# Price instability and competition law: the case of the potash cartel

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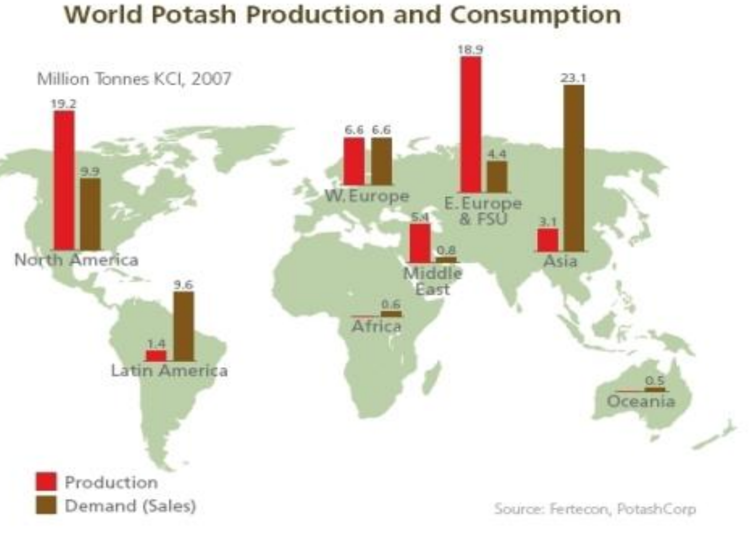
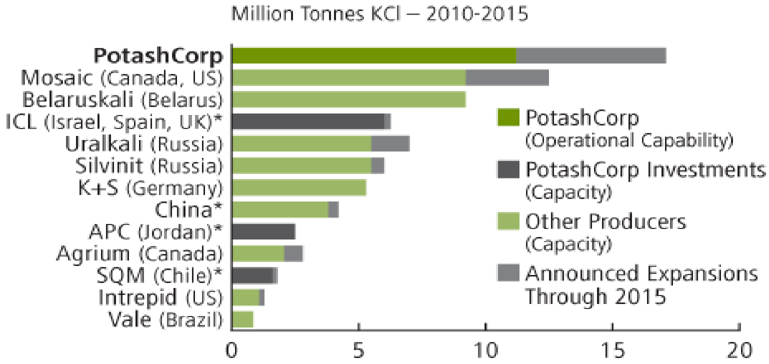
1) This presentation is based on F. Jenny « Export Cartels in Primary Products: the Potash Case in Perspective » in « Trade, Competition and the Pricing Commodities », F. Jenny and S. Evenett eds, CEPR , February 2012, available to download through the VoxEU.org website at http://www.voxeu.org/index.php?q=node/7626.



## World Potash Producer Profile

PotashCorp growth potential is unmatched

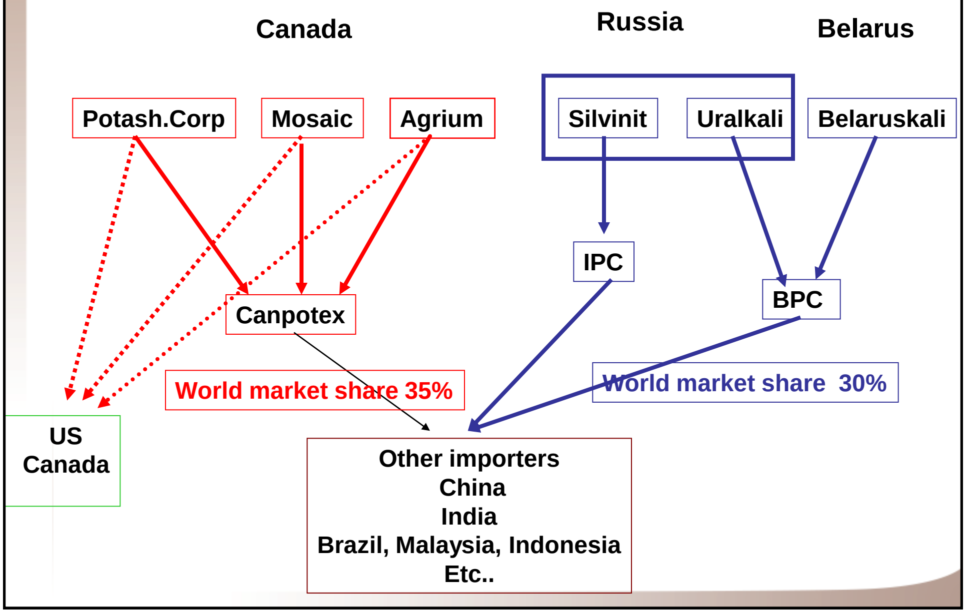



* PotashCorp investments: ICL (14%), APC (28%), SQM (32%) and Sinofert (22%)

Note: PotashCorp based on operational capability while competitor capacity is stated nameplate, which may exceed operational capability.

Source: Fertecon, CRU, IFA, PotashCorp

## The potash trade



## Canpotex

*"(PCS) uses its jointly owned subsidiary, Canpotex, to coordinate sales with Mosaic Co. and Agrium Inc. into export markets outside of North America and counts on market discipline among the three producers in determining volumes for North America (….)" (1).*

**1) Saskatchewan in the Spotlight: Acquisition of Potash Corporation of Saskatchewan Inc.—Risks and Opportunities, The Conference Board of Canada, October 1 2010, p15**

## East West Collusion

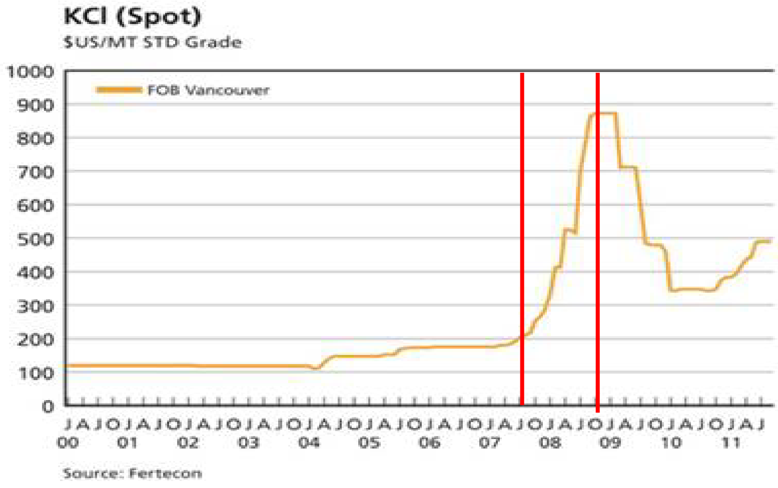
**Less than 10 years ago, the Russian producers started to push up against capacity and realized it was in their interest to behave like oligopolists (1).**

***"Our strategy is that price is much more important than volumes," Chief Financial Officer of OAO Uralkali, Russia's biggest fertilizer maker, Victor Belyakov said in an interview yesterday in London. "It's a strategy for most of the big players in the market. We usually cut some production to come up with a fair price."***

***"Uralkali is following Potash Corp.'s strategy, and historically, Russian producers didn't always do that," he said. "If Russia and Canada have the same strategy, this is a much better business than it used to be.(2)"***

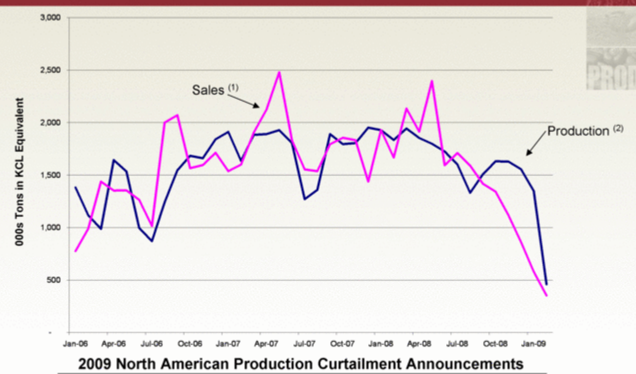
**1) Saskatchewan in the Spotlight: Acquisition of Potash Corporation of Saskatchewan Inc. —Risks and Opportunities, The Conference Board of Canada, October 1 2010**
**2) Bloomberg Business Week, Jan. 25 2012**

# World prices




In a period of 18 months ( January 2008 to october 2009) the price of potash increased by more than 400%.
The price of potash which historically had been for decades less than US$ 200 per ton i multiplied by 250% between January 2008 and 2011

## Production Curtailed to Match Demand




2009 North American Production Curtailment Announcements

Global potash consumption dropped by about 9% in 2009 following a 16% decline in 2008. Global potash production plunged by 39%, shipments declined by 43% and the global trade volume dropped by 51% in 2009. Global potash production and trade volumes were at their lowest levels of the past 30 years.
Between 2008 and 2009 Canada's potash production declined by 56.3%. Potash.corp's production declined by 56%, Agrium's production decliend by 50%

# Cutting production to keep prices high

BusinessWeek

Bloomberg Businessweek

Wednesday January 25, 2012

"Suppliers are seeking to prevent a drop in prices this year, concerned that demand has been "slow,"

Potash Corp., which announced temporary cuts at two mines in Canada last month, has since unveiled a four-week halt at its Allan mine and an extension of the shutdown at its Rocanville operation. Combined, Potash Corp.'s cuts total about 1 million tons, Credit Agricole's Connelly said.

Mosaic, North America's second-largest potash producer, said on Jan. 5 that it is cutting production by 250,000 tonnes over the first three months of this year, trying to pressure prices higher along the Mississippi River supply route.

OAO Uralkali, is ready to cut production (by 10%) to prevent potash prices from falling after Potash Corp. of Saskatchewan Inc. announced reductions this year.

The Conference Board of Canada
Insights You Can Count On

FINAL REPORT

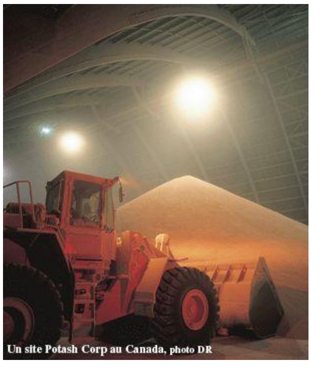
*Saskatchewan in the Spotlight:*
*Acquisition of Potash Corporation of Saskatchewan Inc.—*
*Risks and Opportunities*

**Presented to:**
Government of Saskatchewan

**Prepared by:**
The Conference Board of Canada

October 1, 2010

# BHP attempts to take over Potash.Corp



Un site Potash Corp au Canada, photo DR

## The Conference Board report

**Scenario 1 : Base case**

**The base case forecast considers what would occur if a potential acquisition of PCS fails, or if an acquirer were to behave in a manner similar to that of the existing management at PCS.**

**The key assumption in this scenario is that the market discipline that potash producers have displayed in recent years will continue (….)**

**Scenario 2: Full production scenario**

**The key assumption in this scenario is that once a major producer like PCS breaks ranks with the other producers and maximizes production, all other market participants will follow suit.**

## Expected prices of potash

| Price | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 |
|---|---|---|---|---|---|---|---|---|---|---|
| Competitive scenario | 574 | 356 | 245 | 226 | 217 | | | | | 488 |
| Canadian cartel Scenario | 574 | 591 | 601 | 611 | 611 | | | | | 734 |

# Predicted potash prices


# Cost for India and China

if we assume that India will need an average of 6.5 million tons of potash per year between 2011 and 2020, the overcharge it will pay each year will be on average CAD$ 1.183 billion (US $ 1.171 billion), if it also succeeds in getting an 18% discount, and could reach CAD$ $ 1.825 billion toward 2015 when the pressure of demand will be greatest.

Thus, if the Indian government keeps on paying an annual subsidy of US$ 1.5 billion to make potash fertilizers more affordable for Indian farmers, from 80% 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 the potash producers.

If we assume that China needs to import an average of 4 million tons of potash per year between 2011 and 2020, which is a conservative estimate based on the imports in 2008, the overcharge it will pay each year will be at a minimum US $ 500,000,000, if it succeeds in getting a 30% discount from the cartel price (as it has recently), and could reach $ 1,144,000,000 annually.

## Competition law responses: Canada

**Competition Act**

**Art 45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges**
**(a) to fix, maintain, increase or control the price for the supply of the product (…)**

**(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada(…)**

***In November 2010 the Canadian Bureau of Competition decided that it would not challenge the hostile bid for Potash.corp.***

***But that same month the Canadian government rejected the merger by using the Federal Investment Canada Act because it did not « provide net benefits to Canadians »***

## Competition law responses: United States

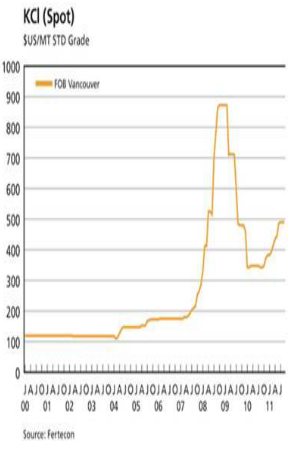
**Two separate groups of plaintiffs, who were direct and indirect potash purchasers in the United States, filed nearly identical antitrust class actions alleging a global conspiracy to raise the price of potash at artificially high levels in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1**

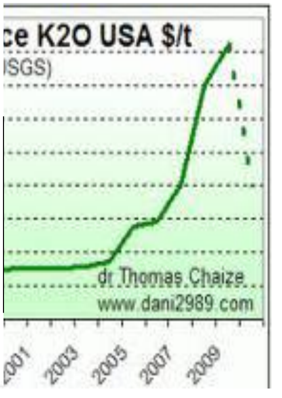
**The court held that the complaint failed to provide any factual description of the way in which prices in China, Brazil, and India served as a "benchmark" for American prices and that it thus failed to permit a plausible inference that the defendants' anticompetitive conduct in these foreign markets has a direct, substantial, and reasonably foreseeable effect on potash prices in the United States.**

**In November 2011 the seventh Circuit has granted rehearing en banc in this case**

(1) United States Court of Appeals For the Seventh Circuit, No. 10-1712, SEPTEMBER 23, 2011, MINN-CHEM, INCORPORATED v.AGRIUM INCORPORATED.

# World and US potash price




# India's response

India is entirely dependent on potash imports and these imports are crucial to meeting the food needs of India's population. In this context, sanctioning the potash cartel by applying domestic competition law may create more problems than it solves both because the cartelists may be tempted to increase their export prices to India in order to recover any monetary fine imposed on them and because there is no easily available mechanism to ensure that sanctioning the cartel will deter the cartelists from fixing prices in India in the future.

One (limited) possibility for India of responding to the cartel high prices for potash is to withdraw imports on a temporary basis, and have farmers delay fertilizers application. This happened in 2009 ( India did not buy potash in the first part of the year). India threatened to do it again in 2010, and it refrained from active buying in the fourth quarter of 2011.

But the potash producers are acutely aware of the fact that India cannot withhold its purchases of potash for very long without endangering its crops.

## Competition law responses: China

In the spring of 2011, Mofcom cleared the the merger of Russian potash producers Uralkali and Silvinit subject to three behavioural conditions.

First, the merged entity must maintain its established sales process and procedures when supplying potassium chloride to customers in China.

Second the merged entity must continue to meet the demands of China's customers (including those in agricultural, general and 'special' industries) for potassium chloride - both in terms of product volume and product range.

Third, the merged entity must continue to utilise traditional price negotiation procedures with Chinese customers and take account of the historical and current trading situation as well as the unique features of the Chinese market.

As a commentator observed ( ): "By requiring the merged entity to maintain current levels of sales and supplies to customers in China, and to continue utilising existing price negotiation procedures, Mofcom will have eased any concerns these customers may have had about the potential for price rises and increased disparity in their bargaining power with suppliers of potassium chloride.

## Conclusion

-1) Export cartels in primary agricultural products may allow SMEs to access international markets and increase competition

-2) But export cartels in primary agricultural products may also lead to price instability and monopolistic prices on the world markets for primary agricultural products.

-3) Export cartels can thus impose significant costs on importing countries.

- 4) Because national competition laws in developed and developing countries usually exempt export cartels such practices are not curbed by the competition authorities of the exporting countries.

# Conclusion

- 5) Total dependence on imports, lack of cooperation between competition authorities in cartel investigations, or restrictive conditions under which domestic competition laws apply to transactions abroad create significant obstacle in the importing countries limiting the possibilities to use of domestic competition laws to fight international or export cartels.

-- 6) Some scope for innovative use of competition law to fight ( eg merger control in China).

- 7) A multilateral trade negotiation could limit the ability of countries to sponsor or tolerate the participation of their domestic firms in exploitative export cartels and / or provide for a mechanism to compensate countries victims of such cartels.

A better multilateral framework on export cartels
and more cooperation between competition authorities
are needed

## Thank you very much

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