

THE STATE SECRETARY

IN THE FEDERAL FOREIGN OFFICE Bonn, March 27, 1998

Mr. Ambassador:

I have the honor to confirm receipt of your Note No. 147 of March 27, 1998 with which you propose on behalf of your Government an Arrangement between the Government of the United States of America and the Government of the Federal Republic of Germany. Your Note reads as follows:

"Mr. State Secretary:

With reference to the discussions between representatives of the Governments of the Federal Republic of Germany and the United States of America, and with reference to the agreement reached between our two Governments by Exchange of Notes on July 13, 1995 regarding the application of Article 73 of the Supplementary Agreement to the NATO Status of Forces Agreement (NA'I'O SOFA SA), on behalf of the Government of the United States of America, I have the honor to propose the following Arrangement to replace the aforementioned Exchange of Notes:

1. The Parties to the present Arrangement shall proceed on the assumption of the following definition of the term "technical expert", which shall serve as the basis for the interpretation and application of Article 73 of the NATO SOFA SA by the responsible authorities of the U.S. Forces and the responsible German Authorities:

a) For purposes of applying Article 73 of the NATO SOFA SA, the term "technical expert" shall refer to a person with a high degree of skill or knowledge for the ac-

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Bonn

accomplishment of complex tasks of a technical military nature, or of a technical scientific nature, as distinguished from routine mental, manual or physical processes. The skill and knowledge must have been acquired through a process of higher education, or through a long period of specialized training and experience. Personnel normally classified as blue collar shall not normally be considered to be technical experts, within the meaning of Article 73, first sentence, of the NATO SOFA SA. The same is true for skilled workers, as well as for crafts and trades occupations.

b) The following are examples of persons who are technical experts within the meaning of Article 73, first sentence, of the NATO SOFA SA:

aa) Technicians of firms through which weapons systems, military command and control systems, defense communications systems, and intelligence systems are procured when these technicians are engaged in the initial fielding, testing, training or repair of such equipment or systems under terms of guarantee, this however not extending to routine maintenance;

bb) Technicians responsible for complicated repairs, complicated re-engineering of equipment and components, or unprecedented and complicated application of the equipment if these technicians have specific knowledge clearly exceeding the knowledge conveyed within the scope of normal vocational training;

cc) The top manager of a contract involving substantial use of technical experts within the meaning of Article 73 of the NATO SOFA SA and those directly subordinate managers responsible for technical as opposed to administrative functions;

dd) Computer software engineers;

ee) Technicians responsible for the maintenance of aircraft, combat vehicles and weapons systems and who must apply knowledge of combat applications of this equipment, this however not extending to routine maintenance;

ff) Former officers, whose technical military skill or technical military knowledge are required for the performance of their work in addition to their other technical skills. As a matter of exception, this shall also apply to former non-

commissioned officers who, under military training conditions, work closely together with soldiers on equipment used for the simulation of tactical combat conditions.

c) The following are examples of persons who are not technical experts within the meaning of Article 73, first sentence, of the NATO SOFA SA:

aa) Administrative support and clerical personnel to include white collar employees in budgeting and accounting, general office workers, and hotel and billeting personnel;

bb) Sales representatives and service technicians for non-military equipment such as telephones, fax machines and copy machines;

cc) Automobile sales representatives;

dd) Secretaries, clerk-typists, computer workstations operators, and draftsmen;

ee) Automotive, aircraft, electrical, and similar mechanics or technicians, unless covered in number 1, paragraph b, letters (aa), (bb), or (ee);

ff) Electricians, plumbers, painters, masons, carpenters, and similar skilled workers;

gg) Unskilled and semi-skilled workers to include warehouse workers, forklift operators, drivers, and helpers;

hh) Customs control inspectors/specialists;

ii) Supply clerks and technicians.

2. a) For technical experts to be considered to be, and treated as, members of the civilian component, the other requirements set out in Article 73 of the NATO SOFA SA must be met, notably the absence of the non-eligibility grounds specified in Article 73, sentence 2, letters (a) to (d) NATO SOFA SA.

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b) Specifically only such technical experts may pursuant to Article 73, sentence 2, letter (d) of the NATO SOFA SA be considered to be, and treated as, members of the civilian component within the meaning of Article 73 of the NATO SOFA SA who are not ordinarily resident in the Federal Republic of Germany on commencing their work.

c) Individuals who have been present in the territory of the Federal Republic of Germany as members of the U.S. Forces or its civilian component or as dependents of such members may, within a period of 90 days after terminating their activity as members of the forces or its civilian component or their status as dependents, commence work as technical experts without being deemed - solely on the basis of this fact - to have become ordinarily resident in the territory of the Federal Republic of Germany within the meaning of Article 73, sentence 2, letter (d), NATO SOFA SA. Hardship cases will be sympathetically considered. Continued privileged status shall, however, only be applicable if the individuals have not become ordinarily resident in the territory of the Federal Republic of Germany within the meaning of Article 73, sentence 2, letter (d), NATO SOFA SA, prior to commencing their work as technical experts.

d) Individuals who have worked as technical experts on a contract and who have been considered to be and treated as members of the civilian component may, within a period of 90 days after terminating their employment as a technical expert, again take up work as a technical expert under a different contract/follow-up contract without being deemed - solely on the basis of this fact - to have become ordinarily resident in the territory of the Federal Republic of Germany within the meaning of Article 73, sentence 2, letter (d), NATO SOFA SA. Hardship cases will be sympathetically considered. Continued privileged status shall, however, only be applicable if individuals have not become ordinarily resident in the territory of the Federal Republic of Germany within the meaning of Article 73, sentence 2, letter (d), NATO SOFA SA, prior to again commencing their work as a technical expert.

e) The Parties to the present Arrangement agree that technical experts employed by private companies serving a force shall, in accordance with Article 73 of the NATO SOFA SA and provided such experts meet the requirements laid down therein, be considered to be and treated as members of the civilian component.

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f) In examining whether an individual is ordinarily resident in the territory of the Federal Republic of Germany within the meaning of Article 73, sentence 2, letter (d), NATO SOFA SA, it has to be ascertained, by weighing the totality of the circumstances, whether the individual has shifted the main focus of vital interests from another nation to the territory of the Federal Republic of Germany. In weighing the totality of the circumstances, the following facts, in particular, have to be taken into consideration:

aa) Duration of stay in the Federal Republic of Germany without status as a member of the forces or of the civilian component or as a dependent;

bb) Performance of work in a trade, or in a freelance capacity, or in an employment status in the territory of the Federal Republic of Germany which is not or was not done in his/her capacity as a member of the forces or of a civilian component;

cc) Ownership of real property in the territory of the Federal Republic of Germany and/or outside Germany;

dd) Current or previous receipt of social benefits from German public funds which are not granted to a member of the forces or of the civilian component;

ee) Regular place of residence of children and, if applicable, children's attendance at a German or non-German kindergarten or educational institution;

ff) Location of other sources of income;

gg) Main focus of social and societal relations within and outside the Federal Republic of Germany;

hh) Professional activity of the spouse within or outside the Federal Republic of Germany including the extent to which in Germany that activity is limited to employment with the American military community or to employment with an agency of the United States;

ii) Marriage to a German citizen.

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3. a) As early as possible during the acquisition process for a contract whose performance is likely to require the employment of a technical expert, the responsible authorities of the U.S. Forces shall notify the responsible authorities of the Land concerned of the nature and scope of the work the technical experts are expected to undertake. Such notification shall contain information as to the nature of the work to be performed by the contractor, at what locations in Germany the contractor is to operate, ***whether, as soon as it is known, the work is to be performed by the contractor or by a subcontractor***, how many of its staff ***or of the subcontractor's staff*** are to be employed at such locations as well as how many are to be employed as technical experts pursuant to Article 73 of the NATO SOFA SA. In this connection the U.S. Forces shall also transmit key parts of any contracts affecting Germany as well as any annexes relating to Germany containing skill classifications and wage or salary categories, for example, the relevant "skill classification cross reference". ***If there is a change of contractor or upon conclusion of a contract with a subcontractor, the responsible authorities of the U.S. Forces shall, as early as possible, provide the responsible authorities of the Land concerned with the name and address of the company as well as with the information listed in sentences 1 to 3 above, to the extent that changes have occurred.***

b) Where contracts are to be awarded affecting several Länder, the U.S. Forces shall transmit such information to all Länder concerned.

4. a) The responsible Land authority shall confirm receipt of such information and notify the responsible authorities of the U.S. Forces of any objections it may have with regard to Article 73 of the NATO SOFA SA as soon as possible. Such confirmation and/or notification of objections shall not prejudice any decision to treat individual employees as technical experts.

b) In the event of differences as to the admissibility of the intended employment of technical experts, the responsible authorities of the Länder and the U.S. Forces shall endeavor to settle such differences by way of negotiation as soon as possible. Where no comments on the relevant information have been received within five weeks after receipt of the information, the U.S. Forces shall proceed accordingly.

5. a) Before an employee proposed as a technical expert commences his/her work under the contract, the responsible authorities of the U.S. Forces shall communicate to the responsible German authorities the following information:

aa) Personal details:

Name, date of birth, nationality, passport number, social security number, home address and telephone number in Germany and family status;

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bb) Family members:

Spouse's nationality, in case of Germans, name and birth name, if different, number of children and dependents living in the employee's household;

cc) Professional details:

Name, German civilian company address and telephone number of the contractor for which the employee works, contract number, place of work, civilian work address and telephone number, detailed job description, starting date of employment (copy of employment contract or offer and acceptance), amount of remuneration, i.e., wage or salary plus monetary value of privileges granted, description of the remuneration package in the general contract;

dd) Education and training, qualifications and professional background:

Education and training (name and description of educational establishment, description and date of qualifications obtained), description of military skills necessary for the work to be performed as well as of the employee's professional background;

ee) Curriculum vitae prepared by the employee;

ff) Declaration as to whether the individual concerned has ever held a German work permit (issuing authority, period of validity and type of work permit);

gg) Declaration by the employee that he/she has no intention of becoming ordinarily resident in the Federal Republic of Germany.

b) If the highest service authority of the U.S. Forces declares that the employee concerned will perform work affecting military interests particularly worthy of protection, the highest service authority of the U.S. Forces may substitute for the detailed description of the work envisaged in number 3 and number 5, paragraph a, letter (cc) above a formal declaration to be transmitted to the responsible German authority. Should the German authority request additional information in individual cases, the highest service authority of the U.S. Forces shall furnish such additional information as is permissible under U.S. Forces security regulations, so that the German authority is provided with the means to conduct the discussions envisaged under number 6 below.

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6. The responsible Land authority shall, as soon as possible, normally not later than four weeks, after receiving information concerning individual employees, respond thereto in writing, stating the reasons for any objections, provided the persons concerned agree. If no response is given within six weeks, it shall be assumed that no objections exist. If objections are raised, the authorities of the Land and the U.S. Forces shall, in principle, within one week discuss whether the prerequisites for technical expert status within the meaning of Article 73, first sentence, of the NATO SOFA SA are met. Should no agreement be reached, the outcome shall be communicated to the employer and employee concerned. The Federal Foreign Office and the relevant authorities of the financial, customs, Federal property, employment and general internal as well as the social security administrations shall be informed.

7. An employee shall only commence his/her work with the contractor if the responsible Land authority has raised no objections in its response, or within the period specified in number 6 has made no response, or if the responsible authorities have discussed the matter and agreed that the individual concerned has technical expert status, or if the consultative commission has unanimously recommended that the individual should be treated as a technical expert.

8. If, in cases of military exigency, determined by superior U.S. military authorities, the U.S. Forces are unable to meet the advance notification and consultation requirements prescribed above, they will immediately inform the appropriate Länder of the actual or imminent presence of such technical experts as soon as the exigency and use of such technical experts becomes known. Treatment as technical expert in such an exigency will be considered conditional until proper notification and consultation occur. Any change in treatment as a result of such notification and consultation will be effected as soon as possible.

9. The outcome of discussions held pursuant to number 6 above shall not affect the right of the responsible German authorities, including financial authorities, to check specifically the nationality of the technical expert in question, his/her actual work as against the detailed work description pursuant to number 5, paragraph a, letter (cc) above as well as whether he/she works exclusively as a technical expert. This shall include external checks with his/her employer. They shall, however, be bound by the judgment reached by the responsible Land authority following discussions pursuant to number 6 above, unless the facts concerning the requirements for treatment as a technical expert within the meaning

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of Article 73 of the NATO SOFA SA (for example, with regard to the employee's work, personal qualifications and professional background) or concerning the non-eligibility grounds relating to the employee's residence were misrepresented or incomplete.

10. The responsible authorities of the U.S. Forces may on request, with the consent of the employee concerned, communicate the views of the U.S. Forces on the question of technical expert status to the responsible German authorities.

11. The Parties to the present Arrangement shall communicate the names and addresses of the agencies to be designated responsible authorities.

12. a) Immediately upon entry into force of this Exchange of Notes the responsible authorities of the U.S. Forces shall undertake a review of the status of all individuals whom the U.S. Forces have previously treated as technical experts. In conducting the said review the responsible authorities of the U.S. Forces shall apply the definition of "technical expert" agreed pursuant to number 1 above.

b) The responsible authorities of the U.S. Forces shall conclude the review no later than 31 December 1998 and communicate the results thereof to the responsible German authorities. Such communication shall contain all the information required pursuant to number 5 of this Arrangement concerning individuals considered by the responsible authorities of the U.S. Forces to meet technical expert status as well as the names of those individuals who in the light of the agreed definition do not meet such status. Individuals who no longer fulfill the legal requirements for a technical expert in accordance with Article 73 of the NATO SOFA SA shall, upon official notification of the nonexistence of technical expert status under Article 73, apply as soon as possible, but at the latest within one month, for the necessary residence and work permits under the relevant German laws and regulations. If the U.S. Embassy exceptionally declares in the following cases that a particular position must be occupied by an American citizen, the Government of the Federal Republic of Germany shall seek to ensure that the competent authorities grant the necessary residence permits in accordance with German law; the competent German authorities shall approve applications for the necessary work permits in these cases accordingly unless precluded from doing so by German law:

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aa) The incumbent must have full time access to military secrets as defined in paragraph 3 of Article 29 of the NATO SOFA SA. In this case, the declaration will certify that the applicant has the requisite access to military secrets and contain as much information in support of the requirement for access as is permissible under U.S. Forces security regulations.

bb) The incumbent meets the requirements of number 1, paragraph b, letters (cc), (ee) or (ff) but is ineligible for treatment as a technical expert because he/she is ordinarily resident in the Federal territory. In this case, the declaration will disclose which of the cited requirements the person meets.

cc) The incumbent must be available for immediate deployment with the U.S. Forces on combat or other urgent military operations outside the Federal Republic of Germany. In this case, the declaration would be based on the fact that American military operations would frequently take place in areas where arrangements have not been made to guarantee rapid entry for accompanying civilian personnel who are not American citizens. The declaration will certify the applicant's availability for deployment. The total number of incumbents under number 12, paragraph b, letter (cc) shall not exceed 100.

c) Individuals whom the said review has found not to meet technical expert status shall have neither the exemptions and benefits nor the ensuing financial gains actually enjoyed up to 31 December 1996 retroactively withdrawn. This shall not apply to persons against whom at the time of the conclusion of this Arrangement proceedings on grounds of wrongfully obtaining exemptions and benefits as technical experts are pending before German courts, public prosecutor's offices or authorities to the extent that these have been made known to the U.S. Forces, the concerned company, or the concerned person himself/herself.

13. A consultative commission, co-chaired by the Federal Foreign Office and the Embassy of the United States of America, shall meet periodically to review implementation of this Arrangement and address problems raised by either party. In cases of lack of agreement between Länder and U.S. Forces officials over the terms used in this Arrangement or over its application, the

consultative commission shall meet at the earliest opportunity following receipt of a written request from either representatives of the Länder or of the

U.S. Forces to seek resolution and issue a written report signed by the co-chairmen. If possible, the report shall contain a written recommendation.

14. This Arrangement shall be concluded in the English and German languages, both texts being equally authentic.

If the Government of the Federal Republic of Germany agrees to the proposals contained in numbers 1 to 14, this Note and the Note in reply thereto expressing your Government's agreement shall constitute an Arrangement between our two Governments, which shall enter into force on the date of your Note in reply.

Please accept, Mr. State Secretary, the assurance of my highest consideration."

I have the honor to inform you that my Government agrees to the proposals contained in your Note. Your Note and this Note in reply therefore constitute an Arrangement between our two Governments, which enters into force on the date of this Note and the German and English texts of which are equally authentic.

Please accept, Mr. Ambassador, the assurance of my high consideration.

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