article 9

Transfer Limitations

In all transactions involving the transfer of logistic support, supplies, or services, the receiving party agrees that such logistic support, supplies or services will not be transferred, either temporarily or permanently, by any means to other than the forces of the receiving party or a NATO government or a NATO subsidiary body or agency thereof without the prior written consent of the supplying party.

Article 10

Excluded Tax and Customs

Relief from taxes and customs of deliveries to and other services rendered for the receiving party will be governed by the applicable agreements.

Article 11

Claims

1. The provisions of support items are without warranty, express or implied, except that unless otherwise stated, the supplies or services are warranted to conform to those ordered. To the extent that warranty rights against third parties may subsist in any item provided by one party to the other, such rights will, upon request, be assigned to the other party.
2. Subject to the provisions of Article VIII of NATO SOFA and Article 41 of the Supplementary Agreement to NATO SOFA, each party herewith waives any claim for damage against the other party when such damage arises from the use or operation of furnished items.

Article 12

Interpretation and Revision

The parties agree to make a good faith effort to resolve disagreements between the parties with respect to the interpretation or application of this Agreement. In the case of an implementing arrangement or transaction, the parties to the arrangements or transactions will make a good faith effort to resolve any disagreements with respect to interpretation or application of the arrangement or transaction. Differences of opinion which cannot be solved at the working level shall be submitted to the parties to this Agreement for investigation and resolution by negotiation.

Article 13

Effective Date and Termination

1. This Agreement will become effective on the date of the last signature and will continue in effect until terminated by either party giving six months' notice in writing.

2. Either party may, at any time, request revision of this Agreement. In the event such a request is made, the two parties shall promptly enter into negotiations.
3. The parties agree that five years after this Agreement enters into effect, they will jointly conduct a general review to determine which amendments, if any, should be made as a result of their experience in using the Agreement.

Done at Bonn, on January 21, 1983. IN TWO ORIGINALS IN THE ENGLISH AND GERMAN LANGUAGES, BOTH TEXTS BEING EQUALLY AUTHENTIC.

For the Secretary of Defense
of the United States
of America

For the Federal Minister
of Defense of the Federal
Republic of Germany

Lawrence J. Karl *Heinz Jochen Wittmann*