

# US-European Defence Cooperation: Imperatives in a Time of War

Christopher R. Yukins

Daniel E. Schoeni\*

☞ Armed conflict; Defence and security contracts; European Union; International co-operation; Military equipment; Public procurement procedures; Risk allocation; Russia; Ukraine; United States

## Abstract

*Rather than summarising the US national procurement regime for defence—the approach taken by many valuable contributions to this special edition, regarding other nations—this article defers to the existing literature and instead places the US practice of defence procurement law in a broader context, especially in light of Russia’s war against Ukraine. The US experience is that civilian and military purchasing are largely interchangeable, and that hard lessons learned from both quarters, such as in the procurement of supplies in a battle zone and the elimination of trade barriers, could be used to advance the cause of Ukraine and its democratic allies in the current war. The moral imperatives presented by the war in Ukraine are obvious, and this brief piece concludes that legal practitioners in our discipline, even if they are not specifically defence experts, can share a common skillset crucial to preserving democracy and rebuilding Ukraine, despite this terrible war.*

*Beat your plowshares into swords and your pruninghooks into spears: let the weak say, I am strong.*<sup>1</sup>

## 1. Introduction

As one of us recently argued in this journal’s sister publication in the United States (US), public procurement law is, in the parlance of the US government’s national security doctrine, an “instrument of national power”.<sup>2</sup> That observation is no less true for the coalition of democracies resisting Russia’s invasion of Ukraine: the democracies’ combined might depends in part on the capacity of their defence procurement systems to meet the challenge. With the globalisation of defence procurement, this effort is no longer purely a domestic question. Even if most defence procurement still occurs at the nation state level, this subject has increasingly become a question of cross-border cooperation and trade among allied states and, more broadly, international trade among like-minded democratic nations around the world.

\* Christopher R. Yukins is the Lynn David Research Professor in Government Procurement Law at George Washington University Law School. Daniel E. Schoeni is a judge advocate stationed at Space Systems Command, Los Angeles AFB, California. The views expressed are the authors’ and do not reflect an official position of the Department of the Air Force, the Department of Defence, or any US government agency, or for that matter of any other government or organisation.

<sup>1</sup> Joel 3:10 (King James).

<sup>2</sup> D. Schoeni, “Government Contracts Law as an Instrument of National Power: A Perspective from the Department of the Air Force” (2022) 51 P.C.L.J. 553.

In a December 1940 “fireside chat” radio broadcast, a full year before the US entered World War II, President Franklin Roosevelt referred to the US as the “arsenal” of democracy.<sup>3</sup> A broader coalition of nations comprises the arsenal that now equips and defends Ukraine in like fashion. Not only must this coalition deliver what the Ukrainian warfighter needs, it must work within the existing web of laws and regulations that govern the arms trade. This transatlantic, indeed *global*, effort will require the special expertise of defence procurement professionals and attorneys.<sup>4</sup>

Because many of our colleagues around the world are relatively new to defence procurement—it is often treated as a discipline separate from mainstream public procurement law—this article takes first steps to make defence procurement, at least from a US perspective, more understandable and accessible. We write from decades of experience, as academics and practitioners who work regularly in defence procurement. The US federal procurement bar includes many active-duty and retired military personnel, and it is quite common for practitioners (both private and public) to move fluidly between civilian and defence procurement. Our professional experience over several decades reflects that practice, which largely erases boundaries between civilian and defence procurement law in the US federal government. While there are exceptions—a relatively small number of classified procurements, for example, can be handled only by attorneys with security clearances—for the most part our shared experience demonstrates that defence and civilian agency procurements can be handled interchangeably, and that expertise in one domain complements work in the other.

This article proceeds from that experience and argues that lessons in US defence procurement can be used to bolster the defence of allies abroad. The discussion below draws in several instances from problems that Ukraine has faced to illustrate how procurement solutions from the US and European experience can help reinforce Ukraine’s defences even in a time of war.

The article begins in Pt 2 with an historical perspective on defence procurement in the United States, and then discusses, in Pt 3, some of the lessons the mature US system might offer, such as insights on what might seem scandals—the high price of food in a combat zone, for example—but which are, in fact, predictable and mitigable problems of public supply. To strengthen those supply chains, Pt 4 discusses one longstanding measure to open defence trade, bilateral reciprocal defence procurement agreements, which may ease barriers to cooperation. Pt 5 concludes by urging that members of the procurement law community should not stand apart simply because they do not consider themselves defence experts. To be sure, some challenges are unique to defence procurement.<sup>5</sup> Yet most challenges are not entirely unfamiliar to the scholars and practitioners working mainly in civilian procurement. So like their American counterparts, scholars and practitioners in the alliance of democracies should be actively engaged in the problem-solving. Innocent lives, and the outcome of this war, depend on it. Further, apart from such

<sup>3</sup> President Roosevelt popularised the phrase “arsenal of democracy” in his eponymous speech delivered on December 29, 1940, but it was industrialist Bill Knudson who coined the term. A. Herman, *Freedom’s Forge: How American Business Produced Victory During WWII* (New York: Random House, 2012), pp. 69–71, 115, 129. The full text and a recording of the address can be accessed at: [https://en.wikipedia.org/wiki/Arsenal\\_of\\_Democracy](https://en.wikipedia.org/wiki/Arsenal_of_Democracy).

<sup>4</sup> While the focus here is on cooperation in cross-border defence trade, parallel efforts are underway to enhance cooperation with Ukraine in other aspects of procurement, such as anti-corruption measures. See, e.g. “Ukraine: NATO Specialists Will Analyze the Procurement of the Ministry of Defense and Propose a Modernised System”, *Mena Report*, 21 July 2023 (“Ukraine agreed with the NATO headquarters on the launch of the Procurement Review program [which will assess, among other things, anti-corruption measures]. This was announced by the Minister of Defense of Ukraine Oleksiy Reznikov ...”); “Call for Project Proposals in Support of Defence Reforms in Ukraine”, *M2 Presswire*, 24 April 2023 (UK will fund capacity-building and monitoring to address corruption in Ukrainian defence procurement).

<sup>5</sup> We also acknowledge, however, the “immutable reality” that the defence sector is different than other markets. J.P. Bialos, C.E. Fisher and S.L. Koehl, *Fortresses and Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security Policy* (Washington: Johns Hopkins, 2009), p. 10. Our colleague Martin Trybus provided the following succinct explanation: “Defence procurement has special characteristics that make it difficult to regulate. It is conducted in an environment determined by national security concerns. State of the art armaments win wars and are a convincing deterrent. Secrecy needs to compete with transparency requirements of procurement law. Security of supply needs to compete with the competition requirements ... The goods and services to be procured can be very expensive and it is often felt that a contract awarded outside the national market would lead to particularly large ‘losses’ of taxpayers’ money and, if there is a national industrial capacity, employment.” M. Trybus, “Defence Procurement” in M. Trybus, R. Caranta and G. Edelstram (eds), *EU Public Contract Law: Public Procurement and Beyond* (Brussels: Bruylant, 2013), p. 249.

near-term concerns, procurement experts from across the world will be involved in the rebuilding of Ukraine for a generation.<sup>6</sup>

Before proceeding, we should make one last prefatory remark about what this piece is not and does not cover and about how it contrasts with the other contributions to this Special Issue. This article does not attempt an introduction to the mechanics of the US defence procurement system<sup>7</sup> nor to the US federal system more broadly.<sup>8</sup> And unlike other essays in this volume, we will neither (for obvious reasons) describe how our system has transposed the Defence Directive, explain how it deviates from that common code, nor discuss how the Commission's or the Court of Justice's interpretation of art.346 TFEU (Treaty of the Functioning of the European Union) may evolve in light of lessons learned from the Russo-Ukrainian war. Instead, our effort seeks to improve mutual transatlantic understanding and to lower barriers to free trade in badly needed defence materiel and services. Our view is that, in a time of war, this is the most urgent task at hand.

## 2. US federal procurement and defence: some background

As our colleague Joshua Schwartz observed in an unpublished paper which he first presented at the University of Nottingham's *Global Revolution* public procurement conference in 2004, "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."<sup>9</sup> Why is that? Several reasons present themselves.<sup>10</sup>

First, as we have argued elsewhere, US procurement is defence orientated because the US Government's constitutional structure is defence orientated.<sup>11</sup> Yale Law's Akhil Reed Amar's recent book on US constitutional history argues that the US constitution in its present form was designed to answer certain defects in the previous version, the Articles of Confederation,<sup>12</sup> which left citizens almost defenceless on land and at sea,<sup>13</sup> at home and abroad.<sup>14</sup> Indeed, Amar argues, the constitution of 1787 was created to

<sup>6</sup> World Bank, "Press Release: Updated Ukraine Recovery and Reconstruction Needs Assessment", 23 March 2023 ("A new joint assessment released today by the Government of Ukraine, the World Bank Group, the European Commission, and the United Nations, estimates that the cost of reconstruction and recovery in Ukraine has grown to US \$411 billion (equivalent of €383 billion). ... The cost of reconstruction and recovery is expected to stretch over 10 years and combines both needs for public and private funds."). The reconstruction of Ukrainian infrastructure would be a major undertaking even if the hostilities stopped today and there was no further damage. All the more reason to provide the weapons and related support needed to end this conflict as soon as possible.

<sup>7</sup> The fundamental principles and procedures informing the US defence procurement system are contained in DoD Directive 5000.01 and DoD Instruction 5000.02. The single best source summarising this system, the *Defense Acquisition Guidebook*, was recently retired and the Defense Acquisition University has replaced it with a series of guidebooks available at: <https://aaf.dau.edu/guidebooks/> [Accessed 6 August 2023].

<sup>8</sup> Several essays cover this ground, providing introductions to the US system aimed at foreign audiences. See, e.g. D. Schoeni and C. Yukins, "Common Principles of Public Contracts in the United States of America" in Stéphane de La Rosa and Patricia Valcarcel Fernandez (eds), *Les Principes des Contrats Publics en Europe/Principles of Public Contracts in Europe* (Brussels: Bruylant, 2022), pp.97–119; C. Yukins, "The U.S. Federal Procurement System: An Introduction" (2017) *Upphandlingsrättslig Tidskrift* 69; J.I. Schwartz, "United States of America" in R. Noguellou and U. Stelkens (eds), *Droit Comparé des Contrats Publics* (Brussels: Bruylant, 2010), pp.613–55; J.M. Whelan, "An Introduction to the United States Federal Government System of Contracting" (1992) P.P.L.R. 207.

<sup>9</sup> J.I. Schwartz, "The Centrality of Military Procurement: Explaining the Exceptionalist Character of United States Federal Public Procurement Law", GW Law Faculty Publications & Other Works, Paper No.1077, 2004, p.51.

<sup>10</sup> Whereas Schwartz's article concentrates on the *what* and *how*, discussing several features of the US federal procurement system that can be traced to military necessity during wartime, here we concentrate instead on the *why*.

<sup>11</sup> See D.E. Schoeni and C.R. Yukins, "Defense Procurement: Lessons from the United States' Articles of Confederation", essay presented at the Fifth International Symposium on Public Procurement sponsored by the University of Rome Tor Vergata on 28 September 2023 and to be published in a forthcoming interdisciplinary volume on public procurement edited by Gustavo Piga, et al.

<sup>12</sup> A.R. Amar, *The Words That Made Us: America's Constitutional Conversation, 1760–1840* (New York: Hachette/Basic Books, 2021), pp.162–165, 169–174, 185–186, 193–194, 380, 683–685.

<sup>13</sup> Amar, *The Words That Made Us: America's Constitutional Conversation, 1760–1840* (2021), pp.171, 233, 278, 300–301, 380–384, 635–636. Uncharacteristically, Amar neglects the role that the capture of US sailors by the Barbary pirates played, both at the constitutional convention and in the subsequent debates during the ratification process. See D.E. Schoeni, "On the Non-tariff Barriers Obstructing Free Trade in the Transatlantic Defense Procurement Market," in G.M. Racca and C.R. Yukins (eds), *Joint Public Procurement and Innovation: Lessons Across Borders* (Brussels: Bruylant, 2019), pp.419, 428–32, which borrows from Michael B. Oren's account in *Power, Faith, and Fantasy: America in the Middle East, 1776 to Present* (New York: W.W. Norton & Company, 2007). As one historian joked, "the brutal Dey of Algiers was a Founding Father of the [US] Constitution." T.A. Bailey, *A Diplomatic History of the American People* (New York: Appleton-Century-Crofts, 1958), p.65.

<sup>14</sup> Amar, *The Words That Made Us: America's Constitutional Conversation, 1760–1840* (2021), pp.170–173, 186–187.

underwrite US national security “above all else.”<sup>15</sup> With so “bellicose” a founding charter,<sup>16</sup> it is no wonder that the US procurement system is likewise preoccupied with defence procurement, both as to its structure and composition of purchases. To reverse the cliché, function follows form.<sup>17</sup>

The second reason that the US federal procurement system is so defence orientated builds on the first. Because the US Federal Government’s role was mainly limited to the postal service and the military, most public procurement happened at the state and local level. Although the US Government’s role has expanded over time, that remains a fact today: much of public procurement spending (on education, healthcare, and transportation, for example) in the US happens at the “subcentral” level, in state and local systems, which are separate from the federal procurement system. Because of this subsidiarity principle (or what we call “federalism”), what procurement does happen at the federal level skews heavily toward defence, with about 70–80% of the procurement budget going to defence each year.<sup>18</sup> Indeed, if US federal procurement spending covered by the Federal Acquisition Regulation is compared with procurement spending in the Member States (central and subcentral) covered by the procurement directives, the proportion of US defence spending is 210–240 times larger.<sup>19</sup> Needless to say, a system whose composition of purchases concentrates so heavily on the work of one agency naturally adapts itself to serve that agency’s purposes. Form follows function.<sup>20</sup>

Another reason for the US system’s defence orientation is supplied by our friend and colleague James Nagle, who is the foremost historian of the US federal procurement system:

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, the impact of *innumerable scandals* ... [Emphasis added].<sup>21</sup>

We have emphasised the words “innumerable scandals” here because, as Nagle observes elsewhere in his book, the US procurement system has been largely driven by scandals—and in particular scandals in the defence sector.<sup>22</sup> It is therefore impossible to understand the idiosyncrasies of the US federal procurement system without a proper cataloguing of defence-related scandals over the past two and half centuries, especially those occurring in wartime.<sup>23</sup> We exaggerate only slightly when we say that most US federal

<sup>15</sup> Amar, *The Words That Made Us: America’s Constitutional Conversation, 1760–1840* (2021), p.536.

<sup>16</sup> See generally D.E. Schoeni, “A Bellicose Founding Charter: The U.S. Constitution and Providing for the ‘Common Defence’, A Book Review of Akhil Reed Amar: *The Words That Made Us: America’s Constitutional Conversation, 1760–1840* (2022)” (2023) 13 *Journal National Security Law and Policy* 509. Amar is not the first to argue that the US constitution is martially orientated. In his famous 1916 speech defending his political opponent President Woodrow Wilson’s exercise of wartime powers, former Supreme Court Justice Charles Hughes coined the term the “fighting constitution”, which has since been regularly repeated in the literature on US constitutional law. See C.E. Hughes, “War Powers Under the Constitution” (1917) 2 *Marquette Law Review* 1, 9, 18.

<sup>17</sup> “Form follows function” was the byword of Louis Sullivan, the Chicago architect who trained Frank Lloyd Wright, perhaps the most famous American architect of the 20th century.

<sup>18</sup> K.M. Manuel, “Competition in Federal Contracting: An Overview of the Legal Requirements” (2011) R40516 Congressional Research Service, pp.1–2.

<sup>19</sup> This line of argument was explored in much greater detail in these pages three years ago. See D.E. Schoeni, “Differing Perspectives on Defence Procurement: The Relative Composition of Purchases as a Barrier to Transatlantic Understanding and Trade Liberalisation” (2021) 30 *P.P.L.R.* 45, 54–55.

<sup>20</sup> Schoeni, “Differing Perspectives on Defence Procurement: The Relative Composition of Purchases as a Barrier to Transatlantic Understanding and Trade Liberalisation” (2021) 30 *P.P.L.R.* 45, 54, “What is being purchased affects the nature of the regime’s policies, laws, and regulations. For example, the rules in one regime that buys mainly commodities may be quite different from another that buys mainly bespoke items (e.g., defence). Peculiarities of the defence market necessarily affect the legal regime’s design, and we will see that this is especially true in America.” (citations omitted).

<sup>21</sup> J.F. Nagle, *History of Government Contracting*, 2nd edn (Washington: George Washington University Press, 1999), p.519 (emphasis added), available at: [https://scholarship.law.gwu.edu/history\\_gov\\_contracting/](https://scholarship.law.gwu.edu/history_gov_contracting/).

<sup>22</sup> Nagle, *History of Government Contracting* (1999), p.3, “Since staggering sums of money and power are involved [in defence], it is not surprising that scandals have been a major part of the history of government procurement.”

<sup>23</sup> For starters consider Nagle, *History of Government Contracting* (1999), pp.29, 32–33 (Carpenter Wharton); pp.24–40 (Thomas Mifflin); pp.28, 33–41, 45 (Jeremiah Wadsworth); pp.62–65, 96 (St. Clair expedition); pp.105–08, 139, 141, 247 (Johnson brother contracts); pp.134–45 (Majors and

procurement laws and regulations can be traced back to defence procurement controversies, if not outright scandals.<sup>24</sup>

Before the Second World War, the sourcing for US defence procurement was mainly domestic. Since then, however, the United States has gradually started buying more from other nations, especially allies in Europe. There are several reasons for this. First, one of the necessities of the Cold War was coordination among allies, and buying the same equipment ensured interoperability.<sup>25</sup> Also, first at the behest of the US government and later because purchasing governments around the world demanded them, various forms of countertrade and offset agreements became the norm, which in turn increased bilateral trade flows.<sup>26</sup> Facing difficulties with rapidly scaling up the production of munitions for the war in Ukraine, the United States is once again considering similar coproduction and licensing agreements with allies around the world.<sup>27</sup>

Not least important, as David Ricardo argued two centuries ago, each country enjoys a comparative advantage for a different mix of goods and services, and European nations are often good at developing weapon systems that provide solutions at a fraction of the price offered by US defence contractors.<sup>28</sup> Those are terms that the Pentagon cannot refuse.<sup>29</sup> And in Ukraine, such democratic allies delivered many of these best-in-class weapons systems to bolster Ukraine in the ongoing war.<sup>30</sup>

There is another truth that ought to be emphasised. Just as economists have struggled for some time to capture what country should receive the credit for “exporting” a product when firms from multiple countries have provided significant value added during the production process,<sup>31</sup> there is an analogous fallacy that is at work regarding transatlantic trade flows in the defence sector. Prime contractors winning contracts grab headlines, and there is indeed fierce competition and sometimes regrettable national favouritism at the prime level; however, at the subcontractor level, there is deep transatlantic cooperation. This underappreciated fact is well documented in an invaluable two-volume book, *Fortresses and Icebergs*, written over a decade ago, which we highly commend to the reader.<sup>32</sup>

Finally, even before the war in Ukraine, we were guardedly optimistic about the potential and prospects for cooperation in the transatlantic defence procurement market.<sup>33</sup> The cross-border defence trade among Member States remains limited. On the operational side, to the extent Europe has achieved military

Russell); pp.145–50 (Indian Trust Fund); pp.175–203 (the Civil War, which presented “scandals on a scale never before encountered”); pp.227–39 (Andrew Carnegie); pp.243–44 (the Dodge commission); pp.269–70 (DuPont); pp.355, 406–08 (Truman committee); pp.498–504 (Operation Ill Wind).

<sup>24</sup> See S. Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (Washington: AEI, 1990), p.14. See also C.C. Turpin and J.W. Whelan (eds), *Comparative Look at Public Contracting in the United States and the United Kingdom* (Chicago: American Bar Association, 1973), p.II-16, observing that “we have an old American tradition that the best way to solve anything is through the passage of a new law or the promulgation of a new regulation.”

<sup>25</sup> The nexus between a cooperative transatlantic defence market and interoperability is palpable. Such 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”. Defense Science Board, *Final Report of the Task Force on Globalization and Security* (1999), p.16.

<sup>26</sup> See D. Schoeni, “Second-Best Markets: On the Hidden Efficiency of Defense Offsets” (2015) 44 P.C.L.J. 369, 379; D. Schoeni, “Defense Offsets and Public Policy: Beyond Economic Efficiency” (2016) 76 *Air Force Law Review* 95, 106–11.

<sup>27</sup> See “The West Is Struggling to Forge a New Arsenal of Democracy” (*Economist*, 19 February 2023), <https://www.economist.com/briefing/2023/02/19/the-west-is-struggling-to-forge-a-new-arsenal-of-democracy>, citing the Pentagon’s under-secretary for acquisition’s advocacy for greater cooperation with allies, including collaborative research and development, foreign sourcing, and coproduction agreements.

<sup>28</sup> See Bialos, Fisher, and Koehl, *Fortresses and Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security Policy* (2009), pp.257–58. Further, sometimes European contractors have developed what is qualitatively superior weapons technology. See Sophie de Vaucorbeil, “The Changing Transatlantic Defence Market” (2008) 113 *Chailot Papers* (European Union Institute for Security Studies), pp.89, 111.

<sup>29</sup> M. Sieff, “Europe Can Offer Defence Deals Washington Can’t Refuse” (2008) 9:3 *European Affairs*, <http://www.europeaninstitute.org/index.php/9-european-affairs/european-affairs/53-europe-can-offer-defence-deals-washington-cant-refuse>.

<sup>30</sup> D. Axe, “Some of the Best Weapons in the World Are Now in Ukraine. They May Change the War,” *New York Times*, 20 February 2023.

<sup>31</sup> For example, see “Value-added Trade”, *Economist*, 19 January 2013, <https://www.economist.com/economic-and-financial-indicators/2013/01/19/value-added-trade>.

<sup>32</sup> See generally Bialos, Fisher, and Koehl, *Fortresses and Icebergs: The Evolution of the Transatlantic Defense Market and the Implications for U.S. National Security Policy* (2009).

<sup>33</sup> See, e.g. L. Butler, M. Bowsher, and C. Yukins, “No Man Is an Island in Defense Procurement: Developments in EU Defense Procurement Regulation and its Implications for the U.S.”, (2022) 64 *Government Contractor*, para.332, available at: <https://ssrn.com/abstract=4293971>.

integration, much of that has been in the context of the transatlantic alliance.<sup>34</sup> Perhaps this may suggest the opportunity for extending such cooperation from the operational to the business side of the defence establishment, thus furthering the longstanding hopes for a defence industry that “straddles the Atlantic”.<sup>35</sup> The present war may encourage a dialogue about a transatlantic defence free trade zone, which is an idea whose time has come<sup>36</sup>—and, as the discussion below reflects, would mark only a modest step beyond the existing reciprocal defence procurement agreements which call for free trade in defence between the US and its allies.

### 3. Continue developing a common approach

As the defence market is globalising, it is easier for allied nations to share in defence procurement. The following discussion concentrates on the *mechanics* of exchanges among allies—on opening trade barriers to international defence procurement, for example, and on best practices in selling defence materiel across borders. In particular, we will focus on *legal approaches* that have proven useful in defence procurement, with a special emphasis on the US experience, and potential lessons for the war in Ukraine. While examples are legion, the focus will be on a recurring and knotty problems in defence procurement: how to allocate costs and risks (and mitigate reputational risks) in a rapidly shifting theatre of war.

The example goes to allocating risks in delivering supplies in a war zone. While the *operational* risks are obvious, the rapid fluctuations in supply prices in a high-risk marketplace bear their own very serious *reputational* risks for both the vendor and the government. A recent “scandal” involving the Ukrainian defence forces shows why. Press sources stirred a political crisis in Ukraine when they reported that a contractor was overcharging the Ukrainian defence forces for food delivered to troops in the field.<sup>37</sup> Yet the facts of the case are complex, from Ukraine’s pre-war history of corruption, to the price of eggs in a Kiev supermarket, to the Ukrainian government’s decision to reduce transparency in the government’s ProZorro e-procurement system<sup>38</sup> during the current conflict with Russia.<sup>39</sup> What is clear, however, is that this type of problem is predictable in a time of war, for vendors, facing (as here) a fixed-price contract will likely charge higher prices in order to shift the cost risks of battlefield deliveries to the government. What is also clear is that there may be a solution available from the US defence procurement experience.<sup>40</sup>

Experience from US defence procurement suggests that what seems like overpricing may simply be a problem in contract structure. Contractors charge higher prices on the assumption that their costs will escalate unpredictably as they buy and distribute food and other supplies while under fire. The US Defence Logistics Agency’s “Prime Vendor” contracts offer a possible solution, for under these contracts, the Government assumes at least some of the cost risks in a war zone.

<sup>34</sup> See F. Mérand and K. Angers, “Military Integration in Europe”, in P. Genschel and M. Jachtenfuchs (eds), *Beyond the Regulatory Polity: The European Integration of Core State Powers* (Oxford: Oxford University Press, 2014).

<sup>35</sup> M. Edmonds (ed.), “International Military Equipment Procurement Partnerships: The Basic Issues”, in *International Arms Procurement: New Directions* (Oxford: Pergamon, 1981).

<sup>36</sup> See L.R.A. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market* (Cambridge: Cambridge University Press, 2017), p.492.

<sup>37</sup> Yurii Nikolov, “Paper Pushers from the MOD ‘Syphon Off Money’ on Food for the Armed Forces More Than During Peaceful Life” (23 January 2023), ZN.U., <https://zn.ua/eng/paper-pushers-from-the-mod-syphon-off-money-on-food-for-the-armed-forces-more-than-during-peaceful-life-.html>; “Ukraine’s Deputy Defense Minister Resigns Amid Corruption Inquiry—Ukraine’s Anti-Corruption Agency Is Looking into Alleged Inflated Prices Paid for Military Rations”, *Politico*, 24 January 2023, <https://www.politico.eu/article/ukraine-deputy-defense-minister-vyacheslav-shapovalov-resign-corruption-war-zelenskyy/>.

<sup>38</sup> See generally C. Yukins and S. Kelman, “Overcoming Corruption and War—Lessons from Ukraine’s ProZorro Procurement System,” *NCMA Contract Management Magazine*, July 2022, pp.22–27, [https://scholarship.law.gwu.edu/faculty\\_publications/1633/](https://scholarship.law.gwu.edu/faculty_publications/1633/).

<sup>39</sup> Ukrainian legislation subsequently called for more transparency in non-arms purchases by the Ministry of Defence, see D. Peleschuk and T. Heritage, “Ukrainian parliament passes transparency law after defence ministry scandal”, *Reuters US World News*, 24 February 2023, and in July 2023 the Ukrainian Ministry of Defence announced that some of its food procurement would once again be conducted through the nation’s “ProZorro” (the word means “transparent” in Ukrainian) electronic procurement system. “Ukraine: Defense procurement has returned to Prozorro,” *Mena Report*, 21 July 2023.

<sup>40</sup> The authors note with gratitude the work done by Katherine Chesney, whose research as an LLM candidate at the George Washington University Law School provided important background for this discussion.

The US Government Accountability Office (GAO) described the use of Prime Vendor contracts in a 2005 report: “A DLA prime vendor arrangement,” the GAO stated, “is one in which a distributor of a commercial product line provides those products and related services to all of DLA’s customers in an assigned region within a specified period of time after order placement.”<sup>41</sup> (This arrangement can be understood as a loose sort of framework agreement.<sup>42</sup>) “The prime vendor either provides the product at the cost to the prime vendor to obtain it, or at a price agreed upon in advance with DLA.”<sup>43</sup> In the former case, when the product is provided at cost, the framework arrangement is, in this aspect, a cost-reimbursement contract, under which the government absorbs the cost risk of price fluctuations (for example, in a war zone). Although this “Prime Vendor” model has sometimes been controversial,<sup>44</sup> it does provide a means for defence agencies to facilitate supply chains—and mitigate reputational risks—when procuring critical supplies in a potentially chaotic environment. In war zones such as Ukraine, flexible “Prime Vendor” contracting could allow the government to absorb cost fluctuations, to strengthen supply chains, and to reduce reputational risks—an example of a proven procurement practice that potentially could be borrowed from abroad. As Ukraine has now established a standalone Defence Procurement Agency to provide procurement support for the Ministry of Defence,<sup>45</sup> and seeks to integrate its defence procurement practices with those of NATO nations,<sup>46</sup> innovations such as the Prime Vendor model may prove especially useful in the ongoing war.

#### 4. Utilise existing legal measures to ease cooperation

The war in Ukraine has also signalled the need to reduce barriers to cooperation among allies in developing and delivering weapon systems. Joint procurement efforts are already underway, in some cases involving dozens of countries.<sup>47</sup> Existing instruments, such as the bilateral reciprocal defence procurement agreements between the US Defence Department and allied ministries of defence, should therefore help eliminate barriers to cooperation. For those instruments to succeed, however, when governments raise new barriers to cooperation there needs to be both awareness and accountability.<sup>48</sup>

<sup>41</sup> US Government Accountability Office, “Defense Management: Attention Is Needed to Improve Oversight of DLA Prime Vendor Program” (2016), p.3.

<sup>42</sup> See generally G. Albano and C. Nicholas, *The Law and Economics of Framework Agreements: Designing Flexible Solutions for Public Procurement* (Cambridge: Cambridge University Press, 2016).

<sup>43</sup> US Government Accountability Office, “Defense Management: Attention Is Needed to Improve Oversight of DLA Prime Vendor Program” (2016), p.3.

<sup>44</sup> See, e.g. US Government Accountability Office, “Defense Management: Attention Is Needed to Improve Oversight of DLA Prime Vendor Program” (2016), p.3.

<sup>45</sup> “Ukraine: Defence purchases in Ukraine are moving to the model of NATO member states”, *Mena Report*, 25 May 2023 (“The procurement of weapons and military equipment for the Armed Forces of Ukraine will be carried out by the Defence Procurement Agency. The Cabinet of Ministers of Ukraine adopted the resolution defining the Agency as a service of the state customer of the Ministry of Defense of Ukraine. ... ‘The agency that we created in 2022 is separated from the Ministry’s apparatus, which allows to minimise corruption risks. This decision brings the Ministry of Defence one step closer to the implementation of NATO standards and procedures, will contribute to the effective use of budget funds and shorten the delivery of goods for needs [of the] Armed Forces,’ stressed [Defence Minister] Oleksiy Reznikov.”).

<sup>46</sup> “NATO Will Teach Defense Ministry To Conduct Procurement”, *Ukraine News Agency*, 16 February 2023 (“The North Atlantic Treaty Organization (NATO) will teach the Ministry of Defense to conduct procurement, Defense Minister Oleksii Reznikov announced ... ‘During the meeting with NATO Secretary General Jens Stoltenberg, we also discussed the development of the procurement system of the Ministry of Defence in accordance with the principles of transparency and efficiency. We agreed on a systematic interaction on the training of the Ministry of Defence of Ukraine personnel on the basis of NSPA and the development of procurement agencies that have already been created in the Ministry of Defense. In fact, we are talking about synchronising all procurement procedures that will be used by the Ministry of Defence of Ukraine with standard procedures adopted by NATO’, he said.”).

<sup>47</sup> E.g. “Slovenia joins joint procurement of ammunition for Ukraine”, *Ukraine News Agency*, 21 April 2023 (“The Slovenian government has decided to join the joint procurement of ammunition for Ukraine as part of the European Defence Agency (EDA) project, in which 23 EU member states and Norway already participate.”).

<sup>48</sup> While the focus here is on trade agreements coordinated with the United States, other allies have been entering into agreements to facilitate defence procurement in response to the war in Ukraine. See, e.g. Government of Sweden, Ministry of Defence, “Press Release: New agreements simplify and speed up deliveries of defence materiel to Ukraine” (13 July 2023) (Sweden’s “Defence Materiel Administration (FMV) is entering into an agreement with Ukraine on procurement support. This agreement enables Ukraine to purchase defence materiel directly from the industry and use options in Swedish agreements, which will cut delivery times”); *BBC Monitoring Service*, “Ukraine, France sign defence deal at NATO summit”, 11 July 2023 (“Ukrainian Defence Minister Oleksiy Reznikov and his French counterpart Sebastien Lecornu have signed an agreement on the sidelines of NATO’s summit in Vilnius [which will, among other things, ensure the] process for procurement and supply of weapons to Ukraine will be simplified; a

The long-standing reciprocal defence procurement agreements should, in principle, define something approaching a “free market” in defence.<sup>49</sup> While the terms vary, the reciprocal defence procurement agreements generally prohibit any trade discrimination between the United States and its allies with regard to defence materiel, services, and research and development.<sup>50</sup> The agreements form a web of *bilateral* free trade arrangements; logically, the next step could be to convert those free trade arrangements into a comprehensive, *multilateral* agreement among allies—that is, a “common market” in defence procurement.

Again and again, however, government initiatives on both sides of the Atlantic have undercut cooperation and open markets in defence. The Foreign Subsidies Regulation (FSR) in the EU, for example, reserves the right of the Commission to make “ex officio” investigations of alleged foreign subsidies in defence procurement—a potentially serious disruption to trade because as a practical matter defence companies regularly receive support, direct and indirect, from their governments.<sup>51</sup> In the US, cybersecurity initiatives that rely solely upon US standards could raise similar barriers to defence trade, against foreign vendors that use international cybersecurity standards.<sup>52</sup> These types of initiatives suggest many officials in the transatlantic alliance are simply unaware of the existing protections for free trade in defence, such as the reciprocal defence procurement agreements, which if properly applied would mitigate such inadvertent barriers to trade.

To make those protections more effective—to ensure that this really is a “common defence market” that encourages shared defence and open borders among allies—one potential solution would be to emphasise individual bidders’ rights to enforce the agreements’ non-discriminatory provisions. Although the reciprocal defence procurement agreements typically do not create a private right of action, in practice vendors in the US system can challenge barriers by citing the US Defence Department’s implementing regulations which themselves ban discrimination against vendors from allied nations.<sup>53</sup> And other allied nations—Canada, for example, and the Member States of the European Union—have long experience in erasing barriers to procurement trade in this manner. What is needed is a shared sense, reinforced by those *inside* the procurement community, that raising barriers to trade among allies can undermine the common defence. In the world of civilian procurement, cooperation on standards and trade across borders have reduced barriers in many areas, such as accessibility.<sup>54</sup> Defence trade among allies needs the same commitment to cooperation in a common market.

## 5. Conclusion

Old Testament prophets foretold a day of peace and prosperity, when wars would cease. In a familiar verse, Isaiah prophesies of a day when “they shall beat their swords into plowshares, and their spears into

framework is being established for the joint production of spare parts and maintenance of foreign weapons and equipment”); “Austria wants to join European Sky Shield”, *Kuwait News Agency*, 1 July 2023 (“Austria announced ... its intention to join the European Sky Shield initiative, launched in 2022 by Germany against the backdrop of the war in Ukraine [to take common precautions] against the risk of drone or missile attacks... The Sky Shield system would involve joint procurement for short-, medium- and long-range systems, including the German-made Iris-T, the American Patriot and the US-Israeli Arrow-3.”); “14 Leopard 2 Tanks Gifted to Ukraine by Netherlands and Denmark”, *MarketLine Industry NewsWire*, 21 April 2023 (“In a joint statement from the Dutch and Danish governments, it was announced ... that the two countries intend to purchase ... tanks for Ukraine. The joint statement said that the two nations will continue to explore other possible areas for joint procurement of additional capabilities with the aim of supporting Ukraine.”).

<sup>49</sup> See Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market* (2017), pp.20–47 (describing decades of efforts to enhance cooperation in defence procurement between US and European allies, including through reciprocal defence procurement agreements).

<sup>50</sup> See C. Yukins and A. Green, “International Trade Agreements and U.S. Procurement Law” in E. Loraine Felix and M. Peterson (eds), *The Contractor’s Guide to International Procurement* (Chicago: American Bar Association, 2018), <https://ssrn.com/abstract=3443244>.

<sup>51</sup> See, e.g. P. Friton, M. Klasse, and C. Yukins, “The EU Foreign Subsidies Regulation: Implications for Public Procurement and Some Collateral Damage” (2023) 65 *Government Contractor* 63, <https://ssrn.com/abstract=4403363>.

<sup>52</sup> See, e.g. C. Yukins, “Assessing the Trade Agenda for Government Procurement in the Biden Administration” (*Thomson Reuters*, February 2021) 2020 Government Contracts Year in Review Conference Briefs 77, <https://ssrn.com/abstract=3801042>.

<sup>53</sup> See generally DFARS Subpart 225.0, 48 C.F.R. Subpart 225.0.

<sup>54</sup> See C. Yukins “Assessing the Trade Agenda for Government Procurement in the Biden Administration” (*Thomson Reuters*, February 2021) 2020 Government Contractors Year in Review Conference Briefs 77, 89, <https://ssrn.com/abstract=3801042>.



pruning hooks; nation shall not lift up sword against nation, neither shall they learn war anymore”.<sup>55</sup> Alas, that millennial day has not come. The epigram which opened this piece quotes a lesser-known passage from the Book of Joel, where the writer deliberately reversed the wording of the familiar scripture to emphasise that, sometimes, peaceful nations must reacquaint themselves with the art of war.<sup>56</sup> Now is such a time, when democratic nations must cooperate to see through the fight against tyranny. Transatlantic cooperation in defence procurement has played and continues to play a critical role in the unfolding drama. We as public procurement lawyers, in turn, find ourselves uniquely qualified to assist in facilitating joint efforts. We would submit that that would include many of our European colleagues who are true experts in public procurement but would not consider themselves experts in defence. May we all do our part.

<sup>55</sup> Isaiah 2:4 (King James).

<sup>56</sup> M.Y. Soloveichik, “Misunderstanding the Drops of Wine” (*Commentary*, May 2019), <https://www.commentary.org/articles/meir-soloveichik/misunderstanding-the-drops-of-wine/>, (explaining that biblical scholars note that Joel “is deliberately reversing Isaiah’s words to stress that ... [sometimes] the wicked must be fought for war to cease.”)

