PROMOTING ACCEPTANCE OF A COMPETITION REGIME – PUBLICIZING COMPETITION LAW AS PROVIDING A 'LEVEL PLAYING FIELD'

I. INTRODUCTION

Since 1991, as part of its industrial policy, India has chosen the path of economic reforms focussing on liberalisation and privatisation, thus directly enhancing the extent of competition in the marketplace. The path of market liberalisation must not end with the first stage of opening of various sectors to participation by private players and reduction of import barriers. A crucial second stage in order to ensure the success of these policies, is ensuring that the competitive structure of the marketplace is developed and maintained. An effective competition law, as an integral part of the competition and industrial policy of a country, is key to achieving this objective. However, the introduction and enforcement of a competition law may often face considerable resistance from players that have become entrenched either prior to market liberalisation or during the "first stage" of the liberalisation policy. Garnering support for the competition law from the participants in the marketplace – ranging from domestic industry and foreign importers to consumers – is essential to ensure its effectiveness and to achieve the benefits of a competition law.

As a widely dispersed group, the ultimate beneficiaries of an effective competition law, *i.e.* consumers (voters), are often the most difficult to target advocacy efforts towards, and are the least organized to make their opinions heard at policy discussions. More organized industry participants often have existing relationships with decision makers and thus have greater influence, and awareness, of the effect of policy and legislative changes such as the introduction of a competition law. Given this scenario, a government that is committed to competition law

and policy, and any competition authority that is entrusted with the task of enforcing the competition law, must not only direct advocacy efforts towards consumers, but also towards the influential group of organized industry participants. In particular, garnering the support of the domestic industry is crucial to the success of a competition law.

This paper briefly discusses one approach that the government and competition authorities may consider, in conjunction with others, in explaining to domestic industry participants the reasons for which an effective competition law can act to their benefit – that of advocating the acceptance of competition policy as a tool to ensure a 'level playing field'.

II. THE BACKGROUND – STAGES OF LIBERALISATION

It is generally well understood that competition law is not the whole of competition policy even though it is an integral part. Competition policy can be understood to mean all the measures a government may take in order to promote competitive market structures and behaviour.[1] In other words, it deals with determining what the marketplace should look like. Measures such as privatisation of public enterprises, encouraging private investment, and permitting foreign investment and trade, all form part of competition policy. Instruments such as competition laws, trade laws, corporate laws, and investment laws are used to implement competition policy.

Competition policy itself is a part of the larger industrial policy framed by a government. Industrial policy deals with the more basic question of the economic approach to be adopted by a country and all policies and legislation that go along with adopting a particular approach. For instance, adopting the path of increased liberalisation and privatisation in the early 1990's was

[1] Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2005), p. 3-4.

part of India's industrial policy, which was a marked shift from the earlier policy of greater governmental control over the marketplace, determining to a large extent who would produce what and make available what to the consumers at what price.

A. The "First Stage"

Since the economic reforms of 1991, the Indian government has continually moved towards enhancing the competitive structure of the economy without articulating a specific competition policy. The economic reforms focussed on reducing tariff and non-tariff barriers to trade with other countries, and also on encouraging the participation of private firms in parts of the economy where state run companies had previously enjoyed a dominant position, are the outcomes of adopting this move. This can be considered to be the "first stage" of the process of liberalisation and economic reform.

This "first stage" of economic reforms of the government focussing on liberalisation and privatisation has seen the Indian economy grow at a rapid pace, and has generally been well received and supported by the public. The best indicator of the acceptance and support for the continuation along the path of economic reform is perhaps seen from the fact that no major political party seriously talks of reversing the course on economic reforms as part of its campaign![2] At the same time, the benefits of liberalisation and privatisation that result in promoting competition in the marketplace also necessitates ensuring that the competitive structure developed is not threatened by a new set of players. Privatisation should not lead to a mere substitution of public monopolies by private ones, causing any potential efficiency gains from privatisation and liberalisation to be undermined by the anti-competitive behaviour of

[2] Of course, different political parties have differing opinions on the rate of economic reform, how they should be carried out, how the consequences should be dealt with, etc.

dominant firms.[3] Abusive and anti-competitive behaviour is harmful to consumers and to economic welfare, whether engaged in by government entities or by private firms. Thus, as a "second stage" of the process of liberalisation and economic reform, governments need to ensure that the competitive structure of the marketplace is maintained and developed.

B. The "Second Stage"

An effective competition law is the key to the "second stage" as it seeks to achieve the purpose of ensuring that the competitive structure of the marketplace is maintained. In India, the formation of a committee under the supervision of Mr. S.V.S. Raghavan to examine the need for an overhaul of the *Monopolies and Restrictive Trade Practices Act* ("MRTP Act") (the "Raghavan Committee Report") in the context of the changed economic scenario indicated the government's recognition of the need to revamp the then existing competition regime. The new *Competition Act* enacted by Parliament in 2002 generally follows the schematic adopted by other modern competition laws in countries with developed competition laws.[4]

There are some well documented benefits of an effective competition law - market liberalisation resulting in enhanced private participation if not accompanied by competition laws that that are aimed at controlling economic (mis)behaviour and structures, can result in substantial price increases and reduced competitiveness, reducing the benefits for the overall economy.[5] The structure of the competition law, in order to make it effective for the conditions of a particular economy, would naturally have to be tailored to that economies' particular needs,

[3] OECD Centre for Co-operation with Non-Members, "Small economies" and competition policy", OECD Global Forum on Competition, 5 February 2003.

[4] There are, of course, a number of differences between the *Competition Act* and the competition legislation in other countries. A discussion of the commonalities and the differences is beyond the scope of this paper.

[5] Lucian Cernat and Peter Holmes, "Competition, Competitiveness & Development: Lessons from Developing Countries (New York: United Nations, 2004), p. 2.

which in the case of developing countries, includes fulfilling and promoting a "development" need.[6] Without an effective competition law in place, domestic firms may abuse monopolistic positions and engage in other anti-competitive practices. For instance, it is not unusual to find that where governments have adopted the path of privatisation, monopoly situations can quickly arise.[7] A World Bank report notes that "anticompetitive behaviour may be especially prevalent among newly privatized firms in industries that are traditionally dominated by a single firm."[8] Foreign firms entering the domestic market may engage in any of the above activities, and in addition may have formed export cartels that are permitted under their domestic laws, engage in predatory activities to gain a foothold in the market they are entering into, enter into market allocation arrangements with domestic competitors, etc. All these instances could result in an overall loss to the domestic economy and the benefits of the first stage of liberalisation not ultimately accruing to consumers.

While the appropriate framework for a competition law is a separate debate, the point for the purposes of this paper is that while the creation of an effective competition law is a crucial part of the "second stage" of liberalisation and economic reform, some industry participants may consider an effective competition law as being adverse to their interests. Industry participants, whether domestic or foreign, that have gained a monopoly position and are abusing it, or that are engaging in anti-competitive activities, would find any move to enact and enforce an effective

[6] Ajit Singh, "Competition and Competition Policy in Emerging Markets: International and Development Dimensions", G-24 Discussion Paper Series No. 18, September 2002.

[7] See for instance, The Proceedings of the Pre-UNCTAD X Seminar on the Role of Competition Policy for Development in Globalizing World Markets, Summary of substantive discussions, p. 6: "One participant pointed to the importance for the competition authority to play a role in the privatization process. Referring to the experience of his country, he said that in the absence of such a role, privatization had resulted in the creation of monopolies in several sectors of the economy…. Another participant stressed the importance of keeping markets open and competitive in order to avoid crisis situations. Referring to the experiences of his country, he noted that the behaviour of monopolies had largely contributed to recent crises."

[8] World Bank, "Global Economic Prospects and the Developing Countries", 2003, pp. 99 – 100.

competition law a threat to their position and activities. Indeed, instances of anti-competitive practices in India have been pointed out by a number of authors.[9] The issue then is, what steps must be taken in order to promote the acceptance of competition law and policy in an economy where there may be influential domestic industry groups that are likely to view an effective and well enforced competition law with suspicion and scepticism?

C. Garnering Support for Competition Law

Garnering support from all the stakeholders in the economy is the crucial step in promoting acceptance of competition law, and the step that can ensure that the competition law is well enforced and therefore effective (assuming that the law itself is appropriately framed, a topic that is beyond the scope of this paper). Among the various stakeholders, building consumer support for an effective competition law through increasing consumer awareness and education is certainly key. However, creating the appropriate "competition culture" is not only about creating awareness and educating consumers, but also about increasing support among industry participants. The interests of industry participants are however, segregated, as the industry players that consider competition law to be detrimental to their interests would not be supportive of a competition law, whereas industry players that are adversely affected by anti-competitive practices, would be supportive of a competition law. Increasing awareness as to the existence and operation of the competition law would go a long way in assisting industry participants to identify instances of anti-competitive conduct and launch appropriate complaints. In addition to building awareness, it is important to garner support for the competition law. This support is likely to come more readily from the domestic industry participants that are being adversely

[9] See, for instance, Prabhat Dayal and Manish Agarwal, "State Government Policies and Competition" in Pradeep S. Mehta (Ed.), *Towards a Functional Competition Policy for India* (Jaipur: CUTS International, 2005) (referring to bid-rigging in the construction industry); Pradeep S. Mehta and Nitya Nanda, "Competition Issues in the Indian Cement Industry", in *ibid* (referring to cartelisation in the cement industry).

affected by anti-competitive practices, whereas industry participants that perceive competition laws to harm their position can be expected to disfavour the effective enforcement of the competition law. Therefore, it is necessary to ensure acceptance and support by this later set of industry participants for the competition law since this group is likely to have significant political links and influence. In other words, this group would have significant influence in determining whether a competition law and policy will be implemented, and if so, in what form. Support of this section of the stakeholders is not only important, but indeed crucial.

A variety of strategies need to be adopted to achieve this goal of garnering support from the industry segment that is likely to have the perception that an effective competition law will harm their interests. These strategies should focus on increasing awareness of the benefits of competition law. Some of the benefits that can be highlighted are: (i) an effective competition law can reduce costs for these firms by encouraging competition in the segments they are not directly operating in, but from which they obtain inputs from or provide outputs to; (ii) effective competition laws will assist in making the firms more competitive by encouraging innovation, increased efficiency, etc., which in turn may not only make them more profitable, but also more effective in facing potential foreign competition, and open up the opportunity of exploring foreign markets; (iii) effective competition laws creates the right environment in the country to encourage foreign investment and improve investor perception; (iv) if a "competition culture" has been instilled in the minds of consumers, the perception of consumers of firms that continue to indulge in anti-competition practices will be negative, etc. In addition, creating awareness of the penalties under the competition law, combined with an assertion of the seriousness and commitment of the government and competition authority in enforcing the competition law is essential.

One particular strategy to convey the benefits of an effective competition law to this segment of industry can effectively be imported from that used in the 'first stage' of economic liberalisation – that of gaining acceptance and support for liberalisation policies by promoting awareness and use of trade remedy measures as a 'safety valve' for domestic industries to seek protection from any harmful effects of liberalisation. The application of this strategy, that has arguably been quite effective in the Indian context, to competition law, is explored further in the next section.

III. COMPETITION LAW AS A SAFETY VALVE

A brief explanation of the 'safety valve' argument under trade law is beneficial in order to understand its potential application to competition law.

A. Trade Measures

The government may adopt certain measures, such as imposition of an additional customs tariff, when it finds that increasing imports into the country are causing harm to the domestic industry producing similar goods. The main types of such measures are anti-dumping measures, countervailing measures and safeguard measures. In brief, anti-dumping measures are tariffs that the government of the importing country may impose on imported goods that are found to have been imported at a price below that at which they are sold in the country of export (*i.e.* "dumped"), and which are causing, or threatening to cause, injury to the domestic industry producing similar goods (thus, the measures are "anti-dumping"). Countervailing measures are tariffs that the government of the importing country may impose on imported goods that are found to have benefited from particular kinds of subsidies granted by the exporting country. Safeguard measures are tariffs, or sometimes quotas, that the government of the importing

country may impose when there has been an unexpected surge in imports that is causing, or threatening to cause, injury to the domestic industry producing similar goods.

Since these measures essentially erect additional tariffs and other trade barriers to the free flow of goods across nations, the WTO agreements seek to limit their application.[10] For instance, anti-dumping measures are expressly permitted under the *General Agreement on Tariffs and Trade* (GATT), even though, based on a recognition that there is potential for its misuse, conditions and criteria for their use were developed under the *Agreement on Implementation of Article VI of GATT* (the 'Anti-dumping Agreement'). WTO members are required to modify their domestic legislation providing for anti-dumping measures to conform to the requirements of the GATT and the Anti-dumping Agreement.

Economists have for long pointed out that anti-dumping measures perhaps cause more harm than benefit to the economy as a whole.[11] This is because the barriers to trade that anti-dumping measures create and the protection to domestic industry that these measures offer, create a greater cost than the purported harm that they seek to redress. The argument is that it is only in very limited cases (particularly, predatory pricing[12]) that the economic harm of dumping

[10] See the WTO *General Agreement on Tariffs and Trade*, the *Agreement on the Implementation of Article VI of the GATT*, and the WTO *Agreement on Subsidies and Countervailing Measures*.

[11] See, for instance, Michael J. Finger (ed.), *Anti-dumping: How It Works and Who Gets Hurt* (Ann Arbor, MI: University of Michigan Press, 1993); Rainer M. Bierwagen, "GATT Article VI and the Protectionist Bias in Anti-Dumping Laws"', in Norbert Horn, Clive M. Schmitthoff and Richard M. Buxbaum (eds), *Studies in International Economic Law* (Boston: Kluwer Law and Taxation Publishers, 1990); Richard Boltuck and Robert E. Litan (eds), *Down in the Dumps: Administration of the Unfair Trade Laws* (Washington, D.C.: Brookings Institution, 1991); P.K.M. Tharakan (ed.), *Policy Implications of Anti-dumping Measures* (Amsterdam: Elsevier Science, 1991); Brian Hindley and Patrick Messerlin, *Anti-dumping Industrial Policy* (Washington, D.C.: American Enterprise Institute, 1996); Michael Hart (ed.), *Finding Middle Ground: Reforming the Anti-dumping Laws* (Ottawa: Centre for Trade Policy and Law, 1997); Robert Z. Lawrence (ed.), *Brookings Trade Forum* (Washington, D.C.: Brookings Institution Press, 1998); Richard Dale, *Anti-dumping Law in a Liberal Trade Order* (London: Macmillan, 1980).

[12] Leycegui, Beatriz and Gustavo Vega-Cánovas, "Eliminating "Unfairness" within the North American Region: A Look at Anti-dumping", *Finding Middle Ground: Reforming the Anti-dumping Laws in North America*, Michael Hart (Ed.), Centre for Trade Policy and Law, Ottawa, 1997; Trebilcock and Boddez, "The Case for Liberalizing North American Trade Remedy Laws," *Finding Middle Ground: Reforming the Anti-dumping Laws in North America,* Michael Hart (Ed.), Centre for Trade Policy and Law, Ottawa, 1997.

is evident, and needs to be countered. In all other situations, dumping is not truly harmful to the importing country or economic welfare as a whole, even if it may cause harm to the domestic industry itself. The benefits that arise from the lower costs of dumped goods, particularly to the consumers of the importing country, offset any harm to the domestic producers.

It is at this stage that the interaction between anti-dumping law and competition law comes to the fore – in the domestic sphere it is competition law that addresses situations of predatory pricing. The argument then is that, if anti-dumping law is justifiable only in cases of predatory pricing, and only causes greater overall harm than benefit in all other cases, why should competition law, which, among other things, addresses predatory pricing, not replace anti-dumping law? Indeed, much has been written on the benefits of competition law over anti-dumping law.[13] However, for starters, there is no global competition law that can immediately and completely replace anti-dumping law.[14] Also, not all countries have effective domestic competition legislation, and even where they do, anti-competitive practices, such as predatory pricing, that arise outside the boundaries of the country may not fall within the purview of the domestic competition legislation.

In any case, there is little indication that WTO members are willing to give up the existing anti-dumping regime.[15] The reason for anti-dumping law to continue to remain popular

[13] For instance, see Ian Wooton and Maurizio Zanardi, "Trade and Competition Policy: Anti-Dumping versus Anti-Trust", Department of Economics, University of Glasgow, June 2002; Niels, Gunnar and Adriaan ten Kate, "Trusting Antristu to Dump Antidumping, Abolishing Antidumping in Free Trade Agreements Without Replacing it with Competition Law", 31(6) *Journal of World Trade*, 1997, 29-43.

[14] Though competition law was one of the "Singapore Round issues" for further negotiation among WTO members, there is little consensus on whether competition law is an appropriate subject for a WTO agreement.

[15] In the Ministerial Declaration adopted at Doha, the Member countries agree to negotiations aimed at "clarifying and improving disciplines" under the Antidumping Agreement. To ensure that this did not lead to a more fundamental questioning of the utility of antidumping measures, and to appease domestic warnings against any renegotiation on antidumping, the US ensured that the Declaration also stated that such negotiation would preserve the "basic concepts, principles and effectiveness" of Art. VI and the Agreement.

among users as well as among WTO members generally then, is not economic welfare, but something else. It is here that the 'safety valve' argument explained below demonstrates its effectiveness.

B. The Safety Valve Justification

The 'safety valve' argument runs thus – anti-dumping measures promise a certain degree of protection to domestic players and thereby convinces them to accept greater, more wide-ranging, and beneficial trade liberalisation.[16] The existence of trade measures, and anti-dumping in particular, is used by governments to convince domestic industry participants that there are sufficient safeguards for the domestic industry to invoke even if increased free trade causes any harm to them. Thus, not only are those involved in domestic manufacturing industries placated, but also, domestic consumers, who are unmindful of the lost opportunity to have cheaper goods available and probably propelled by notions of national pride and protection. This usage of anti-dumping as a bargaining tool to build support for free trade is referred to as the 'political safety valve' function of anti-dumping. Anti-dumping laws are seen as an assurance that the increased free trade will be fair and that temporary relief would be provided to domestic players who are adversely affected. In other words, anti-dumping measures function as an effective political tool for building support for global trade.[17] The continued popularity of anti-dumping measures and the reluctance to revisit its necessity even while economists regularly point out its lack of economic basis, and indeed its economic harm, is an indication of the efficacy of the 'safety valve' argument.

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[16] Mastel, Greg, "The U.S. Steel Industry and Anti-dumping Law", *Challenge*, 1999, http://www.econstrat.org/challenge.htm, visited 21 November 2001.

[17] Boltuck, Richard and Robert E. Litan, "America's 'Unfair' Trade Laws", Boltuck, Richard and Robert E. Litan (Eds.), *Down in the Dumps: Administration of the Unfair Trade Laws*, The Brookings Institution, Washington D.C., 1991, p. 13. *See also* Dale, *Supra*, n. 30 at 34.

In the Indian context also, the 'safety valve' argument under trade law appears to have played out as expected. During the implementation of the "first stage" of liberalisation and economic reforms, the Indian government made much of the existence of trade-remedy measures that domestic industry participants could use in case they suffered any harm from increased imports.[18] Arguably, these efforts by the government had the effect of pacifying the Indian domestic industry of the existence of sufficient tools to address the negative effects of any significant increase in imports that may cause harm to the domestic industry. This in turn minimised opposition from the domestic industry to increased liberalisation and economic reform, thereby permitting the government to fulfill its objective of the "first stage" of liberalisation.

Another testimony to the validity of the 'safety valve' argument is that the use of antidumping measures by the Indian industry has increased manifold since the commencement of the 'first stage' of economic reforms and liberalisation. Indeed, since 1995, cumulatively, India has launched the largest number of anti-dumping investigations in the world.[19]

The rise in the use of anti-dumping measures by domestic Indian industry, particularly after 1991 when the "first stage" of economic reform and liberalisation was launched, and the efforts of government officials to make domestic industry aware of the existence of the anti-dumping measures mechanism, and most significantly the continuation of the liberalisation

[18] For instance, see Commerce Ministry, India Dismantles QRs, WTO Newsletter, at <http://commin.nic.in/doc/wtoapr01.htm> (visited 14 December 2004); See also Hindu Business Line "Seminar on anti-dumping measures", Dec 03, 2003 (stating that a seminar to "highlight the remedial measures available in the wake of alleged dumping and of injury caused by unfair trade practices" was being organised in association with the Ministry of Commerce and Industry).

[19] *Ibid.* For a detailed discussion of the use of anti-dumping measures by India see Prakash Narayanan, "Anti-dumping in India – Present State and Future Prospects", *Journal of World Trade* 40(6):1081-1097, 2006 (forthcoming).

policies, all indicate the success of the 'safety valve' argument in alleging the concerns of the domestic industry.

C. Need for a 'Safety Valve' in the Competition Context

Even if the 'safety valve' argument works well to explain how anti-dumping law can be used as a safety valve to ensure the success of liberalisation policies, the question is whether such an argument can assist in the successful enactment and enforcement of competition law? After all, as noted above, competition law is often noted as resulting in a number of benefits to consumer and producers, and therefore the society and economy as a whole.[20] In other words, there is a fundamental difference between competition law and anti-dumping law – the former should need no further justification other than that it is recognised to be beneficial to consumers, industry and economic welfare as a whole; the later is recognised to be economically harmful, and therefore its existence needs to be explained through other rationale. While the 'safety valve' rationale of anti-dumping promoted the acceptance of the 'first stage' of liberalisation, would a similar 'safety valve' rationale promote the acceptance of competition law as part of the second stage of liberalisation?

The need for a 'safety valve' justification for competition law arises because its benefits are not perceived to be the same by everyone. Indeed, for those who are benefiting from indulging in anti-competitive activities, an effective competition law that is properly enforced would be detrimental as it would stop them from benefiting any further from such activities. Those indulging in anti-competitive activities are often likely to be entities holding dominant

[20] The generally accepted benefits of competition law are mentioned as being lower prices to consumers, greater choice, and incentive innovate. In economic terms competition law is explained as having increasing allocative efficiency, productive efficiency and dynamic efficiency . See, for instance, Richard Whish, *Competition Law*, LexisNexis Butterworths, 5th edition, pp. 1- 20. An elaborate discussion of the benefits of a competition law and policy is beyond the scope of this paper.

positions in the market (by definition, abuse of dominant position can only be engaged in by 'dominant' persons; and mergers of small entities with small market shares are generally not subject to review by competition authorities since such entities presumably will have little effect on consumers or on the economy as a whole). Such large entities, are also likely to be well connected politically and able to spend resources in order to influence policy including the extent of enforcement of legislation.

As noted earlier in this paper, consumers are a disparate group who are rarely able to directly influence policy making, though they do wield influence in a democracy. Domestic industry participants, on the other hand, are a more organised group with specific interests, and can significantly influence policy making on a regular basis. Of course, as noted above, not all members of the domestic industry share the same interests or opinions. The 'safety valve' explanation for anti-dumping law works well because it provides domestic governments an instrument to convince the different groups of an important constituency that wields significant influence, i.e. the domestic industry, to support free-trade policies. The same rationale can therefore be extended for the proposition that a 'safety valve' rationale will assist gathering support from domestic industry for and effective and well-enforced competition law.

D. Competition Law Promotes a 'Level Playing Field'

Adopting the "success" of the 'safety valve' rationale for anti-dumping in the context of promoting the first stage of liberalisation, the adoption and acceptance of a competition law can be promoted by publicizing competition law as a tool for creating a 'level playing field'. In other words, in much the same way as increased free trade was made acceptable by emphasising the 'safety valve' aspect of anti-dumping laws, competition laws can be made acceptable by

emphasising its function in 'levelling the playing field' for all groups of domestic industry participants.

As noted earlier in this paper, the domestic industry participants can be broadly divided into two groups – one that is affected by anti-competitive conduct (usually small and medium-size businesses) and are therefore (once awareness is built) likely to be supportive of a robust and well-enforced competition law, and another that may be involved in anti-competitive conduct and may be in a position of influence regarding how the competition law is to be enforced and how effective it will be. Also as noted earlier, convincing this later group of the need for an effective competition law and ensuring their support is crucial to the success of the competition law. A simple way of doing this is to promote the idea that competition law "levels the playing field" between domestic and foreign players.

Domestic industry participants are often heard to complain that foreign firms have greater resources and are able to better compete in the domestic market as compared to the domestic industry, and that the domestic industry therefore needs a "level playing field". Indeed, anti-dumping duties and other trade measures are a response to this. Effective enforcement of competition law, particularly in relation to foreign firms, is one way by which the competition authority can advertise competition law are promoting this goal of "levelling the playing field" between domestic industry and foreign firms. One note of caution to be added is that this strategy does not mean that foreign firms should be targeted in the competition authority's enforcement pattern, but rather that, competition authorities should be particularly vigilant regarding anti-competitive behaviour by foreign firms, and expend adequate resources to investigate such anti-competitive behaviour. Indeed, it may often be easier to launch successful investigations and proceedings against foreign firms especially when they have been convicted for the same anti-

competitive conduct in other jurisdictions. Monitoring the developments in foreign jurisdictions in relation to multi-national firms can lead to the competition authority being able to relatively easily, and with lower costs of investigation etc., take effective action against anti-competitive conduct by foreign firms. Such enforcement action across a number of jurisdictions against multi-national firms is being seen with increasing frequency. Investigations against Microsoft, Intel and credit-card payment systems in Europe, North America and Asia in addition to global cartels such as the vitamins cartel, and the graphite electrodes cartel are instances of this trend. Nonetheless, foreign firms should not feel specially targeted by the competition authority, as such targeting would lead to a negative impression in the minds of foreign investors and firms.

In essence, while the competition authority should take prompt action and appropriate investigative and enforcement action when any anti-competitive action is alleged, whether against a domestic entity or a foreign entity, in cases where a foreign entity is involved, it should use the fact of the investigation and other proceedings in its advocacy efforts to point out that competition law in fact applies with equal rigour to all participants in the market, and can act as a tool to "level the playing field".

There are other aspects of the Indian Competition Act that can be pointed to by the Competition Commission of India to advocate the "levelling the playing field" feature of an effective and well enforced competition law. The relatively high monetary thresholds for merger review mean that few mergers where only domestic participants are involved will fall under the purview of merger review. On the other hand, foreign firms, particularly multi-nationals, are more likely to fall within the monetary thresholds. Indeed, it is clear that the objective behind keeping a high monetary threshold for mergers to fall within the purview of the merger review provisions was so permit domestic mergers and acquisitions to proceed without having to be

examined by the competition authority.[21] In fact, officials of the Competition Commission of India appear to be repeating this message of the 'liberal regime' under the Competition Act in their speeches to industry.[22] This message can be reframed as one that points to an effective competition legislation as a tool that creates a "level the playing field" for domestic industry participants, and thereby gain their support for the legislation.

In other words, as part of the advocacy efforts in relation to competition law, not only must the benefits of a competition law to consumers, the economy and to society as a whole be mentioned, but also, in particular, the various instances of anti-competitive behaviour by foreign companies and the way in which these have been dealt with by the competition authority must be highlighted. This can be explained as the function of competition law creating a 'level playing field' for domestic industry. Thus, just as U.S. antitrust law has been explained by one author as a "bargain between consumer and producer interests" so that it acts as an intermediate between pro-producer policies that tolerate the exercise of market power and pro-consumer policies that redistribute wealth from producers to consumers,[23] the Indian Competition Act can be promoted as an instrument to level the playing field between foreign participants and domestic Indian manufacturers. The effect of this would hopefully be to bring home the benefits of competition law particularly to that group of domestic industry participants that believes that an effective and well enforced competition law would be to their detriment.

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[21] See CUTS, "Why India Adopted a New Competition Law", p. 24 stating: "The trigger cause in the aforesaid suggestions [relating to high monetary thresholds] was the felt need for companies in India to grow in size in order to become globally competitive." Similarly, the Federation of Indian Chambers of Commerce and Industry (FICCI) reportedly took the position that: "Mergers and acquisitions are the legitimate means by which a company can grow and any intervention by the commission in such activities is bound to create a complete bottleneck for growth and consolidation of Indian enterprises": see Hindu Businessline, "FICCI seeks phased approach to competition bill" , June 25, 2001.

[22] See, for instance, Presentation to CII Regional Councils by Vinod Dhall, "Overview of Competition Law and Policy, March, 2006; Presentation in INSOL India's National Conference on Legal Reforms in India by Vinod Dhall, 14 August, 2005. These presentations are available on the Competition Commission of India website.

[23] Jonathan B. Baker, "Competition Policy as a Political Bargain", *Antitrust Law Journal* 73(2), 2006, p. 483 – 530.

Adopting the approach indicated above in the advocacy efforts of the competition authority, it is submitted, will have greater benefits than harms. The benefit is, as mentioned earlier, gaining the political support of the influential group of domestic industry participants that may be indulging in anti-competitive conduct, particularly after the first stage of liberalisation. At the same time there could be some downsides of adopting such an advocacy approach that focuses on the 'level playing field' aspect of competition law to portray it as a 'safety valve' for domestic industry. For instance, foreign firms may see this as a move to target them in particular, rather than applying competition law equally to all players – creating an impression of protectionism or bias. To address any such concerns, the competition authority must ensure that it does not exclusively focus on foreign firms in its enforcement efforts; rather, the competition authority should attempt to act on all cases that come before it, while highlighting its successes in relation to anti-competitive actions by foreign firms.

Another concern that may arise is whether promoting competition law as a tool to 'level the playing field' for one group of domestic industry participants will make all other groups of domestic industry participants feel that they have little to gain from an effective competition law that is well-enforced. Indeed, all these other domestic industry participants may also have a reasonable degree of influence with the policy makers since these mostly small-and-medium sized enterprises employ the bulk of the industrial work force. To this concern, the response would be that this approach of focussing on the 'level playing field' aspect between domestic industry and foreign firms, should slowly but surely shift to a focus of 'levelling the playing field' among domestic industry participants. Once the 'competition culture' increasingly begins to seep into the minds of the domestic players as well as the consumers, the competition authority can shift its focus on to the anti-competitive conduct of domestic industry participants

and address their advocacy efforts towards increasing the awareness of competition law and policy among small and medium size businesses as well as individual consumers. In other words, the approach discussed above of using the slogan of competition law to bring a 'level playing field' would act in two stages – the first focussing on garnering the support of the larger domestic players who are likely to have significant political influence, by focussing on 'levelling the playing field' between domestic players and foreign firms, and once support is generally seen to have been obtained, the second stage focussing on increasing the awareness and garnering the support of smaller and medium size businesses to 'level the playing field' among domestic industry players.

Yet another concern with adopting an approach that highlights the 'level playing field' aspect of competition law could be whether the core role of competition law of promoting competition will itself be hindered if firms start using competition law as tool of protectionism, just as antidumping is complained of having become a protectionist tool for domestic industry to use against foreign importers. The simple response to such concerns is that the above approach merely suggests a particular advocacy tactic, and not any watering down or selective administration of the competition law itself. Unlike antidumping rules, which provide an exception to application of free-trade rules, the suggested approach advocates no exceptions for the domestic industry or any other player – rather, it merely suggests a particular advocacy option that it is hoped will build greater support for the effective enforcement of competition law.

E. Experiences Abroad

That competition law aims to create a 'level playing field' between competitors is no surprise – the U.S. Department of Justice on its website uses that very phrase in providing an

overview of its missions and goals.[24] Indeed, the focus of European competition law has been described as "the creation of a 'level playing field' between actual and potential competitors (and... across different states)"[25] A recent example where the European Commission used this very phrase was in the case against Microsoft alleging abuse of dominant position and other anti-competitive activities. The European Commission ordered Microsoft "to disclose complete and accurate specification for protocols' necessary for its competitors' server products to be able to 'talk' to an equal footing Windows PCs, and hence compete on a level playing field."[26]

However, emphasising the 'level playing field' aspect of competition law is even more relevant in countries that have recently opened their economies to greater foreign and domestic competition. This is because, industries in sectors that are being opened to greater competition often feel the need to seek for protection, which will purportedly permit them to adjust to the rigours of competition. Governments are inclined to lend a sympathetic ear to such claims since these industries often employ a large number of persons (voters) and are owned or managed by individuals who are politically influential. The 'safety valve' argument under trade remedy law addresses this demand by offering domestic industry some protection in the form of the ability to bring a claim for trade remedy measures which will then 'level the playing field'. In the context of competition law, the existence of a competition legislation can be advertised as a 'safety valve' for domestic industries which, when effectively enforced, will ensure that a 'level playing field' exists.

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[24] "Competition in a free market benefits American consumers through lower prices, better quality and greater choice. Competition provides businesses the opportunity to compete on price and quality, in an open market and on a level playing field, unhampered by anticompetitive restraints. Competition also tests and hardens American companies at home, the better to succeed abroad." See: http://www.usdoj.gov/atr/overview.html.

[25] Tony A. Freyer, "Comparative Antitrust Enforcement and Business History", Presented at FTC Section 2 Hearings, available at; http://www.ftc.gov/os/sectiontwohearings/docs/ComparativeBusinessHistory-Freyer.pdf.

[26] *Id*.

As one author has pointed out in relation to the growth of competition law in developing countries, "[A]s governments increasingly become cognizant of the fact that international markets are characterised by imperfect competition rather than the ideal institution of internal economic laws, the role of competition law and policy becomes fundamental in ensuring a level playing field."[27] The Asian Development Bank in its Asia Development Outlook 2005 concludes after an analysis of the competition laws and policies in six development Asian economies that the existence of a competition law is fundamental to the perception of a level playing field between foreign and domestic competitors.[28]

These experiences can be used by the proponents of competition law to build support for a robust competition law as a tool that creates a 'level playing field' between foreign competitors and domestic industries and amongst domestic competitors, and also provides a "safety valve" to domestic industries.

IV. CONCLUSION

It is beyond doubt that the support of all the participants of the economy is crucial to the success of any attempt to adopt an effective competition law and to create a "competition culture". Achieving consumer, *i.e.* voter, support is a significant part of this exercise and involves the creation of public opinion through education and awareness building exercises.[29] Garnering the support of the domestic industry is an equally important part task, if not even more important, given that some sections of domestic industry may have close links with law-makers

[27] Lucian Cernat, "The Role of Competition in the Promotion of Competition and Development: Experiences from a Sample of Developing and Least Development Countries", 3rd International CRC Conference Pro-poor Regulation and Competition: Issues & Policies, South Africa, Sept., 2004.

[28] Asian Development Bank, "Asia Development Outlook 2005: Promoting Competition for Long-Term Development", p. 75.

[29] See Michal S. Gal, "The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries" in Competition, Competitiveness and Development (UNCTAD, June 2004), pp. 20-38.

and a significant influence in the nature and form that any competition law may take, including whether one is even adopted, and the extent to which it is enforced. Given these high stakes, a number of strategies should be adopted to gain the support of domestic for adopting and enforcing an effective competition law. Promoting education and awareness of the benefits of competition law is certainly a part of this, but in addition, it would be useful to promote competition law as a tool which can ensure a level playing field between foreign competitors and domestic firms, and among domestic firms themselves.

The approach of promoting the existence anti-dumping measures as a tool available to the domestic industry to protect itself from any significant harm that may arise due to the economic reform process, and thus reducing opposition to carrying on increased economic reforms appears to have been effective in the Indian context – successive governments have steadily carried on the liberalisation and economic reform process commenced in 1991, even as the use of anti-dumping measures by domestic Indian industry has increased steadily since then. This approach validates the "safety valve" explanation for the popularity of anti-dumping measures.

This paper argues that a similar approach can be adopted in the competition law context – by advocating competition law as a tool to be used to 'level the playing field', at the first stage between domestic firms and foreign competitors, and at a later stage among domestic participants. Such an approach that focuses on the role of competition law in 'levelling the playing field', will, it is submitted, assist in garnering the support of domestic industry for the adoption and enforcement of an effective competition law. Of course, the object should remain the creation and maintenance of a competitive economy through an effective competition law, and not the promotion of domestic protectionism.