Journal of Antitrust Enforcement, 2018, 0, 1–29
doi: 10.1093/jaenfo/jny011
Article

Role of courts in enforcing competition laws: a comparative analysis of India and Pakistan

Amber Darr*

ABSTRACT

Developing countries adopt modern competition laws based on international blueprints for motivations ranging from gaining international legitimacy to achieving domestic economic goals. However, whilst adopting such laws confers some legitimacy on the competition regimes of these countries, it does not automatically translate into the realization of their economic goals unless the laws are also meaningfully enforced. Comparative law literature, viewed in the light of development economics, suggests that meaningful enforcement entails, among other things, a productive interaction between the adopted laws and the pre-existing legal systems of the countries. In this article, I identify possible interactions between competition laws and pre-existing legal systems in India and Pakistan and compare the interactions that actually occur in the two countries. I observe that, although India and Pakistan have nearly identical pre-existing legal systems and adopted similar competition laws within five years of each other, the interactions of these competition laws with the pre-existing legal systems in the countries are remarkably different. I argue that the nature of interactions in a country is substantially shaped by the strategy, mechanisms, and legal and political institutions through which it adopts its competition law. I also demonstrate that the type of interaction has an observable impact on the enforcement of competition law in that country.

KEYWORDS: comparative law, competition, courts, development economics, enforcement, institutions

JEL CLASSIFICATIONS: F42, F54, K21, K40, K41, K42, L40, L49, N45, 010

* Dr Amber Darr, Senior Research Fellow, Faculty of Laws, University College London, Bentham House, 4-8 Endsleigh Gardens, London, WC1H 0EG. Email: Amber.darr@ucl.ac.uk. The author holds a PhD in Law from University College London (UCL). She is a Senior Research Fellow of the UCL Centre for Law, Economics, and Society and a Teaching Fellow at UCL. The author is grateful to Professors Ioannis Lianos and Riz Mokal for their comments on earlier versions of this article and to Professors Frederic Jenny and Josef Drexl for their comments on the dissertation from which this article is derived. The author confirms that, while practicing in Pakistan, she had represented Lafarge Pakistan Cement Limited before the Lahore High Court in *Lafarge Cement v Federation of Pakistan* WP 15620/2009.

I. INTRODUCTION

In 2002 and 2007, respectively, India and Pakistan replaced nearly 40-year old anti-monopoly legislation with modern competition laws.[1] Although the Indian Competition Act 2002 (ICA 2002) and the Pakistan Competition Ordinance 2007 (PCO 2007) were both based on foreign models, the processes, mechanisms, and legal and political institutions through which these had been adopted were remarkably different. Whilst India established the indigenous Raghavan Committee to discuss the parameters of the proposed law, Pakistan outsourced the discussion and drafting exercise to a World Bank led team. Furthermore, whilst India enacted ICA 2002 after an extensive debate in Parliament, Pakistan promulgated PCO 2007 as a temporary ordinance signed into law by the President. After the lapse of the PCO 2007, Pakistan promulgated two further temporary ordinances before finally submitting the competition law to the Parliament for scrutiny and enacting it as the Competition Act 2010 (PCA 2010).[2]

Although ICA 2002 was enacted five years before PCO 2007, the Competition Commission of India (CCI), proposed to be established by the Act, was not fully constituted until 2009,[3] nearly two years after its Pakistani counterpart, the Competition Commission of Pakistan (CCP), proposed to be established under the PCO 2007, had commenced operations. The delay was owing to the ICA 2002 being challenged before the Indian Supreme Court soon after its enactment on the ground that its provisions were contrary to the principle of separation of powers provided in the Indian constitution.[4] The Supreme Court dismissed the petition on the basis of an undertaking given by the Indian government that it would amend ICA 2002 to address the concerns. These amendments were enacted as the Competition (Amendment) Act 2007, and CCI commenced operations shortly thereafter.[5]

1 I refer here to the Indian Monopolies and Restrictive Trade Practices Act, 1969 and the Pakistani Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 which were repealed by ICA 2002 and PCO 2007, respectively.

2 In October 2007, the President of Pakistan promulgated PCO 2007 in exercise of his powers under Article 89 of the Constitution of Pakistan 1973. In terms of Article 89, an ordinance lapses four months after its enactment unless ratified by the Parliament before the expiry of this period. However, less than two months after the promulgation of PCO 2007, the President declared an emergency throughout the country and issued an executive order, which 'saved' certain ordinances from lapsing—PCO 2007 was one of these. This meant that, instead of lapsing after four months of its promulgation, PCO 2007 survived until July 2009 when the Supreme Court of Pakistan in *Sindh High Court Bar Association v The Federation of Pakistan* PLD 2009 SC 879 declared the President's order of 2007 to be void. In this order, the Supreme Court allowed four months to the government to place all saved ordinances before the Parliament for ratification. However, instead of complying with this order, the government promulgated Competition Ordinance, 2009 in November 2009, just as the four months were due to expire. When this ordinance lapsed in March 2010, the government promulgated yet another ordinance, the Competition Ordinance, 2010. Finally, in October 2010, the Parliament enacted PCA 2010.

3 On 14 October 2003, the Indian government issued notification no. S.O. 1198(E) to establish CCI. However, ICA 2002 was challenged after only one member had been appointed.

4 *Brahm Dutt v Union of India* (2005) 2 Supreme Court Cases 431. The petition argued that rules for appointment of members in ICA 2002 violated the principle of separation of powers. It further argued that given CCI's adjudicatory powers, its members should be appointed according to the procedure prescribed in the Constitution for appointment of judges. See note 67 for further details.

5 On 20 May 2009, the government, by notification nos. S.O. 1241(E) and S.O. 1242(E), brought into force provisions relating to anticompetitive agreements and abuses of dominant position in ICA 2002. Provisions related to mergers did not come into force until 2011.

Since the commencement of operations nearly a decade ago, the Indian and Pakistani competition laws have evolved along different paths and at different paces. In both countries, however, the implementation of these laws has been shaped by two distinct factors: first, by the decisions taken by the CCI and CCP in their capacity as the first-tier competition institutions and secondly, by their interactions with the general high courts pre-existing in the legal systems of the countries. Although the ICA 2002 and PCO 2007 (and PCA 2010) do not cater for the possible impact of high courts exercising their inherent constitutional jurisdiction in respect of competition matters, the exercise of this jurisdiction by the courts has in fact had a considerable impact on the implementation of the competition laws in the two countries. In this article, I examine the interactions between competition laws and pre-existing legal systems in India and Pakistan and argue that these interactions are shaped in part by the strategies, mechanisms, and institutions[6] through which the countries had initially adopted their respective competition laws. I further argue that the nature of these interactions has a discernible impact on the direction and pace of evolution and enforcement of competition laws in the countries.[7]

This article is, therefore, organized as follows: In Section II, I outline the theoretical links between the interactions and the performance of the competition laws. In Section III, I identify the framework within which the interactions between competition laws and pre-existing legal systems are likely to take place. I identify possible legal bases on which these interactions may be initiated. I also indicate the Indian and Pakistani institutions that are likely to engage in these interactions. In Section IV, I examine and compare two different categories of interactions: those that emanate from interim orders of the NCAs and those initiated on the basis of final orders of the NCAs. In Section V, I examine the impact of the strategies, mechanisms, and legal and political institutions engaged by India and Pakistan in adopting the competition laws on the nature of these interactions. In Section VI, I consider the effects of these interactions on the development and enforcement of the competition laws. In Section VII, I conclude. For the purposes of this article, I focus only on enforcement orders of CCI from 2009 to 2017 and of CCP from 2008 to 2017, ie, orders in cases of abuse of dominant position and anticompetitive agreements as there is not sufficient data available for a meaningful comparison of interactions in respect of merger cases in the two jurisdictions.[8]

II. THEORETICAL SIGNIFICANCE OF THE INTERACTIONS

Both the Indian and Pakistani competition laws are modelled on international precedents and may, therefore, be deemed to be 'legal transplants' within the meaning

6 The term 'institutions' includes both formal and informal systems of rules and organizations to the extent that they are engaged in implementing the Laws. See Douglass C North, *Institutions, Institutional Change, and Economic Performance* (CUP 1990).

7 Provisions related to mergers in ICA 2002 did not come into force until 2011, and to date, very few mergers have gone into second-phase review or challenged before the courts to allow for a meaningful comparison.

8 I focus on orders for anticompetitive agreements and abuse of dominant position only because CCI's merger regime did not become operational until 2011, and at present, the data are not sufficient to provide a basis for comparison with Pakistan's merger regime.

given to the term in comparative law literature.[9] Whilst comparative law scholars recognize legal transplants as important sources of laws, they urge the importance of compatibility between the transplanted law and the context of the country into which it is injected and warn countries against adopting laws, without considering both the contexts from which the transplants originate and the contexts for which they are intended. Interestingly, however, the scholars are not often in agreement either about the specific features of the contexts of the adopting and originating countries that in their view must be compatible with each other or the likely impact of this compatibility.

Whilst Montesquieu and Kahn-Freund are of the view that the legal transplant must be compatible with the institutions, political law, and social and political context of the adopting country,[10] Trebilcock and Iacobucci, writing specifically about competition law transplants, emphasize the need for commonalities between 'particularities of history, initial conditions, institutional traditions, and political economy considerations' of the originating and adopting countries.[11] For Gal, the 'commonality' between the contexts of the originating and adopting countries encompasses 'almost all issues which relate to the relationship between law and society', whereas Shahein underscores the importance of examining the 'specific political, economic and social environment' of the two countries.[12] Mattei, somewhat fine-tunes this discussion by referring particularly to the need for the legal transplant to be compatible with the 'machinery of justice' in the adopting country.[13] However, he does not explain what exactly he means by this 'machinery of justice'.

Whilst discussing the likely impact of compatibility (or lack thereof), scholars link it with the 'success' of the legal transplant, however, they do not appear to fully explore the concept of success or its precise links with compatibility. Kahn-Freund speaks of the legal transplant being 'rejected' in the adopting country if certain contextual features in that country are not compatible with those in the originating country. However, he does not explain what he means by 'rejection' or how and when it may occur.[14] Similarly, whilst Watson argues that for a transplant to be successful, it must continue to 'grow in' and become 'a part of the borrowing country' and that 'ascribing a different meaning to the legal transplant should not be confused with its rejection in the country', he neither explains what 'growing' means nor explores the factors that may contribute to (or hinder) this growth in the adopting country.[15]

9 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 21.

10 Charles de Secondat Montesquieu and others, *The Spirit of the Laws* (CUP 1989) 8, 610; Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 12, 13.

11 Michael J Trebilcock and Edward M Iacobucci, 'Designing Competition Law Institutions' (2002) 25 World Compet 361, 471.

12 Michal Gal, 'The "Cut and Paste"of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant' (2007) 9 EJLR 467, 473.

13 Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 IRL 3, 17.

14 Kahn-Freund (n 10).

15 Watson (n 9).

Although Mattei implies that compatibility of the legal transplant with the 'machinery of justice' in the adopting country is a pre-condition of its success,[16] he does not identify possible points at which the transplant and the machinery of justice may interact with other or the legal bases on which the interaction may take place. Teubner and Berkowitz et al add further dimensions to this dynamic: Teubner indicates that the success of a legal transplant lies in its ability to interact 'productively' with other elements in the legal organism in which it is transplanted,[17] whilst Berkowitz and others suggest that the performance of a transplant may be judged by the extent to which actors (including legal actors) in the adopting country are able to understand, apply, and utilize it.[18]

This discussion suggests that the nature of the interaction between an adopted law and the machinery of justice of the adopting country as represented by its pre-existing legal system is an important indicator of the success of the borrowed law. It further indicates that the more 'productive' the interaction between the transplanted law and the indigenous legal system, the greater the likelihood of success of the adopted law. Although Teubner does not define 'productivity', it may be understood, in light of Berkowitz et al's discussion, as the extent to which the adopted law is understood, applied, and utilized by actors in the pre-existing legal system.

This discussion, therefore, provides the framework for analysing the interactions between the Indian and Pakistani competition laws and the pre-existence legal systems of their respective countries. In the sections that follow, I examine the grounds on which parties aggrieved by the decisions of the implementing institutions established by the competition laws have initiated these interactions with the pre-existing legal systems (as represented by courts exercising their constitutional judicial review jurisdiction) and the manner in which the courts have responded to these grounds and draw from this analysis, conclusions not only as to whether these interactions have been productive or otherwise but also as to their impact on the implementation of competition laws in the two countries.

III. THE INSTITUTIONAL FRAMEWORK AND LEGAL BASIS OF INTERACTIONS

The institutional framework

The interaction between the Indian and Pakistani competition laws and the pre-existing legal systems of the two countries takes place through the agency of the institutions they establish. Institutions envisaged under both Indian and Pakistani competition laws are the first-tier CCI and CCP (collectively 'the NCAs') and the second-tier Competition Appellate Tribunals (collectively, 'the Tribunals'). Both laws also confer a competition appellate jurisdiction on their Supreme Courts, thereby making these the third (and final) institutions in the competition implementation stream. Institutions representing the pre-existing legal systems of the two

16 Mattei (n 13).

17 Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 MLR 11, 12.

18 D Berkowitz, K Pistor and JF Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 Eur Econ R 165, 174.

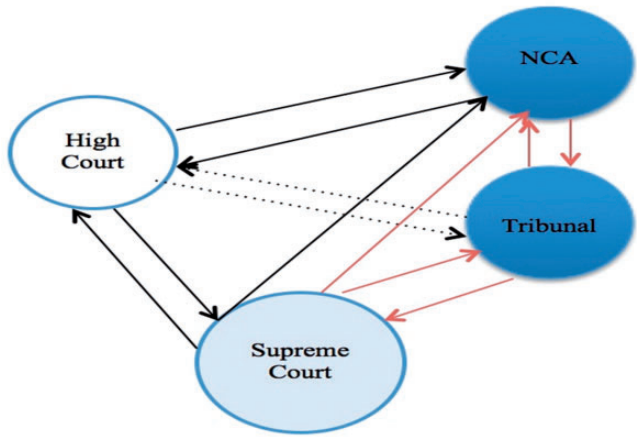

Figure 1. Possible interactions between competition and pre-existing institutions.

countries are the high courts established under the Constitutions of the two countries and the Supreme Courts sitting in their constitutional appellate jurisdiction. Possible interactions between the competition institutions and the courts in their constitutional judicial review jurisdictions may be understood from Fig. 1 which represents two types of interactions. The first set of interactions takes place between the NCA and the Tribunal, the Tribunal and the Supreme Court whilst the second set takes place between the NCA and the high court and the Tribunal and the high court and between the high court and the Supreme Court. The first set therefore indicates the competition implementation trajectory as envisaged by the Indian and Pakistani competition laws, whilst the second set represents the interactions between the competition implementation system and the pre-existing legal systems.

Amongst these interactions, I am interested primarily in the second set of interactions between the NCA, high court and the Supreme Court. These interactions are activated when an aggrieved person invokes constitutional grounds to file a petition before the high court and the high court exercises its inherent constitutional jurisdiction to respond to the petition. The decision of the high court either returns the matter to the NCA or is appealed before the Supreme Court, also sitting in its constitutional jurisdiction. The Supreme Court decision may return the matter to the high court for further action, before it is finally returned to the NCA, or it may return it directly to the NCA. This stream of interactions may be initiated from interim orders of the NCAs (ie orders passed by the NCAs whilst proceedings are still pending before them) and/or final orders of the NCAs (ie orders passed at the conclusion of the proceedings before the NCAs). Moreover, of interest are the dashed black lines, which depict a situation in which a decision of a Tribunal, rather than of the NCA, is challenged before the high court in its constitutional jurisdiction. As in the case of decisions of the NCAs discussed earlier, the high court either returns the matter to the Tribunal or its decisions are challenged before the Supreme Court, and the Supreme Court then either returns the matter to the high court for further action, before it is finally returned to the Tribunal, or directly to the Tribunal. In this

article, I focus exclusively on challenges from orders of the NCAs simply because there is not sufficient data at present to carry out such an analysis for orders or Tribunals.[19]

Juxtaposing the two sets of interactions in Fig. 1 reveals the extent to which the neat implementation structure envisaged in the competition laws may veer off course each time a matter is challenged before the courts in their constitutional jurisdiction. This is not to suggest that constitutional petitions should not be filed—indeed filing these petitions is the right of the aggrieved parties, and they may not be prevented from availing it—but to highlight that, whilst some petitions may only have a temporarily effect on the direction and pace of competition enforcement in the country (such as when a petition from an order of the NCA is filed to a high court and the high court returns it to the NCA), others may derail it almost entirely (such as when the high court issues interim orders restraining the NCA or when the petitioners become embroiled in appeals before the Supreme Courts even from these interim orders).

Reasons for not addressing petitions against orders tribunals

The reason for focusing only on actions emanating from orders of NCAs as opposed to those of Tribunals is the lack of comparable data on orders of Tribunals, which derives from erratic history of the Tribunals in India and Pakistan. The Indian government established the Tribunal (with the mandate to hear appeals from CCI's interim and final orders) almost simultaneously with the CCI.[20] The Tribunal has remained in operation for the next eight years except for a period of approximately one year, when it was unable to hear any appeals because it had a Chairperson but no members.[21] On 31 March 2017, the Indian Parliament amended ICA 2002 to replace the Tribunal with a 'National Company Law Appellate Tribunal'; however, this marked the transfer of jurisdiction rather than a cessation of the appeals from the orders of the CCI.[22]

In Pakistan, on the other hand, the very concept of a Tribunal was only introduced in PCA 2010.[23] Under PCO 2007 and the 2009 Ordinance, appeals from orders passed by a single member or authorized officer of CCP, lay to CCP's appellate bench and appeals from all other orders of CCP and those of the appellate bench lay directly to the Supreme Court,[24] and in the few months that the 2010 Ordinance remained in force, appeals from orders passed by more than one CCP member or by

19 For a detailed discussion of this issue, see section 'Reasons for not addressing petitions against orders tribunals'.

20 The Indian government established the tribunal on 15 May 2009 by notification number S.O. 1240(E). On 20 May 2009, it appointed the first Chairperson of the tribunal.

21 See <http://compat.nic.in/FormerChaiman.aspx> accessed 9 September 2017.

22 See <http://nclat.nic.in/about-nclat.html> accessed 22 June 2017. On 26 May 2017, the government issued notification S.O. 1696(E) to bring into force the provisions amending ICA 2002, and from this date onwards, all appeals from CCI's orders were to lie to the National Company Law Appellate Tribunal.

23 Section 43 PCA 2010.

24 Sections 41 and 42 PCO 2007 and of Ordinance 2009. Although some appeals were filed before the Supreme Court during this period, owing to the endemic delay at the Supreme Court, none of these appeals were finally decided.

the appellate bench were directed to the high courts and from the orders of the high courts to the Supreme Court.[25]

However, even after the PCA 2010 had stipulated that a Tribunal be established, the government waited until 2011 to appoint the first member and Chairman of the Tribunal[26] and until 2012 to appoint the technical members.[27] The Tribunal had been functioning for only five months and had decided only one appeal,[28] when in April 2013, one member resigned and the other retired owing to having reached retirement age. Consequently, the Tribunal ceased to function until 2015 when the government reconstituted it by appointing the requisite number of members. Moreover, it was only in 2015 that, the Tribunal first formulated rules to regulate its conduct and proceedings.[29] At the time of finalizing this article, the Tribunal had only passed approximately 20 orders.

The legal bases for these interactions

The legal grounds on which the interactions between the NCAs and the courts in their constitutional jurisdictions may be initiated derive from the Indian and Pakistani Constitutions. In terms of article 226 of the Indian Constitution and its counterpart, article 199 of the Pakistani Constitution, persons aggrieved by the orders or actions of public institutions (including competition institutions by definition), persons seeking to avail of Constitutional remedies, must demonstrate before the courts that the actions or orders of the competition institutions have infringed one or more of their fundamental rights guaranteed under the respective Constitutions. In terms of Articles 226 (read with article 32) of the Indian Constitution and 199 (read with article 184(3)) of the Pakistani Constitution, if the courts are satisfied that fundamental rights have been violated, they have the inherent jurisdiction to issue by way of remedy for the aggrieved party, writs of mandamus and prohibition;[30] certiorari;[31] habeas corpus;[32] and quo warranto.[33] The courts may also issue interim orders in any petitions filed on these grounds.

25 Section 42, Third Ordinance 2010.

26 Notification No F.15(1)/2010-A.V dated 27 July 2011. <http://pakistannewswire.net/retired-judge-appointed-chairman-competition-appellate-tribunal/> accessed 3 April 2017.

27 Notification No F.21(1)/2011-Admn-III dated 29 May 2012.

28 In the matter of *1-Link Guarantee Ltd.*

29 The Competition Appellate Tribunal Rules 2015 made by S.R.O 749(1)/2015 dated 31 July 2015 <http://www.cc.gov.pk/images/Downloads/rules/appellate_tribunal_2015.pdf> accessed 3 April 2017.

30 That is, writs directing a person carrying out a function in connection with the affairs of the state to refrain from doing anything he is not permitted to do or to do anything he is required to do.

31 That is, writs declaring that any given act or proceeding performed by a person in connection with the affairs of the federation has been done without lawful authority and is without legal effect.

32 That is, writs directing that a person held in custody within the jurisdiction of the court may be presented in court.

33 That is, writs requiring a person holding public office to show the authority of law under which he claims to hold that office.

IV. THE NATURE OF INTERACTIONS IN INDIA AND PAKISTAN

In this section, I examine interactions that emanate from interim and final orders of the NCAs. In examining the interactions, I investigate and compare both the grounds on which persons aggrieved by actions or orders of the NCAs initiated petitions and the responses of the courts to these petitions.

Interactions emanating from interim orders

India

From 2009 (when CCI commenced its enforcement actions) until December 2017, CCI passed 165 enforcement orders.[34] However, petitions were filed in respect of only 20 of these orders (12.12 per cent), while the cases were still pending before CCI—at times more than one petition was filed in respect of a single proceeding before CCI. In the 24 petitions filed before courts throughout India during this period, courts issued final orders in 21 and interim orders in only four. Of these four interim orders, three were replaced by final orders, whilst relevant proceedings were still pending before CCI.

These interactions between the competition systems and the pre-existing legal systems were initiated on a range of legal grounds. One ground raised repeatedly was that CCI did not have the jurisdiction to hear matters that had initially been taken up by its predecessor antimonopoly authority,[35] particularly in cases where the authority had initiated an investigation but failed to complete it. However, all courts before which this ground was raised unequivocally declared it to be without merit and directed the petitioners to submit to CCI's jurisdiction.[36] A further related ground raised before the courts was that CCI could not exercise its jurisdiction in respect of practices that had commenced before the coming into force of the relevant provisions of ICA 2002. However, in each of these petitions, the courts clarified that CCI had the jurisdiction to examine conduct that had commenced prior to the coming into force of its relevant provisions if it continued even after the provisions had come into force.[37]

In at least one petition, an aggrieved party challenged CCI's powers to issue a show cause notice on the ground that doing so was tantamount to pre-judging the case. However, the courts clarified that CCI had the jurisdiction to form a preliminary view of a case at the time of issuing a show cause notice.[38] In other cases, parties challenged CCI's jurisdiction to initiate investigations. However, the courts did not

34 For the purposes of this discussion, I only refer to those proceedings in which CCI subsequently passed final orders for the reason that this is the only data available in this regard. These orders include orders under section 26(6) in which CCI disposes of a complaint without finding a contravention and under section 27 in which CCI establishes a violation of the ICA 2002 and sanctions the contravening party.

35 Established under the Monopolies and Restrictive Trade Practices Act, 1969 repealed by the ICA 2002.

36 See WP 6805/2010 *Interglobe Aviation Limited v Secretary Competition Commission of India*, decided by Delhi High Court on 6 October 2010 in respect of CCI Case RTPE 5/2009 and WP 7766/2010 *Gujarat Guardian Limited v Competition Commission of India and others*, decided by Delhi High Court on 23 November 2010.

37 See in this regard, the litigation history of Case 4/2009 *MP Merhotra v Kingfisher Airlines Limited & others*.

38 See WP 358/2010 *Amir Khan Productions (Pvt) Limited v Union of India* filed before the Bombay High Court and decided on 18 August 2010.

entertain any petitions filed on this ground.[39] In certain petitions filed before them, the response of the courts varied from expressly endorsing CCI; to refusing to restrain it; to directing it to take certain actions; to restraining it from pursuing the matter against one or more of the parties to the proceedings pending before CCI; and very rarely, to restraining it from continuing with the proceedings altogether. Where the courts actually restrained CCI, they did so only for a finite period.[40]

In a few instances, the complainant in proceedings pending before CCI itself approached the courts as a petitioner. In one instance, the complainant sought interim relief against the defendants; however, the court dismissed the petition and directed the complainant to approach CCI.[41] In another instance, the complainant prayed that the court direct CCI to hear an application on an urgent basis.[42] In at least one recent case, CCI voluntarily gave an undertaking to the court that it would not take adverse action against the defendants whilst proceedings were pending before the courts.[43]

Pakistan

In Pakistan, as in India, entities aggrieved by proceedings pending before CCP exercised their right to file petitions before the high courts. And, as in India, aggrieved parties filed petitions before the courts in respect of only a fraction of proceedings pending before CCP. Between 2008 and 2016, petitions had been filed in respect of only 6 (or 16.2 per cent) of the 37 proceedings that were finally decided by the CCP. However, the data reveal that often more than one petition was filed in respect of a single proceeding. Of the nine petitions filed before different high courts throughout the country, the courts issued final orders in only five and interim orders

39 See petitions referred to in CCI's orders in Case RTPE 3/2008 *Federation of Indian Airlines & others*, decided on 2 December 2010 (para 8) and Case 3/2011 *Shri Shamsher Kataria v Honda Siel Cars Limited India & others (Hyundai)*, decided on 27 July 2015 (paras 1.5, 7.4.4). Also, see WP (C) 2471/2016 *Arun Kumar Bajoria v Competition Commission of India and another*, decided by the Delhi High Court on 21 March 2016, and WP No. 1006 of 2014 *Telefonaktiebolaget LM Ericsson v Competition Commission of India & others* dismissed by the Delhi High Court on 16 April 2016.

40 For reference to these challenges, see CCI's orders dated 5 September 2012 in Case C-87/2009 *Vedant Bio Sciences v Chemists & Druggists Association of Baroda* (paras 11–15); 9 December 2013 in Case 30/2011 *Peeveear Medical Agencies Kerala v All India Organization of Chemists & Druggists* (para 12.5.12); 9 December 2013 in Case 41/2011 *Sandhya Drug Agency v Assam Drug Dealers Association & others* (paras 11 and 12); 27 October 2014 in Suo Motu Case 5/2013 *Collective Boycott/refusal to deal by the Chemists and Druggist Association Goa etc*; 25 August 2014 in *Shri Shamsher Kataria Case* (see n 39) (para 22.9); 10 August 2011 in Case 23/2010 *Durga City Cable Network v In2 Cable (India) Limited & others* (paras 8 & 17). Also, see orders of the Courts in WP 31808 and 31809/2012 *Hyundai Motors India Limited & BMW India Pvt. Limited v Competition Commission of India and another* and WP 6361 and 4362/2014 *DLF Home Developers Limited v Competition Commission of India & another*, decided by Delhi High Court on 10 October 2014.

41 See Cases 25, 41, 45, 47, 48, 50, 58, 69/2010 *Reliance Big Entertainment Limited v Karnataka Film Chamber of Commerce*, decided on 16 February 2010 (para 2.1.20).

42 See Case 20/2011 *Santuka Associates Pvt Limited v All India Organization of Chemists and Druggists & others*, decided on 19 February 2013 (para 3).

43 See, for example, WP 7084/2014 *Google Inc. & others v Competition Commission of India and another* decided by the Delhi High Court on 27 April 2015.

in all nine.[44] These interim orders often gave rise to appeals before the Supreme Court, and these five final orders merely remanded matters from the Supreme Court to the high courts or decided miscellaneous applications that had been filed along with the main petitions. It is evident from the final orders that the courts preferred to limit their orders to technicalities rather than addressing the merits of the petitions filed before them.

The petitions filed before the courts whilst proceedings were pending before CCP may be organized into two groups. The first group comprises petitions filed in the period when PCO 2007 was in force, whilst the second group comprises petitions filed in the period after PCO 2007 had lapsed and includes petitions filed after the enactment of PCA 2010.

Some of the grounds raised in petitions filed when PCO 2007 was in force were that (i) CCP had not issued the show cause notice in accordance with PCO 2007; (ii) certain sections of PCO 2007,[45] and, therefore, CCP's actions in exercise of these sections, were *ultra vires* the Constitution and contrary to the fundamental rights stipulated in it;[46] (iii) the President had promulgated PCO 2007 without legal authority because the subject of competition was not within the legislative competence of the Parliament or the President; and (iv) PCO 2007 did not confer jurisdiction upon CCP to exercise its powers against the petitioners.[47] The courts accepted the majority of these petitions without investigating the specific grounds raised in them and issued interim orders restraining CCP from proceeding against the petitioners.

An important petition from the first group arose from proceedings in relation to the All Pakistan Cement Manufacturers' Association (APCMA) and its members (the *APCMA Case*). On 28 October 2008, CCP had issued a show cause notice to APCMA and its members. The defendants challenged the show cause notice before the Islamabad High Court and the high court, by its order dated 10 November 2008, restrained CCP from passing a final order against the defendants. However, by a further order dated 5 December 2008, the high court dismissed the defendants'

44 There were 20 parties to the *Cement Manufacturers Case* pending before CCP who filed individual petitions before high courts. However, the high courts disposed these by a single order.

45 See, particularly sections 41 and 42 PCO 2007.

46 For instance, orders of the Sindh High Court in CP 786/2008 (*Karachi Stock Exchange & another v Federation of Pakistan and others*) filed in respect of the *Karachi Stock Exchange Case* decided on 2 May 2008 and CP 938/2008 filed in respect of *Pakistan Banking Association Case* decided on 7 November 2008. CCP appealed both these orders before the Supreme Court, and the Supreme Court by its order dated 13 November 2008 in *CPs 759, 760/2008* and order dated 23 October 2008 in *CP 715/2008*, set aside the orders of the Sindh High Court on CCP's undertaking that it will not recover any fines from the petitioners whilst the petitions remained pending.

47 The Lahore High Court, in its order dated 10 August 2009, in WP 15616/2009, granted an injunction to *Pioneer Cement Limited* on these grounds. Through further orders dated 11 August 2009, it also granted injunctions on the same terms to *All Pakistan Cement Manufacturers Association* (in WP 15624/ 2009) and to 13 others (namely *Askari Cement Limited* in WP 15640/2009, *Attock Cement Limited* in WP 15622/2009, *Bestway Cement Limited* in WP 15639/2009, *Cherat Cement Limited* in WP 15631/2009, *Dandot Cement Limited* in WP 15670/2009, *Dewan Cement Limited* in WP 15623/2009, *DG Khan Cement* in WP 15630/2009, *Fauji Cement Limited* in WP 15669/2009, *Fecto Cement Limited* in WP 15669/2009, *Flying Cement Limited* in WP 15619/2009, *Kohat Cement Limited* in WP 15688/2009, *Lafarge Cement Limited* in WP 15620/2009, *Lucky Cement Limited* in WP 15637/2009, and *Mustehkam Cement Limited* in WP 15638/2009). Also, by order dated 11 August 2009, the Lahore High Court granted an injunction to *Maple Leaf Cement Company Limited* in WP 15618/2009.

petitions as 'premature'. Given this reprieve from the high court, CCP scheduled a hearing for APCMA and its members for 3 August 2009; however, in the meantime, the defendants approached the Lahore High Court and obtained yet another restraining order against CCP. This second restraining order was lifted by Lahore High Court's order dated 24 August 2009, and CCP was allowed to continue with the proceedings, which culminated in its final order dated 27 August 2009.[48]

A ground repeatedly raised in petitions from the second group (especially whilst the 2009 and 2010 Ordinances were in force) was that CCP did not have the power to issue show cause notices until the Parliament had ratified the Ordinance then in force.[49] In case of at least one petition, the court granted an injunction on this ground, and this injunction was relied upon in subsequent petitions to obtain similar injunctions.[50]

The most notable petition of this period was filed by the Liquefied Petroleum Gas Association of Pakistan (LPGAP and the *LPGAP Case*) in which the courts not only granted an interim injunction in favour of LPGAP and suspended the operation of the show cause notice issued by CCP but also held that petitions against actions or orders of CCP could validly be filed before any high court in the jurisdiction of which the petitioner carried on its business or in which the effect of CCP's actions was most likely to be felt. CCP challenged this order before the Supreme Court. However, instead of deciding the issue on merits, the Supreme Court simply remanded it to the high court for a decision on jurisdiction. Although the Supreme Court set aside the interim injunction issued by the high court, it did so on CCP's undertaking that it would not take any adverse action against the aggrieved parties until the petitions pending before the high court were finally decided. Nearly eight years later, this matter is still pending before the high court, and although CCP has passed final orders in the proceedings before it, it is restricted by the decision of the Supreme Court from enforcing its decision against the petitioners.[51]

48 For example, see CCP's order dated 27 August 2009 in File 4/2/sec.4/CCP/2008 (paras 11–13).

49 See n 2, above.

50 By its order dated 14 January 2010, Sindh High Court granted an injunction on this ground in CP D-110/2010 (*Mirpurkhas Sugar Mills*). This order was relied upon in several other petitions and Sindh High Court granted injunctions in all of these. CCP challenged a number of orders of the high courts before the Supreme Court (Eg in CPs 1065, 1066, and 1067/2010). However, CCP was unable to explain its delay in filing these CPs and, therefore, the Supreme Court only directed the high courts to hear the petitions expeditiously rather than directing that these may be dismissed altogether. Similarly, the Supreme Court dismissed CPs 521, 522, 523, 524, and 525/2010 filed by CCP in respect of orders of the High Courts in WPs 1175, 1174, and 1122/2010 and in CP D.164 and 196/2010, with only an observation that the high courts should expeditiously decide the petitions pending before them.

51 The Lahore High Court decided *LPGAP*'s petition (WP 9518/2009) on 27 May 2009, and CCP challenged this before the Supreme Court (in CP 1022/2009). By its order dated 26 May 2009, the Supreme Court set aside the interim injunction on CCP's undertaking that it would not take adverse action and remanded the matter to the high court. In a related petition filed by *Jamshoro Joint Venture Limited*, a member of LPGAP (W.P 15493/2009) Lahore High Court had passed an interim order against CCP. CCP appealed this before the Supreme Court; however, it withdrew the appeal when the Supreme Court set aside the interim injunction on CCP's undertaking that it would not implement an adverse order whilst the petitions remained pending (Order of Supreme Court dated 16 September 2009 in CP 1694/2009).

Comparing the Indian and Pakistani interactions emanating from interim orders

The interactions between the Indian and Pakistani competition laws (as represented by CCI and CCP respectively) and the pre-existing legal systems of the countries (as represented by the courts) differ not only in the grounds on which petitions were filed against proceedings pending before CCI and CCP but also in the manner in which the courts responded to the petitions filed before them.

The grounds on which persons aggrieved by proceedings pending before CCI filed petitions before the Indian courts generally either called into question CCI's authority to take notice of allegedly anticompetitive practices or the manner in which CCI took such notice. These may be referred to as 'procedural' grounds. In Pakistan, only a fraction of petitions filed against proceedings pending before CCP invoked procedural grounds. A number of other petitions called into question the constitutionality of the particular iteration of the Pakistani competition law these were challenging; CCP's legal basis for existing and its power to initiate and pursue proceedings. These additional grounds may be referred to as 'substantive' grounds.

On the whole, Indian courts responded to the petitions filed before them with reasonable alacrity and clarity. Whilst the courts issued a range of orders, none of these indefinitely and fully restrained the proceedings pending before CCI. In fact, in a number of cases, the response of the courts not only supported CCI but also brought proceedings pending before it into greater conformity with due process norms prevalent in the country.

Pakistani courts, on the other hand, adopted a somewhat hesitant strategy in respect of petitions filed before them. In the majority of petitions, Pakistani courts admitted the petitions for hearing and granted interim orders either restraining CCP from continuing with the proceedings before it altogether or restraining it from enforcing any orders it may pass at the end of these proceedings. The courts issued the majority of these restraining orders in the very first hearing and often without providing CCP an opportunity to be heard.

The few petitions against interim orders that were finally decided were decided on purely technical grounds such as those filed by the APCMA and its members before the Islamabad High Court, which were dismissed for being premature[52] and the petition filed by Attock Cement Limited before the Sindh High Court[53] against CCP's show cause notice in the *APCMA Case*, which was dismissed on the basis that the petitioner already had one appeal pending on this matter before the Supreme Court and another before the Lahore High Court.[54] The Pakistani courts did not pass any decisions on merits in any petitions filed before them.

Interactions in respect of final orders of NCAs

India

In India, no constitutional petitions were filed against CCI's final orders. It is reasonable to assume that this is owing to the establishment of the Tribunal concurrently

52 See n 48, above and text thereto.

53 Order of Sindh High Court dated 31 August 2012 in CP 2086/2009 (*Attock Cement Limited v Competition Commission of Pakistan and others*).

54 ibid.

with CCI, which provided aggrieved persons 'an adequate alternate remedy' to approaching the courts in their constitutional jurisdiction.[55]

Pakistan

For the greater portion of the first three years of its operation in Pakistan, the only right available to persons aggrieved by CCP's final orders was to appeal directly to the Supreme Court, and after 2010, the delay and hesitation in establishing the Tribunal meant that aggrieved persons had little choice but to invoke the constitutional jurisdiction of the courts to seek redress for their grievances.

One of the first petitions against a final order of the CCP was filed in the *APCMA Case*.[56] From the moment CCP had issued show cause notices to APCMA and its members, the *APCMA Case* had provoked considerable litigation. However, when the courts allowed CCP to pass a final order in this matter, it appeared that the ongoing tussle between CCP and the high courts had been resolved in CCP's favour. CCP had only gotten as far as issuing the final order when the Lahore High Court, by its order dated 31 August 2009, once again restrained CCP from taking any adverse action against the defendants whilst that important constitutional and jurisdictional issues pertaining to CCP remained undecided, including whether the federal legislature was competent to enact PCO 2007; whether the provision for a direct appeal to the Supreme Court was unconstitutional; and whether the adjudicatory powers conferred on CCP by PCO 2007 were contrary to the constitutional principles of separation of powers. The only concession the Lahore High Court made to the CCP in this regard was to allow it to publish its order on its official website. The Lahore High Court's order remains in force and to date, and CCP has still not enforced its final order against APCMA or any of its members.

A number of petitions against CCP's final orders raised procedural and substantive grounds similar to those that had been raised in petitions filed against CCP's interim orders.[57] These included grounds that CCP was not properly constituted; at the time of passing the final order, it lacked the requisite quorum to pass the order; the order was not in accordance with the version of the competition law then in force in the country; that CCP had passed the order with *mala fide* intent and by exercising powers beyond its jurisdiction;[58] competition law could not apply

55 It is a long-standing principle of the Indian legal system that a constitutional petition does not lie in situations where there is 'an adequate alternate remedy' available to aggrieved persons. In its decision in *Commissioner of Income Tax v Chhabil Dass Agrawal[(2014) 1 SCC 603*], the Supreme Court of India reiterated the established legal position in the country that, when a statutory forum is created by law for redressal of grievances, then subject to certain exceptions, the high court should not entertain a writ petition by ignoring such statutory dispensation.

56 See section 'Interactions in respect of final orders of NCAs', above.

57 ibid.

58 Examples of petitions in which CCP's jurisdiction was challenged include: (i) WPs filed in respect of CCP's final order dated 22 March 2011 Case 09/Reg/Comp/CAP/CCP/2010 (*Wateen Telecom & Defence Housing Authority*); WP 1134/2011 *Wateen Telecom Limited* in which Islamabad High Court passed an interim order on 14 April 2011; and WP 1465/2011 *Defence Housing Authority, Lahore* in which Islamabad High Court passed an order on 13 May 2011; and (ii) WP 21290/2012 *Allied Bank Limited* filed against CCP's final order dated 28 June 2012 in Case 1/24/ATM Charges/C&TA/CCP/2011 (*1-Link Guarantee Limited & Member Banks*). Lahore High Court passed an order on 7 September 2012.

retrospectively to agreements entered into before its coming into force;[59] and that certain actions of CCP were tantamount to judicial review of subordinate legislation and, therefore, not in accordance with the law.[60] Some petitions urged questions of law and of fact in their grounds, including that CCP's order was contrary to government policy and, therefore, exposed the petitioner to possible adverse governmental action,[61] and that CCP had not fully appreciated the facts of the matter in arriving at its final order.[62]

In a majority of cases, and regardless of the grounds being raised in them, the court simply admitted the petitions and granted a restraining order to the petitioners. Nearly all these petitions are still pending before the courts and the interim injunctions granted by the courts against CCP have been allowed to continue from one date of hearing to the next, with the result that a majority of these remain in force. As in the case of petitions filed in respect of interim orders, the Pakistani courts have not decided any petition filed against final orders on its merits.

The decision of the Supreme Court in a petition against CCI's decision in a merger case was hailed as an important breakthrough for Pakistan, because it endorsed the status of CCP as a first-tier competition institution. However, it is likely that this petition was decided, because it did not raise important constitutional questions.[63] The petitioner had challenged before the Islamabad High Court, the conditions imposed by CCP in a second-phase merger review of two fertilizer companies on the ground that CCP had acted in excess of its statutory powers. The high court had upheld CCP's order and declared that CCP had validly imposed conditions on the proposed merger. The petitioner appealed the order of the high court before the Supreme Court, and the Supreme Court granted relief to the petitioner on the ground that CCP had not provided it a right of

59 Petitions challenging retrospective application include CP D-2491/2011 *Engro Vopak Terminal Limited* against CCP's order dated 29 June 2011 in Case 6/LP/CMTA/CCP/2010 (*Implementation Agreement between Port Qasim Authority & Engro Vopak Terminal Limited*). Sindh High Court issued an order on 13 July 2011.

60 Petitions claiming that CCP was carrying out judicial, review include WP 4412/2013 *Institute of Chartered Accountants* against CCP's order dated 10 January 2013 in Case 1(52)/ICAP/C&TA/CCP/2012 (*Institute of Chartered Accountants of Pakistan*). Lahore High Court passed an order on 25 February 13.

61 Petitions claiming that CCP exposed the petitioner to adverse government action include CP D-2494/2011 *Pakistan Ship's Agents Association* against CCP's final order dated 22 June 2011 in File No 8/APPMA/CMTA/CCP/10/1709 (*Pakistan Ship's Agents Association*). Sindh High Court passed an order dated 15 July 2011.

62 Petitions on facts include WP 20280/2012 *GCC Approved Medical Centres* against CCP's final order dated 29 June 2012 in File No 2(2)/JD(L)/POEPA/CCP/2011 (*Employment Promoters Association v GCC Approved Medical Centres*). Lahore High Court passed an order dated 13 August 2012. This order was also relied upon by petitioners in WP 20729/2012 (*Canal View Diagnostic Centre*), WP 20729/2102 (*GCC Approved Medical Diagnostic Centre & others*), and WP 21106/2012 (*Urgent Medical Diagnostic Centre & others*) and was used as a basis for securing from the Lahore High Court injunctions restraining the Pakistani Tribunal from hearing appeals in relevant matters. LHC granted this by order dated 4 January 2013.

63 Order of Islamabad High Court dated 16 May 2011 in WP 543/2011 (*Fauji Fertilizer Company Limited v Competition Commission of Pakistan*) in which Fauji Fertilizer challenged CCP's order dated 26 January 2011 granting conditional approval of its proposed merger with Agritech Limited.

hearing before determining the conditions of the merger and remanded the matter to CCP with the direction to rehear the parties in respect of each of the conditions.[64]

V. THE IMPACT OF ADOPTION PROCESSES ON INTERACTIONS IN INDIA AND PAKISTAN

The divergence in the nature of interactions between the NCAs and the courts in their constitutional rather than competition jurisdictions in India and Pakistan and the fact that whilst in India, these interactions emanate only from CCI's interim orders, whilst in Pakistan, these emanate from both interim and final orders may be traced to the processes through which India and Pakistan adopted their respective competition laws. I argue that whilst the adoption processes have a 'direct impact' on the nature of the interactions, which stems broadly from the extent to which the judiciary was engaged in the process and affects the judiciary's response to competition related petitions, these also have an important 'indirect impact', which derives from the extent to which the processes engage pre-existing institutions from different branches of the state, which then has a bearing on the attitude of these pre-existing institutions towards the competition laws.

In order to understand the direct and the indirect impact, it is important to first understand the adoption processes followed in India and Pakistan. As outlined briefly earlier,[65] whilst India, in adopting the ICA 2002, had engaged the indigenously constituted Raghavan Committee, different levels of the executive, the Parliament, and the judiciary over a two-year period, at the time of introducing the law, Pakistan had outsourced the deliberation to a World Bank led team and had engaged only the upper echelons of the executive and selected stakeholders, that too for a relatively brief period. The following sections take a closer look at the adoption processes in the two countries and their impact on the interactions between the competition laws and the pre-existing legal systems.

The direct impact of the adoption process on the interactions

The adoption process had a direct impact on the grounds on which petitions were filed before the courts and on the responses of the courts to these petitions. The fact that ICA 2002 had been passed through the long form legislative procedure provided in the Constitution that attempted to meaningfully engage a range of institutions at different levels, including, most importantly, a wide range of stakeholders, implies that these institutions and stakeholders had acquiesced to the process and to the law. This, in turn, is likely to be an important factor in the fact that the petitions filed before the courts urged more procedural rather than substantive grounds. Conversely, the preponderance of substantive grounds raised in petitions filed before courts in Pakistan is likely to be the result of more limited engagement with institutions and the almost negligible engagement with stakeholders, which not only failed to address

64 Order of the Supreme Court dated 26 July 2011 in CP 752/2011 (*Fauji Fertilizer Company Limited v Competition Commission of Pakistan*) (para 4).

65 See Section I. 'Introduction'.

the concerns of stakeholders but also to gain their support for and confidence in the law.

The responses of the courts in India and Pakistan may in large part be attributed to the extent to which the adoption processes engaged the judiciaries of their respective countries. Judiciary in India first became involved in the adoption process when the Indian Supreme Court considered the constitutionality of ICA 2002 in the *Brahm Dutt Case*.[66] Even though the Indian Supreme Court disposed of the *Brahm Dutt Case* on the basis of an undertaking given to it by the Indian government, its decision had an important impact on the subsequent implementation of ICA 2002. Whilst the intervention of the Supreme Court required ICA 2002 to be amended to reflect the constitutional principle of separation of powers, in the course of these proceedings, the Supreme Court also observed that if an expert body is to be created, 'consistent with what is said to be the international best practice', then it might be appropriate for the government to consider two separate bodies, one with advisory and regulatory and the other with adjudicatory expertise.[67] The government adopted the recommendation of the Supreme Court by establishing the Tribunal to hear appeals from decisions of the CCI. This amendment not only brought the ICA 2002 into conformity with the Indian Constitution and thereby enhanced its compatibility with the country's pre-exiting legal system, but also it acquainted the Indian superior judiciary, the legal community, and the interested segment of the public with the fundamentals of the implementation scheme envisaged in ICA 2002. Most importantly, the engagement of the Supreme Court in amending ICA 2002 endorsed the legality and authority of competition law, and thereby bolstered its legitimacy in the country.

On the other hand, not only was Pakistan's judiciary disengaged from the adoption process owing to the adoption through a small number of top-down exclusive institutions, but also it was estranged from the executive in the period in which the PCO 2007 was adopted, as the Pakistani judiciary already weakened by years of deference to the executive[68] was embroiled in an unprecedented battle with the

66 See n 4 above and text thereto.

67 *Brahm Dutt v Union of India (2005) 2 Supreme Court Cases 431*. On 4 April 2003, the government notified the 'Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules 2003', which provided the mechanism for the appointment of the CCI chairperson and members. Dutt challenged these rules on the ground that the appointment procedure violated the principle of separation of powers stipulated in the Constitution and that given that CCI had adjudicatory powers, its members should be appointed according to the procedure prescribed in the Constitution for appointment of judges. [p 434 (b), (c), and (d).] In response, the government argued that CCI was an expert regulatory body that must be operated by persons with special expertise, rather than by judges. The government further argued that as long as the power of judicial review of the Supreme Court and the High Courts remained in place, the government's power to appoint members to CCI could not be challenged on the grounds of separation of powers. [p 434 (e), (f), and (g)]. In the course of the proceedings, however, the government agreed to entrust the appointment of members to a committee chaired by the Chief Justice of India, provided that the committee selected experts in the field rather than judges or retired judges. The government also agreed to constitute a tribunal, in the nature of a judicial body, to hear appeals from CCI's decisions. [p 435(h) and 436(a)].

68 Thrice in Pakistan's 70-year history, military dictators had asked the judiciary to take oaths of office on extra constitutional instruments. This not only prevented the judiciary from taking action against the military-led executive but also made it deferential to the executive.

executive for its very survival.[69] The combination of these factors had a two-fold negative effect on subsequent interactions between CCP and the Pakistani courts: first, the judiciary remained largely unaware of competition principles and implementation scheme envisaged in the Pakistani competition law, and secondly, and more damagingly, that it harboured a distrust for competition law, because it belonged to the set of laws promulgated by the President soon before he turned against the judiciary and because it was one of the laws 'saved' from lapsing by the President by an amendment to the Constitution.[70] Whilst the second issue was somewhat ameliorated by the enactment of PCA 2010, because it demonstrated that the executive had placed the competition law before the Parliament in compliance of the order of the Supreme Court,[71] it did not accelerate the pace at which the judiciary responded to competition matters.

Given the commonalties in the Indian and Pakistani legal systems and legal cultures[72] and the endemic delay in deciding cases in both systems,[73] it is tempting, indeed appropriate, to consider whether the delay in the responses of the courts to the petitions filed before them may be rooted in their inherent natures. However, if the response of the courts to competition related matters challenges filed before them had been rooted only in the dilatory tendencies inherent in the pre-existing Indian and Pakistani legal systems, then it is unlikely that Indian courts would have disposed of a significant number of competition related challenges filed before them.

The indirect impact of the adoption processes

In addition to the direct impact, the adoption processes in India and Pakistan also had an indirect impact on the interactions between the competition laws and the courts in their constitutional judicial review jurisdictions.

In the case of India, this indirect impact was largely positive. By engaging the Parliament in the adoption process over a period of time, India had generated greater

69 It was a quasi-military government in 2006 that initiated the process of adopting a Competition Law. Although the Supreme Court had endorsed the initial military takeover and had supported the government subsequently established by the military chief, the relationship between the judiciary and the executive had become deeply strained over time. In March 2007, the military chief turned President had suspended the Chief Justice of Pakistan on grounds of misconduct. The President's action had been challenged before the Supreme Court and in July 2007, the Supreme Court had reinstated the Chief Justice. The President's actions led to a simmering resentment amongst the three organs of state, which was reaching boiling point towards October 2007 just as the Competition Law was being introduced in Pakistan.

70 See n 2, above.

71 The order of the Pakistani Supreme Court dated 21 February 2013 in CP 102-L/2013 (*ADG LDI (Pvt) Limited v Brain Telecommunications Limited*) is the only instance in which the Supreme Court expressly endorsed CCP by referring a case to it even though the entity filing the case before the Supreme Court had not impleaded CCP as a party to the proceedings.

72 India and Pakistan share a common legal history until their independence from British Rule in 1947 and have since largely retained the legal system introduced by the British.

73 As per the data contained in Annual Reports of the Supreme Court of India 2015–2016 and the Annual Report of the Supreme Court of Pakistan 2015–2016, from 2009 to 2015, more than 50,000 cases remained pending before the Indian Supreme Court each year (2012 was a peak year with 66,692 pending cases), whilst around 20,000 cases remained pending before the Pakistani Supreme Court (2015 being a peak year with 27,639 pending cases). Whilst data for pendency at the high court levels are not available, it may be stated with confidence that it mirrors that at the Supreme Courts in the two countries.

familiarity and perhaps even ownership and understanding of competition principles amongst members of Parliament. Furthermore, by creating the Raghavan Committee and engaging institutions at different tiers of the executive, India had also ensured the ownership of the competition law by the executive. Both these factors are likely to have been important in ensuring that the government took seriously its responsibility to establish the Tribunal. This had the impact of providing aggrieved persons with the necessary forum for addressing their grievances against CCI and thereby limited the scope and the number of interactions with the courts and almost entirely eliminated petitions from CCI's final orders, because aggrieved parties had the option of filing appeals from these orders to the Tribunal.

In Pakistan, the indirect impact of the adoption process was almost entirely opposite to that in India. By keeping the Parliament at a distance throughout the already short adoption process, the Pakistani government not only weakened the compatibility of PCO 2007 (and its subsequent iterations) with Pakistan's pre-existing legal system and cast a doubt on its legitimacy in the country but also failed to acquaint the Parliament with the purpose of the competition law and to convince it that it was genuinely needed for the economic well-being of the country. Furthermore, by outsourcing the deliberating and drafting process, the government had even kept the purpose of and need for the law confined to the highest echelons of the government populated by nominees of the government then in power. This had led to a lack of broad-based ownership of the law even within the executive.

The exclusion of the Parliament from the adoption process meant that the Parliament was not particularly interested in urging the government to establish the Tribunal and the confinement of the discussion on the law to the highest echelons of the government meant that successive governments were not particularly interested in establishing the institutions required for fully implementing the competition law. The government's leisurely approach towards initially setting up and then maintaining the Tribunal significantly increased the traffic of constitutional petitions in respect of competition matters before the Pakistani courts both from interim and final orders, because aggrieved persons did not have an alternate remedy available to them for the redressal of their grievances.

Furthermore, owing to the lack of Parliamentary oversight in passing the law meant that less effort was made to bring the law into conformity with the country's legal system, and stakeholders, therefore, were able to bring petitions on a broader range of procedural and substantive issues.

VI. THE EFFECT OF INTERACTIONS ON THE ENFORCEMENT OF COMPETITION LAWS

The effect of interactions between the NCAs and the courts whilst small in itself (given the small percentage of proceedings in respect of which aggrieved persons invoked the constitutional jurisdictions of the Indian and Pakistani courts) becomes more meaningful when examined in the broader context of actual competition enforcement in India and Pakistan. For the purposes of this section, I examine the effects of the interactions on two aspects of enforcement of the competition laws in India and Pakistan: the development of competition

jurisprudence in the two countries and the ability of the NCAs to impose and recover penalties.[74]

Effect of interactions on development of competition jurisprudence

India

In India, persons aggrieved by the orders of the CCI (whether interim or final) had the option to approach either the courts in their constitutional jurisdictions or the Tribunal depending on whether the grounds of the challenge were more appropriate for one jurisdiction or the other. Over the years, the courts, the Tribunal, and the Supreme Court exercising its competition jurisdiction, issued several decisions, which supported the development of competition jurisprudence in the country.

Decisions of the courts formed valuable precedents for CCI in subsequent proceedings. For instance, CCI cited the decision of the Delhi High Court in the *Interglobe Case* and the *Gujarat Guardian Case*[75] in several subsequent orders including orders in *Varca Druggist & Chemist and others v Chemists & Druggists Association Goa;*[76] *Cartelization by Cement Manufacturers Case;*[77] and *Shree Cement Limited Case.*[78] Similarly, CCI cited the order of the Bombay High Court in the *Kingfisher Case*[79] in a number of its orders, including orders in *Varca Druggist & Chemist and others v Chemists & Druggists Association Goa;*[80] *Cartelization by Cement Manufacturers Case;*[81] *Shree Cement Case;*[82] *Shri Sonam Sharma v Apple Inc. USA & others;*[83] *Steel Producers Case;*[84] cases filed in respect of *Jaiprakash Associates Limited,*[85] and the *Cement Manufacturers Association Case.*[86]

Decisions of the Tribunal and the Supreme Court similarly contributed to the development of competition jurisprudence. Perhaps, the most significant appeal filed before the Tribunal was against an interim order of CCI in Case 11/2009 *Jindal Steel and Power Limited v Steel Authority of India.*[87] CCI had initiated proceedings against the Steel Authority of India Limited (SAIL) upon receipt of information (or complaint) from Jindal Steel and had sought comments from it. However, rather than filing its comments, SAIL filed an application before CCI seeking an extension in the time in which it was to file its comments. CCI denied SAIL's application and, through an interim order, directed the DG to investigate the allegations and directed SAIL to file its comments directly before the DG.

74 The focus on recovery is not intended to detract from the greater discussion about the appropriateness of the quantum of penalties imposed by CCI, which is beyond the remit of this article.
75 See n 36, above.
76 Case MRTP C-127/2009/DG1R4/28 decided on 11 June 2012 (para 26.9).
77 Case RTPE 52/2006 decided on 3 July 2012 (para 104).
78 Case RTPE 52/2006 decided on 31 August 2016 (para 51).
79 See n 37, above.
80 See n 76, above (para 26.11).
81 See n 78, above (para 106).
82 See n 78, above (para 55).
83 Case 24/2011 decided on 19 March 2013 (para 14).
84 Case RTPE 9/2008 decided on 9 January 2014 (para 107).
85 Cases 72/2011, 16/2012, 34/2012, 53/2012, 45/2013 decided on 26 October 2015 (para 14).
86 Case 29/2010 decided on 31 August 2016 (para 163).
87 Order dated on 20 December 2011 (para 13).

SAIL filed an appeal against CCI's interim order before the Tribunal. By its order dated 11 January 2010, the Tribunal allowed SAIL's appeal and granted it time to file its reply before CCI. The Tribunal also directed CCI to take a fresh decision after taking SAIL's reply into consideration. Through a further order dated 15 February 2010, the Tribunal also held that whilst there was no requirement for CCI to invite comments from parties to proceedings pending before it, once it had invited such comments it was not open to it to withdraw the opportunity. The Tribunal also clarified that it was incumbent upon CCI to indicate reasons for having formed the view that a particular case was fit for further investigation and indeed for issuing any other order.

CCI appealed the order of the Tribunal before the Supreme Court.[88] On 9 September 2010, the Supreme Court passed on order that clarified a number of important procedural points for CCI: appeals before the Tribunal may only be filed in respect of CCI orders listed in section 53(A)(1)(a) of ICA 2002; CCI had no statutory duty to issue a notice or grant a hearing to a person alleged to be in violation of ICA 2002 before determining whether the case is fit for further investigation; CCI was a necessary and/or proper party to all proceedings brought before the Tribunal; in the course of an inquiry, CCI had the power to issue interim orders in compliance with section 33 of ICA 2002; CCI was bound to record reasons while forming a *prima facie* view that a case was fit for further investigation and was required to do so within a reasonable time; in any matter in which CCI passed an interim order, it was bound to pass a final order within 60 days of the date of the interim order.[89]

The Supreme Court's decision in this case not only helped CCI to respond to similar objections in subsequent cases[90] but also deterred potential litigants from repeatedly raising the same objections before CCI.[91]

Pakistan

In Pakistan, from 2007 to 2011 and then from 2013 to 2015, persons aggrieved by orders of the CCP (and in the first period, unwilling to exhaust their single right of appeal by appealing directly to the Supreme Court) had little option but to invoke the constitutional jurisdiction of the courts.

Whilst the interaction between CCP and the courts in Pakistan also had a considerable impact on subsequent proceedings before CCP, this impact was largely adverse. Instead of CCP drawing support from decisions of the courts, these decisions formed the basis for further petitions against CCP. For example, persons aggrieved by proceedings initiated by CCP against the Pakistan Sugar Mills Association and its members relied upon the interim order of the Sindh High Court in a petition filed

88 CA 7779/2010 *Competition Commission of India v Steel Authority of India Limited*.

89 Competition Commission of India Annual Report 2010–11.

90 CCI cited the decision of the Supreme Court in the SAIL Case in several final orders including orders in: *Shri Shamsher Kataria Case* (n 39), (paras 18.30.6 and 20.3.3); Case 59/2011 *Shri Jyoti Swaroop Arora v Tulip Infratech Limited & others* decided on 3 February 2015 (para 60); *Cement Cartelization Case* (n 34) (para 27); RTPE 20/2008 *All India Tyre Dealers Federation v Tyre Manufacturers* decided on 16 January 2013 (para 115); and Case 15/2010 *Jupiter Gaming Solutions Private Limited v Government of Goa & others* decided on 12 May 2011 (para 6.1).

91 See n 85, above and text thereto.

by Mirpurkhas Sugar Mills to obtain further restraining orders against CCP in proceedings pending before other courts in Pakistan.[92]

Similarly, the Lahore High Court's decision in the *LPGAP Case*[93] opened floodgates of interim injunctions against show cause notices issued by CCP. Often, the courts granted these injunctions at the first hearing and after only a cursory examination of issues and mostly because 'other constitutional petitions raising similar issues have already been heard by the Court'.[94] Although CCP challenged a number of interim injunctions before the Supreme Court, the Supreme Court preferred not to interfere with the jurisdiction of the high courts. At best, the Supreme Court allowed CCP to continue with the proceedings whilst restraining it from taking any adverse action against the petitioners. In the majority of appeals, the Supreme Court simply directed the high courts to hear and dispose of the matters expeditiously without making them specifically accountable in this regard. The only apparent impact of these decisions on the development of competition proceedings was to stall it.

Between 2011 and 2013, when the Pakistani Tribunal was first made operational, it decided one appeal on 20 March 2013 in the matter of *1-Link Guarantee Ltd* in which it dismissed CCP's final order. After being reconstituted in 2015, the Tribunal decided at least six further appeals against CCP[95] and eight appeals in favour of CCP.[96] However, none of these orders established principles to develop competition

92 For instance, the Mirpurkhas Sugar Mills order (n 50) was replicated in Order of the Lahore High Court dated 11 February 2010 in: WP 1176/2010 *Chishtia Sugar Mills Limited*; WP 1175/2010 *Gojra Samundari Sugar Limited*; WP 1122/2010 *Shahtaj Sugar Mills Limited*; WP 1173/2010 *Sheikhoo Sugar Mills Limited*; WP 2654/2010 *National Sugar Limited*; WP 2556/2010 *Pattoki Sugar Mills Limited*; and WP 2761/2010 *Shakarganj Mills Limited*.

93 See n 51, above.

94 A petitioner from the electronics sector (name not provided) made this statement in WP 3530/2010. The High Court by its order dated 23 February 2010 allowed an injunction on this basis and also relied on the decision in its orders in subsequent petitions, including: WP 22575/2011 *Transfopowers* decided on 12 October 2011; WP 23640/2011 *AB Ampere (Pvt) Limited* decided on 21 January 2011; WP 23743/2011 *Pak Electron* decided on 25 October 2011; and WP 27488/2011 *KBK Electronics* decided 08 December 2011. The High Court also granted injunctions against CCP in its orders dated 16 June 2011 in: WP 13499/2011 *Amin Brothers Limited*; WP 13496/2011 *Creative Engineering*; WP 13497/2011 *M.R Electric*; WP 13500/2011 *Nam International*; and WP 13498/2011 *Redco Pakistan Limited*. Furthermore, the Sindh High Court, by its orders dated 6 June 2012 and 8 August 2012 in CP D 2125/2012 *Schneider Electric Pakistan* and CP D 2871/2012 *Medical Diagnostics Centre and others*, restrained CCP from taking coercive action against the petitioners and suspended the operation of the notice until the next date of hearing of the petitions. (As per general practice of Courts, this injunction was extended at each date of hearing). CCP filed appeals before the Supreme Court (CPs 1938, 1939, 1988, 1989, 2008, and 2009/2011 against orders of the High Court in WPs 22575, 22633, 23640, 22965, 23743, and 23860/2011). The Supreme Court disposed of these CPs by order dated 22 December 2011 in terms of which it refused to interfere with interlocutory orders of the High Court and merely directed the High Court to hear and dispose of the matters expeditiously.

95 These include appeals decided by orders dated 26 November 2015 in *Reckitt Benckiser Pakistan Ltd v CCP*; 25 January 2017 in Appeal 3/2016 *Al- Rahim Foods (Pvt) Limited v CCP and others*; 07 June 2017 in Appeal 12/2016 *Synthetic Fibre Development v CCP*; 07 June 2017 in Appeal 5/2016 *Institute of Business Management v CCP*; 07 June 2017 in Appeal 6/2016 *WAH Engineering College v CCP*; and 7 June 2017 in Appeal 4/2016 *University of Faisalabad v CCP*.

96 The Tribunal issued the following orders in favour of CCP: 30 November 2016, Appeal 2/2015 *Tara Crop Sciences (Pvt) Limited v CCP and other*; 25 January 2017 Appeal 3/2016 *Al- Rahim Foods (Pvt) Limited v CCP and others*; 21 December 2016 Appeal 7/2016 *HASCOL Petroleum Ltd v CCP and others*; 28 September 2016 Appeal 9/2016 *Pakistan Poultry Association v CCP*; 29 March 2017 Appeal 1/2016

jurisprudence in the country. All these orders are in any event under appeal before the Supreme Court that has not yet decided any of them.[97] As in the case of the courts, the CCP has had no support from the Tribunal or the Supreme Court in developing competition jurisprudence.

Enforcement of competition laws: imposition and recovery of penalties

In this section, I examine whether the interactions have supported or stalled the NCAs in the imposition and recovery of penalties. I consider the interactions to have supported the imposition of penalties if they have provided clarity to the NCAs in determining substantive issues related to penalties including reasonableness and proportionality. I consider the interactions to have stalled the imposition and recovery of penalties where the courts have expressly ordered the NCAs to restrain from recovering penalties. Once again, I examine these effects in the broader context of implementation of the competition laws in the two countries.

India

For the period under review in this article,[98] the majority of constitutional petitions filed in India have been against interim orders that only rarely impose penalties. It is, therefore, not possible to gauge whether the courts have directly supported CCI in the imposition and recovery of penalties. However, there is sufficient data and information to establish that the Tribunal and the Supreme Court (sitting in its competition jurisdiction) have supported CCI in this regard.

In the course of the period under review in this article, nearly half of CCI's final orders that imposed penalties were challenged before the Tribunal. However, the response of the Tribunal varied from appeal to appeal. In certain appeals, the Tribunal facilitated the enforcement of CCI's final orders by upholding them and dismissing the appeal(s).[99] In others, the Tribunal set aside CCI's order and quashed the

Saleem Habib Godial v CCP; 29 March 2017 Appeal 1/2016 *Toyota Sahara Motors v CCP*; 10 May 2017 Appeal 3/2017 *Bahria Town (Pvt) Limited v CCP*, and 10 May 2017 Appeal 4/2017 *PTCL v CCP*.

97 Entities aggrieved by orders of the Tribunal have filed appeals before the Supreme Court in: Appeal 2/2015 *Tara Crop Sciences (Pvt) Limited v CCP and other*; and Appeal 9/2016 *Pakistan Poultry Association v CCP*. Both CCP and the appellant have filed an appeal before the Supreme Court in respect of Appeal 3/2016 *Al- Rahim Foods (Pvt) Limited v CCP*.

98 See Section IV, 'The nature of interactions in India and Pakistan'.

99 For example, appeals in respect of CCI's orders in: Case 3/2009 *Uniglobe Mod Travels Pvt Limited v Travel Agents Association of India & others*. Challenged in Appeals 24/2011 and 8/2012, decided by the Tribunal on 10 July 2013; Case RTPE 9/2008 *FCM Travel Solutions India Limited v Travel Agents Federation of India & others)*. Challenged in Appeal 9/2012, decided by the Tribunal on 10 July 2013; Case 1/2009 *FICCI Multiplex Association of India v United Producers/Distribution Forum & others*. Challenged in Appeals 11, 12, and 13/2011, decided by the Tribunal on 17 January 2014 and in Appeals 1, 2, and 3/2012, decided by Tribunal on 5 August 2013; Cases 19/2010 and related cases *Belaire Owners' Association v DLF Limited HUDA & other*. Challenged in Appeals no 20/2011 and 22/2011, decided by the Tribunal on 19 May 2014; Case 13/2009 *MCX Stock Exchange Limited v National Stock Exchange of India Limited*. Challenged in Appeal 15/2011, decided by the Tribunal on 5 August 2014; 23 December 2014, Case 32/2013 *PV Basheer v Film Distributors Association Kerala*. Challenged in Appeals nos. 55, 56, and 61/2015, decided by the Tribunal on 27 April 2016, 17 August 2015, and 3 July 2015; Case 88/2013 *Sai Wardha Power Company Limited v Western Coalfields Limited & others*. Challenged in Appeal 80/2014, decided by the Tribunal on 9 December 2016; and Case 45/2012 *Kerala Cine*

penalty.[100] In yet other matters, the Tribunal upheld CCI's order but revised the quantum of penalty,[101] whereas in others still, it remanded the case to CCI for re-hearing either in its entirety or on a specific question (including the question of quantum of penalty).[102] Occasionally, appellants themselves withdrew the appeals

Exhibitors Association v Kerala Film Exhibitors Federation and others. Challenged in Appeal 100/2015, decided by the Tribunal on 4 February 2016.

100 Appeals were allowed in respect of CCI's orders in: Case 40/2010 *Shri Gulshan Verma v Union of India & others.* Appeal decided by the Tribunal on 14 March 2013; Case 56/2011 *Cinergy Independent Film Services Pvt Limited v Telengana Telegu Film Distribution Association & others.* Challenged in Appeal 15/2013, decided by Tribunal on 14 October 2015; Case 20/2011, *Santuka Associates Pvt. Limited v All India Organization of Chemists and Druggists & others.* Challenged in Appeals 21/2013, 6/2014, and 7/2014, decided by Tribunal on 9 December 2016; Reference Case 1/2012 *Ministry of Commerce Government of India v Puja Enterprises & others.* Challenged in Appeals 34, 35, 36, 37, 38, 39, 40, 41, 42, 43/2013, and 8/2014; Case 78/2011 *Reliance Big Entertainment Pvt. Limited v Tamil Nadu Film Exhibitors Association.* Challenged in Appeal 14/2014, decided by Tribunal on 28 April 2015; Case 39/2012 *Mr. Ramakant Kini v Dr. L.H. Hiranandani Hospital Powai, Mumbai.* Challenged in Appeal 19/2014 decided by the Tribunal on 18 December 2015; Case 60/2012 *Arora Medical Hall Ferozpur v Chemists & Druggists Association Ferozpur.* Challenged in Appeals 21 to 28/2014, decided by the Tribunal on 30 October 2015; Case 38/2011 *Indian Sugar Mills Association & others v India Jute Mills Association and others.* Challenged in Appeals 73, 77, 78, 83, 84, 85, 86, 87, and 88/2014 and 8, 9, 10, 11, 12, 13, 14, and 15/2015, decided by the Tribunal on 1 July 2016; Case 78/2012 *Rohit Medical Store v Macleods Pharmaceuticals Limited & others.* Challenged in Appeal 58/2015, decided by the Tribunal on 13 June 2016; *Indian Foundation of Transport Research & Training v Sh. Bal Malkait Singh & others.* Challenged in Appeal 60/2015, decided by the Tribunal on 18 April 2016; Case 26/2013 *Bio Med Private v Union of India & others.* Challenged in Appeals 85 & 86/2015, decided by the Tribunal on 8 November 2016; Suo motu Case 4/2013 *Sheth & Co. & others.* Challenged in Appeals 88, 89, 90, 91, 102, and 103/2015 decided by the Tribunal on 10 May 2016; Case 28/2014 *PK Krishnan v Paul Madavana Alkem Laboratories & others.* Challenged in Appeals 5, 9, 14, and 15/2016, decided by the Tribunal on 10 May 2016; Case 71/2013 *Maruti & Company v Karnataka Chemists & Druggists Association & others.* Challenged in Appeal 40/2016, decided by the Tribunal on 28 July 2016; and Suo Motu Case 2/2012 and Ref Case 1/2013. Challenged in Appeals 42/2014, 34/2014, 37/2014 and decided by the Tribunal on 7 December 2015 and 10 May 2016.

101 Penalties were revised in CCI's orders in: Case 6/2011 *Coal India Limited v GOCL Hyderabad & others.* On 18 April 2013, the Tribunal decided Appeals 82, 83, 84, 85, 86, 87, 88, 89, and 90/2012 and reduced the penalty imposed by 10 per cent; Case 43/2010 *A Foundation For Common Cause & People Awareness v PES Installations Pvt Limited & others.* In Appeals 93, 94, and 95/2012, the Tribunal on 25 February 2013, modified the penalty from 5 per cent to 3 per cent of the turnover; Case 2//2011 *Suo Motu Case re Aluminum Phosphide Tablets Manufacturers.* In Appeals 79, 80, and 81/2012, the Tribunal on 29 October 2013 affirmed the order but revised the penalties; *Suo Motu Case 2/2012 and Ref Case 1/2013.* In Appeal 37/2014, the Tribunal on 10 May 2016, revised the penalty from 10 per cent to 1 per cent; Suo Motu Case 2/2014 *Cartelization in Public Sector Insurance Companies.* In Appeals 94, 95, 96, and 97/2015, the Tribunal on 9 December 2016 reduced the penalty from 2 per cent to 1 per cent.

102 Tribunal remanded cases in respect of CCI's orders in Case 7/2010 *Vijay Gupta v Paper Merchants Association Delhi & others.* The first respondent challenged CCI's order before the Tribunal. The Tribunal on 29 August 2011 remanded the case to CCI for rehearing. This led to CCI issuing a supplementary order on 10 January 2013; Case 19/2010 *Belaire Owners' Association v DLF Limited HUDA & others.* The Tribunal on 29 March 2012 directed CCI to pass an order under section 27(d) for modification of the agreements between DLF and apartment owners; Cases 18, 24, 30, 31, 32, 33, 34, and 35/2010 *DLF Park Place Residents v DLF Limited* (same as no 2); Case 29/2010 *Builders Association of India v Cement Manufacturers Association & others.* By order dated 11 December 2015 in Appeals 103–113, 122–129, 132, 133, and 134/2012, the Tribunal revised CCI's order; Case 61/2010 *Shri Surinder Singh Barmi v Board for Control of Cricket in India.* The Tribunal on 23 February 2015 revised CCI's order in Appeal 17/2013; Cases 3, 11, and 59/2012 *Maharashtra State Power Generation Company Ltd. v Mahanadi Coalfields Limited & others; Maharashtra State Power Generation Company Ltd v Western Coalfields Limited & others; and Gujarat State Electricity Corporation Ltd. v South Eastern Coalfields*

they had filed before the Tribunal in order to once again approach CCI,[103] whilst in certain others, the Tribunal dismissed the appeals on technicalities.[104] There was at least one occasion at which even though the Tribunal did not agree with the justification provided by CCI for imposing the penalty, it chose not to interfere for the reason that the quantum of the penalty was insignificant.[105] A number of persons aggrieved by the orders of the Tribunal appealed these before the Supreme Court.[106]

Whilst the orders of the Tribunal (and/or the Supreme Court in this regard) may not have contributed to the quantum of penalties recovered by CCI,[107] they have helped CCI rationalize its methodology for determining penalties. For instance:

(i)The order of the Tribunal dated 29 October 2013 in respect of the appeal filed against CCI's order dated 23 April 2012 in Suo Motu Case 2/2011 *Re Aluminum Phosphide Tablets Manufacturers* reduced the penalty imposed by CCI from 9 per cent of turnover to 1/10th of the amount. The Tribunal's reason for this downward revision was that CCI had failed to provide a justification for fixing the penalty at 9 per cent and had acted arbitrarily in selecting turnover as the basis for this calculation.[108] CCI appealed the order of the Tribunal to the Supreme Court and the Supreme Court in its order dated 8 May 2017 upheld the order of the tribunal and reiterated the significance and import of the concept of 'relevant turnover' for the purpose of calculating penalties.

In its order, the Supreme Court also stated that adopting the criteria of 'relevant turnover' would be 'more in tune with ethos of ICA 2002 and the legal principles

Limited & others. By its order dated 17 May 2016 in Appeals 1, 44, 45, 46, 47, 49, and 70/2014 and 52/2106 the Tribunal revised CCI's order; Case 3/2011 *Suo Motu case against LPG Cylinder Manufacturers*. By its order dated 20 December 2013 in Appeals 21 to 65/2012, the Tribunal directed CCI to re-hear the case on the issue of penalty. CCI passed a further order on 6 August 2014, which was also appealed in Appeal 47/2015, and the Tribunal by its order dated 1 March 2016 once again directed CCI to rehear the matter on penalty; *Shri Shamsher Kataria Case* (n 39). The Tribunal on 9 December 2016 in Appeals 60, 61, and 62/2014 revised the criteria for penalties and remanded the case to CCI for recalculation; Case 30/2013 *Express Industry Council of India v Jet Airways (India) Limited & others*. The Tribunal on 18 April 2016 in Appeals 7, 8, and 11/2016 remanded the case to CCI for rehearing.

103 Appellants voluntarily withdrew Appeal 137/2012 against CCI's order dated 3 July 2012 in Case 36/2011 *Kansan News (Pvt) Limited v Fastway Transmission Pvt Limited & others*. The Tribunal allowed the withdrawal on 10 January 2013.

104 For instance, the Tribunal dismissed nine Appeals against CCI's order dated 16 February 2012 in Cases 52 & 56/2010 (*Sunshine Pictures Private Limited v Eros International Media Limited v Central Circuit Cine Association Indore & others*) for non-payment of Court fees. The aggrieved parties filed a further appeal (68/2012), however, the Tribunal refused to grant an interim injunction. By its order dated 3 January 2013, the Tribunal dismissed the appeal when the parties failed to comply with the Tribunal's direction to deposit the amount of the penalty pending proceedings. Also, see Appeal 72/2012 against CCI's order dated 16 February 2012 in Cases 25, 41, 45, 47, 48, 50, 58, and 69/2010 *Reliance Big* Entertainment *Limited v Karnataka Film Chamber of Commerce*, which was dismissed by the Tribunal on 3 January 2013 for non-prosecution.

105 See n 41, for several appeals filed in respect of the CCI's order in *Reliance Big Entertainment*.

106 See n 87, the *SAIL Case* and text thereto.

107 From commencement of operations in 2009 to 31 March 2016, CCI had imposed penalty in the sum of Indian Rupees 13,981 crore (IRs 139,810,000,000.00 or Indian Rupees One hundred and thirty-nine billion, eight hundred and million only). However, as of 31 March 2016, CCI had only recovered penalties in the sum of Indian Rupees 80.47 crore (IRs 804,700,000.00 or Indian Rupees Eight hundred and four million, seven hundred thousand only) or a mere 0.57 per cent of the total penalties imposed by it.

108 Joint order of the Tribunal dated 29 October 2013 in Appeals 79, 80, and 81/2012 (paras 43–70 and para 69 in particular).

which surround matters pertaining to imposition of penalties'. It further stated that accepting CCI's interpretation of the term 'turnover' as 'total turnover' in all situations would 'bring about very inequitable results'. The Supreme Court noted a number of examples that demonstrated that the imposition of penalty on the basis of 'total turnover' in all cases would inequitably discriminate against persons guilty of the same contravention simply on the basis that they had structured their product or business lines differently.

As regards CCI's arguments that penalties were designed to act as a deterrent to anticompetitive practices, the Supreme Court held, that nevertheless 'the penalty cannot be disproportionate to the violation and it should not lead to shocking results'. The Supreme Court also held that the aim of deterrence cannot justify an interpretation of ICA 2002 that may lead to 'the death of the entity' itself. The Supreme Court emphasized that the doctrine of proportionality, which is based on equality and rationality, is a 'constitutionally protected right, which can be traced to Article 14 as well as Article 21 of the Constitution'. Finally, the Supreme Court outlined a stepwise methodology for CCI to follow in imposing penalties.[109]

(ii)In another order dated 9 December 2016 in appeals filed against CCI's order dated 25 August 2014 in Case 3/2011 *Shri Shamsher Kataria v Honda Siel Cars India Limited & others*, the Tribunal revised the criteria on the basis of which CCI had calculated the penalty. CCI had imposed a penalty of 2 per cent of average annual turnover of the appellant companies in the spare parts aftermarket. However, the Tribunal took the view that CCI should recalculate penalties on the basis of relevant turnover of the spare parts aftermarket. The Tribunal also stated that as a matter of policy, it was not in favour of heavy penalties and preferred that CCI imposed penalties in the spirit of a 'transitory reform process'.[110]

(iii)In certain other cases, the Tribunal did not hesitate to quash a penalty if it believed it to be unjustified. For instance, in its order dated 10 May 2016 in appeals against CCI's order dated 1 December 2015 in *P K Krishnan v Paul Madavena Alkem Laboratories & others*, the tribunal quashed the penalty imposed by CCI on the grounds that it had been imposed in violation of the principles of natural justice, because the aggrieved persons had not been given an opportunity of hearing in respect of the penalties imposed.[111]

Pakistan

In Pakistan, aggrieved parties filed constitutional petitions in respect of all final orders of the CCP that had imposed penalties.[112] In the majority of these petitions, the courts passed interim orders restraining CCP from recovering penalties. At the time of writing this, the Pakistani courts had not decided any of the petitions pending before them. Consequently, even after conducting extensive hearings and passing numerous final orders, CCP remains unable to enforce these orders and to recover

109 See <http://competition.cyrilamarchandblogs.com/2017/05/supreme-court-limits-ccis-penalty-powers-relevant-turnover-upheld/> accessed 15 July 2017.

110 Joint order of Tribunal dated 9 December 2016 in Appeals 60, 61, and 62/2014 (paras 167 and 168).

111 Order of Tribunal dated 10 May 2016 in Appeal 5/2016, para 34.

112 See section on '*Pakistan*', in the section 'Enforcement of competition laws: imposition and recovery of penalties'.

penalties, and the only penalties it has recovered are those that were voluntarily paid by the parties.[113]

CCP's inability to realize penalties imposed by it is not the only adverse effect of the multiple constitutional petitions against its final orders. Another and perhaps more fundamentally negative aspect of the situation is that, to date, CCP has received little or no support from the courts in aligning its procedures, let alone its substance, with the pre-existing Pakistani legal system and thereby enhancing its compatibility with and legitimacy in this system. Given that none of CCP's final orders have attained finality under the Pakistani legal system, the Pakistani competition law rather than increasingly integrating with the Pakistani legal system, remains at least as peripheral and alien to it today as it was when it was first enacted.

So far, the recent establishment of the Tribunal in Pakistan has done little to counter the adverse effects of these interactions. The Tribunal has decided less than 20 appeals to date in none of which it has provided guidance in respect of penalties. Furthermore, its orders in nearly all these matters are pending before the Supreme Court (sitting in its competition jurisdiction). Consequently, CCP has had no support from the Supreme Court either in refining its methodology for imposing penalties or in recovering these penalties.

The effects of interactions in a broader perspective

The effect of the interactions in India and Pakistan varies according to the broader implementation context of the two countries. In India, the constitutional system (represented by the courts exercising their inherent jurisdiction) and the competition system (represented by the Tribunal and the Supreme Court in its competition jurisdiction) appear to have operated in support of each other particularly in the development of competition jurisprudence in the country. Orders of the Tribunal had the effect of narrowing possible grounds on which CCI's orders could be challenged before the courts, whilst orders of the courts clarified due process and constitutional norms for CCI and the Tribunal. The clarity provided by the decisions of the courts and the tribunal not only reduced the number of challenges filed on similar issues but also the precedents set by these orders enabled the Tribunal and the courts to deal with any such challenges more effectively and expeditiously.

Conversely, the absence of a functioning competition system in Pakistan directed all challenges against orders of the CCP towards the courts and created interactions between the NCAs and the courts at more than one level. The sheer numbers of petitions and applications and appeals emanating from these petitions and the breadth of grounds that these raised appear to have choked the legal system and prevented CCP from obtaining clarity or support on substantive and procedural issues, and more importantly, brought competition enforcement in the country to a halt.

It is tempting to dismiss the effect of the interactions on the ability of the NCAs to recover penalties as negligible, because CCI's recovery of penalties, even with a functioning competition system, is almost as low as that of the CCP, which has been mired in proceedings before the constitutional system. To do so, however, would be

113 CCP has not published an Annual Report since 2012; therefore, it is not possible to get accurate data on the total quantum of penalties imposed.

to fail to appreciate that, even when CCI has not been able to realize penalties, it has benefited from the dialogue among the CCI, the Tribunal, and the Supreme Court in the competition system, whilst CCP has been deprived of this advantage. The Pakistani Tribunal is still in early stages of operation, and Pakistani courts have failed to decide any matters before them, let alone prescribing any guidelines in support of CCP's actions.

Therefore, whilst in India, the disadvantage of limited recoveries is offset by the strengthening and rationalizing of India's competition system, there is no such corresponding advantage in Pakistan. Going forward, this productive and supportive interaction within the competition system is likely to play a positive role in the pace at which the Indian competition law develops and integrates with India's pre-existing legal system and the extent to which it is understood, utilized, and applied in the country, which in turn, is likely to translate into the law being implemented with greater consistency and transparency.

On the other hand, the impact of the hitherto erratic interactions among CCP, the Tribunal, and the courts (including the Supreme Court in its competition jurisdiction) in Pakistan remains uncertain at best. The absence of a dialogue between CCP and the Tribunal or with the courts suggests that the country has still some way to go before competition law may be integrated into Pakistan's pre-existing legal system or be appropriately understood, utilized, and applied in the country, and before CCP may be recognized as a significant regulatory body in the country.

The impact of the adoption process on the rationalization and, therefore, on the recovery of penalties further confirms the impact of the process through which a law is borrowed on its subsequent implementation. Laws such as the ICA 2002, which are adopted through a relatively more bottom-up, inclusive, and participatory process, have the support of pre-existing institutions in the country and, therefore, are implemented with greater clarity and at a steadier pace when compared with laws such as the PCO 2007 and its successor PCA 2010, which encounter obstacles in their enforcement from both institutions and stakeholders, largely because these were originally omitted from the adoption process.

VII. CONCLUSION

The manner in which borrowed competition laws interact with the pre-existing legal systems of the countries in which they are injected is an important indicator of the quality of performance and indeed 'success' of these laws in the countries. Comparing these interactions in the Indian and Pakistani contexts suggests that the process through which a country acquires its competition law directly and indirectly affects the quantum, nature, and effect of interactions between the borrowed competition laws and the pre-existing legal systems of the country.

A country, such as India, which employs a more inclusive, bottom-up, and participatory process for adopting its competition law succeeds in developing a more productive interaction between the law and the pre-existing legal system by incorporating domestic legal considerations in the law and by sufficiently engaging political institutions so that they are more invested in ensuring that the institutions necessary for meaningfully implementing the law are duly established. However, a

country like Pakistan, that adopts the law through an exclusive and top-down process and keeps legal and political institutions at a distance in the adoption process, ends up with a law that falls short of domestic legal requirements and which fails to harness support from political institutions and stakeholders for its meaningful implementation.

The nature and effect of these interactions is linked to and varies with the broader competition implementation context of the country and, therefore, to the adoption process that establishes this context. It appears that effects of these interactions may be managed and be generally supportive in a country, which, like India, establishes a functioning competition system, and where aggrieved persons have the option to invoke the constitutional jurisdiction of the courts or to approach the competition system for redress of their grievances. On the other hand, in countries such as Pakistan, which fail to establish or maintain competition systems, these interactions have the power to overwhelm and frustrate the implementation of competition laws.

However, whilst the adoption process employed by a country may have shaped the interactions and their effects, it does not prevent the countries, once they understand the hindering factors, from recharting their implementation trajectories and meaningfully enforcing the competition laws. Therefore, in countries such as Pakistan, it is still open to institutions to take ownership of the law and thereby to mitigate the impact of their earlier exclusion: for the judiciary, this means clearing the backlog of competition matters pending before the courts, and for the Parliament and the government, it means committing themselves to maintaining a competition system.