Preface

In late August 2010, when I was still practising law in Pakistan, I received an unexpected and rather anxious call from the chairman of a multi-national cement company that I had been advising, asking to meet me urgently. It appeared that the chairman had just been delivered an order of the Competition Commission of Pakistan (CCP)[1] penalising his company in the sum of Pak Rupees 405 million[2] for participating in a cartel, and he urgently needed advice on strategising an appropriate course of action. He insisted that his company had not engaged in any illegal activity and was upset that the CCP had not provided his counsel a reasonable opportunity of being heard. Most importantly, he was vehement that CCP be prevented from recovering the penalty because paying it would effectively shut down the company's operations in Pakistan.

Reading the order in his office a short while later, I realised that the CCP had fined my client in exercise of its powers under the Competition Ordinance 2007[3] for being a member of the All Pakistan Cement Manufacturers Association (APCMA), which in its view operated as a cartel.[4] The order noted that the CCP had been alerted to the existence of a possible cartel by a news item regarding the APCMA's decision to raise the price of cement. Upon entering and searching the offices of the APCMA as well as of some of its member cement companies the CCP had discovered a 2003 agreement that had confirmed its suspicions.[5] In October 2008, the CCP had taken *suo motu* notice of cartelisation in the cement sector, and after

[1] F. No. 4/2/Sec.4/CCP/200UU8 *In the Matter of Show Cause Notices Issued to all Pakistan Cement Manufacturers Association and Its Member Undertakings* order dated 27.08.2009 ('the APCMA Order').

[2] This was equivalent to approximately United States Dollars 5.3 million as per the exchange rate of the day.

[3] Ordinance No. LII of 2007 dated 02.10.2007 ('the 2007 Ordinance').

[4] APCMA order (n.1) para 40.

[5] ibid para 10.

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several hearings held over a period of ten months, it had found the APCMA and its member companies guilty of facilitating and participating in a cartel, and had fined each of them in a sum equalling 7.5 per cent of their respective annual turnovers.[6]

I found the CCP's order interesting in several respects: in more than two-thirds of its seventy-five-page order the CCP only reproduced the constitutional objections raised by the APCMA and its member companies without actually any of resolving any of the issues relating to the constitutionality of the 2007 Ordinance or of the CCP. Further, in interpreting the provisions of the 2007 Ordinance to decide the issue of cartelisation, the CCP relied extensively on foreign materials: citing economists such as Adam Smith and Joseph Stiglitz, not ordinarily known to Pakistani lawyers, and quoting on EU jurisprudence, which did not have binding force in the Pakistani legal system. The only references to Pakistani precedents in the order were in respect of issues of due process, evidence, and procedure. With regard to my client's argument that it could not be held liable for a cartel agreement that had been organised three years before it had joined the APCMA and which in any event had not been brought to its notice even after joining the APCMA, the order invoked the 1980 judgment of the European Court of Justice in *Van Landewyck SARL and others* v. *the Commission*.[7] The order also failed to provide any justification for fixing the penalty at 7.5 per cent of the average turnover of all alleged participants of the cartel, regardless of their role or extent of participation.

I realised that although there were several grounds on which my client could appeal the order, actually doing so was fraught with difficulty. In terms of section 42 of the 2007 Ordinance, an order passed by two or more members of the CCP, (as this order was), could only be appealed before the Supreme Court of Pakistan. However, despite being named as the final and only competition appellate authority in the 2007 Ordinance, the Supreme Court had no specialist competition knowledge and, therefore, was unlikely to rule on the merits of the CCP's argument. It was also not clear whether in hearing a matter in its competition jurisdiction, the Supreme Court would exercise its general powers to decide the constitutional objections that the CCP order had failed to resolve. This meant that if the Supreme Court confirmed the CCP's order and called upon my client to pay the penalty in full, my client would not only be deprived of a meaningful resolution of its competition and constitutional arguments and objections but would also exhaust its only appellate remedy. My colleagues and I therefore advised my client to adopt a two-pronged strategy: first, to avail of its statutory right of appeal and file the appeal before the Supreme Court within the limitation period, and second, to utilise the constitutional remedy available to it of challenging the order before the high court in its inherent jurisdiction.

[6] ibid para 56.

[7] ibid para 31(l), pp 55–56, *Van Landewyck SARL and others v the Commission* [1980] ECR 3125.

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It turned out my client along with the APCMA and other member companies had already filed petitions before the Islamabad High Court soon after the CCP had issued the show cause notice in October 2008. Although the Islamabad High Court had at first restrained the CCP from deciding the matter while the petitions remained pending, in January 2009 it had dismissed the petitions for being premature and had allowed the CCP to proceed with the hearings. In August 2009, just as the CCP was getting ready to pass its final order, the APCMA and the cement companies had once again challenged the matter, this time before the Lahore High Court. The Lahore High Court too had initially restrained the CCP from passing a final order, however, later it had allowed the CCP to pass the order while restraining it from taking any adverse action against the parties. Simply put, this meant that while the CCP could conclude its hearings and pass an order, it could neither restrain the operatioins of the APCMA or its member companies nor recover penalties from any of them.[8]

The next hearing before the Lahore High Court was fixed for two days later. Although my client had previously shared a counsel with some of the other member companies, it now appointed me to represent it before the court in a bid to distance itself from cement companies that had been members of the APCMA in 2003 when the alleged cartelisation had been agreed. Arriving in court two days later I found myself among some of the most prominent lawyers in the country making erudite and impassioned arguments on behalf of the APCMA and its member companies. Even as I waited my turn, I not only knew that I had little to add to these arguments, but also that it was not permissible for me to press factual grounds (that distinguished my client from the other parties) in the constitutional jurisdiction in which the high court was hearing the matter: the appropriate forum for such arguments would have been a specialist appellate forum, however, the 2007 Ordinance did not provide for any such authority. I nevertheless made my case as best as possible and sought comfort in at the thought that the order Lahore High Court's interim restraining the CCP from taking adverse action against the parties would remain in place until such time as the high court finally decided these petitions.

As things turned out, however, there was not to be a final order in these proceedings. While the date fixed for the announcement of the order was still a few days away, the judge who had been hearing the petitions was elevated to the Supreme Court and left the matter to be decided by his successor. This of course meant that the petitions would have to be argued afresh. It also meant that the case files would be relegated to the bottom of an ever-growing pile of undecided cases and the matter would not be easily or quickly re-listed for hearing. My annoyance at this outcome notwithstanding, I knew that the APCMA and its member companies, including my client, were pleased because the restraining order issued in earlier

[8] ibid paras 11–13 and 58; also p 75.

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hearings would continue and the CCP would not be able to recover any penalties from them.

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It was in the APCMA case that I witnessed for the first time the panic that competition enforcement could provoke in business entities. It was also the first time that I saw the courts quite as reluctant to engage with or comment upon the constitutionality or operations of a regulatory body. In the months following the APCMA proceedings, orders restraining the CCP from recovering penalties and postponing rather than resolving the constitutional objections raised by the aggrieved parties started pouring in from high courts across the country. This meant that even though the CCP continued to hear and decide competition matters it recovered penalties only on the rare occasions when the parties paid these voluntarily. In time, the interactions between the courts and the CCP came to follow a predictable pattern: the courts restrained the CCP from recovering penalties and allowed the restraining order to continue indefinitely, while the CCP increasingly issued orders that were unlikely to be challenged before the courts.

In time I came to the view that at its core, this 'failure' of competition enforcement in Pakistan was linked to the fact that no one – not the CCP tasked to enforce it, the businesses challenging it, the lawyers filing petitions and appeals against it or the courts hearing these – really understood what competition legislation was intended to achieve. For the businesses, the 2007 Ordinance was merely an updated version of the anti-monopoly law it had replaced,[9] and, therefore, essentially anti-business and anti-development, a view that seemed to be reinforced by the CCP's somewhat aggressive enforcement strategy in that period. The lawyers engaged for these cases were largely unfamiliar with competition concepts or jurisprudence and, therefore, preferred to focus on constitutional objections, while the courts remained indecisive, perhaps waiting for more clarity on the status of the 2007 Ordinance which had still not been ratified by the parliament. It seemed to me that this inability to fully understand the rationale and objectives of the competition legislation was aggravated by the fact that the 2007 Ordinance had been introduced by an executive order of a military-led government without meaningful institutional engagement with other state institutions or the public.

In October 2012 when I started my PhD at University College London (UCL) I was keen to explore the link between the process through which Pakistan had adopted its competition legislation and the subsequent implementation of the law in the country. To do so, I decided to compare the adoption and implementation of competition laws in India and Pakistan. While I was initially drawn to India due to

[9] Pakistan had promulgated a Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance in 1970. However, for various political reasons the ordinance was never meaningfully enforced.

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its proximity and ancient historical ties with Pakistan as well as its seemingly steadier record of competition enforcement, I was ultimately convinced of the utility of a comparative analysis due to this passage in an article by Rodolfo Sacco that I had come across early in my research:

> As long as we confine ourselves to the study of a single legal system, we will . . . try to capture its features in a synchronic systematic view. We will try to see statute, scholarly formula, proposals for change, the tradition of the schools, the arguments of judges, and the holdings of cases as compatible with one another. The study of domestic law does not allow us to reject completely the great optical illusion founded on the synchronic view. We do not reject it until we find in different legal systems that identical statutes or scholarly formulas give rise to different applications, that identical applications are produced by different statutes or different scholarly formulas, and so forth.[10]

I was also aware that India and Pakistan shared an interesting mix of commonalities and distinctions that were of particular interest for my proposed study. Both countries had adopted their competition legislation within a few years of each other and in both countries the legislation was based on foreign models, expressed similar goals, and provided for similar competition enforcement systems. Further, the legal and political instituitons in India and Pakistan were of an identical age due to the countries having been simultaneously carved out in 1947 from the former British Indian Empire and having largely retained the legal culture and system introduced by the British. These similarities notwithstanding, the political histories and economic priorities of the countries had diverged considerably after their creation, which in turn, had impacted their law-making processes. India had remained a parliamentary democracy throughout and until 1991 had resisted liberal economic legislation. When it finally adopted laws to facilitate the goals of liberalisation it did so through the parliament and in consultation with a range of stakeholders. Pakistan, on the other hand, had struggled with democracy, but had remained committed to a capitalist and feudal ideology. While this made Pakistan more amenable to liberal economic legislation it also meant that in the majority of cases such legislation was introduced in the country through an executive ordinance rather than through the parliament.[11]

In my PhD I focused on the mechanisms through which India and Pakistan adopted their competition legislations and the unique interplay of their respective, political and legal institutions in the course of adoption. I discovered that the adoption processes in both countries had not only determined the substance of the competition legislations, but also their compatibility with and legitimacy in the countries, and had thereby set the stage for their subsequent implementation. India

[10] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39, American Journal of Comparative Law, 343, 385.

[11] I discuss these issues more fully in Chapter 2.

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had adopted its competition legislation after debates with a range of democratic institutions that lasted over two years and in doing so had enhanced (though not perfected) the compatibility and legitimacy of the Indian competition legislation and had facilitated its implementation. The adoption of the Pakistani competition legislation, on the other hand, had been largely outsourced to a World Bank-led team, which had only superficially addressed the issues of compatibility and legitimacy of the legislation. Consequently after an aggressive start, competition enforcement in the country had all but petered out.

The fact that competition enforcement in the two countries had been shaped, at least in part, by the mechanisms and institutions through which the laws had been initially been adopted, also provided hope that the countries may rechart their competition enforcement by engaging different mechanisms and legal and political institutions in the interpreting and implementing the legislation. Most importantly, however, I realised that for either country to achieve meaningful competition outcomes and to realise the economic benefits of a competitive society, it would have to strike an appropriate balance between the international and domestic legitimacy of its competition legislation: while international legitimacy was necessary for the country to attract international investment, domestic legitimacy was imperative for the legislation to be accepted, understood, and utilised in the country itself. Failure to strike this balance on the part of either country would not only lead to the legislation being rendered irrelevant but would also thwart the economic aims for which the countries had adopted the legislation in the first place.

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This book has grown out of my PhD research. Having examined the links between the adoption and implementation of competition legislation in India and Pakistan I was curious to understand the competition experience of the remaining South Asian countries,[12] whose distinct modern-day political boundaries and complicated relationships belie a strong geographic, historic, and economic connection, comparable struggles with democracy, broadly similar stages of economic development, and analogous relationships with multi-lateral agencies and developed economies.

Most importantly for my purpose, each of the six remaining South Asian countries had engaged with modern competition laws almost concurrently with India and Pakistan, albeit in different ways: Sri Lanka had adopted a modern competition law in 1987 (the Fair Trading Commission Act), and a consumer protection law in 2003 (Consumer Affairs Authority Act) which also provided for a 'competition promotion division', but was still to issue even a single order regarding anti-competitive

[12] I define South Asia as per the Charter of the South Asian Association for Regional Cooperation (SAARC) established in 1985, in terms of which the region comprises of eight countries namely (in alphabetical order), Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.

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practices; Nepal had adopted the Competition Promotion and Market Protection Act, 2063 in 2007, however, its national competition authority, the Competition Promotion and Market Protection Board, appeared to be largely inactive; Bangladesh had adopted a competition law in 2012 and had established a national competition authority but was still to operationalise it; Maldives had adopted a Competition and Fair Business Practices Act in 2020 after extensive deliberations that lasted nearly four years, and Bhutan, claiming it did not need a sophisticated competition legislation due to its small economy, had adopted a National Competition Policy in 2015, which it had updated in 2020. Even Afghanistan, beset as it was with political crises, had adopted an Intellectual Property law which included a provision dealing with 'unfair commercial practices', and in 2011 had circulated a draft competition law, which is yet to be enacted.

The proposition I aim to explore for the remaining six South Asian countries is the same as the one I had explored for India and Pakistan in the course of my PhD: I argue that a country that is able to generate compatibility and legitimacy for the legislation at the adoption stage is likely to have greater success in implementing it. To understand the extent of compatibility and legitimacy generated in each of these countries, I evaluate the mechanisms and institutions through which these countries have engaged with the competition legislation and the progress each country has made along the deliberation-enactment-implementation continuum. As in the case of India and Pakistan, I turn to the literatures on diffusion and policy transfer, comparative law, and new development economics, to understand each country's motivation for adopting modern competition legislation, to predict the extent of compatibility and legitimacy likely to be generated in the adoption processes of these countries, and the degree of success each country is likely to enjoy in implementing its competition legislation.

However, unlike in the case of India and Pakistan, where I had compared the entire deliberation-enactment-implementation continuum for both Indian and Pakistani competition legislation, for the remaining South Asian countries I disassemble the continuum and adapt its constituent parts for each country as appropriate: in case of Afghanistan and Bhutan, for instance, I focus only on the deliberation phase as the countries are still to enact a competition legislation; in case of Bangladesh, Maldives and Nepal, that have already adopted some version of a competition legislation but have not commenced implementation, I examine the deliberation as well as the enactment phase; and finally, in the case of Sri Lanka which has tentatively ventured into implementation, I examine the entire continuum, albeit given the absence of competition orders it is not possible to do so in as much depth as in the case of India and Pakistan.

My primary aim in undertaking this exercise, beyond satisfying my personal curiosity about the state of competition reform in the countries that comprise the South Asian region, is to plug an important gap in competition law and South Asian scholarship. I contribute to competition scholarship in two ways: first, I move away

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from viewing competition legislation as a self-contained economic solution and see it instead as legal organism that co-exists with, and is shaped by other institutions pre-existing in the adopting countries; and second, I evaluate the 'success' of competition legislation from the perspective of the host countries rather than from that of the multi-lateral agencies that bring legislation to these countries. I contribute to South Asian scholarship by producing the a first-ever study of competition laws in South Asia. Although South Asian countries are important players in the global marketplace whether as sellers of raw materials and increasingly of services, as buyers of processed goods or as destinations for foreign investment, these are often viewed only as passive recipients of Western competition (and other legislative) models rather than as independent political and economic actors that play a critical role in shaping not only the content of the legislation that they adopt but also the manner in which the legislation is subsequently implemented. In examining the South Asian experience in the very legal and political context in which it takes place, this book deepens the understanding of competition enforcement in South Asia and thereby creates opportunities for more meaningful competition enforcement across the region.

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Notwithstanding its focus on South Asia and competition, the book aims to speak to all developing countries that adopt laws based on Western or foreign models and to the authorities entrusted with implementing these laws. A growing number of developing countries adopt not just competition legislation but also other a range of regulatory laws and establish authorities to implement them in the hope that doing so will facilitate their economic transformation. Unfortunately, however, these countries often struggle with bridging the gap between law on the books and law in action in their contexts.

The book essentially offers a two-fold message to all these countries: first that any mechanism or strategy that a country employs for adopting legislation based on foreign models has trade-offs, and second, that regardless of which mechanism and strategy that a country ultimately settles upon for the intial adoption, it remains open for it to adjust and re-chart its strategy and thereby the implementation trajectory of its adopted legislation to suit its evolving priorities. Understanding the trade-offs is important because the strategy and mechanisms that a country employs for the adoption of legislation or legal principles is largely dictated by the relationship between the institutions pre-existing in the country and the country's political priorities, rather than an objective assessment of an objectively best mode of adoption. For instance, for some countries, such as India, generating domestic legitimacy through initial consensus-building may be more important, while for others such as Pakistan, acquiring a legislative model which has international legitimacy may be a greater priority. It is important to appreciate, however, that a

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country that disproportionately prioritizes domestic legitimacy may drift away from internationally accepted concepts and outcomes, while a country that disproportionately values international legitimacy, may remain unable to implement the law in its domestic context.

The possibility of course correction is relevant not only for the adopting countries but also for the authorities established for implementing the adopted laws and stems from the fact that countries continue to adopt legal principles in interpreting the adopted laws at the implementation stage. This in turn means that regardless of the strategy employed by a country for initial adoption, it remains open for the government bodies or independent authorities designated to interpret and implement the legislation to adopt a different strategy and thereby not only to fine tune the meaning but also the extent of compatibility and legitimacy of the legislation in the domestic contexts and, in doing so, to re-chart its implementation trajectory.

Beyond the governments and competition authorities of South Asian and other developing countries, this book is also likely be of interest to scholars specialising in EU and US competition law, comparative law, and economics who are interested in how principles from developed, legally sophisticated jurisdictions, travel to and are adopted and implemented in emerging and developing economies. Scholars interested in comparative law will particularly benefit from the theoretical framework utilised in this book, which although constructed to examine the links between adoption and implementation of borrowed competition laws, is equally relevant for all regulatory laws adopted from western models and provides robust tools for analysing the spread of legal principles across developing countries and understanding the factors in the host countries that are likely to affect implementation of these laws. The book also offers scholars interested in development and new institutional economics, greater insight into the role of pre-existing legal and political institutions in the implementation and success of borrowed economic institutions.

This book also speaks to multi-lateral agencies that play an important, if not a critical role in defining the direction of law reform in developing economies. In the South Asian story, for instance, the World Trade Organisation (WTO) features prominently among factors that prompted these countries to adopt competition laws, the World Bank, the International Monetary Fund (IMF), and the Asian Development Bank (ADB) have played an important role in the specific competition legislations adopted, and the United Nations Conference on Trade and Development (UNCTAD) has made, and continues to contribute to capacity building for the implementation of competition legislation in these countries. In most instances, the multi-lateral agencies engaging with particular countries do not engage with, and appear not to fully appreciate, the impact of the legal and political institutions pre-existing in these countries, on the enforcement of these laws and, therefore, factor these only cursorily, if at all, in prescribing competition or other regulatory solutions for these countries or in designing capacity building programmes for them. I believe that in embedding the adoption and implementation

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of competition legislations in the contexts of the adopting countries and in underscoring the significance of their pre-existing institutions, this book will help multilateral agencies understand the limitations of their solutions and advice in bringing about meaningful economic reform in developing countries and, may therefore, encourage them to propose more context-specific adoption and implementation strategies for competition as well as other regulatory laws designed for these countries.

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This book explores the story of competition law in South Asia in nine chapters. Chapter 1 establishes the theoretical framework for assessing the impact of the process through which legislation is adopted, on its subsequent implementation. Integrating strands from diffusion and transfer, new institutional economics, and comparative law literatures, this chapter argues that for a borrowed law 'to continue to grow in and become a part of'[13] the adopting country, it must be compatible with the context of the country and enjoy a degree of legitimacy in it. To this end, the chapter explores the meaning of and connection between the concepts of 'compatibility' and 'legitimacy': in case of 'compatibility' it also explores features of the adopted law and the context must be compatible with each other, while in case of 'legitimacy' it elaborates its internal and external dimensions and argues that both dimensions are relevant and necessary for the successful implementation of adopted legislation. The chapter also explores how compatibility and legitimacy influence and shape the subsequent implementation of adopted laws.

Chapters 2 and 3 describe different aspects of the South Asian experience of adoption of competition laws. Chapter 2 compares the adoption of modern competition laws in India and Pakistan, while Chapter 3 examines the pre-conditions of transfer and the adoption experience in the remaining siz South Asian countries before evaluating the South Asian experience as a whole. These chapters note where each country is located on the deliberation-enactment-implementation continuum in relation to competition legislation and examine the legal and political institutions pre-existing in each country and engaging in the deliberation, enactment, or implementation of competition legislation. The chapters also identity the factors that have motivated South Asian countries to consider adopting competition legislation, and the transfer mechanisms and institutions these countries have employed in this regard. The chapters predict the extent of compatibility and legitimacy that the adopted competition enjoys or is likely to enjoy, in the specific context of each adopting country.

[13] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).

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Chapters 4–7 focus on the Indian and Pakistani competition experience. Chapter 4 establishes the manner in which the adoption processes employed by the two countries have shaped their competition enforcement authorities. It compares the structures, mandates, and compositions of these authorities as well as their decision-making strategies and provides an overview of implementation of competition laws in the two countries by comparing a range of features ('indicators') of the orders of competition authorities. Chapter 5 evaluates the Indian and Pakistani competition authorities' interpretaion of the statutory provisions relating to anti-competitive agreements and in doing so provides a basis for understanding the interpretative strategies of these authorities in relation to other competition principles provided in the legislation. Chapter 6 examines the penal strategies of the Indian and Pakistani competition authorities, focusing particularly on the sanctions and penalties that the authorities have imposed in the first decade of their operations. It also examines how the penal strategies have been shaped by the strategies and institutions through which competition legislation was adopted in either country. Chapter 7 examines the interaction of the Indian and Pakistani competition authorities and the pre-existing dispute resolution authorities in the two countries and explores the manner in which this interaction shapes the implementation trajectory of competition legislation in the countries. The adoption processes through which the countries had acquired the legislation, and the extent of compatibility and legitimacy these processes had generated, form the backdrop for the discussions in all four chapters.

Chapter 8 examines the state of competition enforcement in the remaining six South Asian countries and explores how the adoption processes through which each of these countries have adopted their competition legislation has impacted their enforcement efforts. In the case of countries that are still to adopt competition laws, the chapter predicts their implementation prospects. The chapter also explores how countries that are in the hiatus stage and are still to embark upon implementation may learn from the Indian and Pakistani experience, and ends with discussing the patterns of diffusion and transfer and implementation of competition legislation throughout the region. Having established the gap in competition enforcement in Chapter 8, Chapter 9 explores how governments and competition authorities in all South Asian countries may be motivated to engage more meaningfully with competition enforcement and argues that governments are more likely to support competition enforcement in their contexts if they are convinced of competition's potential to help deliver their broader economic and social goals. The chapter also proposes some implementation strategies for these countries.

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The idea of this book has been with me ever since I started my PhD in 2012 and it is both exciting and daunting to send the final product out into the world. As I do so,

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various stages and and the opportunity to engage with an informed and interested audience which helped further refine my thinking.

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