8

Implementing Competition Laws across South Asia

8.1 INTRODUCTION

Since 2002 four South Asian countries besides India and Pakistan have also enacted modern competition legislations while the remaining two have taken steps to express their commitment to, or at least their interest in, competition. The four that have already adopted competition legislations – Sri Lanka, Nepal, Bangladesh, and Maldives – employed comparable transfer mechanisms and institutions in their adoption processes despite the considerable differences in their histories and governance structures, and the very different sizes of their economies. Much like Pakistan these four countries were primarily motivated to adopt modern competition legislations by their engagement with the WTO and other multi-lateral agencies. However, instead of resorting to top-down exclusive institutions as in the case of Pakistan, Sri Lanka, Bangladesh, and Maldives, mirrored India in enacting their respective competition legislations through their parliaments, which are designed under their constitutions, as bottom-up, participatory, and inclusive institutions. Nepal, like Pakistan, adopted its legislation in a period when its parliament had been dissolved and power was vested in and exercised directly by the president; of the two remaining South Asian countries, Bhutan has demonstrated its continuing commitment to competition by recently revising and updating its 2015 competition policy[1] even though it does not at present consider it necessary to adopt or enforce a legislation, while Afghanistan's interest is evident from it having prepared a draft competition bill shortly after adopting a modern constitution, however, given the political turbulence in the country since 2021, it is unlikely that the draft bill will be enacted into law any time in the near future.

The aim of this chapter is to understand the overall state of competition enforcement in South Asia by examining the progress made by the remaining six South Asian countries in implementing their competition legislations or otherwise promoting

[1] Chapter 3, Section 3.2.2.2 (b) and 3.3.3.2(b).

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competition in their contexts. To this end this chapter proceeds on the premise that as in the case of India or Pakistan, each country's success at the implementation stage is correlated to the institutions and mechanisms through which the countries deliberated and adopted the legislation or policy, and the extent and quality of compatibility and legitimacy generated by the interplay of institutions and mechanisms at the adoption stage. In respect of countries that have adopted competition legislation but are still to enforce it, this chapter draws upon the Indian and Pakistani experience to understand not only how the legislation is likely to be enforced but also to offer suggestions to these countries for facilitating future enforcement.

This chapter is organised as follows: Section 8.2 revisits the Indian and Pakistani experience at the implementation stage to highlight how it has been shaped by the compatibility and legitimacy generated for the Indian and Pakistani Acts at the adoption stage; Section 8.3 outlines the progress each of the South Asian Six have made towards promoting competition and correlates it to the extent of compatibility and legitimacy of their enacted or proposed competition legislation or policy as well as identifying the gaps in their enforcement; Section 8.4 draws upon the Indian and Pakistani enforcement experience to predict how these countries are likely to fill the gaps in their enforcement and to identify strategies that may employ in this regard; Section 8.5 sets out the overall state of competition enforcement in South Asia.

8.2 REVISITING THE INDIAN AND PAKISTANI EXPERIENCE

Evaluating the Indian and Pakistani competition enforcement in a comparative perspective revealed not only the significance of compatibility and legitimacy for a more 'successful' enforcement of the adopted legislation but also offered important insight into how compatibility and legitimacy generated at the adoption stage may be maintained and even enhanced in the implementation stage. This section revisits the key aspects of this discussion.

8.2.1 *The Adoption Stage and Generation of Compatibility and Legitimacy*

India and Pakistan adopted their respective competition legislations in remarkably different legal and political landscapes. While India was a stable democracy at the time of adopting the Indian Act and had a strong tradition of separation of powers and of instituting committees for studying and proposing law reform, Pakistan was under quasi-military rule when it promulgated the 2007 Ordinance in which the executive enjoyed disproportionately greater power than the other organs of state and was exclusively responsible for liaising with multi-lateral agencies that had led much of Pakistan's economic law reform in preceding years.[2]

[2] Chapter 3, Section 3.3.1.1 and 3.3.2.1.

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The countries also employed different transfer mechanisms and engaged different institutions in adopting their respective legislations. India adopted its competition regime by adapting foreign models for the Indian context through two rounds of *socialisation* (albeit with some shades of *emulation*)[3] delivered by a range of domestic, bottom-up, participatory and inclusive institutions drawn from each of its three organs of state. The institutions engaged in the first round of deliberation and enactment of the Indian Act included the independent Raghavan Committee that evaluated foreign competition models and aggregated local information from stakeholders over three years cumulatively as well as parliamentary standing committees that engaged legislators and stakeholders. while in the second round, India's superior judiciary played an important role in bringing the Indian Act into alignment with India's pre-existing legal system.[4] In contrast, Pakistan adopted the 2007 Ordinance through *coercion* (albeit also with traces of *emulation*),[5] delivered through top-down, exclusive institutions drawn only from executive. These institutions lacked both capacity and incentive for aggregating local information and, therefore, relied almost exclusively on the World Bank team to decide the most appropriate competition legislation for the Pakistani context, limiting their own input to prescribing the mechanisms for appointment and removal of the members of the proposed competition authority.[6] Pakistan adopted the 2009 and 2010 Ordinances with the same top-down, exclusive institutions and engaged the legislature only in enacting the Pakistani Act. Although the legislature had the capacity, at least in theory, to aggregate local information and to appropriately adapt the competition legislation for context, it enacted the Pakistani Act with only one amendment regarding the establishment of the Pakistani Tribunal while retaining all substantive provisions of the preceding Ordinances.[7]

The impact of the adoption processes in both India and Pakistan is most evident in the provisions of their respective legislations relating to the structure and composition of the competition authorities they purport to establish. The strategy of *socialisation* in India allowed the relevant provisions of the Indian Act to be adapted for alignment with the constitutional norms prevalent in India's pre-existing legal system,[8] while that of *coercion* in Pakistan led to the CCP being structured almost entirely as per the suggestions of the World Bank team with the

[3] ibid Section 3.3.3.1.
[4] Chapter 2, Section 2.4.1.
[5] ibid Section 2.3.2.2.
[6] The appointment and removal mechanisms prescribed in the 2007 Ordinance and retained in the Pakistani Act are nearly identical to five different Pakistani regulatory laws enacted shortly before or contemporaneously with the Ordinance. See for instance, the Pakistan Telecommunication Authority Act 1996 (sections 3(2) and 3(5)); Securities and Exchange Commission of Pakistan Act 1997 (sections 5 and 19); Regulation of Generation, Transmission, and Distribution of Electric Power Act 1997 (sections 3(1) and 4(1)); Pakistan Electronic Media Regulatory Authority Ordinance 2002 (sections 3(2) and 3(5)); and Oil and Gas Regulatory Authority Ordinance 2002 (sections 3(8) and 3(11)).
[7] Chapter 2, Section 2.4.2.
[8] ibid Section 2.5.1.

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exception of the CCP's composition which was left to the discretion of the Pakistan government.[9] More importantly, however, India's strategy of *socialisation* through bottom-up, participatory, and inclusive institutions that engaged with all three branches of the state as well as with members of the public generated understanding and ownership across these institutions, thereby bolstering the compatibility and legitimacy of the Indian Act.[10] Conversely, in the Pakistani context, *coercion* and the attendant limited engagement with only top-down, exclusive institutions drawn from the executive, culminated in the adoption of a competition legislation that was more attuned to international best practices than to the domestic context, and whose legitimacy was routinely called into question until such time as the Pakistani Act was finally enacted through bottom-up, participatory, and inclusive institutions.[11]

8.2.2 *Impact of Compatibility and Legitimacy on the Implementation Stage*

Competition enforcement in both India and Pakistan is shaped by the extent of compatibility and legitimacy generated for the competition legislation at the adoption stage. In turn the quality and nature of enforcement impacts the compatibility and legitimacy of the competition legislation at the implementation stage, either enhancing it or, in failing to do so, gradually deteriorating it.[12] The adoption of the Indian Act through *socialisation* and a range of bottom-up, participatory, and inclusive institutions had generated greater compatibility and legitimacy than the adoption of competition legislation in Pakistan by *coercion* through a limited number of top-down, exclusive institutions. The relatively greater compatibility and legitimacy of the Indian Act allowed it to be better understood, applied, and utilised in the Indian context. Each competition matter that was finally decided by the Indian Supreme Court enhanced the compatibility and legitimacy of the Act and facilitated the gradual integration of the Indian Act into India's pre-existing legal system. In contrast, the relative lack of compatibility and legitimacy in Pakistan led not only to the competition legislation being under-utilised in the country but also created friction between the adopted legislation and the Pakistani legal system. Over time these obstacles in enforcement diminished the already limited compatibility and legitimacy of the competition legislation and forced it to remain an outsider to Pakistan's pre-existing legal system.

The compatibility between the Indian Act and its context and the relative lack of compatibility of the Pakistani legislation with the Pakistani legal system is reflected in the CCI's and CCP's overall performance: once the CCI commenced operations

[9] ibid Section 2.5.2 and n.6.
[10] ibid Section 2.5.1.
[11] ibid Section 2.5.2.
[12] For the quality and nature of enforcement see Chapter 4, Section 4.4.3.

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in 2009, it received a steady stream of complaints from the public and gradually developed a consistent approach for addressing these complaints. On the contrary, the CCP hardly received any complaints or references, especially in its early years, and initiated the majority of actions *suo motu* at its own volition. In time, the CCP's performance declined, coming to a complete halt in 2014. When the CCP re-commenced enforcement actions post 2014 the numbers of its *suo motu* actions was sharply reduced and the CCP largely restricted itself to responding to complaints, which continued to remain low.[13]

Similarly, the disparity in the legitimacy of the Indian and Pakistani legislations manifested itself in various ways. It was particularly evident in the extent to which the organs of state in either country understood the basis for competition enforcement and owned their responsibility for establishing and operationalising the competition enforcement systems.[14] It was also evident in the extent to, and manner in which the CCI and the CCP relied on and utilised international precedents in enforcing provisions of their competition legislations.[15] Given the relatively stronger legitimacy of the Indian Act, the CCI, even in its earlier orders only expressly referred to or applied foreign decisions and materials when it was necessary for it to do so to support its arguments[16] while the weaker legitimacy of the CCP constrained it to cite especially EU and US antecedents, not merely to evaluate competition issues but also to establish its international pedigree and thereby to leverage its international legitimacy to gain domestic legitimacy.[17] The nature of the CCI and CCP's interactions with their respective pre-existing legal systems is a further manifestation of the legitimacy of the competition legislations:[18] the relative higher legitimacy in India appears to have generated a more supportive response from the general courts to the challenges filed before them in respect of proceedings pending before the CCI while the weaker legitimacy in Pakistan has resulted in reluctance on the part of the general courts to address and deal decisively with the competition-related challenges.[19] The CCI's relatively lenient approach towards penalties may similarly be attributed to its desire to maintain its legitimacy in the domestic context, while Pakistan's relatively aggressive penal strategy, particularly in its early years, suggests the need to assert its international legitimacy and thereby perhaps to compensate for its weaker legitimacy.[20] Finally, the relatively greater number of complaints filed before the CCI may be attributed to its relatively stronger legitimacy in the Indian context while CCP's preference for *suo motu*

[13] ibid Section 4.4.2.
[14] Chapter 7, Section 7.4.
[15] Chapter 5.
[16] Chapter 5, Sections 5.3 and 5.4.
[17] ibid.
[18] Chapter 7.
[19] ibid Sections 7.4 and 7.5.
[20] Chapter 6, Section 6.5.

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action may be traced to its weak legitimacy and as yet another attempt on its part to leverage its international legitimacy.[21]

8.2.3 *Compatibility and Legitimacy and the 'Hiatus' between Adoption and Implementation*

Their rather different starts notwithstanding, the Indian and Pakistani competition regimes had in common the fact that their operations were at least partially suspended for considerable periods of time, albeit for different reasons and at different stages of the adoption–implementation continuum. This period of suspension – the hiatus stage – is often omitted from an analysis of the implementation of competition legislation in the two countries for the obvious reason that no enforcement actions are recorded in this period. However, a closer review of the activities of the CCI and CCP in the hiatus stage suggests that both authorities utilised the opportunity presented by the break in enforcement to raise greater competition awareness among the stakeholders in their countries. This section takes a closer look at the hiatus stage in India and Pakistan and examines its impact, if any, on the compatibility and legitimacy, and future implementation of their respective competition legislations.

The CCI entered a nearly six-year-long hiatus stage even before it was fully operational when the Indian Act was challenged before the Supreme Court in the *Brahm Dutt* case.[22] At this time, the Indian government had only brought into force some of the provisions of the Indian Act which included provisions for establishing the CCI and authorising it to engage in competition advocacy, but not provisions relating to the appointment of its members or any of its enforcement powers in respect of anti-competitive practices.[23] This six-year-period only ended when the Indian government appointed the CCI's members in accordance with the procedure provided in the 2007 Amendment Act[24] and brought into force the provisions relating to CCI's enforcement powers under the Act.[25] For the six years in which it remained in the hiatus stage the CCI existed with a single member/chairperson whose sole mandate in pursuance of section 49(3) of the Act was to take 'suitable measures as may be prescribed for the promotion of competition advocacy, creating awareness and imparting training about competition issues'. This single member/

[21] Chapter 4, Section 4.4.2.

[22] Chapter 2, Section 2.4.1.

[23] By SO 715(E) dated 19.06.2003 the Indian government brought in force several sections of the Indian Act including section 7 (Establishing the Commission) and section 49 (Competition Advocacy). Other sections brought into force by this notification were challenged in the *Brahm Dutt* case and were amended by the 2007 Amendment Act. Also see Chapter 4, n.1.

[24] CCI Annual Report 2009–10, Chairperson's Statement.

[25] Indian Act, sections 3 and 4 relating to anti-competitive agreements and abuse of dominant position respectively were brought into force by SO 1241(E) and SO 1242(E) both dated 15.05.2009.

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chairperson exercised his powers to organise a range of seminars and workshops with business associations, professional institutions, government ministries and departments, and educational establishments throughout India.[26] Although this extensive advocacy could not amend the provisions of the Indian Act and thereby increase its compatibility with context, it raised public awareness and understanding of these provisions and thereby enhanced its legitimacy. Consequently, by the time the Act was operationalised in 2009, members of the public were more prepared and more willing to engage with it. As has already been discussed the more cases that were brought before the CCI and appealed to the Tribunal and ultimately to the Supreme Court, the more the law was clarified and brought into alignment with each other as well as the country's pre-existing legal system.

The CCP entered its hiatus stage several years after first becoming operational. The CCP had been established and operationalised almost immediately after the promulgation of the 2007 Ordinance.[27] Its situation remained stable even when the 2007 Ordinance was replaced first by the 2009 and then the 2010 Ordinance and later by the Pakistani Act. Throughout this period, the CCP prioritised enforcement over advocacy[28] only partially shifting its attention towards advocacy when its legal status became uncertain in the wake of the order of the Supreme Court in the *Sindh High Court Bar Association* case.[29] However, in 2013 the CCP entered an eighteen-month hiatus stage when the term of the CCP's second chairperson came to an end and the government instead of appointing a new chairperson to replace her, left the CCP in the care of an acting chairperson. During this period the CCP did not issue any enforcement orders and focused almost entirely on competition advocacy[30] engaging with the public to create awareness and with government departments to help ensure that their policies, if not actually pro-competitive, were not anti-competitive either.[31] It is a testament to the CCP's efforts during this period that it won the World Bank's 2013 Competition Advocacy Contest in the category of 'Successfully promoting pro-competition market reforms, opening of markets, and infusion of competition principles in other sectoral policies.'[32] Therefore, the CCP's advocacy efforts significantly bolstered the international and domestic legitimacy of the Pakistani competition legislation which in turn, helped the CCP restart its enforcement actions with complaints and references rather than resorting to its initial strategy of initiating *suo motu* actions.

[26] Amitabh Kumar, 'The Evolution of Competition Law in India' in Vinod Dhall (ed) *Competition Law Today: Concepts, Issues and the Law in Practice* (OUP 2007), 497.

[27] Provisions brought into force included enforcement powers with respect to anti-competitive agreements (section 4) and abuse of dominant position (section 3), powers to approve or reject mergers (section 11), and its powers to engage in competition advocacy (section 29).

[28] CCP Annual Report 2011, 'Meeting the Chairperson', vii.

[29] CCP Annual Report 2012, 'Message by the Chairperson', 7. Also Chapter 2, Section 2.4.2.

[30] CCP Annual Report 2014, Acting Chairman's Message, 6–7.

[31] ibid 6.

[32] ibid 7.

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8.3 THE IMPLEMENTATION EXPERIENCE OF THE REMAINING SOUTH ASIAN COUNTRIES

Unlike India and Pakistan, the other South Asian countries – the South Asian Six – have made limited progress towards meaningfully implementing their competition legislations or otherwise preparing the ground for future competition enforcement. This section examines the progress made by these countries and relates it to their adoption processes and the compatibility and legitimacy generated through them.

8.3.1 *Adoption Processes and Compatibility and Legitimacy in the South Asian Six*

The South Asian Six had engaged with competition legislation in distinct legal and political landscapes. Sri Lanka and Bangladesh are both former British colonies: Sri Lanka had become a British dominion in 1947, adopted its first constitution in 1972, and replaced it in 1978 with its present constitution, while Bangladesh had gained independence first from the British as East Pakistan and then from Pakistan in 1971 and had adopted its first constitution in 1972.[33] Nepal and Maldives were both traditional monarchies before becoming constitutional monarchies and later republics.[34] Nepal adopted seven constitutions until it adopted the present constitution in 2015, while Maldives adopted three constitutions, the latest in 2008.[35] Bhutan and Afghanistan were both traditional monarchies. However, while Bhutan peacefully transitioned to a constitutional monarchy in 2008, Afghanistan's history has been more chequered: it was a constitutional monarchy from 1964 to 1973, a republic from 1973 to 1978, and in a state of war first with the Soviets and then with the Taliban from 1978 until 2000. In 2004 Afghanistan adopted a new Constitution; however, in 2020 it once again fell into the hands of the Taliban.[36]Their disparate histories notwithstanding, these countries are all members of the WTO: Sri Lanka, Bangladesh, and Maldives since 1995; Nepal since 2004, and Afghanistan from 2016. Bhutan is the only South Asian country which is presently not a WTO member, but it too has established a working party to support it in obtaining membership.[37]

Among the South Asian Six Sri Lanka was the first to adopt modern competition legislation on the persuasion of the WTO, the World Bank, and the United States

[33] Chapter 3, Section 3.3.1.

[34] In April 2008 Nepal elected a Constituent Assembly and in May the same year the newly elected Constituent Assembly declared Nepal a Federal Democratic Republic, abolishing the 240-year-old monarchy. Nepal today has a president as head of state and a prime minister as head of government. Ministry of Foreign Affairs 'History of Nepal' <https://mofa.gov.np/about-nepal/history-of-nepal> accessed 31 October 2020.

[35] ibid Section 3.2.

[36] ibid Section 3.3.

[37] World Trade Organisation, Members and Observers <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 31 October 2021.

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and as part of its programme of economic liberalisation.[38] The Sri Lankan Act which continues in force today provides for a two-tier, non-exclusive, competition enforcement system comprising the Consumer Affairs Authority and the Consumer Affairs Council whose members are to be appointed and removed by the government.[39] Nepal, despite considerable political turmoil and uncertainty, was next to adopt modern competition legislation in early 2007 largely due to external persuasion.[40] Shortly before Nepal joined the WTO, Nepalese thinktanks had started engaging with multi-lateral agencies and foreign thinktanks to consider an appropriate competition legislation for the country, however, there is no information and indeed little likelihood of meaningful engagement between these thinktanks and the parliament or other stakeholders in the enactment phase.[41] The Nepalese Act, like the Sri Lankan Act, does not provide for a specialist competition authority. However, unlike the Sri Lankan Act, which establishes a non-exclusive authority, the Nepalese Act opts for a Board which it sets up as part of the government. The Act also provides for a Market Protection Officer with the mandate of filing complaints before the Nepalese general courts that remain exclusively responsible for enforcing the Nepalese Act as well as for hearing claims for compensation that may be brought by private parties in pursuance of the Act.[42]

Bangladesh adopted a modern competition legislation five years after Nepal[43] largely due to its engagement with the WTO and other multi-lateral agencies.[44] Although Bangladesh had finalised the first draft of its legislation in 2008 it only enacted it in 2012 under a wider programme of technical assistance from the World Bank.[45] Unlike the Sri Lankan and Nepalese Acts, the Bangladeshi Act provides for an exclusive and independent competition authority–the Bangladesh Competition Commission–, however, it provides that the members of the authority may be

[38] Chapter 3, Section 3.3.1.1. Although there is no information about the deliberation phase of the Sri Lankan Act it is known that it was enacted through the parliament in accordance with the legislative procedures prescribed in the Sri Lankan constitution.

[39] ibid Section 3.2.1.1.

[40] Chapter 3, Section 3.3.2.1.

[41] In January 2007 when it enacted the Nepalese Competition Act, Nepal was undergoing a period of political turmoil: although Nepal had witnessed considerable tension between the monarchy and democratic forces throughout its history, a People's Movement launched in 2006 demanded the transfer of power from the monarchy to a democratically elected government. At the time the Nepalese Act was passed, Nepal was governed by an interim constitution which had been brought into force only weeks before its adoption and power still vested in the monarchy and the prime minister appointed by it. It is therefore unlikely that there was any meaningful engagement with the parliament in the enactment phase. See 'History of Nepal', n.34.

[42] Chapter 3, Section 3.2.1.2.

[43] ibid Section 3.3.1.2.

[44] Bangladesh was still part of Pakistan when Pakistan had adopted the Monopoly Control Ordinance 1970 and had retained it after independence. However, given its considerable economic difficulties it had not prioritised the enforcement of this Ordinance.

[45] Chapter 3, Section 3.3.1.2.

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appointed and removed exclusively by the government. The Act vests in the Bangladeshi government the power to review the orders of the Commission, however, it does not state whether the orders of the Commission or the government may be appealed before the general courts. Unlike regulatory infringements that may be examined by the Commission, offences under the Act are to be tried by a magistrate and may be appealed to the Court of Session whose orders are to be final.[46] Maldives is the last and most recent country to enact a modern competition legislation and it too has done so under external influence. Maldives has maintained a close relationship with multi-lateral agencies and bodies since its independence, and from 2000 onwards it has also embarked upon a long-term plan to reorganise the Maldivian economy and political system with their assistance and support. Maldives finally adopted the competition legislation as part of its Strategic Action Plan for economic reform developed with the support of UNDP.[47] The Maldives Act does not envisage an independent competition authority and entrusts its enforcement to the relevant ministry of the government. However, the Act allows parties aggrieved by the decisions of the ministry to bring appeals before the general courts.[48]

Of the remaining two South Asian Six, Bhutan has adopted a competition policy and Afghanistan has prepared a draft Act which is yet to be enacted. Bhutan's preference for a policy rather than a legislation may be attributed to its small, relatively undiversified economy[49] which is defined and indeed circumscribed by its close relationship with India. Therefore, in 1992 as India embarked upon its Liberalisation, Privatisation and Globalisation programme the Bhutanese government also took measures to create a more competitive economy. One of the measures it proposed in this regard was a hybrid consumer and competition legislation. However, the Consumer Protection Act it finally adopted was more a sale of goods than a competition act[50] and therefore, the question of competition remained unaddressed. It was only in 2015 that Bhutan adopted its first competition policy based on a report commissioned by UNCTAD and prepared by an Indian consultant. Bhutan revised this policy in 2020 and entrusted the Office of Consumer Protection established in pursuance of the Consumer Protection Act to implement it.[51] Afghanistan's competition story, despite having failed to reach its denoument in the enactment of a competition legislation, is true to the type seen across South Asia. As in other South Asian countries, Afghanistan was convinced of its need for a modern competition legislation by multi-lateral agencies. These agencies working

[46] ibid Section 3.2.1.4.
[47] Chapter 3, Section 3.2.2.2.
[48] ibid.
[49] Bhutan's economy is essentially comprised by the agriculture, forestry, and hydropower sectors.
[50] Chapter 3, Section 3.3.3.2.
[51] Chapter 3, Section 3.2.2.2.

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with the Afghani government commissioned an Indian law firm to draft the Afghani Act.[52] The draft proposes a 'Competition and Consumer Authority' which though described as independent is embedded in the Afghani Ministry of Commerce which has the power to appoint and remove members of the authority and to supersede it in specified circumstances.[53]

Their diverse pre-conditions of transfer notwithstanding, each of the South Asian Six to varying degrees derived their motivation to adopt modern competition legislation due to their engagement with the WTO and other multi-lateral agencies. Further, in all these countries the deliberation phase was led by their governments, albeit with varying level of support of multi-lateral agencies, however, Maldives was the only country in which the government engaged in a broad-based consultation with stakeholders prior to enacting its competition legislation. Although there is some information of thinktanks in Sri Lanka, Nepal, and Bangladesh engaging in discussions regarding appropriate competition principles for their countries prior to the enactment of the competition legislations, it is not clear whether and to what extent these discussions were taken into account in the enactment of these legislations. In Sri Lanka, Bangladesh, and Maldives the competition legislation was enacted through parliament, however, there is no information of any engagement betwen parliamentary standing committees and stakeholders. Stakeholder consultation is also unlikely to have taken place in Nepal which enacted its competition legislation by the order of its monarch[54] or in Bhutan and Afghanistan, both of which largely outsourced the deliberation to Indian consultants.

A review of the complex interplay of transfer mechanisms and institutions engaged by these countries in the adoption process returns equally complex results for the extent of compatibility and legitimacy generated in these processes: while the input of the governments of these countries in the deliberation phase creates some compatibility between the proposed legislations and the context for which these are intended, this compatibility is superficial. For instance, both the Bangladeshi and Maldives Act retain the unmistakeable stamp of their Western multi-lateral origins while the lack of conceptual clarity in the Sri Lankan and Nepalese Acts reflects the unconvincing attempts of their institutions to adapt the law for their contexts. Equally, while the enactment of these legislations through the parliament (in Sri Lanka, Bangladesh, and Maldives) or by the monarch (in Nepal) confers a degree of formal authority and legality on these legislations, in all but Maldives which published a strategic plan ahead of the enactment, their substantive legitimacy remains weak due to the absence of broad-based consultations with domestic stakeholders. Although Afghanistan and Bhutan have not adopted competition

[52] ibid Section 3.3.3.1.
[53] ibid Section 3.2.2.1.
[54] n.41.

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legislations, the extent of the compatibility and legitimacy of the draft Afghani Act or the Bhutan policy is also likely to be weak given their external motivations for engaging with competition legislation and, more importantly, their outsourcing of the deliberation entirely to externally situated experts.

8.3.2 *Implementing Competition Legislation in the South Asian Six*

Of the South Asian Six, three out of the four that have adopted modern competition legislations, i.e., Sri Lanka, Nepal, and Bangladesh have established the first-tier competition authorities envisaged in these legislations, however these authorities are yet to issue any competition-related orders while one, Maldives, has only recently brought its Act into force. Interestingly even though Bhutan and Afghanistan they have not adopted modern competition legislations have also taken some steps to promote a competition culture. This section examines the progress made by each of these countries at the implementation stage, or at the very least in laying the ground for this stage.

8.3.2.1 Sri Lanka: Consumer Welfare at the Cost of Competition

The Sri Lankan Act focuses as much on protecting consumers and regulating internal trade as it does on promoting effective competition in the country.[55] Even within the ambit of competition the Act focuses inordinately on anti-competitive agreements as compared to abuse of dominant position and excludes mergers altogether.[56] In fact the Act is often described as resembling 'a consumer welfare law rather than a competition law'.[57]

The Sri Lankan Act's lack of focus on competition is also reflected in the operations of the Consumer Affairs Authority established in pursuance of the Act.[58] Although the Authority lists 'Promotion of Competition' as one of the services

[55] The Sri Lankan Act, Preamble.

[56] Sri Lankan Act, section 35. The provision relating to anti-competitive practices was first stipulated in the Fair Trading Commission Act 1987 which preceded the Sri Lankan Act. As per its decision in *Ceylon Oxygen Ltd. v Fair Trading Commission* (SLR-Year-1997-Vol 2p 372) the Sri Lankan Court of Appeal refused to recognise predatory pricing, discriminatory rebates, and exclusive dealings as anti-competitive practices for the purposes of the 1987 Act, therefore, it is unlikely that in the absence of an express statutory clarification, the same provision in the Sri Lankan Act would be interpreted differently.

[57] Dianarthy Suthakar 'Beyond "More Economics-Based Approach": A Legal Perspective on Competition in Sri Lanka' 11th International Research Conference 2018, General Sir John Kotelawala Defence University, 25. <http://ir.kdu.ac.lk/bitstream/handle/345/2568/Law%20new_4.pdf?sequence=1&isAllowed=y> accessed 5 November 2020.

[58] Consumer Affairs Authority <http://caa.gov.lk/web/index.php?lang=en> accessed 31 October 2021.

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it provides; has appointed a director for this purpose;[59] and requires 'traders' to file with it, quarterly information regarding their production, imports, quantity, sales quantity, and value,[60] it is not clear whether and to what end it utilises this information. Further, while the Authority's Annual Reports suggest that the Authority has regularly conducted competition-related investigations even referring some of these to the Council for adjudication;[61] has launched various competition awareness programmes; conducted market research, and calculated market shares of a range of manufacturers[62] there are no details available for the scope or impact of any of these efforts or of any orders that the Council may have passed in respect of any matters referred to it by the Authority.[63]

The Authority's lack of commitment to competition enforcement has not gone unnoticed. An UNCTAD Investment Policy Review of Sri Lanka noted that the fate of competition regulation in Sri Lanka was uncertain, because the regulatory machinery put in place by the Sri Lankan Act was too heavily dependent on governmental discretion and support and, therefore, not able to respond vigilantly or professionally to complaints regarding anti-competitive behaviour.[64] The review further noted that '[r]ecent governments ha[d] been less than fully committed to competition' and had promoted a non-competitive environment by allowing several privatisations that strengthened market positions in a range of sectors, fixing minimum prices in others and overall remaining timid in encouraging private competition.[65] A more recent World Bank Trade and Competitiveness Report noted that the competitiveness of the Sri Lankan economy was far from ideal: it stated that the

[59] Consumer Affairs Authority, 'Promotion of Competition' <http://caa.gov.lk/web/index.php?option=com_content&view=article&id=117&Itemid=566&lang=en> accessed 31 October 2021.

[60] Sri Lankan Act, section 57. Consumer Affairs Authority 'Production/ Imports/Quantity, Sales Quantity/Value' <http://caa.gov.lk/web/index.php?option=com_content&view=article&id=177&Itemid=526&lang=en> accessed 31 October 2021.

[61] Sri Lankan Act, section 39.

[62] Annual Report 2010, 21–22; Annual Report 2011, 21–22; Annual Report 2011, 27–28; Annual Report 2012, 27–28; Annual Report 2013, 29–30; Annual Report 2014, 20–21; Annual Report 2015, 20–21; Annual Report 2016, 18–19; Annual Report 2017, 17–18. All available at Consumer Affairs Authority, 'Annual Report' <http://caa.gov.lk/web/index.php?option=com_content&view=article&id=94&Itemid=537&lang=en> accessed 29 November 2021.

[63] ibid. Between 2010 to 2017 the Council settled, dismissed, or recommended a number of complaints for further action (Annual Report 2010, 28; Annual Report 2011, 27; Annual Report 2012, 34; Annual Report 2013, 36; Annual Report 2014, 26; Annual Report 2015, 27; Annual Report 2016, 24; Annual Report 2017, 23); however, the details of the Council's orders in this regard are not known. Also, the Authority has only issued orders in pursuance of sections 18 <http://caa.gov.lk/web/index.php?option=com_content&view=article&id=113&Itemid=562&lang=en> accessed 6 November 2020, and directions under section 20 of the Act <http://caa.gov.lk/web/index.php?option=com_content&view=article&id=162&Itemid=672&lang=en> accessed 6 November 2020, neither of which relate to competition.

[64] UNCTAD *Investment Policy Review: Sri Lanka*, 46 UNCTAD/ITE/PC/2003/8 <https://unctad.org/system/files/official-document/iteipc20038_en.pdf> accessed 7 November 2020.

[65] ibid.

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'dense web of business regulations' and the high transaction costs of regulatory compliance posed a barrier to the entry of new firms and limited the growth of exiting firms which in turn resulted in the expansion of the informal sector. The report further highlighted the high costs of monitoring incurred by the government in its attempts to 'police market actors' which led to 'irregularities in the written law and its application' as it enhanced the discretionary powers of 'government officials and politicians' and paved 'the way for waste and corruption'.[66] The opinion of multi-lateral agencies regarding the Sri Lankan competition regime is shared by local commentators who highlight the lack of autonomy of the Authority and the Council and[67] the omission from the Sri Lankan Act of a definition of 'unfair trade practices'[68] and of merger regulation[69] and call for extensive reforms of the Sri Lankan Act for the meaningful competition enforcement in the country.

8.3.2.2 Nepal: To Enforce or Not Remains the Question

Although the Nepalese Act was enacted while the country was still ruled by a monarch, almost immediately after its enactment Nepal abolished the monarchy, adopted a new constitution, and transitioned fully to a democratic government.[70] The political confusion that ensued is likely to have created a shift in governmental priorities which is further likely to have contributed to Nepal's neglect of competition enforcement in the years that followed.

A 2012 report of the South Asia Watch on Trade, Economics, and Environment (SAWTEE) prepared in collaboration with the United States Agency for International Development (USAID) assessed the issues relating to competition in Nepal and recommended that the Nepalese Ministry of Commerce and Supplies adopt appropriate enforcement guidelines for the implementation of the Act. In preparing the report, SAWTEE engaged extensively with stakeholders, including representatives of the Nepalese business community, consumer groups, lawyers, judges, academics, and others in the public and private sector, to discuss the parameters of the Nepalese Act and to develop strategies for its implementation.[71]

[66] World Bank Group 'Enhancing Competitiveness in Sri Lanka' ©2016 World Bank, section 1. <https://openknowledge.worldbank.org/handle/10986/24927> accessed 9 November 2020.

[67] Gamunu Chandrasekera, 'Anti-Competitive Practices & Competition Law of Sri Lanka: A Call for Reform', 5. <www.juniorbarbasl.lk/assets/files/Article%20by%20Gamunu%20Chandrasekera%20-%20Anti-Competative%20Practices%20and%20Competition%20Law%20of%20Sri%20Lanka.pdf> accessed 7 November 2020.

[68] ibid 6.

[69] ibid 8.

[70] n.34.

[71] SAWTEE, 'Report on Operational Guidelines to Implement the Competition Promotion and Market Protection Act' <www.sawtee.org/programme/completed-programmes/report-on-operational-guidelines-to-implement-the-competition-promotion-and-market-protection-act.html> accessed 31 October 2020.

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Despite these efforts, however, even in 2013 there was no evidence of any competition matters having been decided under the Act,[72] while a 2018 news item not only confirmed that the Board established in pursuance of the Act had remained inactive and was to be re-structured to be made more effective for market regulation, but also called for a meaningful enforcement of the competition legislation.[73] Despite these calls, at the time of writing there was no information regarding any steps that the Nepalese government may have taken to re-vamp the Nepalese competition regime.

8.3.2.3 Bangladesh: Is Competition Forgotten?

Although the Bangladeshi government established the Bangladesh Competition Commission shortly after the Bangladeshi Act had been enacted,[74] it did not appoint the Commission's first secretary until 2013 and then too only tasked him with 'setting up the Commission office'.[75] More than four years later in 2017, the Commission was still experiencing 'operational delays' and was not being consulted by the government even in issues raising competition concerns.[76] Despite these handicaps however, the Commission has organised activities to raise awareness about competition issues[77] and

[72] Apurva Kathiwada, 'Nepal' 2 (CUTS 2013) <https://cuts-ccier.org/pdf/23-Nepal.pdf> accessed 30 October 2020.

[73] *The Kathmandu Post*, 'Competition Promotion Fails to Curb Cartels' <https://kathmandupost.com/money/2018/04/09/competition-promotion-board-fails-to-curb-cartels> accessed 31 October 2020.

[74] According to a US State Department Report (2017), the Bangladesh government had formed an independent agency, the Bangladesh Competition Commission in 2011 under the Ministry of Commerce, '2017 Investment Climate Statements: Bangladesh' <www.state.gov/reports/2017-investment-climate-statements/bangladesh> accessed 24 October 2020; however, other unconfirmed sources suggest that the BCC was actually established in December 2012 nearly six months after the enactment of the Bangladeshi Act.

[75] *The Dhaka Tribune*, 'Bangladesh Competition Commission gets Secretary after a Year' <www.dhakatribune.com/uncategorized/2013/09/16/bangladesh-competition-commission-gets-secretary-after-a-year> accessed 31 October 2021.

[76] According to the US State Department Report (n.74), in January 2016, the Malaysia-based Robi and India-based Airtel agreed to merge their operations in Bangladesh. The deal, valued at $12.5 million is Bangladesh's largest corporate and first telecommunications merger. Although the merger raised competition concerns, it was completed in November 2016 with approvals from the Bangladesh Telecommunication Regulatory Commission and the prime minister and without any consultation with the Competition Commission.

[77] See, for instance the news report on the February 2018 workshop on 'Competition Commission for Economic Growth and Fair Price' jointly organised by the Bangladesh Competition Commission, the South Asian Network on Economic Modeling (SANEM), and the British Council. *The Daily Star*, 'Make Competition Commission Functional: analysists' <www.thedailystar.net/business/make-competition-commission-functional-analysts-1530595> accessed 26 October 2020; the keynote address for a seminar organised by the Commission in March 2019 on 'The Role of Competition Commission in Sustainable and Inclusive Development'; Abdur Razzaque, 'The Role of Competition Commission in Sustainable and Inclusive Development' <www-ccb-gov-bd.translate.goog/site/page/87d2154b-5d3c-4509-a4f4–896016f199f9/সেমিনার-পেপার?_x_tr_sl=bn&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc&_x_tr_sch=http> accessed 26 October 2020, and a news report of a October 2020 workshop on digital economy, The Business Standard 'E-commerce Sale Grows 24 Times Over Three Years'

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to train its officers.[78] Further, in the wake of the Covid-19 pandemic, when competition authorities all over the world were re-evaluating their roles, the Bangladeshi Commission also asserted itself by suggesting that steps be taken to ensure the competitive allocation and spending of the government-announced stimulus funds for stabilising economic activities during the pandemic.[79] The Commission followed up on its proposal by lobbying various government ministries to investigate a suspected onion cartel.[80] Laudable as these efforts may be, at the time of writing there was still no indication of when the Commission may be fully operationalised.[81]

8.3.2.4 Maldives: too early for implementation

In August 2020 when the Maldives president ratified the Maldives Competition Act he also announced that the that the Act would be made effective from 1 March 2021.[82] A visit to the website of the Maldives Ministry of Economic Development shows that it has established an 'anti-trust unit' as part of its Trade and Investment Department; however, at the time of writing there is no information regarding any enforcement or advocacy initiatives undertaken by this unit.[83]

8.3.2.5 Bhutan even policies matter

The Bhutanese Competition Policy does not propose an independent authority for its implementation and designates the Office of Consumer Protection as the

<https://tbsnews.net/economy/e-commerce-sale-grows-24-times-over-three-years-143923> accessed 26 October 2020.

[78] See for instance, the April 2018 foundation course organised by the Bangladesh Foreign Trade Institute (Bangladesh Foreign Trade Institute Annual Report 2017–18) and the report of an OECD Conference attended by senior officials of the Commission (Bangladesh Competition Commission 'Report on OECD–GFC Annual International Conference presented by Mr. Md. Abul Hossain Mian, Member Bangladesh Competition Commission, Mr. Md. Monowar Hossain Director Bangladesh Competition Commission, Ms. Dilara Begum Commercial Councellor Bangladesh Embassy, Paris, France 29–30 November 2018 Paris, France' <https://ccb.portal.gov.bd/sites/default/files/files/ccb.portal.gov.bd/page/17510ba7_bdbe_4d2a_99d5_a3da1518b4b4/OECD%20Report%202018%20Final.pdf> accessed 26 October 2020).

[79] *The Financial Express*, 'BCC Suggests Steps Against Anti-competitive Activities' <https://thefinancialexpress.com.bd/economy/bangladesh/bcc-suggests-steps-against-anti-competitive-activities-1596771437> accessed 26 October 2020.

[80] *The Business Standard*, 'Competition Commission to Break up Onion Syndicate' <https://tbsnews.net/bangladesh/competition-commission-break-onion-syndicate> accessed 26 October 2020.

[81] *The Business Standard* n.73.

[82] Chapter 3, Section 3.2.1.4.

[83] Ministry of Economic Development, Republic of Maldives <https://trade.gov.mv/organizational-structure> accessed 31 October 2021.

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Competition Council and entrusts it with the task of reviewing, monitoring, and implementing the policy.[84] However, a visit to the official website of the office at the time of writing suggested that it has yet to take any steps in this regard.[85]

8.3.2.6 Afghanistan ensuring competition without a law

Although Afghanistan has yet to enact its competition legislation, the Afghani government recognises 'Competition Promotion and Consumer Protection' as a pillar of its economic policy and seeks to create and develop 'a competitive marketplace which in that [*sic*] competition is based on supply and demand, and both traders and consumers use from those beneficiaries [*sic*]', and aims to 'standardize and improve business transaction in market'.[86] In the years since the Afghan governmen tcommissioned the drafting of the Afghani Act, the relevant Afghani ministry has also participated in a series of consultations led by the United States Department of Commerce to learn about the political and public awareness challenges faced by Pakistan in developing a competition and consumer protection regime, and to thereby to build 'internal capacity to develop a sustainable competition and consumer protection regime'.[87]

8.3.3 *Links between Adoption and Implementation in these Countries*

Although each of the South Asian Six are likely to offer different explanations for why they have not yet fully operationalised their competition regimes, their inertia in this regard may, in significant part, be attributed to their inability to generate a high level of compatibility and legitimacy for their respective competition legislations due to their particular pre-conditions of transfer and the mechanisms and institutions employed by them in their adoption processes.

Like Pakistan, these countries had acquired their competition legislations through *coercion*, however, unlike Pakistan at least three of these countries (Sri Lanka, Bangladesh, and Maldives) had enacted these legislations through their parliaments, while Nepal like Pakistan had adopted it through an executive order. Although the parliamentary form of enactment in Sri Lanka, Bangladesh, and Maldives resembles the process through which India adopted the Indian Act, the similarity between the enactment in India and in these countries is superficial. For instance, there is no

[84] Chapter 3, Section 3.2.2.2.

[85] Ministry of Economic Affairs, Office of Consumer Protection, Bhutan <www.moea.gov.bt/?page_id=594> accessed 31 October 2021.

[86] Ministry of Industry and Commerce, Competition Promotion and Consumer Protection, Afghanistan <https://moci.gov.af/en/competition-promotion-and-consumer-protection> accessed 31 October 2021.

[87] 'Commercial Law Development Program, Office of General Counsel, United States Department of Commerce: Improving the Legal Environment for Business Worldwide' <https://cldp.doc.gov/programs/cldp-in-action/details/1183> accessed 31 October 2021.

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record of any of these countries having formed any committees, such as the Raghavan Committee in India, to deliberate and draft the proposed legislation, and there is no evidence of parliamentary standing committees engaging with stakeholders to give final form to these legislations or of their judiciaries engaging with the scheme and substance of these legislations to ensure they are in alignment with the constitutions and legal norms prevalent in their contexts. Further, given the turbulent political histories of these countries which have interfered in the smooth functioning of their parliaments (even if not actually suspending these) it is unlikely that their parliaments had the depth of legislative experience of the Indian parliament and therefore were not equipped for *socialising* the proposed legislations for their respective contexts.

Even in the few instances when the competition laws of the South Asian Six were enacted through parliaments the process of enactment could not offset the negative impact of the absence of broad-based consultations. Consequently, whether enacted through parliament or through executive orders the compatibility of these laws remained weak and superficial. This in turn means that those responsible for establishing the competition authorities or enforcing the competition legislations, whether it is the government as in Maldives and Nepal, or the authorities established in pursuance of the competition legislations (as in the case of Sri Lanka and Bangladesh), or the stakeholders who were expected to utilise these legislations, really understood their aims and objectives. In the case of Sri Lanka, this is likely to have been a factor in the Consumer Affairs Authority failing to enforce the competition-related provisions of the Sri Lankan Act as well as for the absence of competition complaints filed before it, while in the case of Bangladesh it is a likely explanation for the government's failure to fully operationalise the Bangladeshi Competition Commission, and in Nepal and Maldives for the lack of application and utilisation of the legislations by the officials appointed for this purpose.

However, the enactment of the competition legislations in Sri Lanka, Bangladesh, and Maldives through parliaments, or in the case of Nepal, by the then all-powerful monarch, does confer on them a reasonable degree of formal legitimacy which is likely to protect them from the kind of constitutional challenges witnessed in Pakistan. However, this formal legitimacy does not automatically translate into productive interactions between the competition enforcement systems set up in pursuance of the adopted competition legislations and the pre-existing legal systems of these countries. As in India and Pakistan, the quality of these interactions is likely to be determined in part by the extent to which the judiciary has engaged with the adoption process, and in part by the extent to which the other organs of state assume ownership and responsibility for these legislations. Given that there is no information or even suggestion that the judiciary in any of these countries has engaged in the adoption process and further given that the extent of ownership of state organs appears weak at best due to their indifference to the enforcement of these laws, it is very likely that the general courts at the

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adoption stage in these countries would not respond to competition matters as supportively as general courts in India. In fact, the repercussions of the absence of judicial engagement in these countries are likely to be even greater than in Pakistan because some of these legislations give a more central competition enforcement role to the general courts: for instance, appeals from offences under the Bangladeshi Act lie to the lower judiciary; Maldives makes the general courts responsible for reviewing all competition orders; and Nepal entrusts the entire enforcement function to the general courts. In these circumstances the judiciary's lack of understanding of core competition principles and of the rationale for which the countries have adopted competition legislations is likely to have a far greater direct adverse impact on competition enforcement in these countries than even in Pakistan where an adverse direct impact can be offset by reducing the negative indirect impact on enforcement (see Chapter 6).

The considerable pressures on the performance of the adopted competition legislations in Sri Lanka, Nepal, Bangladesh, and Maldives and on their interactions with pre-existing legal systems stem from the quality of the legitimacy and compatibility generated for these legislations the adoption stage, and are likely to present an obstacle to the smooth or early integration of these legislations with the pre-existing legal systems of these countries. While the parliamentary enactment of competition legislations in at least three of the South Asian Six confers a degree of legitimacy on these legislations, the need to satisfy different interest groups represented in their parliaments has remained an obstacle to a decisive start to competition enforcement as witnessed in Pakistan, which had successfully promulgated the 2007 Ordinance and established the CCP entirely through executive action and without any interference from the interest groups represented in the legislature.[88] Further, even the competition legislations (such as those of Sri Lanka, Bangladesh, and Maldives) that have been enacted through elected legislatures have not been made compatible for their contexts for at least two reasons: first, that that their parliaments, like the Pakistani parliament when it enacted the Pakistani Act, were constrained by the advice and direction of multi-lateral agencies supporting them in the adoption and did not have the benefit of broad-based consultations with domestic stakeholders at the deliberation phase; and second, because the turbulent politics of these countries had not equipped their parliaments with the institutional capacity necessry for meaningful legislation. The absence of broad-based understanding of the adopted competition legislations also weakened their domestic legitimacy which in turn manifested in a lack of institutional ownership as witnessed in Pakistan, and the lack of stakeholder

[88] Although a Pakistan-style implementation may theoretically be possible in Nepal, the Nepalese Act lacked the clarity of concepts and a clearly delinated enforcement system as provided in the Pakistani competition legislation.

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interest in bringing complaints under these legislations. These factors suggest that the competition experience of these countries is likely to fall somewhere between the two extremes represented by the Indian and Pakistani experiences: the legislations are unlikely to face the kind of fundamental constitutional challenges witnessed in Pakistan that almost choked competition enforcement in the country but they are also equally likely to lack the institutional support and public awareness evident in India and therefore the competition enforcement systems envisaged in these legislations are likely to lack the internal impetus to commence meaningful operations.

Although Bhutan has adopted a competition policy rather than a legislation, its failure to implement this policy may also be attributed to the policy having been introduced through multi-lateral agencies without generating understanding of its rationale and objectives in the country. Similarly, Afghanistan's failure to enact its competition legislation despite receiving a draft in 2011 and despite making efforts to create a competitive culture even without formally enacting the legislation, is at least in part due to the absence of a broad-based understanding of the rationale for the legislation, especially given the other more pressing challenges that the country faces before political events in the country took over and entirely overshadowed any thought of competition enforcement that may have still be lingering in the Afghani context.

8.4 THE HIATUS STAGE: OPPORTUNITY TO LEARN FROM THE INDIAN AND PAKISTANI EXPERIENCE

The mix of mechanisms and institutions through which the South Asian Six engaged with competition legislations or policies have left them at a curious impasse at which despite years of efforts and some important progress, the legislations or policies adopted or contemplated by them remain unable to progress beyond, and at times even through the adoption stage. Although it may be tempting to write off this impasse either as a natural, and, therefore, inconsequential step in the progression of the adopted legislation or policy or, worse still, as the failure of competition reform in these countries, it is too hasty to do so. In fact, the Indian and Pakistani competition experience suggests that this impasse is the hiatus stage in the adoption–implementation continuum, also witnessed in the Indian and Pakistani contexts which despite the enforcement backtracking that came in its wake, provided both those countries with an important opportunity to enhance the compatibility and legitimacy of their adopted competition legislations through advocacy initiatives and in doing so, improved the chances of the subsequent 'success' of the adopted competition legislations.[89]

[89] For a discussion of success, see Chapter 1, Section 1.3.2.3 and for the Indian and Pakistani hiatus stage see Section 8.2.3.

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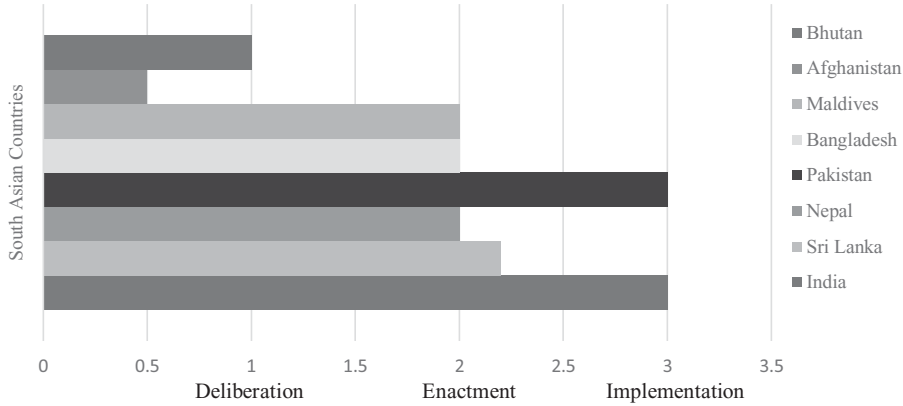


FIGURE 8.1. Progress of South Asian countries along the adoption–implementation continuum

To understand how the South Asian Six may benefit from the Indian and Pakistani experience at the hiatus stage it is first important to identify the point in the adoption–implementation continuum at which each of these countries have entered the hiatus stage. The Indian and Pakistani experience suggests that the probability of a country utilising its hiatus stage for generating compatibility and legitimacy for its adopted competition legislation is greater if the country enters the stage after it has already enacted the competition legislation. This is understandable given that once a competition legislation has been enacted, it already has a degree of compatibility and legitimacy in the country and is, therefore, in a better position to build upon it than if the legislation was still only at the deliberation phase and therefore more vulnerable to the possibility of abandonment altogether. The completion of the enactment phase also means that core competition principles as well as the competition enforcement system for the country have already been clarified, and the country is primed, to popularise these among stakeholders. Sri Lanka, Nepal, and Bangladesh, and Maldives having already adopted competition legislations and Bhutan already having a policy in place, meet this benchmark and may, therefore, be deemed to be well positioned to utilise their hiatus stages meaningfully to enhance the compatiblity and legitimacy of their competition legislations. (Figure 8.1).

The Indian and Pakistani competition experience further suggests that at least three factors other than enactment of the competition legislations helped them utilise their hiatus stage more effectively: first, that the first-tier competition authorities envisaged in the Indian and Pakistani competition legislations – the CCI and the CCP – had already been established, even though, as in the case of India, the CCI was not fully constituted and operationalised when it entered the hiatus stage;

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second that these competition authorities were envisaged as independent of the executive, even though in Pakistan this independence was not perfect as the discretion to appoint and remove members from the CCP vested exclusively in the government (acting on the advise of the CCP chairperson); and finally that the competition authorities in both countries are designed as specialist bodies exclusively focused on regulating competition. Among these characteristics 'independence' is a composite of express statutory independence,[90] the degree of the executive control in appointing and removing members to the authority,[91] and the extent to which the authority is dependent on the executive for its budget.[92] Arguably, a country that has already established its national competition authority that is both independent and specialist has the highest probability of effectively utilising the hiatus stage to enhance the compatibility and legitimacy of its competition legislation in anticipation of its effective enforcement at the implementation stage.

Among the enacted competition legislations of the South Asian Six, the Sri Lankan and Bangladeshi Acts provide for independent competition authorities albeit vesting in their governments the power to appoint and remove their members. The budget of the Sri Lankan Consumer Affairs Authority is voted upon by the parliament[93] while that of the Bangladesh Competition Commission is to be determined by the government.[94] In Maldives, competition enforcement is fully embedded in the relevant ministry while in Nepal the enforcement is entrusted entirely to the courts. Further, the Sri Lankan authority is non-exclusive and is interested in consumer protection and trade in addition to competition. Although Bhutan only has a competition policy and Afghanistan has not enacted its competition legislation, the draft Afghan Act's proposes an authority which is both 'independent' and embedded in the relevant ministry[95] and whose members are to be

[90] Indian Act, section 7 and Pakistani Act, section 12 envisage the CCI and CCP as autonomous bodies independent of the governments of the countries.

[91] The greater the involvement of the executive in the appointment and removal of members, the lower the independence of the authority. For instance, under the Indian Act, sections 9 and 11, CCI members are to be appointed on the recommendation of a selection committee and may be removed by the Indian government after an independent Supreme Court inquiry, while under the Pakistani Act, section 14 the power to appoint and remove members of the CCP vests entirely in the government, albeit in case of appointment the government acts in consultation with the chairman and in case of removal, proceeds only after an independent enquiry. On this benchmark the CCI may be deemed to be more independent than the CCP. Also see Chapter 2, Section 2.5.2.

[92] In terms of the Indian Act, section 51 and Pakistani Act, section 20, the budget of the CCI and CCP is paid from the Commission Fund the size of which is largely determined by Indian and Pakistani governments.

[93] Sri Lankan Act, section 49.

[94] Bangladeshi Act, section 31.

[95] ibid section 10(4).

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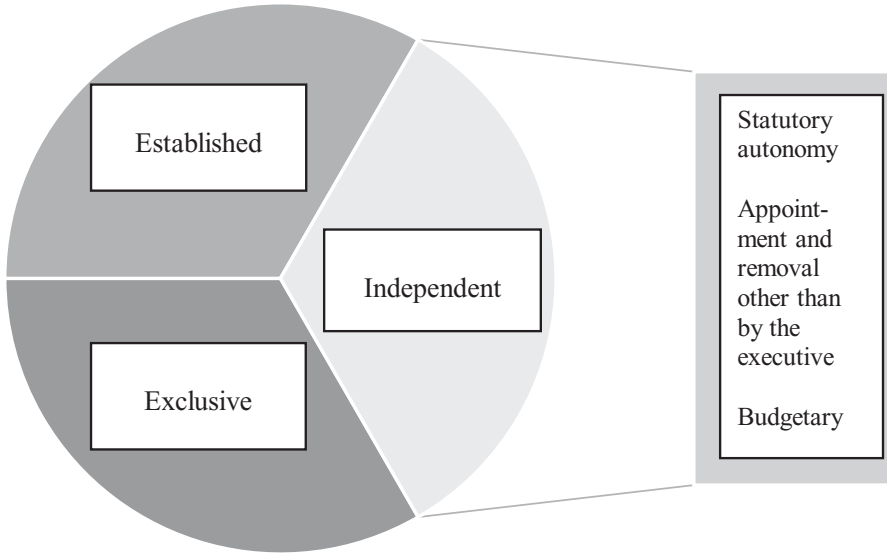


FIGURE 8.2. Anatomy of the potential for utilising the Hiatus Stage

appointed on the advice of the government[96] and may only be removed after an appropriate inquiry,[97] This suggests that Afghanistan's potential for utilising the hiatus stage may be greater than that of Bhutan where the implementation of the policy is vested entirely in a non-specialist government department (Figure 8.2).

Given that none of the competition authorities, whether established or proposed, independent or embedded in the government, fully meet the criteria for effectively utilising the hiatus stage, it may be argued the authority that displays more of these characteristics is more likely to utilise the hiatus stage for creating greater awareness of the competition legislation and thereby enhancing its compatibility and domestic legitimacy and facilitating its future enforcement. Therefore, while the Sri Lankan Consumer Affairs Authority and the Nepalese Competition Promotion Board raise awareness of the competition legislation simply by existing and providing a focal point for competition discourse in their countries,[98] it is the Bangladesh Competition Commission that has utilised the hiatus stage most effectively by organising awareness-enhancing initiatives including trainings, seminars, and workshops and most recently, by issuing a press release highlighting the possibility of it

[96] Draft Afghan Act, section 10.
[97] ibid section 11.
[98] The Sri Lankan Consumer Affairs Authority has also appointed a 'Director' to look after competition matters. Consumer Affairs Authority, Contact Details <http://caa.gov.lk/web/index.php?option=com_content&view=article&id=141&Itemid=591&lang=en> accessed 3 November 2021.

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playing a role in checking price hikes in the pandemic, and in doing so has created at least some space for the future enforcement of the Bangladeshi Act.

8.5 PATTERNS OF COMPETITION DIFFUSION AND TRANSFER AND ENFORCEMENT IN SOUTH ASIA

A theme that emerges from this analysis is that countries characterised by relatively more inexperienced or shallower legal and political institutions are more likely to be *coerced* or persuaded by international forces and multi-lateral agencies to adopt competition legislation. It further appears that the forces and agencies that influence the adoption play an important role in defining the competition principles for these countries, albeit mostly leaving it to the countries themselves to stipulate the competition enforcement systems for their respective contexts. However, it seems that while *coercion* succeeds at the adoption stage by bringing the legislations to these countries it is less successful in enforcing these at the implementation stage: despite enacting their competition legislations through their elected legislatures Sri Lanka, Bangladesh, and Maldives remain stranded in the hiatus stage between adoption and implementation. The only outlier is Pakistan, that despite having adopted its competition legislation on the advice and with the support of multi-lateral agencies has also experienced some success in operationalising its competition enforcement system and implementing its adopted legislation. This confirms that countries that adopt competition legislations through the vertical transfer mechanism of *coercion* only generate weak, superficial compatibility and formal legitimacy for their adopted legislations. The combination of these factors not only prevents the adopted legislations from being understood, applied, and utilised in the countries but also hinders them from productively interacting with the pre-existing legal systems in their countries, thereby limiting their ability to be successfully implemented in their respective contexts and over time becoming valid and important components of their pre-existing legal systems.[99]

This analysis also offers interesting, albeit counterintuitive insight into the role of institutions engaged in the adoption process: it appears that a country that combines *coercion* and a limited number of top-down, exclusive institutions in adopting its competition legislation (such as Pakistan) is more likely to be able to operationalise and enforce its adopted legislation than a country that combines *coercion* with bottom-up, participatory, and inclusive institutions. This is a surprising (and somewhat undesirable) discovery given that in theory bottom-up, participatory, and inclusive institutions are expected to enhance the compatibility and legitimacy of the adopted legislation and thereby to facilitate the enforcement of adopted

[99] Chapter 1, Section 1.4.

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legislation. However, it is possible to explain this anomaly by recognising that despite their institutional design the bottom-up, participatory, and inclusive institutions through which Sri Lanka, Bangladesh, and Maldives adopted their competition legislations, lacked the capacity to meaningfully aggregate local information or to adapt the law in light of this information and to make the adopted law more compatible with its context. Also while these institutions confer formal legitimacy they lack the historic depth necessary for generating substantive legitimacy. The Pakistani experience suggests that where the bottom-up, participatory, and inclusive institutions are weak, the mechanism of *coercion* delivered through limited, top-down, exclusive institutions which can function without engaging with or requiring consensus from a range of diverse stakeholders is more effective, at least in ithe short run, in meaningfully operationalising the adopted legislation.

This analysis also raises an interesting question about the possibility of convergence among competition legislations across the South Asian countries. The likelihood of convergence arises from all these countries having engaged with their respective legislations primarily at the behest of Western multi-lateral agencies and from the fact that a subset among them – Nepal, Bangladesh, Bhutan, and Afghanistan – also having engaged with India in the adoption process. In Afghanistan, the engagement with India was managed by foreign thinktanks; in Nepal and Bangladesh it was generated by domestic thinktanks and commentators either working in collaboration with their Indian counterparts or studying the adoption of competition legislation in India; and in Bhutan, it stemmed from Bhutan's close economic relationship with India as well as its competition policy being drafted by Indian consultants.

However, this dual common influence does not necessarily lead to substantive convergence among the adopted legislations. There is certainly some convergence among the competition principles embodied in these legislations, evident particularly in the strong resemblance between the Bangladeshi and the Indian Act, which may equally be traced to the *coercive* influence of Western multi-lateral agencies advising Bangladesh to adopt a legislation like that of India, or of India engaging directly with Bangladesh in the adoption process. However, this *coercive* influence whether of multi-lateral agencies or India directly does not extend to the competition enforcement systems prescribed in the different legislations which seem to be based on patterns or institutions already operating in the countries' pre-existing legal systems. Given the significance of enforcement systems to the implementation of the adopted competition legislations, the divergence among them is likely to present an obstacle to convergence not only in the future implementation of these legislations but also in the extent to which they are successful in utilising their present hiatus stage (Table 8.1).

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TABLE 8.1. *Review of the adoption–implementation continuum of South Asian countries*

Countries (in order of adoption)	Review of the adoption–implementation continuum				
	Pre-conditions of transfer		Motivation	Deliberation	
	Domestic	International		Status	Strategy
India	Democracy since independence	Member of WTO	▪ WTO ▪ domestic re-evaluation of anti-monopoly regime	Complete	▪ *Socialisation* ▪ through bottom up, participatory, & inclusive institutions
Sri Lanka	▪ British Dominion ▪ Democracy. ▪ Internal strife	Member of WTO	▪ WTO ▪ Evidence of US persuasion also	Complete	▪ *Coercion* ▪ No information regarding domestic institutions of deliberation
Nepal	▪ Traditional monarchy ▪ Constitutional monarchy ▪ Republic ▪ Internal strife	▪ Member of WTO ▪ Extensive engagement with multi-lateral agencies	▪ WTO ▪ Possibly other multi-lateral agencies	Complete	▪ *Coercion* ▪ No information regarding domestic institutions of deliberation
Pakistan	▪ Constitutional democracy ▪ History of martial law and suspension of constitution and parliament	▪ Member of WTO ▪ Extensive engagement with multi-lateral agencies	▪ WTO ▪ World Bank	Complete	▪ *Coercion* ▪ Some information regarding domestic deliberation although led by the World Bank
Bangladesh	▪ Constitutional democracy ▪ Some history of martial law	▪ Member of WTO ▪ Extensive engagement with multi-lateral agencies	▪ WTO ▪ Possibly other multi-lateral agencies	Complete	▪ *Coercion* ▪ No information regarding domestic deliberation
Maldives	▪ Traditional monarchy ▪ Constitutional monarchy ▪ Republic	▪ Member of WTO ▪ Extensive engagement with multi-lateral agencies	▪ WTO ▪ Also other multi-lateral agencies	Complete	▪ *Coercion* ▪ Some information regarding domestic deliberation with support from multi-lateral agencies
Bhutan	▪ Traditional monarchy ▪ Constitutional monarchy	▪ Not a member of WTO ▪ Extensive engagement with multi-lateral agencies	▪ multi-lateral agencies ▪ India	Complete	▪ *Coercion* ▪ No information regarding domestic deliberation.
Afghanistan	▪ Traditional monarchy ▪ Republic ▪ Internal strife and civil war ▪ Republic ▪ More internal strife and civil war	▪ Member of WTO ▪ Extensive engagement with multi-lateral agencies	▪ WTO ▪ Other multi-lateral agencies	Complete	▪ *Coercion* ▪ No information regarding domestic deliberation.

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Enactment		First-tier Authority		Implementation	
Status	Strategy	Status	Type	Status	Enforcement
Complete	▪ Through bottom up, participatory, & inclusive institutions ▪ More *socialisation* ▪ Amendment through judiciary	Established	▪ Independent of executive except for budget ▪ Exclusively focused on competition	Delay in commencement but continuous since starting	Orders in respect of anti-competitive agreements, abuse of dominance and mergers
Complete	▪ Through bottom up, participatory, & inclusive institutions ▪ Some *socialisation*	Established	▪ Independent except for appointments ▪ Non-exclusive ▪ Limited mandate; shares power with Council ▪ Lack of clarity regarding appeals from orders of Council	Ongoing	No competition enforcement orders to date.
Complete	▪ Through presidential order. ▪ *Coercion*	No	▪ Embedded in the relevant ministry ▪ Limited mandate-does not include enforcement.	No evidence	Enforcement not in the mandate of the authority
Complete	▪ First three iterations of the competition legislation enacted through presidential order. ▪ *Coercion* ▪ Some evidence of *socialisation* when final version of the legislation enacted through parliament	Established.	▪ Statutorily independent of executive except for appointments, removals and budget ▪ Exclusively focused on competition.	Ongoing with some gaps in enforcement.	Orders in respect of anti-competitive agreements, abuse of dominance and mergers
Complete	▪ Through bottom up, participatory, & inclusive institutions ▪ Limited *socialisation*	Established	▪ Statutorily independent of executive except for appointments and budget. ▪ Exclusively focused on competition.	Only to the extent of advocacy	None
Complete	▪ Through bottom up, participatory, & inclusive institutions ▪ Limited *socialisation*	No	Enforcement entrusted to the relevant ministry	None	None.
Not enacted	▪ Policy adopted through top-down institutions. ▪ Limited *socialisation*	No	Implementation of policy entrusted to Consumer Protection authority	None	None
Not enacted	N/A	N/A	▪ Independent however dependent on government for appointments and budget. ▪ Also part of relevant ministry	N/A	N/A

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