PRELIMINARY INFORMATION REPORT

Submitted by CUTS to CCI

1. The aim of this PIR is to provide relevant and basic information regarding the domestic impact of the global potash cartel in order to highlight the need for the Competition Commission of India (CCI) to *suo motu* undertake a detailed investigation into their activities under Sec 32 of the Competition Act, 2002 (the effects doctrine) that empowers it to inquire into an agreement which is entered between foreign entities outside India but having an impact in the Indian market.

2. The OECD defines export cartels as an agreement or arrangement between firms to charge a specified export price and/or to divide export markets. Approximately 51 countries, including India, allow for export cartels either explicitly or implicitly in their antitrust regimes; this is approximately half of all countries with antitrust regimes. Seventeen countries, including the United States, maintain explicit exemptions under the Webb Pomerene Act, 1918 and the remaining countries have exempted export cartels from their domestic antitrust regimes.

3. Section 3(b)(i) of the 1998 South African Competition Act lists "maintenance or promotion of exports" as one of the possible grounds for granting an exemption for a restrictive agreement or practice. Section 3 (5) (ii) of India's 2002 Competition Act is a more far-reaching 'carve-out': "Nothing in this section [on anti- competitive agreements] shall restrict … the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export." In China, Section 15(6) of the Anti-Monopoly Act provides that agreements that "secure legitimate interest in foreign trade and economic cooperation" may be exempted. The availability of exemption does not require proof that such arrangements will not substantially restrict competition and that consumers will be able to share in the benefits of the agreements.

4. As Frederic Jenny and Eleanor Fox, distinguished competition-law scholars in Europe and the United States respectively, have noted, these export-cartel exemptions are flagrant manifestations of a "beggar thy neighbour" approach to competition law and are the "soft underbelly" of domestic competition laws that contain such exemptions.

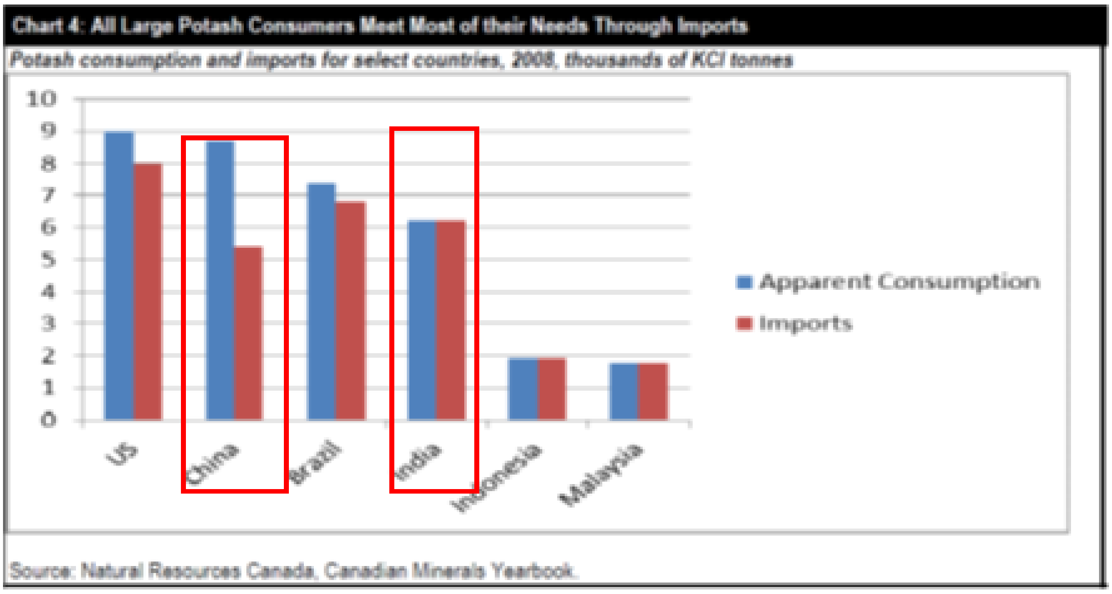
5. Potash is a mined mineral needed to produce one of the three key fertilisers, potassium, required for agricultural production. Canada owns 52% of the world known reserves of potash while Russia and Belarus own 30%. The three largest producers of Potash in Canada, Potash Corp., Mosaic and Agrium with a total share of 35% of the world market participate in a cartel, called Canpotex which is a 41 year old cartel. The producers from Russia and

Belarus have created their own cartel which coordinates with Canpotex. Together the two cartels control about 70% of the world exports of potash. In 2010 the Canadian government blocked an attempted takeover of Potash Corp. by BHP Billiton’s fearing the breakup of the Canpotex export cartel, given that BHP refused to participate in the cartel, on grounds that it would not provide a “net benefit” to Canada.

6. Amongst countries that import potash, India and China are the most import reliant to meet their potash needs with India being completely dependent on imports of potash and China being the world’s largest importer of potash. A study by Jenny has highlighted the overcharge paid by India due to anti-competitive practices in the global potash market. Under a competitive scenario, the price of potash would decline from $574 per tonne in 2011 to $217 by 2015, and subsequently increase to $488 by 2020. However, in the continuing presence of fertiliser cartels, the price of potash would steadily increase from $574 per tonne in 2011 to $734 in 2020. And assuming India imports an average of 6 million tonnes of potash per year during 2011-20, the significant overcharge it would end up paying on these imports would be financed to a large extent (50-100%) from a $1.5-billion (68,400 crore) annual subsidy granted by the government to the department of fertilisers **(enclosed vide annexure)**. Further, Indian negotiators have been requesting a 10% discount on spot prices, which are presently in the vicinity of US$ 500 per tonne, and have claimed in the past that they cannot make a deal between $445 and $450 per tonne they will investigate other options. However, Bill Doyle, CEO of Potash Corp. has reportedly said he doubted that there would be a long term boycott from India.[1]

[1] “Indian Negotiators and Potash Producers Continue to Lock Horns”, Potash Blog, May 27, 2011

Potash consumption and production in different countries



7. In a ruling dated June 27, 2012, U.S. Court of Appeals for the Seventh Circuit in Chicago revived a case file against the potash cartel which comprises a total of seven companies by local potash buyers. One of the lawyers arguing for the plaintiffs reportedly said, “Basically, to the extent that a cartel operates outside the United States but the effect is felt in the United States, especially in a commodity product like potash, companies are going to have to live by the U.S. antitrust laws”.

8. A similar step should be initiated by the competition watchdog, the enforcement agency for the competition legislation in India under its extraterritorial reach. According to this, a country can claim jurisdiction over any anticompetitive activity that affects their domestic markets, irrespective of the location or nationality of the participant(s) involved.

9. The “effects doctrine” is based on principle that any jurisdiction where the effects of any acts are felt should have concurrent jurisdiction over that conduct. In the Alcoa case in 1945 Judge Hand laid down what is known as the effects doctrine. Judge Hand said that the Sherman Act applied to agreements concluded outside the USA which were intended to affect US imports and did actually affect them and may be asserted over export trade and purely extraterritorial foreign trade activity as long as the defendant’s conduct had direct, substantial and reasonably foreseeable effect on either

(1) United State domestic trade

(2) United States import trade, or

(3) export trade of a person engaged in U.S. export trade[2]

10. Following liberalisation, cross-border economic activity has grown enormously making the domestic economies vulnerable at the same time to cross-border negative externalities. CCI's jurisdiction extends to anti-competitive practices and combinations taking place outside India but having effect in Indian markets under Section 32 of the Competition Act of 2002. Given the costs that India and other countries have been paying for the import of potash, it is time to investigate further and take action against this global cartel under the enabling provisions of the domestic competition law.

[2] Alison Jones & Brenda Sufrin, "EC Competition Law - Text, Cases & Materials" – Third Edition, Oxford

Annexure

Global potash trade & competition

The Economic Times

FREDERIC JENNY, Nov 25, 2010,

On November 3, the Canadian government blocked the takeover bid of Potash.Corp, the largest producer of potash in the world, by BHP Billiton arguing that the deal would not benefit the country. One of the underlying reasons for the Canadian government position was the fear that the Canadian potash cartel would crumble and that the price of potash would decrease together with the revenues of the Canadian government.

A report from the Conference Board, an independent research organisation, commissioned by the government of Saskatchewan on the risks and opportunities of the hostile takeover contains a number of projections about the future of the potash market which are of great interest to India that does not have potash deposits and imported over five million tonnes in 2009 at a cost of US$2.5 billion.

Canada owns 52% of the world-known reserves of potash, while Russia and Belarus own 30%. The three largest producers of potash in Canada, Potash Corp, Mosaic and Agrium with a total share of 35% of the world market participate in a cartel, called Canpotex, which manages their worldwide sales (with the exception of their exports to the United States for fear of US antitrust laws).

The cartelists coordinate their production to maintain a high level of price. The producers from Russia and Belarus have created their own cartel which coordinates with Canpotex. Together, the two cartels control about 70% of the world exports of potash.

India's demand for fertilisers and, in particular for potash, is fast increasing because of its goal of achieving self-sufficiency in food, while its population is rapidly increasing and the scope of increasing its land area under cultivation is limited. India must increase its foodgrain production by about 45% by 2025 which requires a significant increase of agricultural productivity and a more intensive use of fertilisers.

Whereas the price of potash hovered between $100 and $150 per tonne from the beginning of the eighties to 2005, it reached $200 by the beginning of 2008, and $825 on average in 2009 due to the increase in demand from India and China and the output restriction by the Canadian potash cartel. A reduction in the consumption of potash in 2010 brought about a reduction in price which is expected to remain at $532 in 2010.

When announcing its hostile takeover bid for Potash Corp, BHP Billiton announced that if successful, it would leave the Canadian cartel and pursue a competitive strategy of high production. The Conference Board report doubts that BHP Billiton would have followed such a strategy but compares the expected prices of potash on the world market for the next decade under two scenarios: a competitive strategy and the continuation of the Canadian cartel strategy.

The results are frightening. Under a competitive scenario, the price of potash would decline from $574 in 2011 to $217 by 2015 and would subsequently increase to $488 by 2020. With an unchanged Canadian cartel policy, the price of potash will steadily increase from $574 in 2011 to $734 in 2020. On average under the current cartel scenario the price of potash would be doubled or $321 more expensive per tonne than under the competitive scenario from 2011 to 2020

If we assume that India needs an average of six million tonnes of potash per year between 2011 and 2020, the overcharge it will pay each year will be at a minimum $750 million if it succeeds in getting a 30% discount (as it has recently), and could reach $1.9 billion toward 2020 when the pressure of demand will be greatest.

Thus, if the Indian government keeps on paying an annual subsidy of $1.5 billion to make potash fertilisers more affordable for Indian farmers, from 50% to 100% of this subsidy will in fact finance the monopolistic rent that potash producers will enjoy on their sales to India, thanks to the restrictive practices of Canpotex.

In many countries, as in Canada, price fixing and supply restrictions are criminal offences but export cartels are exempted from competition law and they can impose huge costs on developing countries. In an era of globalisation of markets and of increasing reliance on market mechanisms to promote economic development this kind of 'beggar thy neighbour' approach to competition is economically unsound, morally wrong and politically less and less tolerable.

It is time to rethink the relationship between international trade and competition.

(The author is professor of economics ESSEC Business School, France, and former chair of the WTO Working Group on Trade and Competition.)