INDEX

Armed Services Procurement Act (ASPA) 1948, 251
Arms Export Control Act (AECA) 1976, 210, 392
Article 346 TFEU, See Treaty on the Functioning of the European Union (TFEU)

barriers to defence trade
EU incentives to remove, 15
influences other than legal regulation, 16
public procurement and procurement law, 66–9
See also EU Defence Directive as a barrier to US trade
Belgium
third country contractor participation, 177
Berry Amendment (US), 346
Brussels Treaty 1948, 22
Budget and Accounting Act 1921, 264
Bush Administration, USA, 63
Buy American Act (BAA) 1933, 340–5
qualified and non-qualified countries under, 343–5
waiver, 454
‘buy national’ laws and policies, 28, 339–40
Campus Oil v. Minister for Industry and Energy, 84
China
rare earth metals production, 355
Clinton Administration, 35, 37, 63

Code des Marchés Publics, France, 172–4
Cold War, 28, 33, 49, 52, 58
Commission v. Italy I and II, 92–5
Commission v. Spain, 87–9, 93, 96
Common Commercial Policy (CCP), 158
Common Security and Defence Policy (CSDP), 33
comparative legal discourse on defence procurement framework, 436
long-term focus, 463–92
extending bilateral defence trade treaties on a transatlantic basis, 464–6
transatlantic defence GATT, 466–80: abandonment and prospects for reconsideration, 473–80; Code of Conduct, 468–72; harmonisation of procedural rules for contract award, 470–1; juste retour, 471–2; lost opportunity to examine legal obstacles to transatlantic trade, 480; NATO Code of Conduct, 473–5; NATO defence GATT, 472–3; NATO transatlantic defence trade treaty, 475–80; non-discrimination and transparency in contract procedures, 469; notification and debrief, 471; open tendering subject to exceptions, 470; publication of contract notices through a NATO-wide
portal, 469–70; rationale, 467–8; scope of equipment covered and financial thresholds, 470
Transatlantic Trade and Investment Partnership (TTIP), 481–92: defence procurement and global trade liberalisation, 491–2; initial inclusion of defence procurement within TTIP, 482–6; long-term structures for coordinating EU and US defence procurement rules, 486–7; recent background to the TTIP negotiations, 481–2; towards a defence TTIP, 487–91
medium-term focus, 447–63
EU policy on third countries in defence procurement, 447–9
RDP Memoranda of Understanding, 450–9: bilateral approach to meeting trade objectives, 451–2; Buy American Act waiver, 454; conditions for participation, 453; dispute settlement, 457–9; juste retour, 456–7; justifications for limited tendering procedures, 453–4; national security and other exceptions, 454–6; offsets, 456–7; procedural requirements, 452–4; scope, 452
short-term focus, 437–47 acquisition planning, 440–1
ad hoc developments under national law addressing foreign participation, 442–3 constitutional features affecting defence procurement legislation, 438–40 legal conditions impacting foreign access, 440–3 review and remedies, 446–7 security exceptions, 445–6 security of supply requirements, 444–5 statutory limitations on competition, 441–2 comparative perspective legal aspects of international defence procurement, 6–10 competition failures in security sensitive contracting, 328–9
Competition in Contracting Act (CICA) 1984, 251–9, 302, 312, 313, 316, 324, 334 Conference of National Armaments Directors (CNAD), 26–7
Task Force on Defense Trade, 34
cooperative R&D programmes (cont.)
EU Defence Directive exclusions, 142–53
EU oversight through notification, 147–8
material scope, 144–5
new product and later lifecycle phases, 145–7
personal scope, 144
Court of Justice of the EU interpretations of Article 346 TFEU, 87–98
cross-border procurement, 121
Culver-Nunn Amendment 1977, 28
Declarations of Principles (DoPs) 2000
US and UK, 35–6
Defence and Security Public Contracts Regulations (DSPCR) UK, 170–1
defence contractors concerns about discrimination, 7–8
defence expenditure, 52–4
defence procurement comparative legal perspective, 6–10
exclusion from EU procurement Directives, 2
exclusion from the GPA, 2
lack of open global debate, 2
security issues for states, 2
Defense Federal Acquisition Regulation Supplement (DFARS), 252, 259, 356–7
Defense Procurement and Acquisition Policy Office (DPAP), 262
Contract Policy and International Contracting Directorate (CPIC), 262
Defense Production Act (DPA) 1950, 420
Defense Security Cooperation Agency (DSCA), 392, 395
demand side of the transatlantic defence market, 48
defence expenditure, 52–4
security interests, 51–2
sovereignty issues, 48–51
Directive 2004/17/EC, 105
Directive 2004/18/EC, 105
Directive 2014/23/EU, 105
Directive 2014/25/EU, 105
Directorate of Defense Trade Controls (DTC) US, 210
dispute settlement RDP Memoranda of Understanding, 457–9
Eisenhower, General Dwight D., 24
Elysée Treaty 1963, 26
empirical data limitations of, 16–17
EU Defence Directive, 2–4, 45–6, 104–17
Article 346 TFEU, 116–17
cautions with regard to interpretations, 18–19
Commission’s intention to issue revised guidance, 18–19
communication and conduct, 114
cross-border procurement, 121
expected EU review in August 2016, 19
external dimension, 5–6
government-to-government sales Article 13(f) exclusions, 403–15
award of US foreign military sales without recourse to Article 13(f) exclusions, 414–15
EU–third country government sales, 413–14
provision on procurement underlying the sale, 407–8
third country–EU government sales and procurement from third countries, 408–13
indirect effects on third country participation, 191–2
information content, 114
material and personal scope, 107–9
performance conditions, 109–10
procurement methods, 110–14
publication, 114
Recital 18, 159–60, 163, 165–8, 180, 187
regulatory strategy for dealing with third countries, 5–6
relative scope, 106–7
remedies, 115–16
security of information and supply, 109–10
specifications, 109–10
subcontracting, 114–15
time limits, 114
US perspective, 193–4
EU Defence Directive as a barrier to US trade, 193–4
accommodation of third party considerations, 244
questions for legal debate, 244–5
security of information, 240–4
as a disguised market access barrier, 242
EU security of information arrangements, 243–4
general and specific conditions, 240–1
security of supply, 204–10
conceptualisation under the Defence Directive, 205–8
requirements under the Defence Directive, 208–10
security of supply and guarantees in a crisis, 234–40
European security of supply arrangements, 236–40
guaranteeing security of supply, 234–6
security of supply and supply chain organisation, 229–34
location and organisation of the supply chain, 229–30
organisation and location of third country sources of supply, 230–4
security of supply and third country export controls, 210–29
ability to honour export obligations, 225–8
export restriction provisions under the Defence Directive, 224–9
impact at prime or lower tiers of the transatlantic defence market, 214–15
International Traffic in Arms Regulations (ITAR), 210–13
ITAR as justification for sole source procurement, 220–3
ITAR-free and the Defence Directives, 216–20
management of security of supply risks, 215–16
restrictions on disclosure, transfer and use, 228–9
security of supply as a disguised market access barrier, 213–14
US export control regulations, 210–13
technical specifications, 194–204
definition and purpose, 194–5
emerging practice in the use of, 195–8
standardisation organisations, 196–7
technical specifications under the Defence Directive, 199–204
equivalence and interoperability, 204
national defence standards, 203–4
order of preference, 200–1
performance of function, 201–3
EU Defence Directive exclusions cooperative R&D programmes, 142–53
catalyst for cooperative procurement, 148–53
EU oversight through notification, 147–8
material scope, 144–5
new product and later life cycle phases, 145–7
personal scope, 144
debate on the scope of the exclusions, 153
effects of the Commission’s Guidance, 122
EU Defence Directive exclusions (cont.)
exclusion from directives but subject
to treaties, 122–9
circumvention of the Defence
Directive, 125–9
compliance with EU principles in
procurement, 123–4
Member States’ rights and
obligations in relation to third
countries, 124–5
impact on cooperative procurement,
121
international agreements and
arrangements, 129–33
definitions, 130–1
general scope of the exclusions,
129–30
specific procedural rules, 131–3
international organisations, 133–42
as public authorities, 139–40
contracts awarded by a Member
State, 139
European Defence Agency (EDA),
140
excluded purposes, 137–8
exclusion as contracting
authorities, 134–5
exclusion of exclusive and mixed
membership organisations,
136–7
general exclusions, 134
NATO agencies, 141–2
OCCAR, 141
questions raised by, 121–2
EU defence market
influence of Article 346 TFEU,
118–20
EU Defence Package, 2–4, 45–6
directives under, 103–18
See also EU Defence Directive EU
Directive on Intra-Community
Transfers
EU defence procurement law, 73–4
comparison with US federal defence
procurement law, 268–9
directives under the EU Defence
Package, 103–18
essential security, 81–3
form and standard of review, 83–5
free movement of goods,
establishment and services,
74–7
Government Procurement
Agreement (GPA) WTO, 80–1
limitations on free movement, 78–85
primary EU law, 74–7
public security, 81–3
secondary EU law, 103–18
security exceptions and derogations
for free movement, 78–85
Treaty on the Functioning of the
European Union (TFEU), 73
Article 18, 74
Article 28, 75
Article 29, 183
Article 34, 75, 78
Article 35, 75, 78
Article 36, 78, 82
Article 49, 76
Article 53, 105
Article 56, 76
Article 62, 105
Article 114, 105
Article 207, 158
Article 207(6), 160
Article 258, 81
Article 259, 81
Article 288, 85
Article 346, 73, 78–81, 82, 85,
118–20, 352
Article 346 and the Defence
Directive, 116–17
Article 346 interpretations, 85–6:
European Commission,
99–102; European Parliament,
102–3; General Court and
Court of Justice of the EU,
87–98; Member States, 86–7
Article 347, 78, 85
Article 348, 85
Article 351, 124
See also EU Defence Directive EU
Directive on Intra-Community
Transfers
EU Directive on Intra-Community
Transfers, 2, 45–6, 117–18

© in this web service Cambridge University Press

www.cambridge.org
EU procurement law
Treaty on the Functioning of the European Union (TFEU)
Article 346, 164
EU subsidiaries
third country mode of access, 180–1
Europe
need to reduce US defence trade advantage, 3
European Coal and Steel Community (ECSC), 24
European Commission interpretations of Article 346 TFEU, 99–102
European Committee for Electrotechnical Standardisation (CENELEC), 196
European Committee for Standardisation (CEN), 196
European Community (EC), 25, 34–5
European Defence Agency (EDA), 40–4
EU Defence Directive exclusions, 140
European Defence and Technological Industrial Base (EDTIB), 100
European Defence Community (EDC) proposal for, 24–5
European Defence Equipment Market (EDEM), 31, 100
European Defence Standardization System (EDSIS), 196
European Economic Community (EEC), 25
renamed as the European Community (EC), 34–5
European Handbook on Defence Procurement (EHDP), 198
European Parliament interpretations of Article 346 TFEU, 102–3
European Security and Defence Policy (ESDP) 2001, 40
European Telecommunications Standards Institute (ETSI), 196
European Union concerns about defence contracts with third countries, 3–4
EU–third country government sales, 413–14
exclusion of defence procurement from Directives, 2
incentives to remove trade barriers, 15
level of commitment to transatlantic cooperation, 15
Member States, 14
policy on third countries in defence procurement, 447–9
protection of critical materials within the EU, 353–4
public procurement expenditure, 1
replacement of the EC, 40
sales and procurement from third countries, 408–13
SMEs and subcontracting policies, 308–9
exclusions under the EU Defence Directive, See EU Defence Directive exclusions
exclusive rights exceptions to competitive procurement, 317–19
Family of Weapons concept for weapons development, 27
Federal Acquisition Regulation (FAR) and supplements, 259–60
Federal Property and Administrative Services Act (FPASA) 1949, 251
Finland
third county contractor participation, 178
Fiocchi Munizioni SpA v. Commission, 89–92, 96
follow-on contracts and additional deliveries exceptions to competitive procurement, 319
foreign acquisition under US law ‘buy national’ laws and policies, 339–40
definition, 338–9
domestic source restrictions and security of supply, 339–55
foreign acquisition under US law (cont.)
Buy American Act (BAA) 1933, 340–5
protection of critical materials within the EU, 353–4
qualified and non-qualified countries under the Buy American Act, 343–5
security and economic reasons, 351–2
security of supply guarantees, 354–5
security of supply under EU and US law, 350–5
specialty and rare earth metals, 346–55
strategic metals critical to national security, 348–50
waiver of specialty metals restrictions for qualifying countries, 346–8
Government Procurement Agreement (GPA), 355–6
NATO cooperative projects, 356–7
offsets, 415–21
Reciprocal Defence Procurement Memoranda of Understanding (RDPs), 357–73
context, 358–63
general procedures, 365–7
main provisions, 364–5
procurement procedures, 365, 368–73
relevance to transatlantic defence trade, 338–9, 378–80
Strategic Materials Protection Board (SMPB), 348–50
trade agreements and other international agreements, 355–7
no export or transfer licence for eligible items, 376–7
oversight and review, 377–8
personal and material scope, 374–6

Foreign Comparative Testing (FCT) program US, 443
foreign competition
full and open competition after exclusion of sources, 296–310
continuous availability of a reliable source, 301–2
contract performance conditions and social considerations, 307–8
establishing or maintaining alternative sources, 297–302
EU small business set-asides in defence procurement, 304–5
EU SMEs and subcontracting policies, 308–9
increase or maintain competition and likely cost reduction, 297–300
interest of national defence and industrial mobilisation, 300–1
small business set-asides, 302–10
subcontracting under the Defence Directive, 305–7
transatlantic reciprocity in defence procurement for small businesses, 309–10
full and open competition under US law, 276–7
definition of full and open competition, 277
discretionary exclusion of foreign competitors, 277–82
extent of discretionary authority to exclude foreign competition, 310–11
facility security clearance requirements, 280–1
KC-X case study, 284–96
‘no foreign personnel’ requirements, 279–80
technical specifications, 283–4
time limits between request for proposal release and submission, 281–2
US Department of Defense procurement, 271
foreign competition rates, 273–6
INDEX

full and open competition under US law, 276–7
definition of full and open competition, 277
discretionary exclusion of foreign competitors, 277–82
extent of discretionary authority to exclude foreign competition, 310–11
facility security clearance requirements, 280–1
KC-X case study, 284–96
background, 285–7
bid protest, 287–92
GAO review from a foreign contractor perspective, 292–6
‘no foreign personnel’ requirements, 279–80
time limits between request for proposal release and submission, 281–2

General Agreement on Tariffs and Trade (GATT), 22
General Court of the EU interpretations of Article 346 TFEU, 87–98

Germany
defence industry, 50
effects of ITAR restrictions, 217, 218
third country contractor participation, 176–7
global defence market, 16
Government Procurement Agreement (GPA), 1–2, 12, 80–1, 355–6
exclusion of defence procurement, 2
government-to-government contracts and offsets, 381
definition of government-to-government contracts, 381
definition of offsets, 381
issues for US and EU comparative discussion, 429–31
offsets comparative legal discourse on offsets, 459–63

France
Code des Marchés Publics, 172–4ndefence industry, 50
third country contractor participation, 172–4
free movement limitations, 78–85
free movement of goods, establishment and services in the EU, 74–7
full and open competition after exclusion of sources, 310
continuous availability of a reliable source, 301–2
contract performance conditions and social considerations, 307–8
establishing or maintaining alternative sources, 297–302
EU small business set-asides in defence procurement, 304–5
EU SMEs and subcontracting policies, 308–9
increase or maintain competition and likely cost reduction, 297–300
interest of national defence and industrial mobilisation, 300–1
small business set-asides, 302–10
subcontracting under the Defence Directive, 305–7
transatlantic reciprocity in defence procurement for small businesses, 309–10

general competition rates, 271–3
foreign military sales (FMS) award without recourse to Article 13(f ) exclusions, 414–15
definition, 381
EU Defence Directive Article 13(f ) exclusions, 403–15
offsets connected with, 416–20
open competition in, 394–6
sole sourcing in, 396–402
under US law on foreign acquisition, 392–4
framework contracting exceptions to competitive procurement, 320–3

offsets comparative legal discourse on offsets, 459–63

Cambridge University Press
978-1-107-11551-4 — Transatlantic Defence Procurement
Luke R. A. Butler
Index
More Information

© in this web service Cambridge University Press
www.cambridge.org
government-to-government (cont.)
discourse on their economic
efficiency and legal prohibition,
459–62
US and EU calls for a dialogue on
offsets, 462–3
offsets under EU law, 415–16, 421–9
offset receipt in
government-to-government
contracts, 428–9
third country offset provision,
425–6
third country offset receipt, 426–8
offsets under US law on foreign
acquisition, 416–21
offsets connected with foreign
military sales, 416–20
statutory obligation to report
offsets, 420–1
transatlantic defence trade, 382–91
government-to-government
contracts, 382–4
offsets, 384–7
significance in the context of,
387–91
government-to-government sales
under US and EU law, 392–415
foreign military sales under US law
on foreign acquisition, 392–4
open competition in US foreign
military sales, 394–6
sales under the Defence Directive,
403–15
award of US foreign military sales
without recourse to Article
13(f ) exclusions, 414–15
EU-third country government
sales, 413–14
provision on procurement
underlying the sale, 407–8
third country-EU government
sales and procurement from
third countries, 408–13
sole sourcing in US foreign military
sales, 396–402

hard defence material
focus of the analysis, 13

historical overview, 20–1
armaments cooperation initiatives,
25–6
Brussels Treaty 1948, 22
‘buy national’ procurement policies,
28
Clinton Administration, US, 35, 37
CNAD Task Force on Defense Trade,
34
Cold War, 28, 33
cooperative programmes through
NATO, 26–7
creation of the European
Community (EC), 25
creation of the European Economic
Community (EEC), 25
Culver-Nunn Amendment 1977,
28
current procurement coordination
issues, 44–5
Defence Trade Cooperation (DTC)
Treaty US–UK 2012, 38
Defense Trade Security Initiative
(DTSI) US 2000, 37–8
EC replaced by the European Union,
40
EEC renamed as the European
Community, 34–5
Élysée Treaty 1963, 26
establishment of NATO, 21–3
EU Defence Package 2007, 45–6
European armaments industry
post-World War II, 21–3
European Coal and Steel
Community (ECSC), 24
European Defence Agency (EDA),
40–4
European Defence Equipment
Market (EDEM), 31
European Security and Defence
Policy (ESDP) 2001, 40
Family of Weapons concept for
weapons development, 27
formation of the Warsaw Pact, 25
free acquisition markets
NATO-wide, 33–4
General Agreement on Tariffs and
Trade (GATT), 22
Independent European Programme Group (IEPG), 28–33
International Traffic in Arms Regulations (ITAR), 37–8
juste retour (fair return, work-share) principle in awarding contracts, 31–2
Letter of Intent 1998, 38–9
Marshall Plan, 21
military cooperation in the face of the Soviet threat, 21–3
NATO Armaments Committee, 23
NATO Basic Military Requirements (NBMR) initiative, 26
NATO CNAD, 26–7
NATO Defence Capabilities Initiative (DCI), 37–8
NATO Forward Strategy for the defence of Europe 1950, 24
NATO Industrial Advisory Group (NIAG), 26
North American Free Trade Agreement 1988, 33
North Atlantic Treaty 1949, 22
Nunn-Roth-Warner Amendment 1986, 29
OCCAR 1998, 39–40
Paris Treaty 1951, 24
proposed European Defence Community (EDC), 24–5
Protocol of the Hague 1947, 23
Reciprocal Defence Procurement Memoranda of Understanding (RDPs), 27–8
Single European Act 1986, 33
transatlantic defence industrial cooperation (TADIC) initiatives, 46–8
Treaty of Dunkirk 1947, 22
Treaty of Lisbon 2009, 35, 40
Treaty of Rome 1957, 25
Treaty on European Union (TEU) 1992, 34–5, 40
Treaty on the Functioning of the European Union (TFEU) 2009, 35, 40
US military and economic support for Europe, 21–3
US–UK Declarations of Principles (DoPs) 2000, 35–6
weapons standardisation or interoperability, 27–9
Western European Armaments Group (WEAG), 33
Western European Union (WEU), 24, 28, 32–3
Western Union (Brussels Treaty Organisation), 22

indefinite delivery–indefinite quantity (IDIQ) contracts, 321
Independent European Programme Group (IEPG), 28–33
Insinööritoimisto InsTiimi Oy v. Puolustusvoimat, 97–8
Inspector General Act 1978, 263
international agreements and arrangements definitions, 130–1
EU Defence Directive exclusions, 129–33
non-competitive procurement, 333–4
International Chamber of Commerce (ICC) Task Force, 190
international organisations EU Defence Directive exclusions, 133–42
International Traffic in Arms Regulations (ITAR), 37–8, 207, 210–13
as justification for sole source procurement, 220–3
ITAR-free initiatives, 216–20
Ireland implementation of the Defence Directive, 179
Italy defence industry, 50
third country contractor participation, 174–5
juste retour, 471–2
fair return or work-share principle in awarding contracts, 31–2
juste retour (cont.)
RDP Memoranda of Understanding, 456–7

KC-X case study, 284–96
background, 285–7
bid protest, 287–92
GAO review from a foreign contractor perspective, 292–6

Letter of Intent 1998, 38–9
Lockheed Martin, 58

maintenance of the industrial base
exceptions to competitive procurement, 324–6

Marshall, George, US Secretary of State, 21
Marshall Plan, 21
Member States
‘buy national’ policies, 339–40
influence on national defence industries, 50
interpretations of Article 346 TFEU, 86–7
rights and obligations in relation to third countries, 124–5
multiple award contracts (MAC), 321

national security
exceptions to competitive procurement, 326–31
NATO, 13–14, 15
and the EDA, 44
Armaments Committee, 23
Conference of National Armaments Directors (CNAD), 26–7
cooperative programmes, 26–7
Defence Capabilities Initiative (DCI), 37–8
establishment of, 21–3
Eurogroup, 27, 29
Forward Strategy for the defence of Europe 1950, 24
free acquisition markets
NATO-wide, 33–4
military standardisation activities, 197

NIAG study, 444
TADIC studies, 48
NATO agencies
EU Defence Directive exclusions, 141–2
NATO Airborne Warning and Control System (AWACS), 138
NATO Basic Military Requirements (NBMR) initiative, 26
NATO Code of Conduct, 473–5
NATO cooperative projects, 356–7
NATO defence GATT, 472–3
NATO Industrial Advisory Group (NIAG), 26
NATO Maintenance and Supply Organisation (NAMSO), 141
NATO STANAGs, 283
NATO transatlantic defence trade treaty, 475–80

Netherlands
third country contractor participation, 177–8
non-competitive procurement
comparison of EU and US approaches, 336–7
non-competitive procurement under US law
access and treatment of foreign contractors, 312–13
extent of discretion to exclude foreign contractors, 336–7
justification and approvals, 313–16
maintenance of the industrial base, 324–6
national security, 326–31
class justifications and approvals, 327–8
competition failures, 328–9
exceptions under US and EU law, 329–31
necessary in the public interest, 334–5
only one responsible source, 316–23
follow-on contracts and additional deliveries, 319
framework contracting, 320–3
| privately developed items and reasons connected with exclusive rights, 317–19 |
| position of ‘other than full and open competition’ (CICA), 312 |
| requirements of international agreements, 333–4 |
| unusual and compelling circumstances, 331–3 |

North American Free Trade Agreement 1988, 33
North Atlantic Treaty 1949, 22
Northrop Grumman, 58
Nunn-Roth-Warner Amendment 1986, 29

OCCAR, 39–40
EU Defence Directive exclusions, 141
Office of Federal Procurement Policy Act (OFPPA), 263
Official Journal of the EU (OJEU), 111

offsets comparative legal discourse on defence procurement, 459–63
  definition, 381
  discourse on their economic efficiency and legal prohibition, 459–62
  issues for US and EU comparative discussion, 430–1
RDP Memoranda of Understanding, 456–7
significance in the context of transatlantic defence trade, 387–91
transatlantic defence trade, 384–7
under EU law, 421–9
  offset receipt in government-to-government contracts, 428–9
  third country offset provision, 425–6
  third country offset receipt, 426–8
  under US law on foreign acquisition, 416–21
  offsets connected with foreign military sales, 416–20

statutory obligation to report offsets, 420–1
US and EU calls for a dialogue on offsets, 462–3
only one responsible source exceptions to competitive procurement, 316–23

Pleven, René, 24
Poland
defence industry, 51
third country contractor participation, 178–9
prime level supply companies (primes), 55–6
privately developed items exceptions to competitive procurement, 317–19
procurement law as barrier to defence trade, 66–9
Protocol of the Hague 1947, 23
public interest exception to competitive procurement in the US, 334–5
public procurement as barrier to defence trade, 66–9
definition, 1
international and regional legal regimes, 1–2
purpose of regulation, 1–2
public procurement markets significance for international trade, 1
value of EU and US expenditure, 1
Public Sector Directive 2004/18/EC, 104
Public Sector Directive 2014/24/EU, 105
Public Sector Directives, 160–2

rare earth metals security of supply, 346–55
Reciprocal Defence Procurement Memoranda of Understanding (RDPs), 27–8, 357–73
bilateral approach to meeting trade objectives, 451–2
Buy American Act waiver, 454
comparative legal discourse, 450–9
Reciprocal Defence (cont.)

- conditions for participation, 453
- context, 358–63
- European and NATO membership is not exclusive, 359–61
- procurement focus is not exclusive, 358–9
- uncertainty as to the effects of RDPs in practice, 361–3
- dispute settlement, 457–9
- general procedures, 365–7
- full and equitable consideration of all qualified sources, 366
- no substantive authorisation to export defence items, 367
- obtaining information about possible procurement, 365–6
- offers evaluated without application of ‘buy national’ laws, 367
- satisfaction of requirements, 367
- *juste retour*, 456–7
- justifications for limited tendering procedures, 453–4
- main provisions, 364–5
- material and personal scope, 364
- principles governing reciprocal defence purchasing, 364
- regular discussion of adverse effects of offsets and other provisions, 365
- national security and other exceptions, 454–6
- offsets, 456–7
- procedural requirements, 452–4
- procurement procedures, 365, 368–73
- absence of a distinct set of rules specifically concerning award, 369–70
- content of invitations to tender, 368–9
- notification of outcome, 370
- publication of contract notices in a generally available periodical, 368
- publication of invitations to tender in adequate time, 369
- reasons for non-award, 370–1
- review and dispute settlement, 371–3
- scope, 452
- review and remedies provision
- comparative legal discourse, 446–7
- Romania
  - defence industry, 51
  - third country contractor participation, 179
- scope and limitations of the analysis, 12–17
- contract formation, not contract administration, 12–13
- hard defence, not security or dual use, 13
- legal perspective, rather than political or economic, 15–16
- limitations of empirical evidence, 16–17
- USA and EU, not NATO or Member States, 13–14
- Security Assistance Management Manual (SAMM) US, 392, 399
- security concerns
  - comparative legal discourse on defence procurement, 454–6
- Security Cooperation Act 2010, 374
- Security Cooperation Organization (SCO) US, 397
- security exceptions
  - comparative legal discourse, 445–6
- security interests of states
  - concerns about defence trade, 51–2
  - security of information, 52, 240–4
  - as a disguised market access barrier, 242
  - EU security of information arrangements, 243–4
  - general and specific conditions of the Defence Directive, 240–1
  - security of supply, 49, 52, 204–10
  - and guarantees in a crisis, 234–40
European security of supply arrangements, 236–40
guaranteeing security of supply, 234–6
and supply chain organisation, 229–34
location and organisation of the supply chain, 229–30
organisation and location of third country sources of supply, 230–4
and third country export controls, 210–29
ability to honour export obligations, 225–8
export restriction provisions under the Defence Directive, 224–9
impact at prime or lower tiers of the transatlantic defence market, 214–15
ITAR as justification for sole source procurement, 220–3
ITAR-free and the Defence Directives, 216–20
management of security of supply risks, 215–16
restrictions on disclosure, transfer and use, 228–9
security of supply as a disguised market access barrier, 213–14
US export control regulations, 210–13
conceptualisation under the Defence Directive, 205–8
requirements under the Defence Directive, 208–10
specialty and rare earth metals, 346–55
under EU and US law, 350–5
security of supply guarantees, 354–5
security of supply requirements comparative legal discourse, 444–5
Single European Act 1986, 33
Small Business Act 1953 US, 302
Small Business Administration (SBA) US, 302
small business set-asides, 302–10
contract performance conditions and social considerations, 307–8
EU SMEs and subcontracting policies, 308–9
in EU defence procurement, 304–5
subcontracting under the Defence Directive, 305–7
transatlantic reciprocity in defence procurement, 309–10
sovereignty influence on national defence industries, 48–51
Spain third country contractor participation, 175–6
specialty and rare earth metals security of supply, 346–55
standardisation organisations, 196–7
Strategic Materials Protection Board (SMPB) US, 348–50
structure of the transatlantic defence market, 55–7
companies producing off-the-shelf-type components, 57
prime-level supply companies (primes), 55–6
second- and third-tier companies, 56–7
sub-system companies, 56–7
supply chain globalisation and integration, 57
subcontracting EU SMEs and subcontracting policies, 308–9
under the Defence Directive, 305–7
subcontractors third country mode of access, 181–2
supply chain globalisation and integration, 57
supply chain organisation and security of supply, 229–34
supply side of the transatlantic defence market, 54
defence industry consolidation, 58–9
defence trade flow, 59–63
supply side (cont.)
- foreign direct investment and foreign market presence, 63–6
- integration of the transatlantic defence industry, 58–66
- mergers and acquisitions among companies, 63–6
- structure of the transatlantic defence market, 55–7
- value of non-prime-company trade, 57
- volume and value of the market, 59–63

Sweden
- effects of ITAR restrictions, 218
- third country contractor participation, 178

third country contractor participation
- third country mode of access, 184–6
- third country contractors definition, 156
- third country–EU government sales and procurement from third countries, 408–13
- third country modes of access, 179–86
- direct participation. See third country participation
- EU subsidiaries, 180–1
- products of third country origin in free circulation, 182–4
- subcontractors, 181–2
- taxonomy, 179–80
- teaming arrangements, 184–6
- third country offset provision under EU law, 425–6
- third country offset receipt under EU law, 426–8
- third country participation and the EU Defence Directive, 156–7
- indirect effects of the EU Defence Directive, 191–2
- procurement directives, 157–68
- enabling direct third country contractor participation, 162–5
- EU and Member State competences in procurement, 158–60

factors affecting direct third country contractor participation, 165–8
- third country provision, 160–2
- treatment of third country contractors, 168
- under national law after the Defence Directive, 169–79
- Belgium, 177
- Finland, 178
- France, 172–4
- Germany, 176–7
- Ireland, 179
- Italy, 174–5
- Member States with major defence capabilities, 170–7
- Member States with some or limited defence capabilities, 177–9
- Netherlands, 177–8
- Poland, 178–9
- Romania, 179
- Spain, 175–6
- Sweden, 178
- United Kingdom, 170–2
- third country products in free circulation, 182–4

third country relations in defence procurement
- equalisation of conditions on third country participation, 186–7
- potentially problematic aspects, 186–91
- regulating third country access and treatment, 187–91
- TODO contracts, 321, 322
- transatlantic defence GATT proposal, 466–80
- transatlantic defence industrial cooperation (TADIC) initiatives, 13, 46–8
- transatlantic defence procurement scope and limitations of the analysis, 12–17
- transatlantic defence trade legal barriers, 10–12
- problematic areas, 16
proposals to reduce trade barriers, 11–12
Transatlantic Trade and Investment Partnership (TTIP), 11, 481–92
defence procurement and global trade liberalisation, 491–2
initial inclusion of defence procurement within TTIP, 482–6
long-term structures for coordinating EU and US defence procurement rules, 486–7
recent background to the TTIP negotiations, 481–2
towards a defence TTIP, 487–91
Treaty of Dunkirk 1947, 22
Treaty of Lisbon 2009, 35, 40
Treaty of Rome 1957, 25
Treaty on European Union (TEU) 1992, 34–5, 40
Article 4(3), 125
Treaty on the Functioning of the European Union (TFEU), 35, 40, 73
Article 18, 74
Article 28, 75
Article 29, 183
Article 34, 75, 78
Article 35, 75, 78
Article 36, 78, 82
Article 49, 76
Article 53, 105
Article 56, 76
Article 62, 105
Article 114, 105
Article 207, 158
Article 207(6), 160
Article 258, 81
Article 259, 81
Article 288, 103
Article 346, 73, 78–81, 82, 85, 164, 352
Article 346 and the Defence Directive, 116–17
Article 346 influence on the EU defence market, 118–20
Article 346 interpretations, 85–6
European Commission, 99–102
European Parliament, 102–3
General Court and Court of Justice of the EU, 87–98
Member States, 86–7
Article 347, 78, 85
Article 348, 85
Article 351, 124
Truman, President Harry S., 21, 24
TTIP, See Transatlantic Trade and Investment Partnership
UNCITRAL Model Law, 491
United Kingdom
Defence and Security Public Contracts Regulations (DSPCR), 170–1
defence industry, 50
third country contractor participation, 170–2
United States
commentary on the EU Defence Directive, 7–8
defence trade advantage over Europe, 3
level of commitment to transatlantic cooperation, 15
position on removal of trade barriers, 15
public procurement expenditure, 1
unusual and compelling circumstances exception to competitive procurement in the US, 331–3
US contractors indirect effects of the EU Defence Directive, 191–2
US Department of Defense procurement, 260–2, 271
Better Buying Power (BBP) initiative, 318
effects of the Berry Amendment, 346
foreign competition rates, 273–6
general competition rates, 271–3
technical specifications, 283–4
US Department of State, 210
US federal defence procurement law, 249–50
<table>
<thead>
<tr>
<th>Index</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>US federal defence procurement law (cont.)</td>
<td></td>
</tr>
<tr>
<td>comparison with EU defence procurement law, 268–9</td>
<td></td>
</tr>
<tr>
<td>procurement function, 260–8</td>
<td></td>
</tr>
<tr>
<td>administrative and judicial oversight, 265–8</td>
<td></td>
</tr>
<tr>
<td>executive oversight, 262–4</td>
<td></td>
</tr>
<tr>
<td>legislative oversight, 264–5</td>
<td></td>
</tr>
<tr>
<td>oversight, 262–8</td>
<td></td>
</tr>
<tr>
<td>procurement by the Department of Defense and Military Departments, 260–2</td>
<td></td>
</tr>
<tr>
<td>regulatory sources, 250</td>
<td></td>
</tr>
<tr>
<td>Federal Acquisition Regulation (FAR) and Supplements, 259–60</td>
<td></td>
</tr>
<tr>
<td>statutes, 250, 251–9</td>
<td></td>
</tr>
<tr>
<td>Armed Services Procurement Act (ASPA) 1948, 251</td>
<td></td>
</tr>
<tr>
<td>Competition in Contracting Act (CICA) 1984, 251–9</td>
<td></td>
</tr>
<tr>
<td>exclusion of sources and other than full and open competition, 257–9</td>
<td></td>
</tr>
<tr>
<td>Federal Property and Administrative Services Act (FPASA) 1949, 251</td>
<td></td>
</tr>
<tr>
<td><strong>full and open competition, 252–7</strong></td>
<td></td>
</tr>
<tr>
<td>US federal procurement limitations of analysis, 270</td>
<td></td>
</tr>
<tr>
<td>US Military Departments procurement function, 260–2</td>
<td></td>
</tr>
<tr>
<td>no export or transfer licence for eligible items, 376–7</td>
<td></td>
</tr>
<tr>
<td>oversight and review, 377–8</td>
<td></td>
</tr>
<tr>
<td>personal and material scope, 374–6</td>
<td></td>
</tr>
<tr>
<td>Utilities Directive 2004/17/EC, 105</td>
<td></td>
</tr>
<tr>
<td>Utilities Directive 2014, 180</td>
<td></td>
</tr>
<tr>
<td>Utilities Directives, 160–2</td>
<td></td>
</tr>
<tr>
<td>variable quantity contracts, 321</td>
<td></td>
</tr>
<tr>
<td>Warsaw Pact, 25</td>
<td></td>
</tr>
<tr>
<td>Western European Armaments Group (WEAG), 33</td>
<td></td>
</tr>
<tr>
<td>Western European Union (WEU), 24, 28, 32–3</td>
<td></td>
</tr>
<tr>
<td>World Trade Organization (WTO) Government Procurement Agreement (GPA), 1–2</td>
<td></td>
</tr>
</tbody>
</table>