# CHAPTER 16
# On the Non-tariff Barriers Obstructing Free Trade in the Transatlantic Defense Procurement Market

BY

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## *1. Introduction*

Defense is the most protected field in the public sector.(1) It constitutes not only a large share of public procurement but also of overall public and private spending.(2) Yet given the massive scale of transatlantic trade,(3) defense forms only a small part.(4) Transatlantic defense liberalisation has been

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* This essay is derived from a draft of one chapter of his dissertation, which considers more broadly how the EU and U.S. federal public procurement systems' mutual foreignness creates non-tariff barriers. The author is grateful to his advisors, Peter Trepte and Craig Rotterham, for their guidance and to his wife, Alicia, for her patience and support. Free access to the law libraries at Nottingham George Washington, Harvard, Virginia, and Yale was indispensable. The views expressed here are his own and do not reflect an official position of the Department of the Air Force, Department of Defense, or any other U.S. government agency.

(1) S. MARTIN, K. HARTLEY and A. COX, "Defence Procurement of Dual-use Goods: Is There a Single Market in the European Union?", *Defence & Peace Economics*, 1999, 10:1, p. 55, writing: "Of all procurement markets, defence is probably the most protected and thus the most difficult sector within which to eradicate buy national policies", p. 56. *See* also C. GRANT, "Transatlantic Alliances and the Revolution in Military Affairs", in *Europe's Defence Industry: A Transatlantic Future?* (G. ADAMS *et al.* eds), London, Centre for European Reform, 1999, p. 63, observing, "The defence industry, more than any other, has defied globalisation".

(2) M. TRYBUS, "European Defence Procurement: Towards a Comprehensive Approach", *Eur. Pub. L.*, 1998, Vol. 111, p. 4.

(3) G. GAMBINI, R. ISTATKOV and R. KERNER, "USA-EU – International Trade and Investment Statistics, EU and United States form the largest Trade and Investment Relationship in the World", accessed 4 July 2019 at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=USA-EU_-_international_trade_and_investment_statistics&oldid=368909, reporting that EU-U.S. trade accounts for nearly one-third of global imports and exports and that "together they have the largest bilateral trade relationship in the world".

(4) U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", 2009, accessed 4 July 2019 at https://ec.europa.eu/docsroom/documents/10489/attachments/1/translations/en/renditions/native, 85, reporting that "overall level of transatlantic defence trade is extremely low" in that it composes a "very small fraction of the overall transatlantic trade and is much smaller than other technology related sectors such as civil aerospace". In fact, when compared to the latter, defense "can be considered almost non-existent", p. 41.



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a longstanding goal.(5) Because this sector has been mostly excluded from free trade pacts, the gains that would accrue from liberalizing this highly protected sector would be greater than from any other.(6)

Tariffs are not the main problem. They are relatively low and do little to impede trade.(7) Non-tariff barriers are the main culprit. These come in several varieties, including domestic preferences, collateral policies, illegitimate practices, and certain commercial procurement policies.(8) Some are overt, such as the Buy American Act. Others are not. Sue Arrowsmith identifies a subtle class of non-tariff barrier that she calls "structural restrictions."(9) These arise from the dissonance among foreign procurement systems and the inexperience of foreign vendors attempting to sell abroad. Such restrictions "raise practical barriers to entry as foreign vendors run headlong into dense and alien procurement regimes".(10)

Despite a common Western legal tradition and much shared history, the U.S. federal government and the EU public procurement systems are no less susceptible to structural restrictions. This essay seeks to bridge the resulting gap insofar as the arms market is concerned. It attempts to answer this question: if the overt trade barriers were removed, what would remain? And it thus assumes a hypothetical world where a robust version of the Transatlantic Trade and Investment Partnership (TTIP) has passed and that this version of the TTIP covers defense procurement.

Comparing the U.S. and the EU public procurement systems is tricky for several reasons. First, the two systems are asymmetric, making comparisons difficult.(11) Further, although some piecemeal work has been done, no one has

(5) *See* M. EDMONDS (ed), "International Military Equipment Procurement Partnerships: The Basic Issues", in *International Arms Procurement: New Directions*, Oxford, Pergamon, 1981, pp. 12-13.

(6) L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, Cambridge, CUP, 2017, pp. 491-492.

(7) J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, Middleburg, Center for Transatlantic Studies, 2009, pp. 65, 68.

(8) S. ARROWSMITH, *Government Procurement in the WTO*, The Hague, Kluwer, 2003, pp. 14-18.

(9) *Ibid.*, pp. 18-19.

(10) C.R. YUKINS and S.L. SCHOONER, "Incrementalism: Eroding the Impediments to a Global Public Procurement Market", in *Georgetown J. Int'l L.*, Vol. 38, 2007, pp. 529-576, citing S. ARROWSMITH, *Government Procurement in the WTO*, *op. cit.*, p. 558.

(11) L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 14. The EU and U.S. federal procurement systems are asymmetric in at least two senses. First, they are asymmetric in that the U.S. national government is a federal system, whereas the EU form of government resists comparison with other systems as "it contains some features of a traditional international organization" as well as "some features of a federation". *See* T.C. HARTLEY, *The Foundations of European Law*, Oxford, OUP, 2014, pp. 11-12. Second, they are asymmetric in that the U.S. federal system encompasses "many aspects of the procurement process which are otherwise not explicitly regulated under EU law, from source selection decisions through to contract performance". L.R.A. BUTLER, *Transatlantic Defence*



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attempted a comprehensive comparison of the two systems.(12) Thus, finding one's way requires proceeding without map or compass. Moreover, a cursory account can be misleading because superficial resemblances are sometimes illusory.(13)

Notwithstanding these challenges, it is worth considering how the two legal systems' differences impede trade flows, even though they are both ostensibly open and competitive.(14) The essay posits that the *foreignness* of the two systems substantially affects the transatlantic defense market. Vendors are deterred from competing in an unfamiliar system that they are unsure how to navigate.(15) This essay sketches a crude map, which requires elaboration. As others contribute, perhaps cumulatively such efforts may lead a few more buyers and sellers to take an interest in opportunities across the pond.

The essay proceeds in three parts. Sections 2. and 3. summarize the histories, constitutional features, and laws of the U.S. and the EU defense procurement systems. Section 4. considers points of comparison between the two and the mutual benefits that would accrue from freer trade. Section 5. summarizes three possible lines of effort to free up defense trade. It bears mentioning at the outset that this essay does not attempt to delve into the Member States' 28 distinct versions of defense procurement and restricts itself comparisons between the U.S. federal government and a generic EU Member State.(16) The author is keenly aware of the difficulties with attempting a comparison in this manner. He devotes an entire chapter of his doctoral thesis (from which this piece is derived) to acknowledging and addressing such challenges. He submits, however, that there is nonetheless value in this exercise – and invites the skeptical reader to temporarily suspend her disbelief as to the profound structural

*Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, pp. 249-250.

(12) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, pp. 10-11, 14, 435, explaining that his book presents the first attempt at a systematic comparison of U.S. and the EU public procurement law for defense.

(13) J.I. Schwartz, "United States of America", in *Droit Comparé des Contracts Publics*, (R. Noguellou and U. Stelkens eds) Brussels, Bruylant, 2010, noting that the U.S. system's complexities have developed over two centuries and warning that "a cursory account therefore risks misleading even those with an extensive knowledge of other procurement law systems", p. 614.

(14) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, pp. 270, 276-277.

(15) U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 8, explaining that barriers can be "numerous and diverse in nature" and that "[t]hey can be direct or indirect, political, cultural, economic, technological, or military".

(16) This essay restricts its attention to the EU level for two reasons. First, for the sake of brevity. Second, because "there are no detailed studies on the national implementation of the Defence Directive", *Ibid.*, p. 5, 161. For a brief introduction to the defense procurement practices of about half of the Member States, *see* European Defence Agency, "Vademecum on Member States Defence Procurement Practices for Defence Procurement Gateway", 10 October 2014.



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differences between U.S. and EU institutions and consequent difficulties with comparing their procurement systems.

## *2. Defense Procurement in the United States*

The U.S. federal government acquires only a small portion of goods and services from foreign suppliers.(17) While that is partly due to explicitly protectionist policies, that is not the whole story. In the closing chapter of his book on transatlantic defense procurement, Luke Butler makes the following observation about the existing literature on this subject: "A fundamental aspect that has not been considered in any detail concerns the significance of what might loosely be termed "constitutional features" of the United States, EU, and EU Member State procurement law systems".(18) American scholars have likewise noted that the U.S. federal system's "fundamental values" are especially ill-defined.(19) This section aims to narrow that, especially for European vendors who are considering competing for U.S. defense contracts.

### 2.1. History

Justice Oliver Wendell Holmes wrote, "A page of history is worth a volume of logic".(20) So it is with U.S. defense procurement. Often its nuances and idiosyncrasies can only be explained from a historian's perspective:

> "If someone were asked to devise a contracting system for the federal government, it is inconceivable that one reasonable person or a committee of reasonable people would come up with our current system. That system is the result of thousands of decisions made by thousands of individuals, both in and out of government. It reflects the collision and collaboration of special interests,

(17) J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, pp. 84-87, providing a detailed analysis of U.S. defense spending and what sorts of procurement are subject to foreign competition. *Ibid.*, pp. 273-275, elaborating on the difficulties with ascertaining what proportion of U.S. defense spending includes foreign competition. Anecdotal evidence suggests that very little goes to foreign suppliers. *Ibid.*, pp. 660-661, finding that four large U.S. contractors alone receive 69% of defense spending at the prime level. Foreign suppliers' share is higher at the subcontract level. *Ibid.*, pp. 662.

(18) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 7, 317.

(19) S.L. Schooner, "Fear of Oversight: The Fundamental of Businesslike Government", *Am. U. L. Rev.*, Vol. 50, 2001, p. 627, saying "a constantly changing patchwork of statutes defies efforts to identify broad Congressional aims, and the literature is strangely silent with regard to efforts to define the system's fundamental values", p. 675, and citing J. Whelan and E.C. Pearson, "Underlying Values in Government Contracts", *J. Pub. L.*, Vol. 10, 1962, p. 298, saying "The Federal Government has been making contracts for as long as it has existed, yet little attempt has been made to rationalize this phase of governmental activity in its relation to the functions of government and to the persons and firms with whom contracts are made".

(20) *New York Trust Co. v. Eisner*, 256 U.S., 1921, 345, 349.



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the impact of innumerable scandals and successes, and the tensions imposed by conflicting ideologies and personalities".(21)

The authoritative volume on the history of the U.S. government's procurement system to date runs to 597 pages.(22) Only a few pages are devoted here. It is hoped, however, that this outline may illustrate how this system was forged in the crucible of war and explain how its framework derives from the federal government's history and experience.

Although the United States has from colonial times been a bellicose nation,(23) actively engaged in warfare with the native population and the rival European powers competing for dominance in North America, it has also been deeply ambivalent about warfare.(24) If Congress has infrequently formally declared war, the United States has for two and a half centuries regularly engaged in "savage wars of peace".(25) Many are blissfully unaware or forgetful that the United States fought small wars against insurgencies spanning the globe long before Vietnam, Iraq, or Afghanistan.(26) Americans conquered a continent in pursuit of manifest destiny(27) yet cast a wary eye on colonialism.(28) This cognitive dissonance has existed from the founding of the Republic and features of this ambivalence are embedded in the Constitution.(29)

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(21) J.F. NAGLE, *History of Government Contracting*, 2nd ed., Washington, George Washington UP, 1999, p. 519.

(22) *Ibid.*, p. 597.

(23) *See* gen. B. BAILYN, *The Barbarous Years: The Peopling of British North America*, New York, Knopf, 2012, whose closing chapter summarizes British colonists' first century in North America as follows: "They lived conflicted lives, beset with conflicts experienced, rumored or recalled – unrelenting racial conflicts, ferocious and savage; religious conflicts, as bitter within as between confessions; conflicts with authority, private and public; recurrent conflicts over property rights, legal obligations, and status; and conflicts created by the slow emergence of vernacular cultures, blending of disparate subcultures adjusting to the demands of heightened aspirations and local circumstance"; J.F. NAGLE, *History of Government Contracting*, *op. cit.*, p. 497.

(24) *See* D.S. REVERON, N.K. GVOSDEV and M.T. OWENS, *U.S. Foreign Policy and Defense Strategy: The Evolution of an Incidental Superpower*, Georgetown, GUP, 2015, p. 45, explaining that the "creation and expansion" of a national security establishment "went against the grain of U.S. political culture"; J.Q. ADAMS, "Address of July 4, 1821", in *John Quincy Adams and American Continental Empire: Letters, Papers, and Speeches* (W. LAFEBER ed), New York, Quadrangle Books, 1965, pp. 42, 45, observing that America "goes not abroad in search of monsters to destroy".

(25) *See* gen. M. BOOT, *The Savage Wars of Peace: Small Wars and the Rise of American Power*, New York, Perseus, 2002, describing the many small wars fought in the course of U.S. history.

(26) *See* gen. *ibid.*

(27) *See* J.T. HEIDLER and D.S. HEIDLER, "Manifest Destiny, in Encyclopaedia Britannica", available at www.britannica.com/event/Manifest-Destiny, accessed 4 July 2019, describing the quasi-religious movement that led the United States to seize the Oregon country, Texas, New Mexico, and California before the Civil War and then to declare war with Spain and to annex Hawaii in the 1890s.

(28) Some argue that Americans have long opposed colonialism to a fault. *See* gen. W.R. LOUIS, "American Anti-Colonialism and the Dissolution of the British Empire", *Int'l Affairs*, Vol. 61:3, 1985, p. 395, arguing that unrest during the Cold War had as much to do with America's push for rapid decolonization as with Soviet meddling.

(29) *See* D.S. REVERON, N.K. GVOSDEV and M.T. OWENS, *U.S. Foreign Policy and Defense Strategy: The Evolution of an Incidental Superpower*, *op. cit.*, pp. 45-47, citing U.S. Constitution, Art. I, sec. 8, which gives Congress the power to raise armies only "in times of war" but giving it unequivocal authority



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Due in some part in some part to Madisonian fears about a large standing army and in some part to a treasury that was underfunded until the passage of the Sixteenth Amendment, national security was ad hoc from 1775 to 1945.(30) World War II and Cold War experiences were formative to the contemporary defense procurement system.

During the interwar years, sentiment shifted away from interventionism. Americans sought to avoid further entanglements in foreign wars; isolationism was the word of the day.(31) Then came the attack that irrevocably changed the course of U.S. history. The United States was unprepared for a two-front war.(32) In hindsight, perhaps the outcome seems inevitable. It was, in fact, a close-run thing.(33) The lesson was learned: never again would the United States fail to prepare. Pearl Harbor informed defense planning for decades.(34)

U.S. politicians – and not only the current resident of the White House – are wont to complain about European allies' failure to build up their militaries. But the disparity is due in part to historical accident. The buildup of massive forces that are deployable around the globe owes to the nature of the Soviet threat and America's geographic advantages. During the Cold War, Communists sought to foment revolution in virtually every corner of the world, and the United States responded in kind.(35) Building a military specializing in fighting abroad would have been impractical had America faced existential threats on its borders as in Europe, whose armies naturally concentrated on territorial defense. But with oceans providing buffers on east and west, friendly neighbors to its north and south, and a menacing Soviet threat farther afield, the United States built a fearsome arsenal geared toward extraterritorial warfare.

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to maintain a navy, reflecting the Founders' concerns that standing armies would lead to tyranny but tacitly approving of adventurism abroad with a navy that would protect U.S. commercial interests.

(30) D.S. Reveron, N.K. Gvosdev and M.T. Owens, *U.S. Foreign Policy and Defense Strategy: The Evolution of an Incidental Superpower*, *op. cit.*, p. 49.

(31) *Ibid.*, p. 3, stating that "[r]ight up to the Second World War […] the preferred American position was", quoting F.L. Schuman, *International Politics: An Introduction to the Western State System*, 2nd edn, New York, McGraw-Hill, 1937, p. 481, "to protect its world interests without involving itself in entanglements abroad".

(32) *See* K.P. O'Brien, "The United States, War, and the Twentieth Century", in *The Cambridge Companion to American Culture*, Cambridge, CUP, 2006, pp. 235, 242.

(33) A.J. Levine criticized a tendency among popular historians to cast the Allied victory as narrow or near-run for dramatic effect. *See* A.J. Levine, "Was World War II a Near-Run Thing?", *J. Strategic Studies*, 1985, p. 38. However, whatever the reality, Americans *perceived* that the outcome of World War II was too close for comfort.

(34) *See* W.B. Burnett and W.E. Kovacic, "Reform of United States Weapons Acquisition Policy: Competition, Teaming Agreements, and Dual Sourcing", 6 *Yale J. Regulation*, 1989, pp. 249, 257.

(35) D.S. Reveron, N.K. Gvosdev and M.T. Owens, *U.S. Foreign Policy and Defense Strategy: The Evolution of an Incidental Superpower*, *op. cit.*, pp. 5, explaining that the "Soviet threat required the United States to develop a global logistical system to reinforce its allies".



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Post-Cold War history is still unfolding. This much can be said so far. Defense underwent deep cuts in the 1990s in pursuit of the peace dividend, even as the U.S. military deployed at an unprecedented pace to Somalia, Rwanda, Haiti, the Balkans, and beyond. Spending spiked to nearly Cold War levels during the prosecution of the War on Terror in the first decade after the 9/11 attacks, only to subside again following the 2007 financial crisis. But fighting dispersed terrorist groups and counterinsurgencies in Iraq, Afghanistan, Libya, and Yemen, and beyond reinforced the procurement spending centered on operational requirements for a military that could rapidly deploy to far-flung reaches of the globe.

What does this history lesson say about the legal framework of defense procurement? At least three lessons can be drawn. First, from colonial times America has long favored competitive procedures.(36) But *competitive* doesn't mean openness to *foreign* competition.(37) This is due in equal parts to post-Pearl Harbor security of supply concerns and longstanding protectionist sentiments.(38) Further, because the United States enjoyed a technological lead in the Cold War, it was cautious about exporting weapons technology that could land in enemy hands. Third, post-war military purchasing has been structured around a specialized defense industrial base and a system endowing the federal government with considerable flexibility.(39) Nagle identifies several other trends that lie beyond the scope of this short essay.(40)

## 2.2. Constitutional features

A full understanding of the U.S. defense procurement system requires looking beyond the Federal Acquisition Regulation (FAR). Turning to the U.S. Constitution, one finds only limited guidance because "[t]here is no express provision" about government contracts there.(41) Yet there is a "large and complex body of law" on defense contracts.(42) In addition to some hints contained in the Constitution itself,(43) legal scholar Francis Laurent has suggested that this "large and growing body of law respecting defense

(36) J.F. Nagle, *History of Government Contracting*, *op. cit.*, p. 7, describing a preference for sealed bidding since the early Republic, even though this contracting method "is often the least efficient way to contract and has often obstructed America's ability to prepare for war."

(37) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, pp. 273-277.

(38) W.B. Burnett and W.E. Kovacic, *Reform of United States Weapons Acquisition Policy: Competition, Teaming Agreements, and Dual Sourcing*, *op. cit.*, p. 258.

(39) *See* below Section 2.2.3.

(40) *See* J.F. Nagle, *History of Government Contracting*, *op. cit.*, pp. 5-8.

(41) F.W. Laurent, *Legal Aspects of Defense Procurement*, Madison, U. Wisc. Press, 1962, p. 17.

(42) *Ibid.*, p. 23.

(43) *Ibid.*, pp. 1-3, 17.



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procurement programs and activities" is composed of statutes, common law, and executive orders.(44)

The Constitution does not expressly mention government contracts, but some guidance can be pieced together. Article I grants Congress "dominant influence over procurement for defence purposes".(45) Congress's power encompasses the power to impose and collect taxes "to pay the Debts and provide for the common Defence and welfare of the United States";(46) to raise and support armies;(47) and to provide and maintain a navy.(48) Article II designates the President as the commander-in-chief of the armed forces,(49) but Congress's "power of the purse" curtails this authority: "No Money shall be drawn from the Treasury, but in consequence of Appropriations made by law".(50)

While the Constitution, statutes, and executive orders are surely familiar sources to anyone with even a passing familiarity with U.S. federal law, that a separate common law for government contracts exists may come as a surprise. Laurent explains that "the Federal courts gradually formulated a distinctive system of rules, the federal 'common law' of contracts".(51) This unique body of federal law is composed of treatises, State court rules, and federal precedents on government contracts.(52) The Supreme Court first recognized the existence of this separate corpus of law governing federal public contracts in 1944:

> "The validity and construction of contract, through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State".(53)

Two years later, the Supreme Court held that interpreting the meaning of contracts to which the United States is a party "the governing rules of law must be finally declared by this Court".(54)

What general principles can be drawn from these "constitutional features"?(55) To be sure, this is a "large and complex body of law"(56) and

(44) *Ibid.*, p. 3.
(45) *Ibid.*, p. 1.
(46) U.S. Const., Art. 1, Sec. 8, Cl. 1.
(47) U.S. Const., Art. 1, Sec. 8, Cl. 12.
(48) U.S. Const., Art. 1, Sec. 8, Cl. 13.
(49) U.S. Const., Art. 2, Sec. 2.
(50) U.S. Const., Art. 1, Sec. 9.
(51) F.W. LAURENT, *Legal Aspects of Defense Procurement*, *op. cit.*, pp. 69-70, 208-209, writing that this common law "had its sources in authoritative text writings, rules adhered to by State courts generally, and precedents developed in prior litigation".
(52) *Ibid.*, pp. 69, 208.
(53) *United States v. Allegheny County*, 322 U.S. 174, 183, 1944.
(54) *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 564, 1946.
(55) L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 317.
(56) F.W. LAURENT, *Legal Aspects of Defense Procurement*, *op. cit.*, p. 23.



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space does not allow a full summary here. But a few of the more distinctive features can be mentioned.

### 2.2.1. Built-in gridlock

Perhaps the most salient feature of U.S. Constitution was that its aim was not efficiency or good government but protection from the tyranny of an over-mighty central government. It was to this end that checks and balances,(57) federalism,(58) and the Bill of Rights(59) were established. Few would disagree that the U.S. Constitution has served this purpose well. But a government set up to foil itself comes at a cost. Compromise is frequently required to carry out business and finding common ground in so large and diverse a republic is devilishly hard. Such a system of deliberate gridlock has predictable results for defense procurement.(60) With reason a *New York Times* columnist infamously wished that America could be China for a day.(61)

### 2.2.2. A strong legislature

Butler posits that the prime example of a U.S. constitutional feature that would require further research "concerns the legislative processes involved in the formulation of procurement and associated legislation".(62) He continues,

> "in the U.S. system of government, Congress exercises a significant impact on all aspects of procurement, its functions ranging from the determination of budgetary appropriations, to the formulation of procurement legislation and the oversight of the procurement function. Inevitably, Congress may, therefore,

(57) "Checks and balances" refer to the "horizontal" division of power, whereby the executive, legislative, and judicial functions are divided between three competing branches of government. *See* A.R. Amar, "Of Sovereignty and Federalism", *Yale L.J.*, 1987, pp. 1425, 1441-1444. James Madison's classic formulation of this principle is frequently quoted: "[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. […] This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public … [T]he private interest of every individual may be a sentinel over the public rights", J. Madison, *The Federalist*, 9 February 1788, No. 51, pp. 321-322.

(58) Federalism is the "vertical" division of power between the federal government and the States. *See* A.R. Amar, "Of Sovereignty and Federalism", *op. cit.*, pp. 1444-1451.

(59) The bill of rights refers to the first ten amendments that were appended to the Constitution as a condition of ratification and to appease the anti-federalist movement.

(60) D.S. Reveron, N.K. Gvosdev and M.T. Owens, *U.S. Foreign Policy and Defense Strategy: The Evolution of an Incidental Superpower*, *op. cit.*, p. 46, borrowing from William Corwin the notion that the Constitution is "an invitation to struggle between the executive and legislative branches" and arguing that this description applies to "control of the military instrument".

(61) T. Friedman, *Hot, Flat, and Crowded: Why We Need a Green Revolution – and How It Can Renew America*, New York, Farrar, Straus and Giroux, 2008, pp. 343-370.

(62) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 317.



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> affect procurement decision-making in a whole host of respects that can impact significantly on the extent to which U.S. federal procurement is accessible to foreign competition as well as the character of procurement legislation.(63)"

His observation is keen. Sometimes the literature talks about defense procurement as if it were purely an administrative function.(64) It is not. Because of its spending power, Congress plays an outsized role in the process.(65) Studies show, for example, that weapons programs live or die based on support in the congressional armed services committees or lack thereof.(66)

### 2.2.3. The centrality of defense

Understanding U.S. federal procurement requires understanding defense procurement; delving into constitutional history will explain why. For the first decade after the Revolution, America had operated under a weak central government under the Articles of Confederation. What led to the passage of a constitution with a stronger federal government? One underappreciated factor was the young nation's humiliation by pirates operating along the Barbary Coast.

Following America's break with Great Britain in 1776, her commercial ships no longer sailed under the protection of the Union Jack.(67) And under the

(63) *Ibid.*, p. 63.

(64) S.L. SCHOONER, *Fear of Oversight: The Fundamental of Businesslike Government*, *op. cit.*, pp. 714-717, criticizing reformers in 1990s for their failure to appreciate some of the fundamental differences between public and private sectors and arguing that the effort to reinvent government so that it would behave more like a business was, therefore, fatally flawed. Schooner cites G.A. CUNEO and E.H. CROWELL, "Impossibility of Performance – Assumption of Risk or Act of Submission?", *L. & Contemporary Problems*, 1964, pp. 531, 548, who observed that "the myth of the government descending to the market place and negotiating like any other businessman is being slowly exploded".

(65) Congressional meddling results in pork-barrel spending and the manipulation of the procurement system to favor special interests; in short, "democracy is a messy form of government". *See* M. CANCIAN, "Acquisition Reform: It's not as Easy as it Seems", *Acquisition Rev. Q.*, Summer 1995, pp. 189, 191-192.

(66) For a good example of how important Congressional support can be, compare how the Marine Corps's V-22 and the Army's Crusader programs fared. In the former case, then-Secretary of Defense Dick Cheney repeatedly sought to cancel the V-22 program but was repeatedly thwarted in Congress. Production was distributed among 42 states and predominantly in two large and politically powerful states, Texas and Pennsylvania. The Crusader's production was less widely distributed and most of the work was to take place in Oklahoma and Minnesota, two less populated states. So Secretary of Defense Donald Rumsfeld succeeded in canceling the Crusader program. *See* C.M. JONES and K.P. MARSH, "The Politics of Weapons Procurement: Why Some Programs Survive and Others Die", 27:4 *Defense & Security Analysis*, 2011, pp. 359, 364-368. For empirical studies, *see* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit*, pp. 45-47, noting that "Congress is in the business of micromanaging defence programs and their industrial consequences" and the U.S. system "nurtures fierce competition for defence industrial activities among the 50 states and some 455 districts"; B.S. RUNDQUIST and T.M. CARSEY, *Congress and Defense Spending: The Distributive Politics of Military Procurement*, Norman, U. OK Press, 2002, pp. 158-59, finding that the distribution of defense expenditures tracks representation on defense committees; T.L. MCNAUGHER, *New Weapons, Old Politics: America's Military Procurement Muddle*, Washington, Brookings Institution, 1989, pp. 39-40, 69-70, 166-167, describing the systemic failure of defense procurement resulting from Congress's constitutional role.

(67) M.B. OREN, *Power, Faith, and Fantasy: America in the Middle East, 1776 to Present*, New York, W.W. Norton, 2007, p. 17.



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Articles of Confederation, America lacked a navy of its own to protect itself. This was no small matter for a seafaring nation with its population "[c]oncentrated along the eastern seaboard".(68) A critical "maritime lifeline" was the route "to the blue water ports of the Mediterranean",(69) which "represented one of the world's last remaining spheres free of European domination, where enterprising Americans could still seek their fortunes unchecked".(70) By the 1770s, one-fifth of America's exports were bound for this destination.(71) Self-styled mujahedeen hailing from Morocco and the Ottoman regencies of Tripoli, Tunis, and Algiers were kept at bay during the Revolutionary War with the help of the French fleet, but when the "fighting ended in 1783, most of America's warships had either been captured, sold off, or sunk" and its commercial vessels were therefore easy prey for the Barbary pirates.(72)

In October 1784, corsairs attacked the *Betsy*, a Massachusetts vessel, and took its crew hostage in North Africa; three months later the same fate awaited the *Dauphin* and the *Maria*.(73) America panicked.(74) Previously, they had primarily feared the dangers to liberty that a peacetime military buildup would portend, and so the Articles of Confederation had prohibited national taxation(75) and the formation of a peacetime navy.(76) "It will not be an easy matter, to bring the Americans to act as a nation," Britain's Lord Sheffield observed, "America cannot retaliate".(77)

When the delegates met in Philadelphia in May 1787 to refashion the constitution, they did so "[u]nder the specter of imprisoned sailors in North Africa".(78) George Washington urged delegates against "talk of chasing the Algerines" until "the wisdom and force of the union can be more concentrated and better applied",(79) and direct references to the Barbary pirates in the

(68) *Ibid.*, p. 17.

(69) *Ibid.*, pp. 17-18.

(70) *Ibid.*, p.18.

(71) *Ibid.*, p. 71.

(72) *Ibid.*, pp. 18-22, quoting Lord Sheffield, "The Americans cannot protect themselves [from the Barbary pirates]; they cannot pretend to a Navy".

(73) *Ibid.*, p. 22.

(74) *Ibid.*, pp. 22-23.

(75) Articles of Confederation, Art. VIII 1 March 1781, providing that defense expenses be charged to the common treasury supplied by each State.

(76) A.C. McLaughlin, *A Constitutional History of the United States*, New York, Simon, 1935, p. 1068; S. Prakash, "Unleashing the Dogs of War: What the Constitution Means by 'Declare War'", *Cornell L. Rev.*, 2007, pp. 45, 85-86, noting that noting that Alexander Hamilton complained during the constitutional convention that the Articles of Confederation barred the States from having navies or armies "before war is actually declared", citing M. Farrand (ed), *The Records of the Federal Convention of 1787*, New Haven, Yale U. Press, 1966, p. 200.

(77) M.B. Oren, *Power, Faith, and Fantasy: America in the Middle East, 1776 to Present*, *op. cit.*, p. 23.

(78) *Ibid.*, p. 29.

(79) *Ibid.*, p. 29-30.



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constitutional convention are few. But James Madison did observe, "Weakness will invite insults", and "The best way to avoid danger is to be in [a] capacity to withstand it",(80) which no doubt referenced how America should respond to the piracy that was on everyone's mind.

If the threat from Barbary pirates was downplayed at the convention, it played a more prominent role in the ratification debate.(81) Peter Markoe's satirical novel, *The Algerine Spy*, did its part for the cause, telling of an Algerian agent scouting out America's defenses, mocking weaknesses that he found, and recommending seizure of Rhode Island.(82) Two of *The Federalist Papers* called for a navy to protect U.S. commercial interests(83) and a third specifically referenced the North African threat as reason for greater "maritime strength".(84) Such concerns "helped to tip the balance"(85) and the new constitution gave Congress the power both to declare war(86) and "to provide and maintain a Navy".(87) Thus, wrote historian Thomas Bailey, "In an indirect sense the brutal Dey of Algiers was a Founding Father of the Constitution".(88)

This digression into U.S. constitutional history explains why defense has become so central to U.S. federal procurement: "common defence"(89) has been a core purpose of the U.S. federal government since 1789. The EU was formed as a primarily customs union, perhaps with an ulterior motive to foster peace in Europe,(90) and seven decades later is still developing a common defense

(80) *Ibid.*, p. 30.

(81) *Ibid.*, p. 82, quoting Reverend Thomas Thacher of Massachusetts, who argued that the enslavement of "our sailors [...] in Algiers is enough to convince the most skeptical among us of the want of a general government"; Nathaniel Sargent, who called the idea that America could adequately defend itself under the Articles of Confederation from "piracies and felonies on ye high seas" "preposterous"; Hugh Williamson of North Carolina who questioned, "What is there to prevent an Algerine Pirate from landing on your coast, and carrying your citizens into slavery?"; and Kentucky's George Nicholas, who wrote, "May not the Algerine seize our vessels? Cannot they [...] pillage our ships and destroy our commerce, without subjecting themselves to any inconvenience?".

(82) *Ibid.*, p. 31.

(83) *See* A. HAMILTON, *The Federalist*, 23 November 1787, No. 11, at 321-322, warning that without a "federal navy" of "respectable weight" "the genius of the American merchants and navigators [...] would be stifled and lost"; A. HAMILTON, *The Federalist*, 19 December 1787, No. 24, pp. 321-322, writing, "If we mean to be a commercial people, or even to be secure on our Atlantic side, we must endeavor, as soon as possible, to have a navy."

(84) J. MADISON, *The Federalist*, 19 Jannuary 1788, No. 41, pp. 321-322, arguing that a strong central government was necessary to protect America's "maritime strength" from the "rapacious demands of pirates and barbarians".

(85) M.B. OREN, *Power, Faith, and Fantasy: America in the Middle East, 1776 to Present*, *op. cit.*, p. 31.

(86) U.S. Const., Art. 1, Sect. 8, Cl. 11.

(87) U.S. Const., Art. 1, Sect. 8, Cl. 13.

(88) T.A. BAILEY, *A Diplomatic History of the American People*, Upper Saddle River, Prentice-Hall, 1980, p. 65.

(89) U.S. Const., Preamble, stating that the federal government would "provide for the common defence".

(90) The Schuman Declaration (9 May 1950), available at europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en, accessed 4 July 2019, justified the creation of the European Coal and Steel Community on the basis of eliminating the rivalry between France and Germany:



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policy.(91) The United States's founding, by contrast, centered on a Hobbesian bargain for mutual protection from monsters abroad(92) (pace John Quincy Adams).(93)

This foundation led to a procurement system dominated by defense. Joshua Schwartz has observed, "it would require a willful blindness to the main currents of United States history to miss the fact that military and defense contracting has played the central role in the United States's federal procurement system".(94) The salience of defense has led to an "exceptionalist flavor" in that system.(95) Schwartz lists termination for convenience,(96) the *Christian* doctrine,(97) the sovereign acts and unmistakability doctrines,(98) and the deferential standard of review in bid protests(99) among the unique doctrines and practices that share a military lineage.(100) These are among the core doctrines that distinguish public and private contract law in the United States.

This close connection between defense procurement and federal procurement generally has given rise to a feature that Christopher Yukins considers a model for duplication abroad – namely, that there is no divide between military

"The solidarity in production thus established will make it plan that any war between France and Germany becomes not merely unthinkable, but materially impossible".

(91) H. KRIEGER, "Common European Defence: Competition or Compatibility with NATO?", in *European Security Law* (M. TRYBUS and N. WHITE eds), Oxford, OUP, 2007, pp. 174, 178, contrasting Member States' extensive economic cooperation with their unwillingness "to transfer any sovereignty in defence matters".

(92) The Barbary pirates were not the colonies' first common enemy. They had united against foreign foes in the French and Indian War (known in Europe as the Seven Years' War) and, of course, in the Revolutionary War. During the latter, at the signing of the Declaration of Independence, Benjamin Franklin famously quipped, "We must, indeed, all hang together or, most assuredly, we shall all hang separately". Three decades of conflict with French, British, and North African powers led America's founders to establish a constitutional order that would include a common defense at its core.

(93) J.Q. ADAMS, "Address of July 4, 1821", *op. cit.*, p. 45, observing that America "goes not abroad in search of monsters to destroy".

(94) J.I. SCHWARTZ, "The Centrality of Military Procurement: Explaining the Exceptionalist Character of United States Federal Public Procurement Law", Washington, GW Law Faculty Publications & Other Works, Paper 1077, 2004, scholarship.law.gwu.edu/faculty_publications/1077, p. 51.

(95) *Ibid.*, p. 53.

(96) *Ibid.*, pp. 55-65, citing *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321, 1875.

(97) J.I. SCHWARTZ, "The Centrality of Military Procurement: Explaining the Exceptionalist Character of United States Federal Public Procurement Law", *op. cit.*, pp. 66-68, citing *G.L. Christian & Assoc. v. United States*, 312 F.2d 418, Ct. Cl., 1963, cert. denied, 382 U.S. 821, 1965.

(98) J.I. SCHWARTZ, "The Centrality of Military Procurement: Explaining the Exceptionalist Character of United States Federal Public Procurement Law", *op. cit.*, pp. 68-79, citing *Deming v. United States, 1271 Ct. Cl. 190*, 1865, appeal dismissed, 76 U.S. (9 Wall) 145, 1870; *Jones v. United States*, 128 1 Ct. Cl. 383, 1865.

(99) J.I. SCHWARTZ, "The Centrality of Military Procurement: Explaining the Exceptionalist Character of United States Federal Public Procurement Law", *op. cit.*, pp. 79-80, citing *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1298-1299, 1300-1306, D.C. Cir., 1971.

(100) Schwartz lists several other examples of "military-derived exceptionalism" in U.S. federal procurement doctrine, including the strict compliance doctrine, the right to submit change orders, competitive negotiation procedures, the cost-reimbursement contracting method, and the government contract defense. J.I. SCHWARTZ, "The Centrality of Military Procurement: Explaining the Exceptionalist Character of United States Federal Public Procurement Law", *op. cit.*, pp. 80-82.



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and civil procurement in the United States.(101) In private correspondence with Martin Trybus, Yukins elaborated on the benefits of this integrated public procurement system:

> "The practical effect of this is that the Defense Department and the civilian agencies share lessons learned in developing new regulations and implementing old ones, and it is quite easy for trained procurement personnel to move between the civilian and military worlds. When there are difficult debates over regulatory reform – such as the debate over how to handle organizational conflicts of interest – the exchanges between the Defense Department (which handles the majority of U.S. federal procurement, by dollar value) and the civilian agencies (which tend to be more nimble and entrepreneurial) can be quite useful".(102)

The United States's favorable experience with an integrated system suggests that abolition may be the best course for the EU's separate defense procurement regime.(103) The benefits of such a monistic system have been recognized elsewhere.(104) A contrary view is touched upon in Section 4.1.

## 2.3. Law

The U.S. federal procurement laws that could affect transatlantic trade are voluminous. These include not only "internal" laws on the operation of the procurement system(105) that may be off-putting to foreign vendors(106) but also "external" laws that regulate relations with foreign buyers and sellers in various ways.(107) Concerning the latter, this essay assumes a hypothetical world in which the TTIP has passed and overt barriers have been removed.

(101) C.R. Yukins, "Barriers to International Trade in Procurement After the Economic Crisis, Part II: Opening International Procurement Markets: Unfinished Business", *West Government Contract Year in Review Covering 2010* (2011), Int'l 2–10, Int'l 2–18, Washington, GW Law Faculty Publ., 2011. He writes: "policymakers may wish to address the regulatory divide between civilian and defense procurement systems. Systems around the world are beginning to close that traditional divide, and there are substantial arguments, including lower transaction costs, reduced corruption, and enhanced professionalism, to press for uniformity across civilian and military procurement systems. The GPA is not yet a ready means of achieving that uniformity across domestic and military systems, but it could be pointed in that direction". *Ibid.*

(102) Correspondence dated 8 April 2016, on file with author.

(103) *Ibid.*, replying to Trybus's query about the merits of the Defence Directive: "abolish it!".

(104) *See Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, 2014, par. 46-49, explaining that the current version of the model law "brings national defence and national security sectors, where appropriate, into the general ambit of the Model Law so as to promote a harmonized legal procurement regime across all sectors in enacting States, and to enable all procurement to benefit from the Model Law's provisions."

(105) These internal laws are much more than the FAR. They include the Constitution, statutes, the federal common law for government contracts, and executive orders. *See* above Section 2.2.

(106) *See* C.R. Yukins and S.L. Schooner, "Incrementalism: Eroding the Impediments to a Global Public Procurement Market", *op. cit.*, p. 558, arguing foreign procurement systems "raise practical barriers to entry as foreign vendors run headlong into dense and alien procurement regimes".

(107) External laws would include the Buy American Act, the Berry Amendment, and the Trade Agreements Act, as well as the export control regulations and restrictions on foreign acquisitions discussed below.



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Regardless, the effect of such overt barriers is limited for most European countries.(108) Some examples of the internal and external laws in question are considered below.(109)

### 2.3.1. Internal federal procurement laws

It is worth considering, Butler suggests, that "the ways in which foreign access may be affected even within a legal framework of ostensibly full and open competition that does not impose specific legal limitations on foreign participation".(110) Certainly procurement authorities' discretion could be abused in a variety of ways to deliberately exclude foreign competition.(111) But the examples considered here concern inadvertent and unintentional discrimination.

U.S. federal government contracting is fraught with peril for the uninitiated – and not only for foreign firms but also for domestic firms with little experience competing for federal government contracts and for counsel who are inexperienced at the government contracts bar.(112) For example, requests for proposals use the jargon of technical military specifications that only a few privileged vendors fully comprehend.(113) Timely filing of bid protests is another example; even domestic firms inexperienced with federal government contract litigation are sometimes caught unaware of various traps and miss unforgiving filing deadlines.(114)

(108) *See* J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 91, noting that "despite constant Congressional Buy American pressures, formal domestic content rules are not by and large a major factor in defense markets" and that these laws "are more important symbolically than in practice". *Cf.* D. Fiott, "The 'TTIP-ing Point': How the Transatlantic Trade and Investment Partnership Could Impact European Defence", 48:3 *Int'l Spectator*, 2013, pp. 15, 17, observing that a "web of protection presently marks transatlantic defence markets".

(109) If the reader finds the internal/external terminology disagreeable, Trepte offers corresponding terminology that perhaps better captures the dichotomy between laws that apply differently to foreign and domestic vendors: distinctly and indistinctly applicable laws. P. Trepte, *Public Procurement in the EU: A Practitioner's Guide*, 2nd ed., Oxford, OUP 2007, pp. 330-331.

(110) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, pp. 276-277.

(111) *Ibid.*, pp. 277-279, suggesting that requests for proposals could be rigged to favor domestic firms; *ibid.*, pp. 281-802, noting that the time limit for proposals could be shortened to minimize the competition.

(112) J.S. Przemieniecki, *Acquisition of Defense Systems*, Wright-Patterson, Air Force Institute of Technology, 1993, p. 174, claiming that it should be apparent "that Government contracting is highly regulated, fraught with peril to the legally uninitiated".

(113) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, pp. 283-284, reporting that the DoD is moving away from military-specific specifications and toward commercial standards.

(114) M.J. Navarre, "GAO Reminds Offerors of Timeliness Traps for the Unwary", Steptoe & Johnson, 28 April 2016, www.steptoe.com/publications-11230.html, explaining that a disappointed offeror's failure to protest right after being eliminated from the competitive range rendered the subsequent protest untimely; M.D. Maloney, "Agency's 'Brief Explanation' Was a Trap for Unwary Protester",



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Butler observes that procurement officials' discretion "is likely to be the primary cause of foreign discrimination and the most significant barrier to transatlantic defense trade".(115) Surely he is right. This section barely scratches the surface of ways in which the federal acquisition system's byzantine legal framework may deter foreign competition.

### 2.3.2. External federal procurement laws

The Buy American Act and Berry Amendment are perhaps the most notorious external laws affecting the transatlantic defense trade, but they are mostly waived for NATO partners.(116) Other external laws, though lesser known, may have a greater effect. Their motives range from national security to protectionism.(117) Two of these merit special consideration – both because of their significant influence on transatlantic trade and because their connection to national security could shield them from the TTIP.

The first is not a single law, but a body of laws and regulations controlling technology exports. These are perhaps the most significant obstacle to transatlantic defense trade.(118) The worst offender is the International Traffic in Arms Regulation (ITAR), which has been called the "the largest inhibiter of the transatlantic defence trade".(119) ITAR has long delayed and even "actively denied... European firms from entering the US market".(120) ITAR was designed to prevent transfers of critical technology to America's enemies, but it has a perverse effect on trade as European firms design around or out U.S. components or subsystems to avoid entanglements with ITAR.(121)

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Denver, Holland & Hart, *GovCon Insider*, 29 May 2015, holding that whether a protest period is mandatory or discretionary determines whether the period for filing bid protest is tolled.

(115) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, pp. 310-311.

(116) J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 91.

(117) Defense Science Board, *Final Report of the Task Force on Globalization and Security*, 1999, p. 14, observing that the "complex and often politically motivated statutes underlying the FAR and DFARS often restrict DoD's ability to purchase" from foreign suppliers.

(118) U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 47, naming technology and security control polices as "the biggest inhibiters" of transatlantic defense trade; *Ibid.*, p. 50, reporting that the European defense industry considers these policies the "first inhibiter to greater transatlantic defence trade flow."

(119) *Ibid.*, p. 68. *See* also L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 212, noting that ITAR "has been the subject of extensive criticism in light of the perception of excessive controls, extensive delays, and resulting risks impacting on the global competitive position of US contractors."

(120) D. Fiott, "The 'TTIP-ing Point': How the Transatlantic Trade and Investment Partnership Could Impact European Defence", *op. cit.*, p. 17, quoting D. Moore *et al.*, "U.S. Export Controls and Technology Transfer Requirements – A United Kingdom Perspective", *Int'l J. Defense Acquisition Management*, 2010, pp. 24, 43.

(121) J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, pp. 16, 20. *See* also U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European



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The Obama administration updated the ITAR control lists in 2013, moving control of some technologies from the State Department to the Commerce Department.(122) Although a welcome reform, this did not entirely solve the problem.(123)

The second item deserving special treatment is the Committee on Foreign Investment in the United States (CFIUS), which regulates foreign purchases of U.S. companies based on national security. European experience suggests "the best and arguably the only sustainable model to do business with the DoD is not to export European products to the US but to set up US subsidiaries"(124) or to affiliate with a U.S.-based contractor through mergers and acquisitions.

The perception is that CFIUS discourages foreign purchases of U.S. companies.(125) At least one study suggests that this perception may be inaccurate based on several examples of foreign investors being allowed to purchase U.S. defense firms,(126) though mere proof that foreign investors are sometimes

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Defence Industries", *op. cit.*, p. 52, noting that ITAR is a "double edged sword" because manufacturers go out of their way "to avoid using American technology when it is not indispensable simply to avoid a costly and cumbersome ITAR process". Europeans designing around U.S. technology has had two knock-on effects. First, second- and third-tier U.S. defense firms are being replaced by European competitors who are ITAR-free. N. Tushe, "U.S. Export Controls: Do They Undermine the Competitiveness of U.S Companies in the Transatlantic Defense Market", *Pub. Cont. L.J.*, 2011, pp. 57, 70-72. Second, restrictive export controls have "chilled collaboration on defense and technology matters with even our closest allies" and "eroded trust with traditional partners". *Ibid.*, p. 72.

(122) *See* Bureau of Industry and Security, Department of Commerce, *United States Export Reform Initiative*, 2013, www.bis.doc.gov/index.php/forms-documents/pdfs/1094-ecr-brochure-nov-14-2014/file, explaining that on 16 April 2013, the U.S. Departments of Commerce and State published the Export Control Reform (ECR), which transferred jurisdiction over thousands of items from the Department of State's ITAR to the Department of Commerce's Export Administration Regulations, which expedited review of items "that do not provide a critical military or intelligence capability".

(123) M.A. Goldstein, "Status and Adverse Consequences of U.S. Export Control Reform", 3:6 *Thomson Reuters Practical Trade & Customs Strategies*, June 2014, available at goldsteinpllc.files.wordpress.com/2014/07/thomsen-reuters-ecr-article-july2014.pdf, p. 6, explaining that while the ECR made thousands of control list transfers, it needlessly increased the complexity of the process by unhitching the regulation from the statute.

(124) U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 35.

(125) S. de Vaucorbeil, "Reforming the Transatlantic Defence Market", in *The Estonian Foreign Policy Yearbook* (A. Kasekamp ed), Tallin, Estonian Foreign Policy Institute, 2008, pp. 115, 122, reporting that Member States are concerned about U.S. ownership in European defense companies because "US defence companies have been protected from much foreign investment by law"; A. Ashbourne, "Introduction", in *Europe's Defence Industry: A Transatlantic Future?*, *op. cit.*, pp. 1, 5, complaining that U.S. "legal and structural obstacles [...] would make any transatlantic mergers extremely difficult to undertake"; Defense Science Board, *Final Report of the Task Force on Globalization and Security*, *op. cit.*, pp. 16-17, noting that a "consistent complaint" among Europeans is that the "DoD's policy on major cross-border defense industry mergers and acquisitions is unclear".

(126) U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 8, reporting that "CFIUS does not appear to be a barrier to European investments in the United States", *ibid.*, p. 33, noting that in 2007 CFIUS approved "at least 14 cases involving critical defense technology for a total value of 55 B$".



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allowed to buy U.S. defense firms is inconclusive. Further, even if CFIUS ultimately approves a transaction, evidence suggests that the process can unduly delay foreign investments, and the timing "is often critical to the financial viability of the transaction".(127)

Interest in U.S. restrictions on foreign investments increased following the 2006 Dubai Ports affair and passage of the Foreign Investment and National Security Act of 2007.(128) Dubai Ports concerned the purchase of a U.S. port operator by a Middle Eastern firm. Both CFIUS and the President initially approved the transaction but their approval was withdrawn following a public outcry.(129) The 2007 Act expanded CFIUS's review process beyond defense firm to include "critical infrastructure".(130) Since 2006, available data indicate that there has been a track record of "increased CFIUS scrutiny of foreign acquisitions".(131) "What is missing from the data", however, "are the acquisitions not pursued because of foreign firms' awareness of the U.S. government's policies in this area".(132)

A bellwether of the transatlantic defense trade "concerns the ability to buy into a foreign market through mergers and acquisitions of domestic companies".(133) Perhaps in part because of CFIUS and related restrictions, there are not "any truly 'transatlantic' defense companies comprising multiple nationalities"(134), nor have there been any major transatlantic mergers in recent years.(135)

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(127) Defense Science Board, *Final Report of the Task Force on Globalization and Security*, *op. cit.*, pp. 17-18.

(128) J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 676.

(129) *Ibid.*, p. 130.

(130) *Ibid.*, pp. 676-677.

(131) *Ibid.*, pp. 679-680.

(132) *Ibid.*, p. 681, reporting that the authors have anecdotal experience "with a number of these case in the defense industry", where "foreign firms chose not to proceed on their own in light of their awareness of U.S. policies".

(133) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, pp. 63-64, reporting that the Clinton administration's support for European investors' acquisitions led to an uptick in the 1990s, that European acquisitions of U.S. defense firms dropped in the aftermath the 9/11 attacks (2001-04), and then increased again in 2004-08.

(134) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 80. BAE Systems is an outlier; however, its relationship with the United States is bilateral – a British vendor doing business mainly with the United States. Thus, Butler's claim that there is not a multinational transatlantic defense firm holds.

(135) *Ibid.*, p. 86. Though there is a dearth of multinational defense firms in the north Atlantic and there have been few transatlantic mergers of late, there is evidence of European defense firms' organic growth in the U.S. market. Indeed, European firms "are achieving an increasing degree of market access through investment and organic growth in the US" and that such growth is "typically achieved through partnering with, or sales to, U.S. primes rather than directly to the US DoD", *ibid.*, p. 137.



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## *3. Defense Procurement in the European Union*

As the last section did for the United States, this section identifies and describes the constitutional features of EU defense procurement(136) and breaks this into history, constitution, and law. The hope is that a better understanding the two systems may help bridge the gap, especially for American firms considering whether to compete for European defense contracts.

### 3.1. History

"Since the long-headed men first drove the short-headed men out of the best land in Europe", wrote Walter Bagehot, "all European history has been the history of superimposition of the more military races over the less military".(137) Intra-European Union rivalry is emblematic of the continent's tumultuous history.(138) With three millennia of recorded history to cull from, what follows highlights a few points relevant to defense procurement.(139) This starts with the modern conception of the nation State, considers the Second World War and the Cold War that followed, and concludes with a preliminary sketch of the Post-Cold War environment.

#### 3.1.1. The Treaty of Westphalia

"The Treaty of Westphalia", writes Norman Davies, "set the ground plan of the international order in central Europe for the next century and more".(140) The ravages of the Thirty Years War (1618-1648)(141) concluded with the signing of a historic document that signaled the first recognition of the modern nation State.(142) Westphalia "symbolically indicated a sea-change in inter-

(136) *Ibid.*, p. 438.

(137) W. Bagehot, *Physics and Politics* (first published 1872), Chicago, Ivan R. Dee 1999, p. 46. Long- and short-headed referred to the now discredited cephalic index that was used by anthropologists to categorize the human populations.

(138) N. Davies, *Europe: A History*, Oxford, OUP, 1998, pp. 15-16, observing in his magisterial tome that one should not "forget the sorry catalogue of wars" that have "dogged every stage of the tale".

(139) "The best history", Bagehot said, "is like the art of Rembrandt; it casts a vivid light on certain selected causes, on those which were best and greatest; it leaves all the rest in shadow and unseen". W. Bagehot, *Physics and Politics*, *op. cit.*, p. 56.

(140) N. Davies, *Europe: A History*, *op. cit.*, p. 565.

(141) *Ibid.*, p. 568, recounting that Germany, the epicenter of the conflict, "lay desolate" with its population falling from "21 million to perhaps 13 million" and "[b]etween a third and half of the people dead" and that "Germany was not alone in its misery" as a "concatenation of catastrophes" befell Spain, France, England, Poland-Lithuania, and Sweden.

(142) The signing of the Treaty of Westphalia is shorthand in two senses. First, two treaties were signed in 1648, the Treaties of Münster and Osnabrück, which "taken together are known as the Peace of Westphalia". Second, these two treaties memorialized incremental changes to the international order that had been slowly evolving over 150 years. *See* C. Brown, "Sovereignty, Rights, and Justice: International Political Theory Today", *Polity*, 2002, p. 22.



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national organisation – the transition to a system of modern States".(143) It "paved the way for a system of States to replace the hierarchical system under the leadership of the Pope and the Hapsburg families that linked the Holy Roman and Spanish Empires".(144) While this treaty recognized several principles of international law,(145) two are of most interest here: sovereignty and the nation State's right to self-defense.(146)

These two principles are closely related. Sovereignty is bound up with a State's capacity to defend itself. In the modern age, where weaponry matters as much as manpower, the State's capacity for self-defense depends on its internal industrial base.(147) It was not always so. In mediaeval times, private armies employed "foreign armourers, gunsmiths, and shipwrights".(148) It was not until the 16th century that "domestic monopolies in the production of weapons and munitions" became the norm.(149) Perhaps the coincidence with the creation of the modern State was no accident.(150) Newly sovereign States sought a monopoly on the legal use of force.(151)

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(143) C. HARDING and C.L. LIM (eds), "The Significance of Westphalia: An Archaeology of the International Legal Order", in *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law*, New York, Springer, 1999, pp. 1, 5-6.

(144) K.J. HOLSTI, *Peace and War: Armed Conflicts and International Order, 1648-1989*, Cambridge, CUP, 1991, pp. 25-26.

(145) The Treaty of Westphalia stands for such principles as sovereign immunity, equality among States, non-intervention, and non-aggression; it also recognized procedural rules "governing the practice of diplomacy and such matters as the making of treaties". *See* C. BROWN, "Sovereignty, Rights, and Justice: International Political Theory Today", *op. cit.*, pp. 22, 35.

(146) *Ibid.*, p. 33, explaining that Westphalia enshrined the rule that "the balance of power may just be preserved by preventative war". Westphalia codified what was the prevailing view among the founders of international law. *See* H. GROTIUS, *The Rights of War and Peace* (1st publ. 1625), A.C. CAMPBELL tr., New York, M. Walter Dunne, 1901, bk II, ch I, P XVI, holding that notwithstanding the differences between persons and States, right of self-defense of persons may be "applied to public hostilities, allowing for the difference of circumstances"; E.D. VATTEL, *The Law of Nations* (1st publ. 1758), Joseph CHITTY tr., Philadelphia, Johnson, 1844, bk 2, ch 4, p. 154, writing, "Every nation, as well as every man, has, therefore, a right to prevent other nations from obstructing her preservation, her perfection, and happiness – that is, to preserve herself from all injuries". Indeed, "the right of self-defense is one of the oldest legitimate reasons for States to resort to force" under customary international law. A.C. AREND and R.J. BECK, *International Law & the Use of Force: Beyond the UN Charter Paradigm*, London, Routledge, 1993, p. 72, citing Aristotle, Aquinas, *et al.*

(147) *See* J. MAWDSLEY, "The Gap Between Rhetoric and Reality: Weapons Acquisition and ESDP", Paper 26, Bonn, International Center for Conversion, 2002, pp. 4-5, arguing defense firms and the nation State have a "symbiotic relationship", that a nation's defense production "touches the heart of the concept of sovereignty", and that "[w]ithout weapons to defend its territorial sovereignty [...] a State cannot truly be sovereign".

(148) M. EDMONDS, "International Military Equipment Procurement Partnerships: The Basic Issues", *op. cit.*, pp. 1, 3.

(149) *Ibid.*, p. 150.

(150) If modern European States' pursuit of self-sufficiency in arms production did not occur in precisely 1648, neither did the Westphalian reforms happen all at once. *See ibid.*, p. 144.

(151) M.WEBER, "Politics as Vocation", in *From Max Weber: Essays in Sociology* (H.H. GERTH and C. WRIGHT MILLS (eds and trs) (1st publ. 1946), London, Routledge, 1998, p. 78, defining a State as a group that successfully "claims the monopoly of the *legitimate use of physical force* within a given territory" (emphasis original).



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Even free market advocates like Adam Smith favored protection of strategic industries.(152) Whatever the rationale, economic or otherwise, European powers sought defense autarkies for the three centuries after Westphalia.

### 3.1.2. Cold War

Following two devastating world wars(153), where the Allied powers were uncomfortably reliant on imported war material, and with a mounting Soviet threat on its doorstep,(154) Europe spent generously on defense, favoring "autonomous weapons policies".(155) After watching the United States abandon France and Britain during the Suez crisis,(156) the lesson was learned: "great stress was placed on security of supply, and defense industries everywhere were regarded as prized national assets" and Member States "retained exceptional freedom to pursue autarkic policies".(157) The "instinct in every country in the years following World War II was to internalize the development and manufacture of military equipment".(158) "[N]o real 'European' defense market" existed at the close of the Cold War.(159)

(152) A. SMITH, *The Wealth of Nations* (1st publ. 1776), New York, Knopf 1991, pp. 405, 461-462, advocating that Great Britain should offer bounties for military necessities such as gunpowder and sailcloth because "it might not always be prudent to depend upon our neighbours for the supply."

(153) *See* A. HERMAN, *Freedom's Forge: How American Business Produced Victory in World War II*, New York, Random House, 2012, pp. 125-127, 166-167, 216-219, describing the Allies' humiliating reliance on U.S. industry when their own resources proved inadequate; A. ROBERTS, *The Storm of War, A New History of the Second World War*, New York, Harper, 2010, pp. 352-354, arguing that Hitler might have pushed Britain out of the war had he recognized the potential of U-boats and Britain's dependence on imports ("It was to be one of his greatest blunders of the war".).

(154) W. WALKER and P. GUMMETT, "Nationalism, Internationalism, and the European Defence Market", 9 *Chaillot Papers*, Pretoria, Institute for Security Studies, 1993, p. 10, writing that in the postwar years that "the international conflicts of the previous decades cast long shadows".

(155) *See* A. GOLDSTEIN, "Discounting the Free Ride: Alliances and Security in the Postwar World", 49 *Int'l Organization*, 1995, pp. 39, 63, 65, reporting that after Suez the UK and France decided they "could not count on adequate U.S. backing unless vital American interests were at stake" and planned their strategies accordingly.

(156) *See* N. STONE, "The Atlantic and its Enemies: A History of the Cold War", *Basic*, 2010, pp. 136-142, summarizing the Suez crisis and its aftermath.

(157) W. WALKER and P. GUMMETT, "Nationalism, Internationalism, and the European Defence Market", *op. cit.*, pp. 10-11.

(158) *Ibid.*, p. 11.

(159) N. TUSHE, "U.S. Export Controls: Do They Undermine the Competitiveness of U.S. Companies in the Transatlantic Defense Market?", *op. cit.*, pp. 57, 63.



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### 3.1.3. Post-Cold War

With communism's demise, defense budgets plummeted.(160) EU Member States initially opposed industry consolidation.(161) Instead, their defense firms sought exports to spread costs. With the U.S. market largely closed off due to protectionist tendencies,(162) their efforts concentrated on the Middle East and developing countries.(163) European firms succeeded in some measure and exports lessened their defense spending burdens.(164) But EU firms were not alone in this effort, which tightened margins.(165) Sharpening

(160) *See* S.G. NEUMAN, "Defense Industries and Global Dependency", *Orbis*, Summer 2006, pp. 429, 435, reporting that defense budgets had fallen by almost one third; J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, pp. 46-47, noting that European spending dropped after the Cold War, that it has not recovered despite post-9/11 threats, and that much of Europe has been generally "debellicized".

(161) *See* B. SCHMITT, "From Cooperation to Integration: Defence and Aerospace Industries in Europe", in *Chaillot Papers*, Pretoria, Institute for Security Studies, 2000, pp. 13-14, 59-60, recounting Europe's belated transnational cooperation and consolidation; J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, pp. 180-181, describing Europe's slow move "away from buying national and national champions"; R. HOOKE, *The Defence Industry in the 21st Century*, London, Price Waterhouse Coopers, 2005, p. 14, https://www.pwc.pl/en/publikacje/defence_industry_ads.pdf, accessed 4 July 2019, reporting that the United States led the way as to consolidation.

(162) Because the United States is the biggest spender, penetrating the U.S. market is critical to EU defense firms' survival. *See* W. WALKER and S. WILLETT, "Restructuring the European Defence Industrial Base", *Defence Economics*, 141, 1993, pp. 154-156; J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 133, writing that the long-term survival of European defense firms hinges on their competition with U.S. defense firms. The challenge is that the United States maintains nearly an autarky in defense. *See* E. KLEPSCH, *Two-way Street: USA-Europe Arms Procurement*, London, Brassey's, 1978, p. 36, quoting P. DANKERT, "A European Armaments Policy", Assembly of the Western European Union, 23rd Sess., Part 1, Doc. 738, 10 May 1977, p. 17, reporting that "So far the United States has persisted, both for strategic reasons and as a result of political and industrial pressure, in a policy of near autarchy in weapons procurement". Thus far EU firms have had little success at penetrating the United States. *See* U.S. Department of Defense, Office of the Deputy Undersecretary of Defense for Industrial Policy, "Study on Impact of Foreign Sourcing Systems", June 2004, pp. 33-35, reporting that in fiscal year 2002 only 4% of total Pentagon procurement went to foreign sources and less than 1% of that to military hardware. But European firms are pursuing "the American option" by using subcontracting, joint ventures, mergers and acquisitions, and buyouts. *See* S.G. NEUMAN, "Defense Industries and Global Dependency", *op. cit.*, pp. 443-445.

(163) *See* W. WALKER and S. WILLETT, "Restructuring the European Defence Industrial Base", *op. cit.*, pp. 154-156, explaining that European defense firms turned to developing countries and the Middle East in particular. European firms depend on exports far more than their U.S. rivals. *See* J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 132, reporting that whereas European firms receive 66-75% of revenues from non-domestic sources, U.S. firms typically derive only 15-30% from exports.

(164) C.H. ANDERTON, "Economics of Arms Trade", in *Handbook of Defense Economics: Defense in a Globalized World* (K. HARTLEY and T. SANDLER eds), Vol. 1, Amsterdam, North-Holland, 1995, pp. 523, 540.

(165) *See* T. GUAY and R. CALLUM, "The Transformation and Future Prospects of Europe's Defence Industry", *Int'l Affairs*, 2002, pp. 757, 765, explaining that the post-Cold War arms market "has become both crowded and severely competitive".



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the competition even further was the end of the Cold War subsidies; importing countries now paid full price and became more demanding customers.(166)

Exports alone could not close the gap. Due to a "changed operational and political context, reduced budgets, industrial over-capacity, duplication between domestic industries, lack of standardization, and dependence" on the United States,(167) the market was transformed, from "a collection of medium-sized, nationally oriented firms to one dominated by two giants, with several smaller firms closely linked to these leaders".(168) Despite this consolidation,(169) Europe's defense industry remains protected and fragmented.(170)

### 3.2. Constitutional features

Though "constitutional features" may primarily evoke the EU treaties, this expression is used in a broader sense.(171) It includes the politics, practices, and cultural assumptions that underlie EU defense procurement. And at this level, "there is currently a fundamental debate as to the purposes" of the procurement directives: that is, whether they are solely to promote the internal market or are also to promote competition.(172)

First, a word about the EU legal system is in order. Defense procurement must comply with the general principles set forth in the treaties, unless an exclusion applies.(173) These general principles include non-discrimination based on nationality, transparency, proportionality, and equal treatment.(174) While the Article 346 exemption has been commonly invoked in the past, the

(166) C.H. ANDERTON, "Economics of Arms Trade", *op. cit.*, pp. 532-533.

(167) B. HEUNINCKX, "Defence Procurement and the European Defence Equipment Market: The Virtues of Kissing the Frog", *Procurement L.J.*, 2015, pp. 319, 336.

(168) T. GUAY and R. CALLUM, "The Transformation and Future Prospects of Europe's Defence Industry", *op. cit.*, pp. 757, 761-762, describing the political pressure for rationalization of the U.S. defense industry in the 1990s and how this, in turn, affects the European defense industry.

(169) Europe's consolidation should not be overstated. The EU has never undergone the same degree of consolidation that the United States underwent in the 1990s. *See* M. STAPLES, *The Future of European Defence: Tackling the Productivity Challenge*, New York, McKinsey & Company, 2013, explaining, "The European defence industry has integrated to a degree but remains fragmented". Europe is still "a series of atomistic defence procurement markets". P. TREPTE, *Public Procurement in the EU: A Practitioner's Guide*, *op. cit.*, pp. 241-242.

(170) B. HEUNINCKX, "Defence Procurement and the European Defence Equipment Market: The Virtues of Kissing the Frog", *op. cit.*, p. 336, writing that the EU defense market "is still very much in a misshapen state" and maintaining that it "has evolved into a difficult relationship between cash-strapped buyers in an oligopsony position that are hardly able to drive the market as they did earlier, and a defence industry finding itself caught between an uneasy survival as a cluster of protected entities fragmented along national lines and an evolution into an oligopoly at the European level".

(171) *See* L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 438.

(172) *Ibid.*, pp. 255-256 (citations omitted).

(173) *See* P. TREPTE, *Public Procurement in the EU: A Practitioner's Guide*, *op. cit.*, pp. 239-240.

(174) *Ibid.*, pp. 5-6, 13-27; S. ARROWSMITH, *The Law of Public Utilities and Procurement: Regulation in the EU and UK*, Vol. I, London, Sweet & Maxwell, 2014, pp. 262-279, 301-302, 628-632.



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European Court of Justice has tightened down the use of this exemption.(175) And because the Defence Directive creates a separate system for defense, use of Article 346 will be increasingly unnecessary.(176) Lastly, the Directives are separately implemented in each State's domestic legislation; and it is, of course, at the Member State level where the vast majority of defense procurement happens.

### 3.2.1. Protectionism and fragmentation

Member States collectively maintain the second largest military in the world and spent €203 billion on defense in 2015;(177) however, the EU achieves less "bang for its buck" than does the United States.(178) That is in part due to fragmentation and protectionism.(179) For example, one study conducted in 2005 indicated that 80% of the Member States' budgets were spent on defense materiel from domestic suppliers and only 13% came from other Member States.(180)

The EU is not alone. What has been described are widespread problems in defense economics. "In defense procurement", two defense economists explain, "preferential purchasing and tariff protection represent government-created

(175) *See* B. Heuninckx, "Security of Supply and Offsets in Defence Procurement: What's New in the EU?", *PPLR*, 2014, pp. 33, 39, summarizing the ECJ's jurisprudence on the Art. 346 exemption: it concerns only "exceptional and clearly defined cases"; there is no "general exception"; it is "interpreted strictly"; appeals to security are limited cases where there is "a genuine and sufficiently serious threat to a fundamental interest of society"; "aims of a purely economic nature" do not suffice; Member States enjoy a "particularly wide discretion in assessing the needs receiving protection", but mere reliance on such interests are insufficient; security "interests have to be specifically expressed"; and for a measure to be necessary to an essential security interest, States must show that "such protection could not have been addressed by a less restrictive measure" (internal citations omitted).

(176) *See* T. Briggs, "The New Defence Procurement Directive", *PPLR*, 2009, NA 129, NA 130, explaining that the objective of the Defence Directive was "to reduce unjustified reliance" on Art. 346 "by providing a bespoke procurement regime in the field of defence and security"; M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, Cambridge, CUP, 2014, p. 253, explaining that one purpose was to "accommodate most national security needs of the Members States" and thereby "the need to derogate from the procurement regime on the basis of Article 346 TFEU".

(177) Z. Stanley-Lockman and K. Wolf, "European Defence Spending 2015: The Force Awakens", *European Institute for Security Studies: Brief Issue*, March 2016.

(178) *See* M. Staples (ed), *The Future of European Defence: Tackling the Productivity Challenge*, *op. cit.*, p. 4, observing, "Everybody knows that the bang-to-buck ratio in Europe today is unacceptable".

(179) *See* R. Seidelmann, "Costs, Risks and Benefits of a Global Military Capability for the European Union", *Defence & Peace Economics*, 1997, pp. 123, 129, arguing Europe would have to spend 10-15% more on defense than the United States to achieve similar results; H. Kuechle, "The Cost of Non-Europe in the Area of Security and Defence, Study for the European Parliament", *No EP/ExPol/B/200513*, 2006, pp. 4, 25, estimating that the EU would need to spend four or even five times as much as the United States, citing Unisys, "Innergemeinschaftliche Transfers von Verteidigungsgütern Endbericht der Studie: Bewertung der Gemeinschaftsinitiativen im Zusammenhang mit dem innergemeinschaftlichen Transfer von Rüstungsgütern", Brussels, EC, 2005, p.116.

(180) M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, *op. cit.*, p. 28 (citations omitted).



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market failures".(181) This market failure inflates prices, reduces transparency, and hinders innovation. Europe overpays by at least 20%.(182)

Fragmentation causes several problems. A fragmented market cannot benefit from economies of scale.(183) If European demand were consolidated to the same extent as in the United States, "batch sizes would be 570% bigger".(184) "Closed procurement environments" undermine transparency and grant local firms "a special status" that eliminates incentives for innovation.(185) Not least, fragmentation leads to the duplication of efforts: although the EU spends less than half what the United States does, it funds six times as many weapon systems;(186) and only five percent of EU defense R&D spending is collaborative.(187) While it is tempting to speak of a "European" market, "there is no unified EU defense market, but a complex structure characterised by [28] national marketplaces".(188) On paper, defense should be no less a part of the common market project than any other business sector. "There is", however, "no common market for armaments in practice".(189)

In the last decade, there have been "tentative steps away from national buying". But EU procurement is still characterized by the same protectionism and fragmentation that plagued it for the half century after World War II.(190) Nationalist *juste retour* and offset policies only "sustain" and "accelerate" protectionism and fragmentation.(191)

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(181) T. Sandler and K. Hartley (eds), "Defense in a Globalized World: An Introduction", in *Handbook of Defense Economics*, Amsterdam, Elsevier, 2007, pp. 607, 620.

(182) D. Keohane (ed), "Introduction", in *Towards A European Defence Market*, 113 *Chaillot Papers*, Pretoria, ISS, 2008, pp. 5, 6.

(183) T. Sandler and K. Hartley, *The Political Economy of NATO, Past, Present, and into the 21st Century*, Cambridge, CUP, 1999, pp. 121, 124, explaining that defense is thought to be "economically strategic" and such industries are characterised by economies of scale, significant R&D spending in high technology, and "technical spillovers to the rest of the economy".

(184) M. Staples (ed), *The Future of European Defence: Tackling the Productivity Challenge*, *op. cit.*, p. 15.

(185) S.R. Sandler, "Cross-border Competition in the European Union: Public Procurement and the European Defence Equipment Market", *Wash. U. Global Studies L. Rev.*, 2008, pp. 373, 383-385.

(186) M. Staples (ed), *The Future of European Defence: Tackling the Productivity Challenge*, *op. cit.*, p. 14.

(187) S.G. Neuman, "Defense Industries and Global Dependency", *op. cit.*, p. 430.

(188) C. Mölling, "Options for an EU Regime on Intra-Community Transfers of Defence Goods", *Towards A European Defence Market* (D. Keohane ed), *op. cit.*, pp. 51, 53.

(189) M. Trybus, "The Tailor-made EU Defence and Security Procurement Directive: Limitation, Flexibility, Descriptiveness, and Substitution", *EL Rev.*, 2013, pp. 3, 5.

(190) *See* M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, *op. cit.*, pp. 138-139, writing that the "dominant view of economist and policymakers is that defense spending in Europe is inefficient"; A.C. Alleback, "The European Union: From the EC to the European Union", in *Arms Industry Limited* (H. Wulf ed), Oxford, OUP, 1993, p. 191, recounting that the European arms market has historically been "characterised by protected national markets".

(191) P. Platzgummer, "The EDA and Defence Offsets: Trailing After the Commission", in *The European Defence Agency: Arming Europe* (N. Karampekios and I. Oiknomou eds), London, Routledge, 2015, pp. 225, 227.



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The costs of protectionism and fragmentation are considerable. Noting that Member States had abused Article 346, Sir Leon Brittan lamented "highly protected high cost national producers" dominate the market which has "led to grotesque distortions" and has been to Europe's grave detriment.(192) Writing a decade later, Andrew Cox decried this "imperfect market structure" that results in

> "feather-bedded companies, collusive relationships between national suppliers and purchasers and gross inefficiencies in production. This has led, in all but the most technologically advanced equipment markets where the United States has dominated, to the duplication of R&D and of production systems. This system of national production and protection worked passably well in an environment of Cold War certainties: the Soviet threat allowed politicians, defence establishments and arms manufacturers to engage in a *conspiracy of inefficiency against the public*. In the new post-Cold War environment, in which there is no self-evident threat and a declining world export market for defence goods, the maintenance of this conspiracy of inefficiency is much more difficult to achieve".(193)

Americans complain that NATO allies spend less than the agreed upon target of two percent of GDP, but protectionism and fragmentation are more serious problems as they undermine economies of scale and ensure that "the modest European resources are spent unwisely".(194)

Hope lies in Herbert Stein's Law: "If something cannot go on forever, it will stop".(195) "Under the twin constraints of increasing costs and diminishing resources", maintaining 28 separate defense autarchies has become unsustainable.(196) "Thus, traditional notions of national independence in arms production is not, and indeed cannot, continue to be the whole picture for the future of the defense industry".(197) History, alas, has not ended.

(192) J.B. Wheaton, "Defence Procurement and the European Community: The Legal Provisions", *PPLR*, 1992, pp. 432, 433-434.

(193) A. Cox, "The Future of European Defence Policy: The Case for a Centralised Procurement Agency", *PPLR*, 1994, pp. 65, 77 (emphasis added).

(194) A. Georgopoulos, "The European Armaments Policy: A Conditio Sine Qua Non for the European Security and Defence Policy?", in *European Security Law* (M. Trybus and N.D. White eds), Oxford, OUP, 2007, pp. 198, 204, explaining that "modest European resources are spent unwisely" due to fragmentation and protectionism.

(195) H. Stein, "What I Think: Essays on Economics, Politics, and Life", *AEI*, 1998, p. 32.

(196) J. Becker, "The Future of Atlantic Defense Procurement", *Defense Analysis*, 2010, pp. 9, 13; M. Staples (ed), *The Future of European Defence: Tackling the Productivity Challenge*, *op. cit.*, p. 171, observing that "European governments are pinched between two pressures – a need to commit more resources to their collective defence and straitjacketed finances" and averring that the solution to this dilemma lies in "address[ing] a highly fragmented supplier base".

(197) J. Becker, "The Future of Atlantic Defense Procurement", *op. cit.*, p. 13.



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### 3.2.2. Common security and defense policy

As costs rise, separately equipping Member States has become unaffordable,(198) and as common threats proliferate, it has become difficult to justify 28 separate security policies.(199) A common policy – whereby resources are pooled, redundancies eliminated, and efficiencies made – has been a longstanding goal.(200) These efforts culminated with the Maastricht Treaty in 1991(201) and the Treaty of Nice in 2001.(202) But from a practical standpoint, there has been little to show for these efforts. Progress has been modest since Member States resist relinquishing this last vestige of sovereignty.(203) Authority for integration already exists.(204) What is lacking is the political will.(205) It is unclear if such resolve will ever coalesce. Despite a profusion of agencies tasked with devising a coherent procurement system, their accomplishments are few.(206)

Common security lacks a ready definition. That is partly because Member States favored "constructive ambiguity" to reach a compromise at Maastricht, partly because of a "general problem" that "there has never been consensus" among

(198) H. Krieger, "Common European Defence: Competition or Compatibility with NATO?", *op. cit.*, pp. 174-175, describing a common defense and security policy as "inevitable" given that "a single Member State is no longer capable of providing for its military security on its own".

(199) *See* ECJ, *Fritz Werner Industrie Ausrustungen GmbH v Germany*, case C-70/94, *E.C.R.* I-3189, 1995, p. 26; ECJ, *Criminal Proceedings against Leifer*, case C-83/94, *E.C.R.* I-03231, 1995, p. 27, holding that "it is becoming increasingly less possible to look at the security of a State in isolation, since it is closely linked to the security of the international community at large".

(200) C. Lenzer, *Co-operation on the Procurement of Defence Equipment – Lessons Drawn from the Symposium*, Report on behalf of the Technological and Aerospace Committee to the Western European Union, Doc. 1587, 4 November 1997, p. 4, explaining that cooperation "has been a political and military objective since the end of the Second World war".

(201) *See* M. Trybus, N.D. White *et al.*, "An Introduction to European Security Law", in *European Security Law*, *op. cit.*, p. 3, recounting that the Maastricht Treaty created the Common Foreign and Security Policy (CFSP) as a second pillar of the Treaty on the European Union.

(202) *See* H. Krieger, "Common European Defence: Competition or Compatibility with NATO?", *op. cit.*, p. 179, explaining that together the Maastricht and Nice treaties created a Common Security and Defence Policy.

(203) *See ibid.*, pp. 92, 178, contrasting Member States' economic integration with their unwillingness "to transfer any sovereignty in defence matters". *See* also S.G. Neuman, "Defense Industries and Global Dependency", *op. cit.*, p. 442, explaining that "attempts to create a unified market and to end costly industrial duplication have foundered on concerns about national sovereignty, the security of supply, and the conflicting strategic interests of Europe's small and large countries".

(204) *See* H. Krieger, "Common European Defence: Competition or Compatibility with NATO?", *op. cit.*, pp. 179-180, citing the authority deriving from the Maastricht and Nice treaties.

(205) *See* A. Georgopoulos, "The European Armaments Policy: A Conditio Sine Qua Non for the European Security and Defence Policy?", *op. cit.*, pp. 212-213.

(206) *See* T. Guay and R. Callum, "The Transformation and Future Prospects of Europe's Defence Industry", *op. cit.*, p. 773, writing that "previous efforts to institutionalize (or at least coordinate) defence procurement have yielded a litany of acronyms but few tangible accomplishments"; A. Georgopoulos, "The European Armaments Policy: A Conditio Sine Qua Non for the European Security and Defence Policy?", *op. cit.*, p. 221, concluding that "institutional congestion" did little for the "rationalization" of the European defense industry.



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stakeholders "about what the proper aims of a European defence policy should be".(207) Cox wrote 20 years ago: "There is a pressing need for European nations to decide what they have in common and what ends their security policy seeks to serve".(208) Despite some progress,(209) his observation remains largely true.

Whatever the definition of common security, any sensible understanding must include procurement.(210) Any truly integrated common defense policy would require interoperability among the constituent armed forces, which would require some cooperation in procurement.(211) Indeed, it is not a stretch to say that procurement should lie "at the heart of any future defense policy structure".(212) Of late, greater significance has been attached to procurement.(213) Case in point, Article 17 TFEU designates procurement as a part of the common security policy.(214) This is a promising development.

### 3.2.3. Separateness of defense

Perhaps this point has already been driven home: unlike the U.S. procurement system, where defense is central, defense is a niche subject in Europe. One can be deemed an expert in EU public procurement and know next to nothing about defense procurement. That is partly a function of Member States' post-Westphalian preference to safeguard their national sovereignty and domestic production capabilities at the national level, partly due to more

(207) A. Cox, "The Future of European Defence Policy: The Case for a Centralised Procurement Agency", *op. cit.*, p. 51.

(208) *Ibid.*, p. 68.

(209) The European Defence Agency (EDA) provides a glimmer of hope, and has in some measure succeeded in reducing fragmentation of the European defense industry. *See* A. Georgopoulos, "The European Armaments Policy: A Conditio Sine Qua Non for the European Security and Defence Policy?", *op. cit.*, p. 219, explaining that the EDA "brought European armaments cooperation under the ambit of the EU" and that this was "an important development in its own right and not only because of its symbolic value"; "The EDA and EU Defence Procurement Integration", in *The European Defence Agency: Arming Europe*, *op. cit.*, pp. 118, 132, calling the "contribution of the EDA in the process of European integration in the field of defence 'fundamental'".

(210) *See* M. Trybus, "Defence Procurement", in *EU Public Contract Law: Public Procurement and Beyond* (M. Trybus, R. Caranta and G. Edelstram eds), Brussels, Bruylant, 2013, pp. 249, 253, arguing that "Defence procurement forms part of defence policy"; B. Schmitt, "The European Union and Armaments: Getting a Bigger Bang for the Euro", 63 *Chaillot Papers*, Pretoria, ISS, 2003, pp. 32-33, observing that a "European armaments agency has continually haunted the process of building European defence" precisely because coordinated defense procurement is central to any common security policy.

(211) *See* A. Cox, "The Future of European Defence Policy: The Case for a Centralised Procurement Agency", *op. cit.*, p. 77.

(212) *Ibid.*, p. 213.

(213) *See* B. Schmitt, "The European Union and Armaments: Getting a Bigger Bang for the Euro", *op. cit.*, p. 5, writing that "one is bound to be satisfied with the importance now attached to the armaments dimension of European security and defence policy".

(214) *See* A. Georgopoulos, "The European Armaments Policy: A Conditio Sine Qua Non for the European Security and Defence Policy?", *op. cit.*, p. 199, citing TEU, Art. 2, Protoc. 23, and Art. 17, sent. 4, and arguing that cooperation in defense procurement is a sine qua non for a common defense policy; TEU, Art. 17, sent. 4, "the progressive framing of a common defence policy will be supported [...] by cooperation in the field of defence".



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general protectionist tendencies, and partly because of the EU's deference to abuses of Article 346. But whatever the origin, there exists a fundamental difference between the EU, which is at core a customs union, and the United States, which unified a nation around a common defense policy in 1789.(215) The two systems are so different in this respect that they resist comparison.

### 3.3. Law

Some worry that the Defence Directive contains a built-in "Buy European" preference.(216) That may be. But this essay is framed on a hypothetical where the TTIP has passed that would eliminate overt discrimination. As with the summary of U.S. system provided above, this section presents Europe's legal system from two perspectives, internal and external. The former considers the normal operation of the system that may be off-putting to foreign vendors and the latter on laws that directly regulate commerce with foreign buyers and sellers, often with clear protectionist intentions.(217)

#### 3.3.1. Internal laws

The single biggest obstacle for U.S. defense contractors in the EU is dealing with 28 separate national markets.(218) Member States are all subject to the Defence Directive, but their national legislation transposing these rules differ. Deciphering this national legislation is not for novices; this entails "adapt[ing] to idiosyncratic national legal and policy regimes concerning third country contractor participation".(219) Further, the Defence Directive does not mandate that Member States do business with non-EU defense suppliers but rather leaves to each State the choice to include or exclude these vendors.(220) In fact, at present the EU is mostly agnostic as to third-country access and treatment, leaving this to Member States' discretion.(221)

(215) *See* above, Section 2.2.3.

(216) *See* M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, *op. cit.*, p. 30, observing that while the Defence Directive does not explicitly favor European suppliers, "it has raised American concerns to that effect".

(217) *See* also P. Trepte, *Public Procurement in the EU: A Practitioner's Guide*, *op. cit.*, pp. 330-331.

(218) D. Fiott, "The 'TTIP-ing Point': How the Transatlantic Trade and Investment Partnership Could Impact European Defence", *op. cit.*, p. 18.

(219) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 191.

(220) *See ibid.*, pp. 156-157, quoting Defence Dir. 2009/81/EC, Recital 18, noting that Member States "retain the power to decide whether or not their contracting authorities may allow economic operators from third countries"; M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, *op. cit.*, p. 30, noting that "the Directive leaves the choice on whether to open a procurement to bidders from third countries such as the United States to the individual Member States".

(221) *See* B. Heuninckx, "The EU Defence and Security Procurement Directive: Trick or Treat?", *PPLR*, 2011, pp. 9, 12.



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Perhaps the second biggest problem is Article 346. It has long been used to shield EU defense suppliers from competition under the guise of protecting national security interests.(222) Recently, the European Court of Justice has cracked down and the opportunities for abusing Article 346 have been curtailed.(223) At the same time, its applicability remains unclear.(224) Further, notwithstanding the Court's, the system will only work if Member States use Article 346 in good faith, which is often lacking.(225)

A third barrier for U.S. contractors is the workings of the new Defence Directive itself. This is not a concern that the Defence Directive does so purposefully(226) but that it may do so inadvertently in the same way that U.S. procurement system discourages the uninitiated from participating.(227) Further, the Directive sanctions the use of exemptions for the security of supply and of information, and such justifications are susceptible to abuse.(228) Butler gives a thorough treatment of this question, and ultimately maintains that the Directive makes considerable provision to accommodate third-countries.(229) He acknowledges, however, that "it is open to question whether the Defence Directive could better accommodate third country considerations".(230)

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(222) K. HARTLEY, "The Arms Industry, Procurement, and Industrial Policies", in *Handbook of Defense Economics*, *op. cit.*, pp. 1139, 1148, unfavorably compares Art. 346 and the Buy American Act as two examples of legislation that limit foreign competition and create domestic monopolies.

(223) *See* B. HEUNINCKX, "Security of Supply and Offsets in Defence Procurement: What's New in the EU?", *op. cit.*, p. 39, summarizing the ECJ's jurisprudence on Art. 346.

(224) L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 87, observing that the "EU courts have not yet been presented with a credible invocation of Article 346" and it is, therefore, "uncertain the circumstances in which Article 346 TFEU could conceivably be validly invoked".

(225) *See* S. R. SANDLER, "Cross-border Competition in the European Union: Public Procurement and the European Defence Equipment Market", *Wash. U. Global Studies L. Rev.*, 2008, pp. 373, 385, describing the resistance to transparency and noting that derogations under Art. 346 have been "invoked with impunity".

(226) But *see* L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 193, noting that some U.S. commentators have warned that "provisions on technical specifications, security of supply and security of information, in particular, could potentially form disguised market access barriers for US contractors".

(227) *Ibid.*, p. 195, reporting that "it has long been argued that the Defence Directive's technical specifications provisions could become an intended or unintended" market access barrier.

(228) *See ibid.*, pp. 204-205, describing the potential for abusing the Defence Directive's security of supply provisions; P. TREPTE, *Public Procurement in the EU: A Practitioner's Guide*, *op. cit.*, p. 240, observing that there is "a clear tendency to overstate the need for security".

(229) *See* gen. L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, Chapter 5, "The Defence Directives as a Barrier to Trade with the United States".

(230) *Ibid.*, p. 245. This chapter, he concludes, "pointed debate towards the need for a more sustained legal discourse that digs behind claims of latent potential for discrimination based on limited empirical evidence towards one encouraging open engagement on the issues of how the EU and US legal systems are configured and calibrated to deal with the issue of foreign contractor participation and treatment in the field of defence procurement."



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### 3.3.2. External laws

Several U.S. observers have expressed concern that the Defence Directive will create a "fortress Europe" that excludes U.S. suppliers from defense procurement.(231) Following this essay's hypothetical that overt discrimination is eliminated under the TTIP, the concern here is not so much with *de jure* but with *de facto* restrictions arising from the structure of non-transparent and exclusive European defense clubs.(232)

In terms of external laws, perhaps the most important obstacle is export restrictions that resemble the workings of the States's own tightly controlled technology export regime.(233) Further, the Defence Directive compounds the problem by allowing European firms to design around ITAR.(234) Even passage of the TTIP and the prohibition of unfair discrimination would not necessarily preclude restrictions based on concerns about security of supply.(235) Governments are prone to exaggerate security of supply concerns(236) and, therefore, the EU's own version of technology export controls are likely a trade barrier, or at least have the potential to become one.(237)

Another major obstacle looms on the horizon. Since 2012, the EU has been considering the International Procurement Instrument (IPI), which is to be used as a negotiation tool to encourage liberalization. Though not intended as a protectionist measure, if enacted in its present form (updated in 2016), the

(231) *See* C.R. YUKINS, "Assessing the New European Defense Procurement Directive", West Government Contracts Year, in *Review Conference: Conference Briefs*, 2010, pp. 3-1, 3-7, 3-10, noting the Defence Directive hints at the power to exclude third-country suppliers; J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, pp. 220-225 describing the Defence Directive's "subtle areas of potential discrimination" against the United States.

(232) *See* S.N. FERRARO, "The European Defence Agency: Facilitating Defense Reform or Forming Fortress Europe?", *Transnational L. & Contemporary Problems*, 2007, pp. 549, 569-570, 613-614, describing latent "competitive obstacles" that "may have the effect of creating a *de facto* European preference" in part due to the lack of transparency and organizational structure of the EDA and the Organisation for Joint Armament Cooperation.

(233) *See* C.R. YUKINS, "Assessing the New European Defense Procurement Directive", *op. cit.*, pp. 3-2, describing "cumbersome licensing requirements for transferring sensitive technologies across borders".

(234) *See* J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, pp. 2, 16, 222-223; L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, pp. 217-218; U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 52.

(235) This exemplifies how fortress-like conduct can be interactive and reciprocal. J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 4.

(236) P. TREPTE, *Public Procurement in the EU: A Practitioner's Guide*, *op. cit.*, p. 240.

(237) This is doubly unfortunate. Art. 346 not only impedes free trade by authorizing an exclusion for dubious security of supply concerns, it also "legitimates antiquated thinking that domestically derived technology provides the best defense capability". *See* R. SANDLER, "Cross-border Competition in the European Union", *op. cit.*, p. 426.



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IPI would create additional barriers for American firms competing for public contracts in the EU. However, this essay assumes a hypothetical wherein a TTIP is in effect and that preclude the IPI. The two would be mutually exclusive.

National access rules are a final barrier that the TTIP's rules against overt discrimination would not necessarily overcome. That is because such national access rules are not necessarily discriminatory against non-EU suppliers as they can be made to apply as much to EU suppliers as to third-country suppliers. In practice, having 28 different national access procedures serves as a significant barrier to entry. The cost of separately adapting to each market discourages foreign commercial interests. Further, acquisition of a domestic firm in one EU Member State does not grant foreign suppliers reciprocal access to other nations' markets.(238)

## *4. Toward a Free Market in Defense*

### 4.1. Comparisons

Now that a summary of each system has been provided, some general observations and comparisons are possible. Both sides of the Atlantic suffer from illiberal defense markets: the United States from duopolies;(239) the EU from monopolies at the Member State level;(240) both from oligopsonies on the demand side;(241) and both from double monopolies resulting from insufficient competition for both supply and demand.(242) The result is inefficiency, poor value for money, and inflated prices.

Transatlantic civil trade dwarfs transatlantic military trade.(243) At the same time, their militaries are more deeply integrated than ever before, forming a "dense

(238) *See* D. Fiott, "The 'TTIP-ing Point': How the Transatlantic Trade and Investment Partnership Could Impact European Defence", *op. cit.*, p. 18, reporting that "American firms have often rejected the idea of mergers with or acquisition of European firms because it would not translate into Europe-wide market access" and observing that "acquiring a Czech firm would not automatically translate into access to the Italian market".

(239) *See* K. Hartley, "The Arms Industry, Procurement, and Industrial Policies", *op. cit.*, p. 1151, explaining that "the United States has more duopolies and oligopolies in major weapons systems".

(240) *Ibid.*, p. 1151, saying that the EU defense market "is characterized by domestic monopolies" among Member States.

(241) For example, *see* W.P. Rogerson, "Economic Incentives and the Defense Procurement Process", *J. Econ. Perspectives*, 1994, pp. 65, 67, explaining, "Government is the only possible buyer of most weapons".

(242) "[W]here a monopsonistic seller faces a monopolistic buyer" economists call this a double monopoly. *See* J.N. Morgan, "Bilateral Monopoly and the Competitive Output", *Q.J. Economics*, 1949, p. 371. Several markets suffer from this condition, including professional sports, healthcare, and defense. Double monopolies are characterized by prices that are at least as high under a traditional monopoly or monopsony, perhaps even higher. *See* R.D. Friedman, "Antitrust Analysis and Bilateral Monopoly", *Wisc. L. Rev.*, 1986, pp. 873, 874-875.

(243) J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 27.



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web."(244) Far from disintegrating at the close of the Cold War as many predicted, NATO has proven to be indispensable. Europe's contribution to coalition forces in Afghanistan and Iraq (though not via NATO for the latter conflict) is but one manifestation of the value of this alliance. Corresponding depth in the arms trade through a version of the TTIP that includes defense may not be far off.(245)

A common trope is that the EU can hardly push for freer transatlantic defense trade when little exists even among its Member States.(246) But trade within the EU is flourishing, at least relative to where it was until a few years ago.(247) To be sure, protectionism and fragmentation persist.(248) But this market is nonetheless growing steadily. Americans worry that this brisk trade within the EU may devolve into a protectionist Fortress Europe that would exclude U.S. suppliers as European have long accused the United States of.(249)

The EU and the United States have different objectives for the transatlantic defense trade: the EU wants absolute equality in terms of volume traded; the United States wants comparable acquisition rules.(250) Yukins's recommendation to abolish the military-civil divide in the EU,(251) is emblematic: the United States seeks not a perfect balance of trade but to replicate its own system abroad.(252) But because the two systems are in many ways asymmetric,(253) this complicates mutual understanding and calls into ques-

(244) J. BECKER, "The Future of Atlantic Defense Procurement", *op. cit.*, pp. 10-11, 16.

(245) The longstanding transatlantic military cooperation is not the only reason for thinking that the TTIP may be on the horizon. Another is that most European defense integration has been achieved under the auspices of NATO. *See* gen. F. MÉRAND and K. ANGERS, "Military Integration in Europe", in *Beyond the Regulatory Polity: The European Integration of Core State Powers* (P. GENSCHEL and M. JACHTENFUCHS eds), Oxford, Scholarship Online, 2014. Left to their own devices, Member States consider their domestic defense industries as strategic hedges against their neighbors and historic rivals. But were the larger transatlantic community included, perhaps Member States would be more open to the liberalization of their defense markets.

(246) D. FIOTT, "The 'TTIP-ing Point': How the Transatlantic Trade and Investment Partnership Could Impact European Defence", *op. cit.*, p. 18, writing that "European countries can hardly push the case for reciprocity with the US when there is little reciprocity between themselves".

(247) *See* J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, pp. 2, 13, describing the increased competition within the EU.

(248) *See* M. STAPLES (ed), *The Future of European Defence: Tackling the Productivity Challenge*, *op. cit.*, p. 24, explaining, "The European defence industry has integrated to a degree but remains fragmented".

(249) *See* S.N. FERRARO, "The European Defence Agency: Facilitating Defense Reform or Forming Fortress Europe?", *op. cit.*, pp. 234, 552, 582, 611-614, reporting there is neither a "welcome mat at Europe's doorstep" nor any discernible "intent to exclude U.S. firms from the European market".

(250) *See* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, pp. 40, 51, explaining that "are two overall different views of the two way street system that transatlantic defence trade should represent: Europe sees it as a comparable traffic in volume and the U.S. sees it as comparable acquisition rules".

(251) *See* above Section 2.2.3.

(252) *See* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, pp. 40, 51.

(253) L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 14.



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tion how well the U.S. system can be transplanted.(254) Further, the U.S. federal procurement system is the product of improvisation;(255) as noted above, its foremost historian has observed that it is "inconceivable" that any reasonable person asked to design a public procurement system from scratch "would come up with our current system".(256) How well a system geared to the particular circumstances in the United States would work if transplanted abroad is uncertain.

One thing seems clear. Both sides would benefit from a liberalized market because both are afflicted by the pathologies common to defense economics.(257) Consolidation and cooperation are often prescribed.(258) But perhaps the better remedy is competition, particularly the *foreign* competition that would accompany trade liberalization.(259)

### 4.2. Mutual benefits from removing non-tariff barriers

Before tactics for carrying out liberalization are considered, the "critical issue" must be addressed. Namely, is such liberalization mutually beneficial?(260) Freeing up the transatlantic defense trade would be good policy for at least three reasons: the savings, improved military capabilities, and deeper ties within the transatlantic alliance.(261)

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(254) *See* gen. A. WATSON, *Legal Transplants: An Approach to Comparative Law*, 2nd ed., Athens (GEO), UGP, 1993, calling into question the transportability of legal systems.

(255) J.F. NAGLE, *History of Government Contracting*, *op. cit.*, p. 519.

(256) *Ibid.*, p. 519.

(257) *See* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. A-2: "The defense sector can no longer prosper in a bubble and is impacted by globalization on at least two fronts: the technology front and the investment front. A quick look at the U.S. and European defense industry landscape and defense equipment shows an ever growing common technology supply and multiple transatlantic investments. Even the United States who, as a nation, enjoys the highest defense investment in the world, could not afford to sustain its technology base by relying exclusively on domestic business. Let alone the sensitive political aspect of the issue, it is simply impossible both from a financial and commercial standpoint."

(258) *See* E. KLEPSCH, *Two-way Street: USA-Europe Arms Procurement*, *op. cit.*, p. 19, writing that "[q]uantities of ink have flowed on this intractable subject over many years".

(259) *See* C. BALIS, "Whither the EU Internal Defense Market? Thinking Beyond 'Pooling and Sharing'", *Avascent*, 2014, arguing that "trading and competing" are just as important as "pooling and sharing"; Defense Science Board, *Final Report*, *op. cit.*, p. 16, arguing that competition "could yield innovative, high-quality products, and, for domicile governments, a greater return on defense investments". "Such competition", the authors continue, "would stimulate innovation and create the incentive to adopt the industrial and acquisition related efficiencies that generate downward pressure on cost cycle-time".

(260) M. EDMONDS, "International Military Equipment Procurement Partnerships: The Basic Issues", *op. cit.*, p. 15.

(261) *See* Defense Science Board, *Final Report*, *op. cit.*, p. 16, writing that "[c]ross-border defense industrial links can help spread help spread the fiscal burden" and that such "transatlantic industrial links are a potential source of greater political-military cohesion" and would "amplify NATO fighting strength by enhancing U.S.-European interoperability and narrowing the U.S.-European technological gap".



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### 4.3. Economics

Defense economics is complicated and politically fraught; pursuing free trade on purely economic grounds would be overly simplistic.(262) Yet given the high cost of a modern military, affordability resonates.(263) Indeed, "The economics of defense is a powerful driver for change".(264)

As Stephen Martin, Keith Hartley, and Andrew Cox explain, the savings from a liberal transatlantic trade would accrue in three dimensions:

> "first, the static trade effect with purchasers buying from the cheapest, possibly foreign supplier; second, the competition effect which creates downward pressure on the prices of domestic firms as they attempt to compete with foreign companies entering previously protected domestic markets; and third, a restructuring effect as industry reorganises under the pressure of new competitive conditions[...]".(265)

Though the latter two may seem too theoretical, both sides would benefit immediately from the static trade effect. The United States spends too much on gold-plated products that cost billions and are only marginally better than the next best option.(266) European vendors can offer the Pentagon savings that it cannot refuse.(267) Similarly, too often Member States waste their budgets duplicating products that are available off the shelf from U.S. vendors.(268) Such savings could be politically valuable on both sides of the Atlantic.

Less obvious but no less real would be the benefits from the competition effect and the restructuring effect. Competition from abroad "constrain[s] the behavior of domestic suppliers" and drives down cost.(269) Longer term, the

(262) K. Hartley, "The Future of European Defence Policy: An Economic Perspective", *Defence and Peace Economics*, 2003, pp. 107, 112-113.

(263) J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 10.

(264) *Ibid.*, p. 265.

(265) S. Martin, K. Hartley and A. Cox, "Defence Procurement of Dual-use Goods: Is There a Single Market in the European Union?", *op. cit.*, p. 58.

(266) *See* W.S. Curry, "Government Abuse: Fraud, Waste, and Incompetence in Awarding Contracts in the United States", *Transaction*, 2014, pp. 1-2.

(267) *See* M. Sieff, "Europe Can Offer Defense Deals Washington Can't Refuse", 9:3 *Eur. Affairs*, Fall 2008, listing among the niche products that the United States has abandoned but provide far cheaper solutions the diesel-electric submarines that are built in France, Germany, and Sweden.

(268) B. Maudave, "U.S. Aerial Tanker Contract Decried As Symptom of Protectionism", www.europeaninstitute.org/index.php/ei-blog/95-march-2010/971-aerial-tanker-contract-decried-as-symptom-of-protectionism, accessed 4 July 2019, quoting Germany's *Die Welt* newspaper recommending that Europe "stop its common practice of senselessly developing some of its own weapons-products when it could just buy them from America".

(269) W.B. Burnett and W.E. Kovacic, "Reform of United States Weapons Acquisition Policy: Competition, Teaming Agreements, and Dual Sourcing", *op. cit.*, 298-299. *See* also Defense Science Board, *Final Report*, *op. cit.*, p. 16, explaining that foreign competition can "create the incentive adopt the industrial and acquisition-related efficiencies that generate downward pressure on cost".



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restructuring effect forces monopolistic domestic monopolies to reorganize in response to foreign competition.(270)

Estimates about the benefits of freeing up the transatlantic defense trade vary, but these savings are not paltry.(271) This is especially true in light of the large sums involved and the twin constraints of shrinking defense budgets and cost growth.(272) It is with good reason that efficiency is the most common argument made in favor of freeing up the transatlantic defense market.(273)

### 4.4. Capabilities

"Equipment wins wars".(274) In addition to the savings from freer trade, and the attendant potential for purchasing more equipment, both sides would benefit from *qualitatively* improved warfighting capabilities.(275) The United States has integrated a number of European weapon systems,(276) recognizing that European suppliers are the "world leaders in certain technologies with potentially military application"(277) and that the United States "does not have the monopoly on all key emerging military-relevant technologies".(278) The United States sometimes struggles to design and field weapons apace

(270) K. HARTLEY, "The Arms Industry, Procurement, and Industrial Policies", *op. cit.*, p. 1168, suggesting that governments ought to "subject their domestic monopolies to competition by allowing foreign firms to bid for national defense contracts".

(271) J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, pp. 53-54, describing vast potential for savings from foreign competition; H. KUECHLE, "The Cost of Non-Europe in the Area of Security and Defence, Study for the European Parliament", *op. cit.*, p. 7, predicting the savings from a liberalized market in Europe; K. HARTLEY, "The Future of European Defence Policy: An Economic Perspective", *op. cit.*, p. 112, estimating the savings at 10-20%.

(272) J. BECKER, "The Future of Atlantic Defense Procurement", *op. cit.*, p. 13. *See* also S. DE VAUCORBEIL, "The Changing Transatlantic Defence Market", in *Towards A European Defence Market*, *op. cit.*, pp. 89, 96, reporting that the cost of equipping a soldier has increased 100-fold since World War II and the price of a fighter plane increased 10,000% from 1944 to 1985.

(273) *See* M. EDMONDS, "International Military Equipment Procurement Partnerships: The Basic Issues", *op. cit.*, pp. 6, 10, "The most frequent argument in favor of international weapons procurement is economic".

(274) M. TRYBUS, *European Defence Procurement Law: International and National Procurement Systems as Models for a Liberalised Defence Procurement Market in Europe*, The Hague, Kluwer, 1998.

(275) *See* S. DE VAUCORBEIL, "Reforming the Transatlantic Defence Market", *op. cit.*, p. 119.

(276) S. DE VAUCORBEIL, "The Changing Transatlantic Defence Market", *op. cit.*, pp. 103-104, providing a table listing several European such weapons including, German canons and British armor on the M1A2 Abrams tank and the Swiss-designed Stryker armored vehicle.

(277) *Ibid.*, p. 111, quoting D. KEOHANE and T. VALASEK, *Willing and Able? EU Defence in 2020*, London, Centre for European Reform, 2008, p. 25.

(278) *Ibid.*, p. 111, quoting K. HAYWARD, *Friends and Rivals: Transatlantic Relations in Aerospace and Defence in the 21st Century*, London, Royal Aeronautical Society, 2005, p. 7. Europe's "strategy has been to devote fewer resources to defense-specific R&T and instead leverage innovations in commercial technology for military purpose". U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 44. European suppliers may thereby develop affordable alternatives to gold-plated U.S.-designed weapons.



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with emerging threats(279) and would benefit from "alternative competitive solutions" from Europe.(280) European suppliers may offer products that are superior in absolute terms(281) and others may offer "70% solutions" at a fraction of the cost.(282) And EU capabilities would likewise benefit from a freer transatlantic trade,(283) given that the U.S. defense industry still constitutes "the main technology driver[s] in the field".(284)

### 4.4.1. Politico-military

Two decades ago, the European Court of Justice observed: "it is becoming increasingly less possible to look at security of the State in isolation, since it is closely linked to the security of the international community at large".(285) The truth of that observation seems obvious today. Further, though skeptics prophesied NATO would fall apart with the end of the Cold War, the North Atlantic countries share common security threats and "are becoming more

(279) *See* Committee on Armed Services, U.S. House of Representative, 114th Congress, 27 October 2015, "Shortening the Acquisition Cycle", p. 99, appending A. CARTER, "Running the Pentagon Right: How to Get the Troops What They Need", *Foreign Affairs*, 6 December 2013, saying "the same system that excels at anticipating future needs [...] proved less capable of quickly providing technology and equipment" for the rapidly changing conditions in Afghanistan. But such problems extend beyond rapidly evolving operational needs. *See* National Research Council, *Optimizing U.S. Air Force and Department of Defense Review of Air Force Acquisition Programs*, Washington, National Academies Press, 2009, p. 1, writing, "Too often DoD weapons systems programs experience large cost overruns and schedule delays, contributing to a loss of confidence in the DoD acquisition system".

(280) *See* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 3, explaining that "Europe can offer competitive solutions to the U.S. military with technology derived from the commercial sector". For examples *see* M. SIEFF, "Europe Can Offer Defense Deals Washington Can't Refuse", *op. cit.*, p. 269, describing BAE's contribution to up-armoring vehicles for Iraq and Afghanistan; U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 81, explaining that "European technologies were already available and suited to" the Littoral Combat Ship because this size of ship and type of mission "were more traditionally European".

(281) *See* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 81, noting that when European firms successfully compete in the U.S. market the general rule "is that European products do not win on price but on their technological edge". Some examples include electric-diesel submarines, de-gauzed minesweepers, and littoral ships. *See* M. SIEFF, "Europe Can Offer Defense Deals Washington Can't Refuse", *op. cit.*, p. 269.

(282) J.P. BIALOS, C.E. FISHER and S.L. KOEHL, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 3, explaining that "enhanced market access can not only result in more competition, and the innovation and affordability it can bring, but also can facilitate our war fighters' access to existing 70 percent solutions from abroad" thereby "putting the practical ahead of the perfect".

(283) S. DE VAUCORBEIL, "Reforming the Transatlantic Defence Market", *op. cit.*, p. 119, arguing greater "cross-border competition across the Atlantic" would help Europe to "beef up its capabilities".

(284) S.G. NEUMAN, "Defense Industries and Global Dependency", *op. cit.*, p. 443, quoting an official at the Swedish Defense Material Administration.

(285) *Fritz Werner Industrie Ausrustungen GmbH v Germany*, case C-70/94, *ECR* I-3189, 1995, p. 26; *Criminal Proceedings against Leifer*, case C-83/94, *ECR*, I-03231, 1995, p. 27.



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deeply integrated than even before".(286) Yet deep ties in political and military affairs contrast starkly with the defense trade.(287) The logic behind deepening the level of defense trade among such close allies is irresistible.(288) Rather than jeopardizing security of supply as some would suppose, procuring from allies would broaden the supply base and enhance the security of supply within the alliance.(289) Freeing up defense would also revitalize NATO at a time when America is complaining especially vociferously that Europeans are failing to pay their fair share for defense.(290) Liberalizing defense would further "entangle" members of the alliance(291) because importing weapons is not a one-off transaction but rather "implies agreement from the seller to provide technical assistance" and thus entails a long-term relationship.(292)

### 5. *Strategies for Removing, Mitigating, and Avoiding Non-Tariff Barriers*

The weight of this essay has described differences of history, constitution, and law that create non-tariff barriers. The balance considers four options for removing, mitigating, or avoiding those barriers. Three are considered in this section, and the fourth is addressed in the conclusion and concerns this essay's larger project of developing better mutual understanding. In the author's forthcoming doctoral thesis, the latter effort extends beyond defense to cover the whole of the public procurement.

There are several strategies that this section does not consider, which may seem obvious and would likely fit under the near-term strategies discussed in Section 5.3. Namely, that firms can mitigate non-tariff barriers by establishing

(286) J. Becker, "The Future of Atlantic Defense Procurement", *op. cit.*, pp. 10-11, 16, describing a "dense web of interactions" that unites NATO countries and asserting, "How both Europe and America define their security interests has become inextricably intertwined".

(287) *See* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 41, noting that defense trade is incommensurate with the "importance of the transatlantic defence relationship from the political standpoint".

(288) M. Edmonds, "International Military Equipment Procurement Partnerships: The Basic Issues", *op. cit.*, p. 7.

(289) *See* D. Fiott, "The 'TTIP-ing Point': How the Transatlantic Trade and Investment Partnership Could Impact European Defence", *op. cit.*, p. 23, writing that "[o]ne method of ensuring supply security is to increase the supply base" to include transatlantic vendors; A. Mayer, "Military Procurement: Basic Principles and Recent Developments", 21:1 *GW J. Int'l L. & Econ.*, 1987, pp. 165, 179-182, explaining multiple sourcing.

(290) S. de Vaucorbeil, "Reforming the Transatlantic Defence Market", *op. cit.*, p. 128.

(291) *Ibid.*, p. 292, citing E.B. Kapstein, "Allies and Armaments", *Survival*, Summer 2002, pp. 141, 143-144, summarizing the defense economics literature and maintaining that armaments cooperation entangles allies and leads them to form deeper relationships.

(292) M.D.C. García-Alonso and P. Levine, "Arms Trade and Arms Races: A Strategic Analysis", in *Handbook of Defense Economics*, 2007, *op. cit.*, pp. 941, 947.



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local subsidiaries (either organically or through mergers and acquisitions), entering into joint ventures with domestic suppliers, or hiring local counsel. Such options were mentioned in Section 2.3.2 but are skipped over here because, while obvious, they are often costly and inefficient. They can impose transaction costs that render foreign competition cost prohibitive, especially for smaller firms.

### 5.1. The long-term strategy for removing non-tariff barriers: harmonization via reciprocal defense agreements

One policy option that has thus far gone unmentioned is the use of reciprocal defense procurement agreements (RDAs). This omission resulted in part from this essay's hypothetical under which the TTIP has come into force and overt trade barriers have been removed and only subtle non-tariff barriers remain. Now that problems with such barriers have been set forth, the balance of this essay turns to potential solutions. One such is the use of RDAs to encourage the harmonization of defense procurement.

RDAs emerged during the Cold War, seek to establish free trade in defense, and consist of mutual assurances of nondiscrimination in the form of memoranda of understanding.(293) This U.S.-led initiative sought rationalization, standardization, and interoperability of defense equipment among allies.(294) Sometimes the RDA's wording suggests that they would venture beyond strategic concerns "to facilitate the mutual flow of defense procurement"(295) and trade liberalization more broadly. These bilateral agreements are, therefore, an alluring option for freeing up a sector that various multilateral trade agreements have mostly passed by.(296)

Some advocate a more ambitious goal: the broader harmonization of procurement rules to facilitate cross-border procurement.(297) In a perfect world, that would make cross-border procurement easier, cheaper, and perhaps more common. So far TTIP negotiations seem to have ignored, or at least failed

(293) D.B. MILLER, "Note, Is it Time to Reform Reciprocal Defense Agreements?", *Pub. Cont. L.J*, 2009, p. 93.

(294) *Ibid.*, p. 95.

(295) Memorandum of Understanding Between the Federal Minister of Defense of the Federal Republic of Germany and the Secretary of Defense of the United States of America Concerning the Principles Governing Mutual Cooperation in the Research and Development, Production, Procurement and Logistic Support of Defense Equipment, U.S.-F.R.G., 17 October 1978, Art. I, § 1.1, www.acq.osd.mil/dpap/Docs/mou-germany.pdf, accessed 4 July 2019.

(296) *See* D.B. MILLER, "Note, Is it Time to Reform Reciprocal Defense Agreements?", *op. cit.*, p. 95, observing that defense procurement "has largely been excluded from the march toward liberalization".

(297) *See* gen. C.R. YUKINS and S.L. SCHOONER, "Incrementalism: Eroding the Impediments to a Global Public Procurement Market", *op. cit.*



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to prioritize, such harmonization efforts.(298) Even the most optimistic partisans concede that harmonization is at least a generation away.(299) Meanwhile, perhaps RDAs may serve as a useful step toward such harmonization that like-minded policymakers can push for, even if their domestic politics would preclude broader reforms for the time being. Updating existing agreements with EU Member States and perhaps establishing a new RDA at the EU level may form part of that solution.(300)

Yet RDAs are not a panacea. While RDAs may succeed at addressing overt barriers to trade such as the Buy American Act or the Berry Amendment, they fail to address problems with the subtler kinds of non-tariff trade barriers discussed in this essay. The structural restrictions that discourage vendors from participating in transatlantic procurement opportunities would persist. Even if overt barriers are removed, the remaining structural restrictions would still "raise practical barriers to entry as foreign vendors run headlong into dense and alien procurement regimes".(301)

RDAs are, therefore, helpful as far as they go. But opening up the transatlantic trade fully will require either harmonization of procurement rules, which is unlikely in the near term, or a solution that would somehow avoid the problems arising from deep dissimilarities in the two systems. As this essay has been at pains to demonstrate, simply removing overt barriers will not suffice: even if the letter of the law were the same, in practice the law would be interpreted and applied differently due to incommensurable cultural, constitutional, and political differences. In short, using RDAs to encourage harmonization mitigates the problem, but would not fully resolve it.

### 5.2. Medium-term strategies for mitigating non-tariff barriers

In addition to the political efforts to remove non-tariff barriers, there lies a parallel academic and didactic effort. This entails developing a better understanding of the differences between the EU and U.S. systems and then socializing that research to a broader audience. Butler's book has done a great

(298) *See* S. Woolcock and J.H. Grier, "TTIP and Public Procurement", in *Rule Makers or Rule Takers? Exploring the Transatlantic Trade and Investment Partnership* (D.S. Hamilton and J. Pelkmans eds), Brussels, Center for European Policy Studies, 2015, pp. 297, 321-323.

(299) C.R. Yukins and S.L. Schooner, "Incrementalism: Eroding the Impediments to a Global Public Procurement Market", *op. cit.*, pp. 530, 558.

(300) D.B. Miller, "Note, Is it Time to Reform Reciprocal Defense Agreements?", *op. cit.*, pp. 295, 102-112, advocating that RDAs should be modernized to incorporate the GPA's transparency requirements and broader trade liberalization goals.

(301) C.R. Yukins and S.L. Schooner, "Incrementalism: Eroding the Impediments to a Global Public Procurement Market", *op. cit.*, p. 558.



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service to this cause, but much work remains.(302) This essay is also primarily devoted to that effort; the conclusion (Section 6.) remarks on progress made. This section, however, considers some practical options for removing non-tariff barriers to a freer transatlantic defense trade. These medium-term policy options require neither politically challenging legal reforms nor awaiting the slow accretion of academic contributions.

### 5.2.1. Addressing public relations

If the TTIP is ever going to happen, would-be reformers must persuade both policymakers and their constituencies.(303) Not only is the public unusually skeptical about the merits of free trade at present, defense remains politically sensitive.(304) So successful persuasion will require artful statecraft. This section outlines what such statecraft may encompass.

Having missed the chance to extend an olive branch with the aerial tanker procurement a decade ago, perhaps the United States should take the first step toward reconciliation. The DoD could start by acknowledging that mistakes were made(305) and reaffirm its openness to competition in future.(306) Otherwise, the extent that the EU considers U.S. policy to be protectionist, it

(302) L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, pp. 8-9, acknowledging that he is providing a "framework" for "more systematic comparative research" that may be possible in future and offering a "preliminary mapping exercise". Given the dearth of research in comparative U.S./EU procurement, this signifies a major contribution.

(303) Even if the TTIP passes, as this essay's hypothetical assumes, the politics of defense procurement must be considered and addressed. Even if the overt rules favor liberal trade, national preferences can still be exerted covertly – and further differences in the two procurement regimes may create non-tariff barriers unintentionally. So it is necessary to persuade the public and policymakers alike of the virtues of free trade in defense.

(304) *See* A. Georgopoulos, "The EDA and EU Defence Procurement Integration", *op. cit.*, p. 118, observing that defense is "linked to core functions of the notion of the Westphalian nation State"; J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 30, describing the "close linkage" between domestic defense markets and sovereignty; J. Mawdsley, "The Gap Between Rhetoric and Reality: Weapons Acquisition and ESDP", Paper 26, *BICC*, 2002, pp. 4-5, writing that defense acquisition "touches the heart of the concept of sovereignty of the nation State", that this "rhetoric is both emotive and fundamental to the Westphalian ideas of statehood" and that "national autonomy in the armaments sector has therefore traditionally been very important for States".

(305) *See* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, pp. 59-60, remarking that the handling of the aerial tanker procurement evinced a protectionist atmosphere in Congress; R.F. Laird, "US Flap on the Aerial Tanker Could Be Self-Defeating", *Eur. Affairs*, Fall 2008, warning that U.S. chauvinism would come "at the expense of allies and of hopes for strongly expanding the transatlantic defense-industrial base on which future force modernization depends".

(306) Defense Science Board, *Final Report*, *op. cit.*, p. 48, recommending the DoD "publicly reaffirm [...] its willingness to consider a range of cross-border defense and industry linkages [...] that enhance U.S. security, interoperability with potential coalition partners, and competition in defense markets".



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will respond in kind.(307) By taking the lead on freer cross-border trade and articulating a public relations campaign to offset past mistakes, the United States can influence the EU's perception of U.S. protectionism.(308) Such efforts would include advocating that the longstanding imbalance in U.S.-EU the arms trade should not be a cause for concern(309) and the implementation of outreach programs to lower barriers for foreign vendors.(310) They would also include greater honesty about the limitations of the U.S. constitutional structure. That structure endows Congress with a potent role in the public procurement process and constrains aspirations to commercial efficiency. The United States would do well to exercise caution when touting its businesslike procurement system abroad since political favors to congressional constituencies play a significant role in defense procurement.(311)

The EU can also do its part to encourage friendly relations. High among its priorities ought to be dispelling lingering worries that the Defence Directive will be used to discriminate against U.S. contractors.(312) While the EU has so far "maintained a position of ostensible neutrality concerning third country participation", it should make that position explicit.(313) It should also cast aside heavy-handed tactics such as the IPI (Section 3.3.2), which only embitters trade negotiations and, if enacted, would exacerbate existing tensions. If unfamiliarity with the idiosyncrasies of 28 distinct systems discourages foreign tenders, perhaps the EU should devote resources to outreach programs to stimulate competition, especially from smaller firms.(314) Foremost, the EU should reconsider its specious

(307) *See* D.B. Miller, "Is it Time to Reform Reciprocal Defense Procurement Agreements?", *Pub. Cont. L.J.*, 2009, pp. 93, 107-108, predicting that "the more Europe perceives American trade policy as protectionist, the more apt Europe is to impose retaliatory measures" and warning that "prospects for such a tit-for-tat exchange have no doubt been heightened by the circumstances surrounding cancellation of the Air Force refueling tanker".

(308) *See* J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 4, observing that "risks of 'fortress-like' conduct on both sides of the Atlantic are interactive" and that "policies and attitudes" trigger reciprocal responses.

(309) *See* below Section 5.2.2.

(310) *See* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 88.

(311) *See* above Section 2.2.2. *See* also D.I. Gordon and G.M. Racca, "Integrity challenges in the EU and U.S. procurement systems", in *Integrity and Efficiency in Sustainable Public Contracts* (G.M. Racca and C.R. Yukins eds), Brussels, Bruylant, 2014, pp. 117, 142, noting that the United States tolerates political activity that is tantamount to corruption: "lobbying and contributions to political campaigns mean that large amounts of money pass between private actors and government officials".

(312) *See* L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 7, noting that U.S. commentators have "inevitably identified the potential for certain provisions to become disguised market barriers [...] against US contractors".

(313) *Ibid.*, pp. 447-448.

(314) *See* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 88.



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complaints about the trade imbalance, and recognize that such concerns rest on the outmoded premises of mercantilist economics. The next section elaborates on this topic.

### 5.2.2. Debunking the trade imbalance

Europeans have long decried the *imbalance* in the defense trade.(315) That imbalance is both large(316) and longstanding.(317) While this is due in part to U.S. protectionism, that is not the whole story. The very notion of a trade "imbalance" derives from the mercantilist theory that Adam Smith debunked in 1776.(318) But setting aside competing theories of international trade, there are several explanations for the trade imbalance other than U.S. protectionism.

U.S. defense contractors are often more efficient due to economies of scale.(319) Not only do EU Member States spend less than the United States, their production is divided among 28 separate markets(320) with small production runs.(321) EU competitors also have to add the cost of shipping their exports to the United States, making their wares even more expensive.(322)

Perhaps the most salient fact is that the trade imbalance closely tracks R&D spending. The trade imbalance is a ratio of roughly 5:1 or 6:1.(323) Likewise, the United States outspends the EU on R&D by a ratio of 6:1.(324) U.S. defense contractors enjoy a windfall from the federal government's spending

(315) *See* W. Walker and S. Willett, "Restructuring the European Defence Industrial Base", *op. cit.*, p. 155, reporting that the "imbalance in favour of the United States in its transactions with its Western European allies has been a constant source of irritation".

(316) *See* J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 27, reporting that U.S. defense exports to Europe "dwarf" the EU defense exports to the United States both in absolute and relative terms.

(317) *See* U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 19, reporting that the trade imbalance has been "more or less constant over the last 20 years".

(318) Long story short, if trading were not in nations' mutual interest, they would stop.

(319) *See* E. Klepsch, *Two-way Street: USA-Europe Arms Procurement*, *op. cit.*, pp. 26-27.

(320) M. Staples (ed), *The Future of European Defence: Tackling the Productivity Challenge*, *op. cit.*, pp. 14-15, reporting that although the EU spends less than half what the United States does, it funds six times as many weapon systems and if the European defense industry were as consolidated as in the United States "batch sizes would be 570 percent bigger".

(321) *See* E. Klepsch, *Two-way Street: USA-Europe Arms Procurement*, *op. cit.*, p. 30, reporting that small production runs are Europe's fundamental problem.

(322) U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 45, explaining that "market forces favour assembly lines in the US" because the United States buys a larger share of defense goods and services than any country in the world.

(323) J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses & Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security*, *op. cit.*, p. 27.

(324) U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 16.



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priorities.(325) R&D spending priorities results in qualitative differences. Perhaps the United States buys more from domestic suppliers mainly because they offer products that are qualitatively better. If so, then European expectations for a strict balance of trade are misplaced.

Finally, it bears mentioning that although the United States exports more defense goods and services to Europe than it imports, overall trade flows favor the EU (to the extent that such an imbalance "favors" one side from a mercantilist perspective).(326) Overall, the EU exports far more to the United States than it imports – and this holds true not only for U.S./EU trade generally but also for public procurement.(327) So it seems strange to fixate on one sector and to demand parity. If the mercantilist trade philosophy reigns and a nation is "winning" in overall trade flows, why should it matter if the EU is "losing" in a few isolated sectors?

### 5.2.3. Reforming export control regimes

As mentioned, ITAR has "long put off" and even "actively denied [...] European firms from entering the U.S. market".(328) Lowering this barrier would be perhaps the most promising reform to the transatlantic defense market. In the short run, the U.S. government should seek to educate foreign firms that may be intimidated by this complicated restriction on technology exports.(329) In the longer run, the United States should create a transatlantic "general license" that would waive ITAR's strictures for members of the transatlantic alliance.(330) This would present "an historic opportunity [...] for harmonization of export control regimes across the Atlantic given the attention being paid to the issue on both sides of the Atlantic".(331)

(325) *Ibid.*, p. 7, noting that this sector remains "grossly in favour of the United States but this imbalance in market share is not greater than the imbalance in defense spending and investment between the U.S. and Europe".

(326) U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, p. 40.

(327) *See* G. Gambini, R. Istatkov and R. Kerner, "USA-EU – International Trade and Investment Statistics, EU and United States form the largest Trade and Investment Relationship in the World", *op. cit.*, p. 4, reporting that the trade balance is "positive", meaning that EU's exports to the United States are greater than its imports from the United States; General Accounting Office, *International Trade: Foreign Sourcing in Government Procurement*, GAO-19-414, 2019, pp. 20-22, reporting that in 2015 the U.S. federal government bought $2.8 billion from European contractors, whereas EU member states bought only $300 million from American contractors.

(328) D. Fiott, "The 'TTIP-ing Point': How the Transatlantic Trade and Investment Partnership Could Impact European Defence", *op. cit.*, p. 17.

(329) U.S.-Crest, "The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries", *op. cit.*, pp. 45, 51.

(330) *Ibid.*, p. 90.

(331) *Ibid.*, p. 5.



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### 5.2.4. Consolidation versus specialization

Received opinion says that European defense contractors must consolidate to achieve economies of scale necessary to compete with U.S. contractors. Commentators often repeat this mantra.(332) There is a logic to it. But it is strange that a country that is so paradigmatically a free trade advocate prescribes collectivism for defense acquisitions.(333) Attempts to consolidate in Europe have repeatedly foundered,(334) not least because nations treasure their independence in this area.(335) Even if there is too much product differentiation in Europe, too much consolidation is also not without costs.(336) The United States's own consolidation, for example, may have gone too far, with an industry that is now characterized by a few large firms that exercise market power.(337)

There is an alternative. Rather than consolidation, perhaps the better course would be to specialize and pursue a "core competency strategy".(338) Some have suggested that this was the obvious strategy for post-Cold War Europe, but instead it sought consolidation.(339) The result of this consolidation has been that a few multinational firms dominate both U.S. and EU defense industries. Whereas multinational firms were once favored, they are now increasingly in disrepute.(340) It may prove unfor-

(332) For example, *see* the National Defense Authorization Act of 1976, Section 803(c), saying "It is the sense of Congress that standardization of weapons and equipment within the North Atlantic Alliance on the basis of a two-way street between Europe and North America could only work in a realistic sense of the European nations operated on a united and collective basis".

(333) K. HARTLEY, "The Political Economy of NATO Defense Procurement Policies", in *International Military Equipment Procurement Partnerships: The Basic Issues*, *op. cit.*, pp. 98, 112, noting the "paradox" that a free market economy like the United States would propose "socialist solutions".

(334) *See* S.G. NEUMAN, "Defense Industries and Global Dependency", *op. cit.*, p. 442, recounting that "attempts to create a unified market and to end costly industrial duplication have foundered on concerns about national sovereignty, the security of supply, and the conflicting strategic interests of Europe's small and large countries".

(335) *See* K. HARTLEY, "The Future of European Defence Policy: An Economic Perspective", *op. cit.*, p. 112, noting that EU consolidation has failed in part because nations prefer their independence; S.G. NEUMAN, "Defense Industries and Global Dependency", *op. cit.*, p. 438, noting that the "dark side" is "dependency" and "forgoing the production of one or more classes of weapons means the military can no longer initiate a full range of military operations".

(336) *See* K. HARTLEY, "The Political Economy of NATO Defense Procurement Policies", in *International Military Equipment Procurement Partnerships: The Basic Issues*, *op. cit.*, pp. 98, 99, noting that "it is possible that there is 'too much' and product differentiation within NATO, but reductions are not costless and complete elimination might not be worthwhile".

(337) *See* J.S. ZUCKER, "The Boeing Suspension: Has Increased Consolidation Tied the United States Department of Defense's Hands?", *PPLR*, 2004, pp. 260, 262, 276, explaining that the "drastic consolidation" created an oligopoly and is "making it difficult to suspend or debar mega-defence contractors".

(338) *See* S.G. NEUMAN, "Defense Industries and Global Dependency", *op. cit.*, p. 443.

(339) *See* W. WALKER and P. GUMMETT, "Nationalism, Internationalism, and the European Defence Market", *op. cit.*, p. 18, observing that specialization was an "obvious solution" but that "[b]y and large, this did not happen".

(340) *See* gen. Briefing, "The Retreat of the Global Company", *Economist*, 3 February 2017, pp. 18-22.



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tunate if Europe finishes its defense industry consolidation project just as scholars and business leaders begin to question the efficiency of sprawling organizations.(341)

### 5.3. A near-term strategy for avoiding non-tariff barriers: the U.S. foreign military sales program as a model for collaborative procurement

The United States's Foreign Military Sales (FMS) program presents an alluring model for furthering transatlantic defense collaboration and perhaps beyond. This section describes the FMS program, defines collaborative procurement under the EU procurement directives, and then explains how FMS is compatible with collaborative procurement, how it may further the transatlantic defense trade, and how it could serve as a model for wider procurement policy.

#### 5.3.1. The U.S. foreign military sales program

Among the United States's primary foreign policy tools is foreign military assistance, whereby America transfers defense equipment to friends and allies.(342) FMS is species of U.S. security assistance, which traces it lineage to 1941 assistance to the British during World War II through the Lend-Lease Program.(343) For three decades, the United States transferred defense gear to Cold-War allies under precursors to FMS.(344) Congress established FMS in its current form in the late 1970s.(345)

Under the auspices of the FMS program, the U.S. government either sells from its own stockpiles or serves as middleman between U.S. defense contractors and foreign governments.(346) It is the latter that is of most interest because FMS allows U.S. defense contractors to avoid the complications that arise from selling abroad, such as securing export licenses(347) and domestic requirements such as full and open competition.(348) Governments have the

(341) *Ibid.*

(342) A.B. Green, *International Government Contract Law*, New York, West, 2011, pp. 109-110.

(343) *Ibid.*, p. 110.

(344) *Ibid.*, pp. 110-111.

(345) *Ibid.*, pp. 111-112, citing 22 U.S.C. §§ 2751–2799, originally known as the Foreign Military Sales Act and now known as the Arms Export Control Act. *See* A.J. Perfilio, *Foreign Military Sales Handbook*, Toronto, Thomson, 2016, §§ 1.4 and 1.5 for a description of the deep differences in President Carter's and Reagan's FMS policies.

(346) Security Assistance Management Manual, § C4.4.1, www.samm.dsca.mil/, accessed 4 July 2019, "Defense articles or services may be sold from DoD stocks, or the DoD may enter into contracts to procure defense articles or services on behalf of eligible foreign countries or international organizations".

(347) A.B. Green, *International Government Contract Law*, *op. cit.*, p. 113, noting that FMS alleviates the need for contractors to secure export licenses.

(348) For example, one of the cornerstones of the U.S. federal procurement system is the Competition in Contracting Act (CICA), but foreign governments may waive full and open competition when purchasing via the FMS program. A.J. Perfilio, *Foreign Military Sales Handbook*, *op. cit.*, § 4.12, citing



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option of buying most defense products directly from U.S. contractors,(349) but they vote with their feet: fully 90% of U.S. defense exports are consummated through the FMS program.(350)

The U.S. is the world's largest defense exporter(351) in part because it sells superior wares, but perhaps the FMS program also explains its dominance. FMS is much more than clever marketing. It reduces uncertainties and transaction costs for buyers and sellers.(352) This intermediary service isn't free. The United States demands a surcharge.(353) Rapid growth in FMS in the past two decades, however, suggests this is a price that foreign buyers willingly pay.(354)

Perhaps the secret to FMS's success lies in the nature of the contractual relationship. Entering into an FMS agreement entails paying the U.S. government to buy from contractors on their behalf.(355) Privity of contract lies not with the manufacturer but with the middleman. The buyer thereby benefits from the same terms and conditions that would apply if the United States were buying on its own behalf. Such benefits would include economies of scale, contract management expertise, and a predictable legal system.(356)

### 5.3.2. Collaborative procurement in the EU

Collaborative procurement in a defense context is a term of art. It refers to a practice whereby Member States "agree to procure defence equipment and fund its development and/or production in common".(357) Many hope it can solve the EU's defense procurement problems.(358) Thus far such hopes seem to have been misplaced.(359) One commentator went so far as to say that the

FAR, § 6.302-4; 10 U.S.C. § 2304(c)(4).

(349) A.B. Green, *International Government Contract Law*, *op. cit.*, p. 113, explaining that in 2011 about 40 defense articles were available only through the FMS program and could not be purchased through direct commercial sale.

(350) A.J. Perfilio, *Foreign Military Sales Handbook*, *op. cit.*, § 1.2.

(351) *Ibid.*, § 1.1.

(352) *Ibid.*, p. 113.

(353) *Ibid.*, § 3.19, explaining that by statute FMS must be managed at no cost to the United States, citing SAMM C.9.3.1.

(354) *Ibid.*, § 1.2, reporting that annual FMS sales averages $10 billion in the 1990s, climbed to $20 billion in the aughts, and is hovering around $30 billion the in the past decade.

(355) *Ibid.*, § 3.3, explaining that the DoD "uses the same procedures and mechanisms when conducting procurements for its own use" and the same federal acquisition law applies – the FAR, DFARS etc.

(356) A.B. Green, *International Government Contract Law*, *op. cit.*, p. 113.

(357) B. Heuninckx, "A Primer to Collaborative Defence Procurement in Europe: Trouble, Achievements, and Prospects", *PPLR*, 2008, p. 123.

(358) *Ibid.*, pp. 124-125, listing economies of scale, greater interoperability, stable funding for defense R&D, stronger ties among participating States, and technology transfer among the benefits that Member States hope for.

(359) *Ibid.*, pp. 131-139, demonstrating collaborative procurement undermines interoperability, delays development, and increases costs.



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only thing worse than Member States' fragmentation in defense procurement is their collaboration.(360)

Collaborative procurement is indisputably exempted from the Defence Directive and does not apply to contracts awarded in the framework of a cooperative programme based on research and development, conducted jointly by at least two Member States for the development of a new product and, where applicable, the later phases of all or part of the life-cycle of this product.(361)

A closer question, however, is whether the Directive would cover government-to-government purchases from third countries (that is, non-EU Member States).(362) EU defense procurement experts are divided on this point.(363) Whatever the academic answer maybe, as a practical matter most EU countries are FMS purchasers.(364) This essay proceeds on the assumption that FMS is not covered by the Defence Directive and, thus, that FMS purchases remain permissible.(365)

### 5.3.3. FMS as a model for collaborative procurement

Thus far the FMS program has been described mainly as a vehicle for increasing the United States's already favorable balance of trade in defense exports. But it is more than that. The aims of the FMS program's enabling statute are surprisingly compatible with the aims of collaborative procurement under the EU Defence Directives. Four decades ago, the opening section of the Arms Export Control Act recognized that "[b]ecause of the growing cost and complexity of defense equipment, it is increasingly difficult and uneconomic

(360) B. SCHMITT, "The European Union and Armaments: Getting a Bigger Bang for the Euro", in *Chaillot Papers*, Pretoria, ISS, 2003, pp. 10-11, "Ironically, armaments cooperation has often made things even worse" because "cooperative projects have implied complex institutional and industrial settings, creating delays and extra costs".

(361) Dir. 2009/81/EC, Art. 13(c).

(362) A.E. IPPOLITO, *Government to Government Contracts*, in *EU Defence Procurement*, 2014, Cambridge, CUP, pp. 249-250, 261, arguing that the "prevailing view" is that the public procurement directives would not cover FMS purchases, but noting Martin Trybus's disagreement.

(363) *Cf. ibid.*, pp. 250, 261 (not covered). B. HEUNINCKX, "Lurking at the Boundaries: Applicability of EU Law to Defence and Security Procurement", *PPLR*, 2010, p. 91 (not covered). And E. ANDRESEN, "The New EU Defense and Security Procurement Directive", *Colum. J. Eur. L*, 2011, p. 22 (not covered); with M. TRYBUS, "The Tailor-made EU Defence and Security Procurement Directive: Limitation, Flexibility, Descriptiveness, and Substitution", *ELR*, 2013, p. 3, arguing FMS is covered because otherwise such purchases would violate Art. 11's anti-circumvention provision and citing three compatriots who agree with him.

(364) Accurately calculating FMS spending is hard. For estimates based on historical purchases over the previous 10 years, *see* FY 2010 Congressional Budget Justification, Foreign Assistance, Title IV Supporting Information, 2009, accessed 4 July 2019 at https://2009-2017.state.gov/f/releases/iab/fy2010cbj/pdf/index.htm, pp. 2-6, listing most EU Member States.

(365) Even if the Defence Directive applies to third-country transactions such as FMS purchases, it remains unclear what effect the Directive would have. *See* L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 412. Practically speaking, most Member States regularly employ FMS purchases, and theoretical arguments that would forbid FMS seem futile. *See ibid.*, p. 367.



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for any country [...] to fill all of its legitimate defense requirements from its own design and production base".(366)

"Accordingly," the preamble to the statute continues,

> "it remains the policy of the United States to facilitate the common defense by entering into international arrangements with friendly countries which further the objective of applying agreed resources of each country to programs and projects of *cooperative exchange of data, research, development, production, procurement, and logistics support* to achieve specific national defense requirements and objectives of mutual concern".(367)

This "cooperative exchange" resonates with the Defence Directive's exception for cooperative R&D among Member States.(368) Perhaps FMS would be more regularly used if the United States saw it as an opportunity to enter what would be effectively collaborative research, development, and procurement projects with its European allies.

If the FMS program is imperfectly implemented, two features may deserve emulation and definitely merit further study. First, FMS lowers the transactions costs for both buyers and sellers and thereby encourages cross-border procurement on a massive scale, no small feat given how much the EU has struggled to stimulate cross-border procurement among Member States. Just how it does this is not a simple matter and would be an essay unto itself, but perhaps the answer lies partly in the second feature.

Unlike most collaborative procurement, which is purely government-to-government or at least orchestrated by and among governments, FMS crucially involves a private party that can freely walk away from uneconomic deals. This may introduce an element of market rigor that is often missing. FMS may function as a *simulacrum* of a free market – not as good as the real thing, but less dysfunctional than how public procurement "markets" usually work.

As noted, the FMS model is imperfect. The premium for having the U.S. government contract on another country's behalf is not insignificant.(369) FMS is subject to the whims of U.S. foreign policy, which are sometimes unpredictable.(370) Buyers have been disappointed to learn that without privity of

(366) 22 U.S.C. § 2751.

(367) *Ibid.* (emphasis added).

(368) Dir. 2009/81/EC, Art. 13(c).

(369) The surcharge totals 4.7%, the sum of the Contract Administration Services rate (1.2%) and the Administrative Surcharge rate (3.5%). Defense Security Cooperation Agency, News Release, 3 November 2013, www.dsca.mil/news-media/news-archive/cost-foreign-military-sales-reduced.

(370) A.J. Perfilio, *Foreign Military Sales Handbook*, *op. cit.*, § 1.1, describing the political tension arising from FMS given that it implicates sensitive questions about foreign and trade policy, domestic employment, and national security; *ibid.*, §§ 1.4 and 1.5, describing the massive swings in FMS policy from the Carter to the Reagan administrations.



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contract they lack standing and cannot sue in U.S. federal court.(371) This list is hardly exhaustive. Yet despite such shortcomings, FMS may serve as an innovative model not just for collaborative defense procurement but for collaborative procurement generally.

## *6. Conclusion*

Perhaps more questions have been raised in this essay than answers have provided; many loose ends remain. It has attempted to introduce some problems of mutual understanding that have created non-tariff barriers and to provide some options for addressing those barriers.

Because the comparative discussion across the Atlantic has been limited thus far,(372) scholars now have an opportunity to make a practical contribution to defense procurement:

> "unlike in the context of public procurement in which comparative legal analysis has largely grown in response to regional and international initiatives, there is now a real opportunity for comparative legal analysis to directly inform rather than simply respond to regional and international initiatives. Ultimately, a clearer legal and empirical understanding which may result from comparative analysis could improve the quality of the decision-making of policy-makers and legislators tasked with ensuring not only that defence procurement regulation is effective to meet national objectives but also, increasingly, objectives of regional and international trade".(373)

To this end, this essay has sketched out the historical, constitutional, and legal underpinnings of the public procurement systems in the United States and the EU. The goal has been to directly inform the free trade initiatives that are on the horizon for the transatlantic defense market.(374)

Cross-border defense procurement within the EU remains limited. If the past is any guide, Europe's prospects for achieving further liberalization of its own accord seem dim.(375) Paradoxically, hope for freeing up European defense lies farther afield – given that most of the integration within Europe

(371) *See Secretary of State for Defence v. Trimble Navigation Limited*, 484 F.3d 700, 707-09 (4th Cir. 2007), holding that the purchasing government under an FMS government is not granted third-party beneficiary status and therefore cannot bring direct legal action against the defense contractor.

(372) L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, *op. cit.*, p. 438.

(373) *Ibid.*, p. 374.

(374) *Ibid.*

(375) *See* C. CRANE, "Dealing with Reality: the Difficulties of European Consolidation", in G. ADAMS, *et al.*, *Europe's Defence Industry: A Translantic Future?*, *op. cit.*, p. 22, observing that "[t]he obstacles to pan-European consolidation remain immense – namely the political, philosophical, psychological and cultural differences, not to mention the many vested interests, which divide the European nations".



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has happened in cooperation with the United States.(376) Interest in a defense industry that "straddles the Atlantic" has been longstanding.(377) Perhaps a TTIP that includes defense could serve as a catalyst to rationalize the European arms industry.(378) Problems would remain. Even if the TTIP were enacted, surmounting the barriers described in this essay would be challenging.(379) Nonetheless, given the mounting costs of cosseted defense industries, freeing up the arms trade among NATO countries (of whom there is a substantial overlap with EU Member States) is an idea whose time has come. Such a program would entail more than removing or mitigating overt barriers; it would require further scholarship to deepen mutual understanding and thereby identify and remove the disguised barriers to trade.

(376) *See* F. Mérand and K. Angers, "Military Integration in Europe", *op. cit.*, p. 2, reporting that although post-war Europe has achieved some military integration, "Most of this integration has taken place in the context of the Atlantic Alliance".

(377) M. Edmonds, *International Military Equipment Procurement Partnerships: The Basic Issues*, *op. cit.*, p. 13.

(378) *See* D. Fiott, "The 'TTIP-ing Point': How the Transatlantic Trade and Investment Partnership Could Impact European Defence", *op. cit.*, p. 15, arguing that the TTIP could "shift the terms of reference for European defence markets and defence policy completely"; *ibid.*, p. 25, "could provide the push that European defence-industrial integration needs".

(379) *See* also G. Adams, "The Necessity of Transatlantic Defence Co-operation", in *Europe's Defence Industry: A Translantic Future?*, *op. cit.*, pp. 42, 48, predicting that the "transatlantic route is not an easy one; it will doubtless suffer many setbacks", but "[o]ver time [...] it promises a more competitive future for the defence industry; more cost-effective acquisitions for allied governments; and greater efficiency of coalition operations, inside or outside Europe".



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