The Legality of Bailouts and Buy Nationals

International Trade Law in a Crisis

Kamala Dawar

• HART •
PUBLISHING
OXFORD AND PORTLAND, OREGON
2017

Hart Publishing
An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

First published 2017

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-50990-824-0
ePDF: 978-1-50990-821-9
ePub: 978-1-50990-822-6

Library of Congress Cataloging-in-Publication Data

Names: Dawar, Kamala, author.

Title: The legality of bailouts and buy nationals : international trade law in a crisis / Kamala Dawar.

Description: Oxford ; Portland, Oregon : Hart Publishing, an imprint of Bloomsbury Publishing Plc, 2017. | Series: Hart studies in competition law ; volume 17 | Includes bibliographical references and index.

Identifiers: LCCN 2017021990 (print) | LCCN 2017022554 (ebook) | ISBN 9781509908226 (Epub) | ISBN 9781509908240 (hbk. : alk. paper)

Subjects: LCSH: Foreign trade regulation. | Bailouts (Government policy) | Export subsidies—Law and legislation. | Buy national policy.

Classification: LCC K3943 (ebook) | LCC K3943 .D39 2017 (print) | DDC 343.08/7—dc23

LC record available at https://lccn.loc.gov/2017021990

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters

1

Introduction

> Modern international law was not born to celebrate sovereignty but to attack it, and the intellectual development of the discipline has been about recurrent attempts to articulate always anew, and thus to strengthen the power of a cosmopolitan and gapless legal system over the sovereign egoism of the state.[1]

I. Overview

This book assesses the legality, under international and regional trade law, of the bailout and buy-national crisis measures that were implemented during the great recession of 2008–12. The unique feature of this banking crisis and consequent collapse of aggregate demand in Europe and North America was that it was systemic—unleashing a global recession. The turmoil surfaced in 2007 when major financial institutions began to incur heavy losses as a result of their exposure to the market for subprime mortgages. The subsequent uncertainty that emerged over the extent of these losses put a cap on lending and credit flows. Significantly, this cap was not only to businesses and consumers but also to banks. When investment bank Lehman Brothers failed in September 2008, equity values plummeted, along with the value of the housing market. Both firms and consumers reduced spending dramatically, resulting in a sharp fall in aggregate demand.

Lehman Brothers' collapse had global repercussions—contracting world trade and output sharply, triggering a global economic slowdown. The Chair of the Federal Reserve announced that the pressure placed on financial firms was the worst in history: out of the thirteen most important financial institutions in the United States, twelve were at risk of failure for a week or two.[2] Following Lehman Brothers' collapse, the crisis ripped through the global economy and in just one day it tore $700 billion off the value of investment portfolios, including retirement plans and government pension funds. This was to rise to $11 trillion before the

[1] M Koskenniemi, 'International Law as Therapy: Reading the Health of Nations' (2005) 16 *European Journal of International Law* 339.

[2] The Chair of the Federal Reserve announced that the pressure placed on financial firms was the worst in history: out of the thirteen most important financial institutions in the United States, twelve were at risk of failure within a period of a week or two (ibid, 345).

end of 2011.[3] The case of Lehman illustrated sharply that one major bank going down threatened others—not just by panic effects but by the potentially cascading effects of balance-sheet contagion.[4]

Having let Lehman Brothers fail, the US government did not then push the financial industry to find its own solution,[5] rather it used public money to rescue the ailing banking and manufacturing sectors. The Unites States was not alone. Various governments introduced explicit 'crisis' measures to reverse the recession through bank bailouts and stimulating employment and spending. By 2009, the WTO Trade Policy Review Body (TPRB) report had recorded policy slippages towards more trade restriction on the part of many countries,[6] including seventeen of the G20 countries.[7] These crisis measures were directed at borders through increased tariffs and export restraints, and behind borders through domestic subsidies, as well as through trade remedies such as anti-dumping and countervailing duties. In all countries, the political decisions to rescue the banks were met with fierce criticism, some of which focused on the close relationship between the financial industry and government which produced biased decision-making.[8]

An overview of the stimulus packages implemented in the six countries chosen for this research indicates[9] that, by 2009, the United States had implemented a $787 billion stimulus package under the American Recovery and Reinvestment Act (ARRA) comprising of a wide variety of tax incentives and procurement projects aimed at vigorous job creation and a swift revival of the economy. In the European Union, the €256 billion European Economic Recovery Plan (EERP) was approved in December 2008 to fund internal EU cross-border projects, including investments in clean energy and upgrading telecommunications infrastructure. At the Member State level, in addition to implementing bespoke domestic crisis measures, governments were requested to spend 1.5 per cent of GDP to boost consumer demand and tasked to invest in energy-efficient equipment and environmentally clean energy to create jobs and save energy.[10] Likewise, in Brazil a

[3] Financial Crisis Inquiry Commission, 'The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States' (New York, Public Affairs, 2011) 339.

[4] J Vickers, 'The Financial Crisis and Competition Policy: Some Economics' [2008] *GCP* 7 (www.ucl.ac.uk/laws/jevons/docs/Vickers_Dec_08.pdf).

[5] See C Woll, *The Power of Inaction: Bank Bailouts in Comparison* (Ithaca, NY, Cornell University Press, 2014).

[6] WTO WT/TPR/OV/12, 18 November 2009.

[7] The increase in protectionist measures was documented by institutions including the IMF and the World Bank and notably the GlobalTradeAlert.org.

[8] B Ritholtz, *Bailout Nation: How Green and Easy Money Corrupted Wall Street and Shook the World Economy* (Hoboken, NJ, John Wiley, 2010); V Reinhart, 'A Year of Living Dangerously: The Management of the Financial Crisis in 2008' (2011) 25 *Journal of Economic Perspectives* 71; L Seabrooke and E Tsingou. 'Revolving Doors and Linked Ecologies in the World Economy: Policy Locations and the Practice of International Financial Reform', CSGR Working Paper no 260 (June 2009).

[9] See Appendix 1.

[10] WTO TPR, April 2009.

stimulus plan was implemented, which included supporting the car industry by extending $1.7 billion in credits for carmakers and a temporary reduction of the industrial products tax on car sales. The Provisional Programme for Investment Support created an additional credit line of $4 billion for sub-federal state governments to finance the production of capital goods destined for exports.[11] In India, the total fiscal stimulus administered was set at 6 per cent of GDP. The Indian government sought to increase liquidity with the banks, infusing about $29 billion[12] into the domestic money market to alleviate the pressures brought on by deterioration in the global financial environment.[13]

This book examines the legality of the crisis *bailouts* and *buy-national* measures implemented by these governments during the 2008–12 period. Part I of this book therefore identifies and characterises the legal frameworks that these governments have agreed upon to promote competition and non-discrimination—with the aim of preventing tit-for-tat retaliation and subsidy wars from undermining the benefits of international competition and economic liberalisation. This research follows a specific competition approach that is set out in this introductory chapter, and promoted throughout the book. It uses this competition perspective to identify the gaps and weaknesses of first the international and then the regional legal frameworks that have been set up to constrain governments' protectionist instincts towards distorting the competitive process by discriminating in favour of domestic interests. In an economic crisis the incentive and opportunity for vested interests to seek such favours from the political system are greater than usual, as are the incentives to form cartels to fix prices and rig bids.

Having established both the applicable rules that have been negotiated at both the international and regional level, Part II of this book examines how these agreed rules operated to constrain governments' protectionist instincts, under their most significant stress test since their negotiation: the 2008–12 great recession. These three chapters examine, as case studies, the legality of the crisis measures taken by six countries, including the United States, Brazil, India and three EU Member States. Four of these six countries are also signatory parties to the WTO Government Procurement Agreement (GPA)—the EU, representing the UK, Ireland and Germany, and the United States. India has been an observer since 2012. Finally, all of these six countries have also become signatories to regional trade agreements, with diverse competition and procurement laws and policies. After identifying the various bailout and buy-national measures that these governments implemented during the 2008–12 crisis, the book assesses their legality under the commitments that have been negotiated by the governments in both the WTO and in their Regional Trade Agreements (RTAs).

[11] This offered an interest rate of 4.5%. WTO WT/TPR/OV/12, 18 November 2009.

[12] Rs 2,00,000 crore is valued at $29,372,888,824 @ 68.09 Indian rupees to $1 dollar (http://convert.syzygy.in/what-is-200000-crores-in-millions-and-billions, accessed (9 January 2017).

[13] S Mukherjee, 'India's Response to Financial Crisis', available at: www.economicsdiscussion.net/india/financial-crisis/indias-response-to-financial-crisis/11093.

The conclusions of this assessment of the 2008–12 crisis measures' compliance with these rules are then taken into Part III. The final chapters of this book discuss the enforcement of international trade rules from a competition perspective and with specific reference to a crisis. Chapter 7 looks at the enforcement of these rules during the crisis period, while Chapter 8 discusses when and why governments chose to obey international trade law. It submits that legal and political systems will inevitably face passing exigencies where the most positive way forward involves flexible application of the law. Nevertheless, such flexibility should be coordinated and cooperative to avoid undermining the objectives of the rules themselves. This book therefore concludes with some suggestions for improving the existing legal frameworks to better regulate crisis bailouts and buy-nationals from a competition perspective. This endeavour is undertaken in the belief that enhancing competition, particularly during a systemic crisis, is for the sustainable benefit of markets and citizens—as taxpayers and consumers.

II. Promoting Competition

> Antitrust laws … are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental freedoms.[14]

The importance of competition or anti-trust[15] has been acknowledged for centuries.[16] As long ago as the eighteenth century Adam Smith famously argued that economic prosperity in England was primarily due to the laws and institutions that, in addition to protecting individual freedom, also defended property rights, contract law and legal security. Moreover, any market failures caused by abuse of dominance or collusion, for example, needed to be removed by law.[17] Nowadays, it is a basic proposition in industrial organisation that competition tends in most circumstances to generate lower prices and/or higher quality for a given price. That is, with contestable markets—or free entry and an absence of collusion—prices will be driven to marginal costs, moreover costs themselves will be minimised, as firms compete for survival. The dynamic of competition also serves as an important driver of

[14] *United States v Topco Assoc Inc*, 405 US 596, 610 (1972).

[15] This book uses the term competition and anti-trust interchangeably but for the sake of consistency employs the term competition.

[16] See E-U Petersmann's historical study of the constitutional and economic principles supporting competition policy from Plato to the WTO: 'International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition' (1999–2000) 34 *New England Law Review* 145.

[17] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London, W Strahan & T Cadell, 1776).

innovation, as firms learn from one another to continuously improve their products, as well as their marketing, production and managerial techniques.[18]

This book uses the term 'competition policy' to refer to those *non-regulatory* government measures having an impact on the conditions of competition in markets,[19] both open markets and for public procurement purposes. Competition policy extends far beyond the enforcement of competition law. It rather comprises an entire set of measures and instruments used by governments to regulate or determine the conditions of competition and the contestability of markets.[20] It includes subsidies that distort competition, and in so doing it provides a workable yardstick with which to determine whether subsidies should be objectionable.[21] That is, in keeping with mainstream opinion, the present research explicitly positions competition law—regulating private markets—and government procurement law—regulating public markets—as two components or siblings located under the same conceptual umbrella of competition policy.

Whether or not there is a crisis, government interventions in the form of bailouts or buy-nationals are designed to provide an economic advantage to domestic firms. In principle, therefore, they may be covered by competition policy and laws in the form of subsidy control and government procurement law. These types of financial assistance can be distinguished from regulations.[22] In other words, although from the view point of an economist anything the government does that alters the producers' costs or revenues in a favourable direction could be regarded as a subsidy,[23] there is a crucial conceptual and legal difference: while a regulation is an expression of a general policy choice, a crisis subsidy in the form or a bailout or buy-national is antonym to norm.

A. Competition Policy and Allocative Efficiency

There is broad agreement on what competition policy is, along with its overall benefits for an economy. Nevertheless, beneath this general consensus domestic competition policies continue to vary widely. This can be partly attributed to the different legal traditions and customs in each jurisdiction. However, different governments do not have the same conception of what constitutes anti-competitive behaviour; governments treat the same types of practices differently. What is considered to be an anti-competitive or restrictive practice not only varies in different

[18] DW Carlton and JM Perloff, *Modern Industrial Organization* (Reading, MA, Addison-Wesley, 2004).

[19] International Competition Network, 'Report on Interface between Competition Policy and other Public Policies', prepared by the Turkish Competition Authority, presented at the 9th ICN Annual Conference, Istanbul, Turkey.

[20] B Hoekman, 'Economic Development, Competition Policy and the WTO', World Bank and CEPR (8 April 2003) 5.

[21] L Rubini, *The Definition of Subsidy and State Aid* (Oxford, Oxford University Press, 2009) 382.

[22] ibid, 91.

[23] R Hudec, in ibid, 92.

jurisdictions but also within countries. This is reflected in the number of different objectives competition policy may be used to pursue.

A frequently cited objective of competition policy is to maximise economic welfare through the achievement of *allocative efficiency*. This can be attained by ensuring that the competitive process is not distorted or impeded by restrictive practices. Anti-competitive behaviour has a detrimental effect on allocative efficiency and therefore levels of social welfare.[24] One essential aspect of the notion of welfare under allocative efficiency is that it deliberately sidesteps the issue of income distribution between consumers and producers. This is because the distribution of income is addressed through the use of other legal measures.[25]

Thus, although governments commonly pursue domestic social goals aimed at redistributing opportunities and income, for example, competition laws are not the most effective tools for achieving such a goal. Using competition policy would detract from achieving allocative efficiency and consequently diminishes total welfare. There may also be other less trade-distorting measures available to achieve the policy objective, for instance taxation laws, social security schemes, education, health and R&D. The rationale for avoiding issues of income distribution is twofold: first, if the intervention works, it produces a beggar-thy-neighbour effect that can lead to retaliation and spiral into a lose–lose trade war. Second, domestic policy interventions are prone to rent seeking, further reducing the likelihood of success.[26]

The GATT/WTO legal framework for regulating trade is based on the allocative model. The WTO Appellate Body has noted that to address a discrimination challenge under Article III GATT[27] a panel must examine 'whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products'.[28] Moreover, any exceptions to the principle of non-discrimination, provided for under GATT Article XX General Exceptions, require an assessment of its contribution to the objective pursued and also an assessment of reasonably available alternative measures that may be less trade restrictive.[29]

This research also works from within the allocative efficiency paradigm. It submits that competition law should not be used as a first-best option to pursue secondary or redistribution objectives. Cost–benefit analyses are invaluable because the use of competition policy to promote secondary policies potentially

[24] W Kolasky and A Dick, 'The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers', paper presented at the 20th Anniversary of the 1982 Merger Guidelines, The Contribution of the Merger Guidelines to the Evolution of Antitrust Doctrine (2002) 49.

[25] M Motta, *Competition Policy, Theory and Practice* (Cambridge, Cambridge University Press, 2004) 18.

[26] PR Krugman, 'Is Free Trade Passé?' (1987) 1 *Journal of Economic Perspectives* 141.

[27] Art III GATT stipulates that internal taxation and regulation should not be applied to imported or domestic products so as to afford protection to domestic production.

[28] 'Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef', ¶137.

[29] A similar requirement is also included under the Sanitary and Phytosanitary Agreement (SPS) Art 5.6 and the Technical Barriers to Trade Agreement Art 2.2.

drains total welfare when other less trade-distorting measures are available to achieve the same goal.[30] Overall there will typically be less economic growth to redistribute through other more efficient tools. While one section of society may experience increased welfare through positive discrimination, this will be at the cost of others because the overall level of welfare in society will be less than optimal. An empirical basis is a prerequisite to inform policy-makers as defenders of the public interest of the 'optimal regime' of efficiency and equity. Quantitative analysis is necessary to estimate any possible side effects of a policy instrument. A simple 'rule of thumb' is to assign a single policy instrument to each target, for single policy instruments have been shown to have the least adverse effects for other policy goals.[31]

However, few governments make policy according to the principle of allocative efficiency or adhere to this rule of thumb. Moreover, governments do always act in the national interest, especially when influenced by sectional interest group pressures. As Paul Krugman noted in his defence of free trade as a rule of thumb in a world whose politics are as imperfect as its markets:

> Nobody who has followed US trade policy in sugar or lumber can be very sanguine about the ability of the government to be objective in applying a policy based on the Brander–Spencer model.[32]

In other words, in practice governments vary enormously in the emphasis that is placed on maximising total welfare. Domestic competition policies typically include 'fairness considerations' or public interest overrides,[33] in addition to those more misguided interventions undertaken as the result of the winners having more knowledge and influence than the losers.[34]

B. Competition Law

In contrast with the umbrella definition of competition policy provided above, the term 'competition law' refers specifically to the set of legal instruments created and maintained by governments to regulate unnecessary anti-competitive market distortions in the *open* market. Domestic frameworks regulating competition differ, operating as they do under different legal systems as well as different

[30] See SJ Evenett, 'Would Enforcing Competition Law Compromise Industry Policy Objectives?' (Oxford University Working Paper, 2005).

[31] See J Tinbergen, *On the Theory of Economic Policy* (Amsterdam, North-Holland, 1952).

[32] Krugman (n 26) 142 discussing the work of James Brander and Barbara Spencer which suggested that government policies such as export subsidies and import restrictions can, under certain circumstances, deter foreign firms from competing for lucrative markets.

[33] R Richardson, 'On the Objectives of Competition Law' (1998), cited in B Hoekman and P Holmes, 'Competition Policy, Developing Countries, and the World Trade Organization' [1999] *The World Economy* 875–93.

[34] Krugman (n 26) 142.

economic and political pressures. Competition laws can directly shape the strategic and tactical choices of governments and businesses as well as national economic interests. These laws can be applied on the basis of the effects of conduct, as well as on a territorial basis; consequently, several domestic laws may be applicable to the same conduct. The territorial principle was applied in the early *US–Banana* case, involving acts to induce monopolisation committed outside the United States.[35] This principle was subsequently applied, albeit more flexibly, until the landmark *Alcoa* case. The Court of Appeal for the Second Circuit held that: '[A]ny State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders.'[36] This approach—known as the *effects doctrine*—has since dictated court practice, although with more restraint.[37] In the European Union, the effects doctrine is less controversially known as the *implementation test*.[38]

In addition to regulating firm behaviour, competition frameworks also address the anti-competitive behaviour of governments when providing anti-competitive subsidies or State aid.[39] This book is concerned with this latter category of competition rules: those provisions that condition a government's ability to provide subsidies to bailout a failing bank or firm.[40] These measures are addressed not to firms but to government bodies. These competition rules and regulations seek to limit the freedom of governments to grant financial advantages to certain sectors of their economy, irrespective of the technique that may be used, including tax or social security rebates.[41]

Unsurprisingly, subsidy or State aid control is a highly sensitive issue at both the regional and multilateral level due to its interference with national sovereignty and flexibility in policy-making. While the impact of these international rules is not that of a direct regime of governance taking over from the state, the impact is rather placed on the governance functions of the state. For as a result of these rules, there is a power shift or a 'subtle reversal of the internal order of values' due

[35] *American Banana Co v United Fruit Co*, 213 US 347 (1909). Here, the US Supreme Court categorically denied it had jurisdiction due to the territorial principle.

[36] *US v Aluminium Company of America et al*, 148 F 2d 416 (1944).

[37] *Timberlane Lumber Co v Bank of America National Trust & Savings Association*; later followed in *Uranium Antitrust Litig*, 617 F 2d 1248 (7th Cir 1980); *Munnington Mills Inc v Congoleum Corp*, 596 F 2d 1287 (3rd Cir 1979).

[38] The ECJ held during a case involving alleged price fixing activities among EU and non-EU wood pulp producers located throughout the world that the concerted practice complained of had been implemented in the EU and consequently EU competition law could be applied extraterritorially. Joined Cases 89, 104, 114, 116, 117 and 125–129/85, 27 September 1988, *Woodpulp* [1988] ECR 5193.

[39] This book uses the term subsidy and State aid interchangeably.

[40] The term 'subsidy' is defined both imprecisely as a government transfer of money to a private-sector firm or entity as well as the broader category of a favourable provision by a government of a good, service or other advantage to a private company. See AO Sykes, 'The Economics of WTO Rules on Subsidies and Countervailing Measures', The Chicago University John M Olin Law & Economics Working Paper no 186 (2003).

[41] C-D Ehlermann, 'State Aid Control in the EU: Success or Failure?' (1994) 18 *Fordham International Law Journal* 1218.

to changes in the law of justification, burdens of proof and legal presumptions.[42] Consequently, and as this research indicates, despite the general economic consensus that competition—whether in public or open markets—is beneficial, governments remain unwilling to commit themselves wholeheartedly to any such international or, for the most part, even regional control of these measures.

III. Government Procurement Law and Policy

Government or public procurement can be defined as the formal process through which official government agencies obtain the necessary goods and services, including construction, to undertake governmental activities that are not with a view to commercial sale or resale.[43] Since public spending increased significantly throughout the twentieth century[44] a vast range of government or public entities are routinely expected to procure the vast array of goods and services necessary for providing citizens with services as diverse as education, security, public health, utilities, infrastructure and renewable energy facilities. OECD data from cross-national studies suggest that government procurement typically constitutes in the range of 10–15 per cent of total economic activity,[45] and in many developing countries it is more.[46]

A domestic government procurement law is typically comprised of a series of detailed rules on tendering procedures and technical specifications, along with deadlines for the preparation, submission and receipt of tenders. It will also include guidelines on the evaluation of tenders and award of contracts, rules on post-contract information and publication, and a domestic bid challenge system or dispute resolution mechanism to support compliance. As with domestic competition policies, there are also contending objectives or 'desiderata' operating in a procurement system.[47] Again, these competing policy objectives range from aims as diverse as promoting allocative efficiency, customer satisfaction and integrity; to distributing wealth, avoiding risk and promoting uniformity.

[42] JHH Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy* (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2004) 559.

[43] Government procurement generally covers two main types of public expenditure: consumption expenditure and expenditure on capital formation, ie investment expenditure. OECD, *The Size of Government Procurement Markets* (Paris, OECD, 2002) annex II.

[44] See eg V Tanzi and L Schuknecht, *Public Spending in the 20th Century: A Global Perspective* (Cambridge, Cambridge University Press, 2000).

[45] See OECD, *The Size of Government Procurement Markets* (Paris, OECD, 2001).

[46] For example, China's government procurement market totalled approximately $88 billion in 2008, more than triple the amount in 2003. The EU's procurement market was worth over €1,500 billion, over 16 per cent of total EU GDP in 2004, and grew to over €2,150 billion in 2008. See: EC DG Internal Market Government Procurement Indicators (2008).

[47] S Schooner, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 11 *Public Procurement Law Review.* 2.

Some advocate the use of procurement as a tool for advancing social values. This approach contends that a state should pursue certain social ends through procurement contract specifications, even when it is prohibited from pursuing the same ends through regulation.[48] Others opine that in a democracy the state should be bound by the same policy objectives whether it acts as a regulator or consumer.[49] Consequently, to 'hide' policy objectives in the tender specifications to avoid legal constraints at best is non-transparent and discriminatory, and at worst a scattergun approach without evidence or mandate to support such a departure from the principle of competition and value for money.

Ultimately, a degree of policy trade-off seems inevitable as there is little compatibility among some of the various objectives that government procurement can potentially serve. Value for money, for example, is unlikely to be obtained at the same time as the redistribution of wealth through preferential procurement policies or 'offsets'.[50] Requiring the best price for the best quality available could mean choosing a large foreign supplier over a small local firm or disadvantaged community. Equally, the experience and expertise required to identify the best value available in, for instance, a complex communications technology market will necessarily detract from short-term efficiency because the tendering process will require additional time and resources. It may involve training in a process as diverse as market research, tender design and contract negotiation.

Similar trade-offs emerge with due process and access to redress. A challenged tender will often hold up the completion of the contract. Nevertheless, the right to challenge a bid is one of the most effective monitoring and self-policing mechanisms a procurement system can have. Open competition could compromise welfare and efficiency if the required tender process takes several months to complete when the contract is an urgent requirement of society, such as building health facilities or emergency road repairs. And while costly, transparency in government procurement is necessary to ensure that procurement decisions are based only on considerations regarded as 'legitimate' within the system and encourages participation by suppliers.[51] Yet in the private sector, transparency is rarely considered let alone valued because it often proves antithetical to accepted commercial practices. In sum, the move towards faster and more commercial behaviour by procuring

[48] C McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford and New York, Oxford University Press, 2007).

[49] See JL Dunoff, 'Linking International Markets and Global Justice' (2009) 107 *Michigan Law Review* 1039.

[50] The WTO GPA defines offsets as 'measures used to improve local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements'.

[51] S Arrowsmith, 'Towards a Multilateral Agreement on Transparency in Government Procurement' (1998) 47 *International and Comparative Law Quarterly* 793.

entities is not easy precisely because of the need for greater transparency and public accountability from the state as representative of citizens,[52] as well as compliance with applicable international trade laws.

IV. Integrating Competition and Government Procurement Laws

Traditionally, government procurement laws have been perceived as largely focused on eliminating public restrictions on the circulation of goods and services associated with protectionist measures by other governments. Competition law, on the other hand, is perceived as largely focused on private restraints of competition that damage consumers and contestable markets. Under this 'classical' perspective, very limited interaction between competition and government procurement law is envisaged. Both bodies of economic regulation seem to have different objectives, and, consequently, seem to offer weak reasons for their joint study or for the development of consistent rules and remedies.[53]

Indeed, most of the available literature undertakes separate assessments of competition policy and laws[54] and government procurement policy and laws.[55] There is also a body of theory that positions these laws within broader national and public policies, interests, strategies and priorities.[56] This research suggests that competition policy is, by design, both selective and episodic. The vast majority of markets, including some that are in fact not very competitive, escape through the net, and only a few markets come to be the subject of investigation.[57]

[52] S Schooner, 'Commercial Purchasing: The Chasm between the United States Government's Evolving Policy and Practice' in S Arrowsmith and M Trybus (eds), *Public Procurement: The Continuing Revolution* (London, Kluwer Law International, 2002) ch 8.

[53] A Sánchez Graells, 'Public Procurement and State Aid: Reopening the Debate?' (2012) 21 *Public Procurement Law Review* 205.

[54] Hoekman, and Holmes (n 33). See also SJ Evenett, 'What Is the Relationship between Competition Law and Policy and Economic Development?' (University of Oxford, 2005); and European Commission, 'Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules', Report of the Group of Experts (July 1995) ('Van Miert Report'); P Cook, 'Competition and its Regulation: Key Issues', Centre on Regulation and Competition Working Paper Series no 2 (University of Manchester, October 2001).

[55] Arrowsmith and Trybus (n 52); S Arrowsmith and R Anderson (eds), *The WTO Regime on Government Procurement: Recent Developments and Challenges Ahead* (Cambridge, Cambridge University Press, 2011); S Schooner and C Yukins, 'Public Procurement: Focus on People, Value for Money and Systemic Integrity, Not Protectionism', GWU Law School Public Law Research Paper no 460. 2009.

[56] PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (New York, Aspen, 2011) 125.

[57] In the UK, it was estimated in 2002 that well under 5% of all mergers end up at the Competition Commission, an average of one to two market inquiries a year. This is in a country that hosts literally hundreds of markets which might, in principle, be investigated. See PA Geroski, 'Is Competition Policy Worth It?', Chairman, UK Competition Commission (September 2004).

Clearly, competition rules are not the sole expressions of relevant public policies and can never be isolated completely from other public policy choices relevant to democratic societies.[58] Non-efficiency considerations attached to both competition and procurement rules include: consumer welfare;[59] protection of national champions;[60] justice;[61] fairness;[62] promotion of entrepreneurial liberty and opportunity;[63] self-regulation by collective or professional bodies;[64] prevention of unethical business conduct;[65] environmental protection and green innovation;[66] inflation control;[67] intellectual property;[68] and national security.[69] These differences in domestic policies create a disparity in competitive conditions. And it is this disparity that ultimately affects the ease or difficulty of access into the national markets of other trading nations.

One underlying premise of this book is that the prevailing approach of separating the study of competition and procurement regimes overlooks important aspects of these rules as composing parts of the same system. If competition law fails to guarantee undistorted conditions of competition, government agencies will be unable to procure goods or services most efficiently. Similarly, when government procurement rules are not sufficiently pro-competitive, they can generate the very same market failures that competition law seeks to prevent.

[58] H Schweitzer, 'Competition Law and Public Policy—Reconsidering an Uneasy Relationship: The Example of Art 81', Working Paper, European University Institute (2007) 13; T Calvani, What Is the Objective of Antitrust?' in T Calvani and J Siegfried (eds), *Economic Analysis and Antitrust Law*, 2nd edn (Boston, MA, Little, Brown & Co, 1988) 7.

[59] See eg: J Vickers, 'Economics for Consumer Policy' (2004) 125 *Proceedings of the British Academy* 289; T Muris, 'The Interface of Competition and Consumer Protection', paper presented at the Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, New York (31 October 2002); K Dawar, 'Establishing Consumers as Equivalent Players in Competition Policy' in P Cook (ed), *Competitive Advantage and Competition Policy in Developing Countries* (Cheltenham, Edward Elgar, 2005).

[60] See SJ Evenett, 'Would Enforcing Competition Law Compromise Industry Policy Objectives?' (University of Oxford, 2005).

[61] McCrudden (n 48) 2007.

[62] See LS Liu, 'In Fairness We Trust?—Why Fostering Competition Law and Policy Ain't Easy in Asia' (2004) available at SSRN: https://ssrn.com/abstract=610822; LB Schwartz, '"Justice" and Other Non-economic Goals of Antitrust' (1979) 127 *University of Pennsylvania Law Review* 1076; Areeda and Hovenkamp (n 56).

[63] See R Pitofsky 'The Political Content of Antitrust' (1979) 127 *University of Pennsylvania Law Review*; AA Foer, 'American Idealism: Level Playing Fields' (1996) 96 *Business and Social Review* 27; W Adams and J Brock, 'Antitrust and Efficiency: A Comment' (1987) 62 *New York Law Review* 1116.

[64] CC Havighurst, 'A Comment—The Antitrust Challenge to Professionalism' (1981) 41 *Maryland Law Review* 30.

[65] R Lande, 'Wealth Transfers as the Original and Primary of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 *Hastings Law Journal* 65, 115.

[66] See eg OECD, *Competition Policy and Environment* (Paris, OECD, 1996); and JH Adler, 'Conservation through Collusion: Antitrust Barriers to Cooperative Fishery Management' (2002), available at SSRN: https://ssrn.com/abstract=305921.

[67] Motta (n 25) 24.

[68] See RD Anderson and H Wager, 'Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy' (2006) 9 *Journal of International Economic Law* 707.

[69] See eg the US disputes: *FTC v Imo Indus, Inc*, 1992-2 Trade Cas (CCH), 69, 943 (DDC 1989); *FTC v Alliant Techsystems, Inc*, 808 F Supp 9 (DDC 1992).

Yet an overview of the literature identifies few integrated studies in the international regulation of public restraints of competition in both open and government procurement markets. This lacuna is also apparent in analyses of the legal nature of these particular rules; particularly supported by empirical research into their levels of compliance and enforcement. The research undertaken here therefore seeks a holistic understanding of how the competition and public procurement rules operate together. It is premised on the belief that at the most general level, competition and procurement laws are both derived from the fundamental principle that in the long term, competitive markets produce benefits to the economy and to society as a whole.[70] Both sets of rules aim to regulate the competitive conditions of markets and are prima facie subject to same sovereign domestic decision-making pressures.

The influence of competition's economic principles is most obvious in the area of bid rigging and collusion amongst tenderers for public contracts.[71] This concentrates on the economic impact of procurement on competition, including the so-called *buyer power*.[72] Such work stresses the importance of preventing procurement processes being affected by egregious practices such as collusion, bid rigging, fraud and corruption.[73] It encompasses three main areas: first, the application of competition rules to prevent collusive tendering; second, the role of such policy in addressing regulatory and other barriers to competition, through 'competition advocacy' activities; and third, the application of other aspects of competition law including the treatment of mergers and joint ventures. The main thrust of this work is that competition policy is an essential complement to international liberalisation via mechanisms including government procurement agreements.[74]

The complexity of competition effects from procurement results in the public sector both promoting and restricting competition. Governments can do this through procurement policy, either by helping firms to overcome barriers to entry or by adopting procurement practices that restrict participation or discriminates against particular firms.[75] Their interdependent nature is also apparent in the impact of government procurement activities in the prospective analysis conducted in merger control cases, or on the impact of subsidies in public markets. These

[70] C Munro, 'Competition Law and Government Procurement: Two Sides of the Same Coin?' (2006) 6 *Public Procurement Law Review* 352.

[71] SE Weishaar, *Cartels, Competition and Public Procurement* (Cheltenham, Edward Elgar, 2013).

[72] The Bundeskartellamt, 'Buyer Power in Competition Law—Status and Perspectives', www.bundeskartellamt.de/wEnglisch/Vergaberecht_e/vergaberecht_eW3DnavidW2643.php.

[73] 'Public Procurement: The Role of Competition Authorities in Promoting Competition', OECD, DAF/COMP 2007:34.

[74] RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalization: Essential Complements to Ensure Good Performance in Public Procurement Markets' [2009] *Public Procurement Law Review* no 2, 67.

[75] See eg J-J Laffont and J Tirole, *A Theory of Incentives in Procurement and Regulation* (London, MIT Press, 1994). They contend that procurement is a special case of regulation in which the roles of principal (regulator or designer of contract mechanisms) and buyer are combined; UK Office of Fair Trading, *Assessing the Impact of Public Sector Procurement on Competition. Vol 2—Case Studies* (OFT742b) (September 2004).

issues determine the competitiveness of markets where the public buyer sources goods, works and services, and can constrain the ability of the public buyer to obtain allocative efficiency and value for money.

There is, therefore, a direct relationship between the extent of competition in procurement markets and the costs of the goods and services that are procured. This is evinced by the resources private companies spend on ensuring competition for cost-effective public procurement in business-to-business commercial transactions, as well as in ensuring procurement departments make effective use of competition to reduce the cost and increase the quality of inputs.[76] Nevertheless, the effects and distortions that government procurement regulation and practice can generate in the market and the welfare losses that restrictive government procurement can provoke have been overshadowed by competition policy and law enforcement. Research into government procurement from the standpoint of industrial organisation has received limited attention because its analysis belongs with the relatively secondary field of microeconomics dedicated to the study of monopsony and buyer power.[77]

A. The Application of Competition Law to Public Procurement

A part of the reason for the lack of competition perspective in public procurement markets is the uncertainty surrounding the application of the competition rules to public-sector bodies. Within the EU, legal uncertainty can be traced to unpredictable case law, most notably the radical departure from prevailing interpretations during the case *FENIN v Commission*.[78] Here it was held that it is 'the act of placing goods or services on a given market which characterises the concept of economic activity and not purchasing activity as such'.[79] The earlier CAT *Bettercare* II decision concluded otherwise: rather, that the ability to generate the effects that the competition rules seek to prevent is a necessary but not a sufficient condition for an activity to be that of an undertaking.[80]

Policies to develop local renewable energy markets through the use of feed-in tariff programmes have presented a new opportunity to consider a more integrated approach,[81] with a view to filling gaps in the multilateral rulebook, particularly

[76] RD Anderson, WE Kovacic and AC Müller, in S Arrowsmith and R Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge, Cambridge University Press, 2012).

[77] See A Sánchez Graells, *Public Procurement and the EU Competition Rules* (Oxford, Hart Publishing, 2011).

[78] Munro (n 70) 352.

[79] Case C-205/03 P, *Fenin v Commission*, Judgment of the Court (Grand Chamber) 11 July 2006, ¶24.

[80] Case 1006/2/1/01, *BetterCare Group Limited v Director General of Fair Trading.*

[81] See eg L Rubini, 'Ain't Wastin' Time No More. Subsidies for Renewable Energy, the SCM Agreement, Policy Space and Law Reform' (2012) 15 *Journal of International Economic Law* 525; M Wilkes, 'Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review', ICSTD Issue Paper no 4 (2011).

as regards local content requirements.[82] For as this book explicates, emerging disputes regarding the legality of horizontal policies in public procurement in both the WTO and EU have fuelled the growing awareness that the boundaries between public and private markets are blurred, and moreover, the legal uncertainty surrounding the application of the trade and competition rules to public-sector bodies should be addressed.[83]

In short, the 'public side' of the procurement phenomenon and, most notably, the impact of the market behaviour or the power of the public buyer on competition dynamics has remained substantially unexplored and are largely overlooked in current competition policy and law enforcement.[84] Limitations within current rules and case law prevent further tackling of publicly generated restrictions and distortions of market competition. The effects of government procurement on competition, and competition laws on government procurement merit further scrutiny from both an economic and legal perspective. Otherwise there is the potential for distortions that government procurement rules and practice generate in the market somewhat perversely engendering the very same effects that competition rules seek to prevent. This suggests that competition policy in public and open markets needs to be reconfigured if it is to better take into account the effects of the market behaviour of the public buyer and in so doing, promote economic efficiency and social welfare. This would have a major impact and generate significant benefits, to the advantage of citizens—both as consumers and as taxpayers.[85]

The approach taken by this research therefore seeks to contribute to this less explored legal area. It does so by identifying and characterising the nature and operation of the frameworks that regulate the anti-competitive instincts of governments towards domestic interests operating in both public procurement and open markets. It undertakes an integrated research approach at both the multilateral and regional level. This theoretical method of analysis is supported by empirical research into levels of compliance and enforcement when these rules are under a stress test: most notably during a global economic crisis.

The research is ultimately motivated by the premise that public or state restrictions to competition are amongst the most pervasive, entrenched and most problematic sources of distortion to free market dynamics. Promoting competition through free trade is a simple rule of thumb through which special interest group politics can be resisted. Moreover, to abandon competition and the free trade principle in pursuit of the gains from even the most sophisticated of interventions would likely open the door to adverse political consequences that would outweigh any potential gains.[86]

[82] C Cimino, GC Hufbauer and JJ Schott, 'A Proposed Code to Discipline Local Content Requirements', Peterson Institute for International Economics no PB14-6 (February 2014).

[83] See, for example, the WTO *Feed-in-Tariff* dispute and EU case law on PreussenElektra AG, Fenin and Bettercare, and *MOL Magyar Olaj- és Gázipari Nyrt v Commission*.

[84] A Sánchez Graells, 'Distortions of Competition Generated by the Public (Power) Buyer: A Perceived Gap in EC Competition Law and Proposals to Bridge It', University of Oxford Centre for Competition Law and Policy Working Paper CCLP (L) 23 (2009).

[85] Sánchez Graells (n 53) 205–12.

[86] Op cit. Krugman (n 26) 1987.

V. Private Anti-Competitive Behaviour

This book only examines government restraints on competition. While explicitly acknowledging the significance of the anti-competitive behaviour of firms, this book does not undertake a singular analysis of the rules governing private anti-competitive practices in either open or procurement markets. Nor does it undertake a systematic empirical assessment of the anti-competitive behaviour of firms that took place during the 2008–12 crisis, such as cartel activity or bid rigging.

This choice highlights one of the premises for advocating a more holistic approach to competition. For within the jurisdictions of the case study countries, the rules applicable to *private* restraints of competition cannot be extended to control *public* or government activity. For example, in the United States the *Parker immunity doctrine* presumes that the state is exempted from liability if it creates regulation with anti-competitive effects when it exercises legislative authority.[87] In this landmark case, the Supreme Court ruled that the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or an official action directed by a state. Rather, the Sherman Act is applicable to persons, including corporations, and it authorises suits under it by persons and corporations.[88] Moreover, although a US state may maintain a suit for damages under the Sherman Act,[89] the federal state of the USA may not.[90]

In the EU, Article 101 TFEU clarifies the targets of competition law in two stages with the term *undertaking*. Any entity engaged in an economic activity that consists of *offering* goods or services on a given market, regardless of its legal status and the way in which it is financed, is considered an undertaking. To qualify, no intention to earn profits is required, nor are public bodies by definition excluded.[91] In effect, this term is used to describe nearly anyone that is engaged in an economic activity,[92] except employees[93] and public services based on 'solidarity' for a 'social purpose.'

A *public undertaking*, on the other hand, is an undertaking over which public authorities directly or indirectly exercise dominant influence by virtue of their ownership, financial participation or the rules that govern it.[94] *Fenin v Commission*[95]

[87] *Parker, Director of Agriculture, et al v Brown*, 317 US 341 (1943).

[88] ibid, ¶7–15.

[89] *Georgia v Evans*, 316 US 159.

[90] *United States v Cooper Corp* 312 US 600.

[91] The Commission published this definition on DG Competition's website at: http://ec.europa.eu/comm/competition/general_info/u_en.html#t62.

[92] Case C-41/90, *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979.

[93] See AG Jacobs, *Albany International BV* (1999).

[94] A dominant influence of public authorities is in particular presumed when they: (a) hold the major part of the undertaking's subscribed capital, (b) control the majority of the votes attached to shares issued by the undertaking, or (c) are in a position to appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

[95] Case C-205/03 P, Advocate General Maduro in *Fenin v Commission.*

highlights that the Community courts' traditional approach for establishing whether or not a public body is an undertaking turned on the concurrent application of two tests: (i) the comparative criterion and (ii) market participation tests. The first test focuses on whether the activity of a public body is capable of being performed by private operators. The potentially all-encompassing scope of this first test is reined in by the market participation test. This determines whether those activities are conducted under market conditions. It distinguishes between conduct undertaken with the objective of capitalisation, and those activities pursued solely pursuant to the principle of solidarity. For where the activities of the Member State are typically those of a public authority, they will not be considered an undertaking subject to Article 101 TFEU.

The results of this approach was that in so far as a public entity undertakes an economic activity that could be separated from the exercise of its public powers, this entity, in relation to that activity, acts as an undertaking. However, if that economic activity could not be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers.[96] The fact that the product or a service supplied by a public entity and connected to the exercise by it of public powers was provided in return for contractual remuneration rather than determined, either directly or indirectly—by that entity—was not sufficient to classify the activity as economic or the entity as an undertaking.[97]

Significantly, this TFEU approach effectively operated to push most government procurement activities outside of the application of the competition rules under Articles 101 and 102 TFEU. Government procurement in the EU was seen as an ancillary to a non-economic activity, which prima facie disqualified it from the economic activity regulated under Articles 101 and 102 TFEU. This was regardless of the anti-competitive distortions that government procurement activities may effect, and which may impact both public and open markets. This asymmetrical approach in the competition rules accorded to EU public and open markets undermined a more coherent integrated approach to regulating these markets. Chapter 3 notes post-crisis developments in CJEU rulings such as the *EasyPay* judgment,[98] broke with this historical approach in ruling that for the purposes of the application of EU competition law, an undertaking is any entity engaged in an economic activity.

In Brazil, government procurement is still deemed an ancillary activity with the primary objective of meeting the core interests of the State.[99] Article 3 of Law No 8666/93 clarifies that the goal of bidding is to ensure the equality among the

[96] Case C-113/07 P, *Selex Sistemi Integrati v Commission* [2009].

[97] Case C-138/11, *Compass-Datenbank GmbH v Österreich*.

[98] Judgement in *EasyPay and Finance Engineering,* C-185/14, EU:C:2015/716.

[99] This began with the Philippine Ordinances of 1575. See D Pezzutti Ribeiro Teixeira, 'The Brazilian Experience of Using Public Procurement Policies to Promote the Development of Micro and Small Enterprises from the Legal Point of View', available at www.ippa.org/IPPC4/Proceedings/13ProcurementPreferences/Paper13-3.pdf.

bidders, which means not only equal conditions of competition but also to select the most advantageous proposal to the government. The Brazilian procurement Law No 10520 of 2000[100] is applicable to all direct and indirect public administration and federative levels in all branches of government. Under this framework, state-owned joint capital corporations and governmental agencies may establish their own standards for purchases. When seeking a social mission, the Brazilian state seeks to benefit from the bid as a sustainable economic development activity, creating jobs and income in a context of scarcity. Consequently, procurement has become one of the state's core activities, as assigned by the federal government.

Competition law in Brazil, on the other hand, is governed primarily under Law No 8.884[101] and the federal constitution. In theory, these rules apply economy-wide and contain no express exclusions for particular sectors or firms. Commercial enterprises owned by federal or state governments are covered, as are companies operating in regulated sectors. However, in applying the statute to regulated firms, the competition authority, CADE, avoids creating conflict with the operative regulatory scheme and does not prosecute firms for unilateral conduct mandated or controlled by regulatory agencies.[102]

The OECD has urged CADE to exploit its political and moral authority by fully utilising the powers provided under Article 7 X and the consultation procedure under Resolution 18, to examine anti-competitive restraints imposed by state and local governments.[103] If it were to, CADE could potentially perform a useful integrating function by assessing local regulatory schemes, reflecting the view that anti-competitive restraints imposed by law are often more harmful to competition than any restraints imposed by private agreement. As yet, CADE does not have the power to enforce such requests. The Brazilian agency in charge of investigating and prosecuting anti-competitive conducts, SDE, announced in 2007 that it would focus on collusion investigations involving the public procurement area. These cause an estimated $12.5–20 million in damages to the government per year. A department in charge of antitrust analysis of public procurement was established to approach other governmental entities dealing with competitive bids and projects budget and review of public accounts to develop a common agenda.[104] These incipient efforts may, in time, lead to assessing the anti-competitive effects that procurement practices can engender on open markets in a manner analogous to private practices. Until then, the fact remains that public procurement is viewed as an ancillary activity, overwhelmingly excluded from the regulation applied to the same economic activities in the private sector, as with the USA and the EU. And as such, any assessment of the operation of the international regulation of private anti-competitive practices requires a different research focus to that undertaken in this book.

[100] Also known as the Reverse Auction Law.

[101] Of 1994, amended in 2000 and 2007.

[102] OECD, *Competition Law and Policy in Brazil* (OECD Policy Brief, 2005).

[103] OECD, 'Competition Law and Policy Developments in Brazil' (2000) 2 *Journal of Competition Law and Policy* 195.

[104] 'Brazil: SDE Focuses on Public Procurement Sector', Felsberg E Associados (10 December 2013).

Public procurement India accounts for roughly 30 per cent of the country's GDP, but as yet there is no single institutional framework governing exclusively public procurement, let alone an integrated competition approach.[105] India's procurement system continues to be decentralised, comprising of an array of entities at various levels of government. India retains preferential treatment in government procurement for small enterprises, Scheduled Caste or Scheduled Tribe entrepreneurs, and traditional handicrafts. India is not a party to the WTO GPA, but became an observer to the Agreement on Government Procurement in 2012, and embarked on a process of formulating a comprehensive government procurement legislation applicable to all parts of the central government, and one that accommodates the requirements of the WTO GPA.

Of relevance to the competition approach underpinning this research, is that the Indian Competition Act 2002 does not distinguish between private and government enterprises except for limited exemptions relating to sovereign functions of government.[106] The Indian Competition Act presumes that any agreement between enterprises or persons (engaged in identical or similar businesses) which, directly or indirectly, results in bid rigging or collusive bidding will have adverse appreciable effect on competition. Under the Act, such agreements are void; if there is any agreement between the coordinating firms resulting in bid rigging, such agreement shall be presumed to be anti-competitive and, consequently, void. The Competition Commission of India (CCI) also has a role in the regulation of public procurement, to intervene if any alleged malpractice causes (or could cause) an appreciable adverse effect on competition in India. The role of the CCI in such cases is also preventive. Moreover, pursuant to Article 19.6 covering the inquiry into certain agreements and dominant position of enterprise, the CCI shall, while determining the 'relevant geographic market', have due regard to, inter alia, national procurement policies. Indeed, by 2013 the CCI had investigated thirteen cases of bid rigging, including for medical equipment, the railway and state lotteries.[107] Nevertheless, it remains the case that public procurement law is fragmented both regionally and sectorally, and is largely separated from competition law along traditional lines, except for the few areas of integration such as bid rigging.

[105] The current regulatory framework for India's public procurement includes the General Financial Rules (GFRs), 2005; the Delegation of Financial Powers Rules (DFPR); the Manual on Policies and Procedures for Purchase of Goods issued by the Ministry of Finance; government orders regarding price or purchase preference or other facilities to sellers in the handloom sector, cottage and small-scale industries and to CPSEs; and the guidelines issued by the Central Vigilance Commission to increase transparency and objectivity in public procurement. There are also sectoral laws such as the Telecom Regulatory Authority Act 2000, the Electricity Act 2003, and the Petroleum and Natural Gas Board Act 2006, which also regulate public procurement. In addition, various government instruments and agencies including ministries and departments (e.g. the Public Works Department and the National Highways Authority of India) have their own public procurement system.

[106] This includes activity relating to energy, currency, defence and space.

[107] AK Chauhan, Director General Competition Commission of India, 'Public Procurement System: Competition Issues', presentation at the Conference of National Productivity Council, Bhubaneswar, 5 February 2013.

VI. Assessing the Legality of the Crisis Measures in Six Case Study Countries

The second area of research that this book undertakes is an assessment of the legality of these anti-competitive state measures in the form of bailouts and buy-nationals implemented during the 2008–12 fiscal crisis. Chapters 4–6 conduct a legal investigation of the relevant data available on the application of crisis measures or stimulus packages implemented during the crisis by: the USA, Brazil, India and three EU Member States—Germany, Ireland and the UK. This assessment of the legality of the bailout and buy-national measures is divided into those that were implemented in the financial services sector as opposed to those implemented in the 'real' or manufacturing economy. These six case studies are included in an attempt to examine the interplay of all variables in order to provide as complete an understanding of an event or situation as possible. This involves an in-depth description of the legal framework being evaluated, the circumstances under which it is applied and the community in which it is located. It seeks a more complete understanding of the regulatory frameworks that have been negotiated by different governments. These qualitative case studies are concerned with identifying not only all the traits found in a particular agreement, but also in its supporting institutions and external policy environments.[108]

The choice of case studies selected—the USA, Brazil, India and three EU Member States: Ireland, Germany and the UK—has been made so as to include as wide a range of examples as possible. It includes a WTO GPA member whose RTAs with provisions regulating competition are separated out along the traditional lines of competition/anti-trust law and government procurement law—the USA. The selection also includes a WTO GPA member with a notified RTA with competition and public procurement laws, which are enforced by a centralised regional body with competence over its Member States in trade and competition policy issues: the EU. The three EU Member States chosen—Germany, the UK and Ireland—offer further contrasts. The UK is a non-euro Member State and the first EU country to signal a financial crisis.[109] Germany is the largest economy in Europe, and the third largest in the world. Due to its large export-oriented manufacturing sector and its specialisation in investment goods, Germany was more exposed to the global trade shock triggered by the financial crisis than most other economies,[110] while at the same time, better equipped to respond than most other economies.

[108] FH Giddings, *Principles of Sociology* (London, Macmillan, 1896).

[109] On 9 August 2007 the bank BNP Paribas blocked withdrawals from three hedge funds, citing 'a complete evaporation of liquidity'. This led to a panic as investors and savers attempted to liquidate assets deposited in highly leveraged financial institutions. The highly leveraged British bank Northern Rock was forced to request security from the Bank of England, leading to a bank run in September 2007. Having failed to find a private-sector buyer, the British government eventually nationalised the bank.

[110] European Economic Forecast (Autumn 2009) 82.

In Ireland, there was both a credit squeeze and a fiscal crisis, which were caused directly, through the costs of recapitalising the banking system as well as indirectly, through the loss of asset-driven revenues. Further, being in the eurozone, Ireland and Germany were also entitled to EU temporary funding programmes, which by September 2012 became the European Stability Mechanism (ESM). This intervention, while not uncontested in Ireland,[111] provided a permanent firewall for eurozone countries to safeguard and provide instant access to financial assistance programmes.

At the other end of the spectrum lie Brazil and India. Both of these case study countries are WTO Members, but neither is a signatory party of the WTO GPA nor party to an RTA with integrated rules to regulate public restraints of competition. As such, these two case studies serve as a type of counterfactual. They illustrate how a government can choose to respond to a crisis when it has minimal regulatory restraints. This can be compared with those governments that have chosen to enact strong rules at regional and multilateral levels, or those choosing to do so only at the multilateral level. In sum, the main objective in selecting this sampling of case studies is to identify and compare the broadest range of different legal scenarios available to produce the richest results possible within the confines of a book on compliance and enforcement in international economic law.

VII. The Enforcement of International Trade Law in a Crisis

After Part II's assessment of the legality of these crisis measures or the extent of their compliance with the international and regional obligations agreed to by the case study countries, Part III of the book addresses issues of compliance and enforcement with regards to the legal nature of these rules. In so doing, the research seeks to ask why governments sometimes obey international trade laws and why they sometimes do not. For if there is no attempt to predict when and why governments comply with their international obligations, it is difficult to advocate multilateralism as opposed to regionalism or even unbridled unilateralism.

Part III examines the nature of these rules from within a discussion of their strength or so-called *degree of legalisation*.[112] This debate positioned the selected legal provisions along a spectrum where one pole is characterised as soft, unenforceable law or best-practice guidelines; while at the other pole laws are characterised as hard law and enforceable law. The research then addresses whether

[111] See Case C-370/12, *Thomas Pringle v The Government of Ireland*.

[112] KW Abbott, RO Keohane, A. Moravcsik, AM Slaughter and D Snidal, 'The Concept of Legalization' (2000) 54 *International Organization* 401; KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421.

these rules are transactional and bilateral, or collective in their nature and enforcement properties.[113] The results of this examination provide significant insight into their enforcement characteristics. It governs who has standing to bring a challenge based on a particular provision, as well as who can impose or benefit from remedies where a provision has been breached. It indicates the limits to what the WTO Members and RTA parties have agreed to in negotiations.[114] Finally, such an empirical and conceptual analysis offers the basis for making informed and evidence-based conclusions about the extent of state sovereignty[115] and domestic regulatory discretion.[116]

In light of Part I and the analysis and conclusions of Part II, Part III examines how international trade law works in crisis, when under a stress test. It asks whether existing enforcement mechanisms have appropriate incentive structures to address the challenges of a global crisis and for preventing a slide into tit-for-tat protectionism. The results of this theoretical and empirical assessment underpin this book's conclusions and recommendations concerning the role and operation of these laws when governments are under pressure to ignore them, along with their raison d'être, and discriminate in favour of domestic actors.

A. Counterfactuals

> It's very hard to know the counterfactual.[117]

This book examines different domestic legislative frameworks and compares their regulatory approaches, but it does not examine counterfactuals. From a policy perspective, 'what if?' questions relate to corresponding policy counterfactuals, such as: what would governments have done to address the crisis if the legal frameworks to prevent public distortions of competition in public procurement and open markets had ensured 100 per cent compliance during 2008–12? It would

[113] J Pauwelyn, 'The Nature of WTO Obligations', Jean Monnet Working Paper No 1/02, NYU School of Law, Jean Monnet Centre (2002); J Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 *European Journal of International Law* 907; JH Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach' (2000) 94 *American Journal of International Law* 335; C Carmody, 'WTO Rules as Collective' (2006) 17 *European Journal of International Law* 419; T Grazzini, 'The Legal Nature of WTO Obligations and the Consequences of their Violation' (2006) 17 *European Journal of International Law* 723.

[114] See RE Hudec, 'Broadening the Scope of Remedies in WTO Dispute Settlement', originally published in F Weiss and J Wiers (eds), *Improving WTO Dispute Settlement Procedures* (London, Cameron May, 2000) 345.

[115] JH Jackson, *Sovereignty and the Fundamental Logic of International Law* (Cambridge, Cambridge University Press, 2006) 58.

[116] This term was defined in the UNCTAD São Paulo Consensus 2004 as 'the scope for domestic policies, especially in the areas of trade, investment and industrial development' that might be 'framed by international disciplines, commitments and global market considerations'.

[117] Mervyn King, the Governor of the Bank of England, before the Treasury Select Committee on the Financial Crisis, March 2009.

be naïve not to assume that if a trade obligation hurts certain producers in the import-competing sectors through reduced tariffs, this interest group will lobby the government for another measure that will protect them. During an economic crisis, these interest groups can be expected to be more active and morally persuasive. This is the policy substitution problem.[118] Given the mercantilist thrust that governments displayed during 2008–12, there are a multitude of alternative policy measures—and therefore counterfactuals—that governments could also have implemented instead of bailouts.

Moreover, some alternative measures may have been more blatantly protectionist, such as increasing tariffs, which was implemented during the depression of the 1930s in the USA under the Smoot–Hawley Tariff Act.[119] It is generally believed that Smoot–Hawley contributed to the early loss of confidence on Wall Street. It raised average tariff rates by 20 per cent, led to retaliation from more than twenty other governments and the failure of overseas banks. US imports from and exports to Europe fell by two-thirds between 1929 and 1932, while overall global trade declined by similar levels in the four years that the legislation was in effect.

Counterfactuals are clearly an important research device. One cited alternative measure is the use of 'green protectionism', or the (non)use of trade rules, with the stated aim of protecting the environment.[120] Indeed, Bagwell and Staiger concluded from their empirical assessment that in the absence of competition rules on domestic subsidies, governments may instead choose to indeed use subsides to erode market access commitments made in previous tariff negotiations.[121] Moreover, trade agreements that are too permissive with respect to subsidies can be self-defeating; but on the other hand, agreements that are too restrictive as regards subsidies could have a chilling effect on trade negotiations.[122] Such hypothetical scenarios provide insight into a situation that could actually happen.

Nevertheless, this book does not attempt to discuss policy counterfactuals. This is not only because of the many plausible alternative instruments that could be described as either blatant or murky protectionism. Rather, this is because these measures were neither reported nor justified by governments as a necessary stimulus measure in a crisis. That is, the objective of this analysis is to assess the legality of 'crisis measures', including how they were implemented, whether they were

[118] D Brou and M Ruta, 'A Commitment Theory of Subsidy Agreements', World Trade Organization. Economic Research and Statistics Division, Staff Working Paper ERSD-2012-15 (September 2012) 4.

[119] Smoot–Hawley Tariff Act, formally United States Tariff Act of 1930, also called Hawley–Smoot Tariff Act, US legislation (17 June 1930).

[120] SJ Evenett and J Whalley, 'The G20 and Green Protectionism: Will We Pay the Price at Copenhagen?', Centre for International Governance Innovation, Policy Brief 14 (April 2009).

[121] K Bagwell, and RW Staiger, 'An Economic Theory of GATT' (1999) 89 *American Economic Review* 215; K Bagwell and RW Staiger, *The Economics of the World Trading System* (Cambridge, MA, MIT Press, 2002).

[122] K Bagwell and RW Staiger, 'Will International Rules on Subsidies Disrupt the World Trading System?' (2006) 96 *American Economic Review* 877.

challenged and how they were defended—in the context of the worst recession since the 1930s. It seeks to understand how best to regulate competition in both government procurement and open markets, given the assumed inevitability of another global depression.

The strategy followed in this book is to provide a textual analysis of existing rules that regulate public restraints of competition in open and public procurement markets. This research takes the international and regional competition and government procurement provisions that have been either (a) negotiated under the GATT/WTO frameworks, or (b) notified to the WTO by the selected case study countries and included in their database of the regional trading arrangements.[123] It assesses these provisions within two conceptual frameworks examining, first, their degree of legalisation, and second, their bilateral or collective nature. The results of this research are then presented from a comparative analysis perspective. The theoretical assessment complements the empirical examination of how these rules operated to condition government responses to the 2008–12 global crisis. Such theories can be empirically tested through country case studies. This conceptual and empirical approach provides deeper insight into the internationally agreed rules to regulate government bailouts and buy-nationals, as well as who breaks them during crisis times. This multidimensional analysis allows for some conclusions to be formed concerning governments' attitudes towards their mutually agreed upon international trade obligations.

VIII. The Outline of the Book

The outline of the book is as follows. In Part I, Chapter 2 sets out competition analysis of the trade policy rules that have been agreed to at the international and then regional level in Chapter 3, which seek to prevent anti-competitive distortions through bailout outs or buy-national measures. Chapter 4 then analyses the nature of these rules, in terms of their degree of legalisation.

This doctrinal analysis of the black-letter rules and jurisprudence is then complemented in Part II, with an empirical examination of the operation of these rules as they operated to constrain the six case study countries from implementing anti-competitive bailout and buy-national measures during the 2008–12 fiscal crisis. The assessments set out in Chapter 5 cover the legality of crisis bailout and buy-national policies directed at both the financial sector and the manufacturing economy in the six case study countries, the USA, Brazil, India, Ireland, Germany and the UK, under both their international and regional competition and public procurement law obligations.

[123] This includes customs unions (CU), economic integration areas (EIA) and free trade agreements (FTAs). See http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

Having made findings on the legality of these crisis measures and assessments of each case studies' compliance with its trade commitments, in Part III Chapter 6 examines whether, where violated, these rules were challenged and enforced. Chapter 7 then puts forward some conclusions regarding the legal frameworks regulating the anti-competitive instincts of governments during economic downturns, followed by some more general observations on the nature and enforcement of international trade law under the WTO and RTAs, and how they operate in a crisis.