
Pradeep Mehta: The Indefatigable Fighter

*Potash as Symbol of What Can Go Wrong
and How to Go Right*

Introduction

Pradeep Mehta is a valiant fighter for competition, consumers and the poor. Pradeep is at the forefront of every battle to reset the skewed compass that favours rich countries and vested interests at the expense of peoples of the developing world.

The potash battles provide a good laboratory for observing forces that deflect competition on the merits, and for contemplating what can be done. To honour Pradeep and his ceaseless fight for competition on the merits, this essay looks briefly at the state of the world in antitrust and the aspirations for a fairer (and more efficient) world, and, through the window of potash, it observes strategies to preserve the status quo and blueprints for a breakthrough.

Competition and the State of the World

In matters of competition and the quest for a coherent regime that would lower world prices and increase economic opportunities, the motor of the world has stalled. To be sure, national competition laws look more and more alike, and cartels are well recognised as a scourge to be stamped out; but still, no law says: You must not do unto others what you would not do unto yourself. There is no international effort with traction to embed this principle. Rather, the gaps between the countries are moats; and the law of moat is: Go ahead; exploit your neighbours. Conspire to raise their prices.

Let them catch you if they can. If the targets are poor developing countries with no resources to tilt at giants, they will not be able to catch the foreign cartel. If they are a developed country, still they might be at the mercy of the price fixers if the price fixers pick a detour to market or their government simply says: Do it.

Potash

The potash story is a tale of scenarios one and two (poor country victims and indirect victims), to which we turn. The Chinese vitamins and raw materials cartels are tales of scenario three.¹

First, a word about potash. Potash is an important ingredient in fertilisers and an important nutrient in cereals. It is exported to 150 countries, most of which are developing countries. Canada, particularly in Saskatchewan, accounts for more than 30 per cent of world potash exports. The three big potash producers operate a potash export cartel in Saskatchewan—Canpotex—and have done so for 40 years. The cartel is strongly supported by the government of Saskatchewan. Most of the rest of the world supply comes from Russia and Belarus, whose potash firms collaborate with the Canadians.

The high cartel price of potash “has led to a decrease in the use of fertilisers in developing countries, contributing to the food crisis. It has been hugely expensive for developing countries; for example the Indian government is reported to have spent US\$3 bn last year to help its farmers cushion the high prices of potash fertilisers.”²

How can developing countries protect themselves from this scourge? The answer of the developed world is: “This is not our problem. Let the importing country sue.” But can Benin (with no competition law) sue? Can the Gambia, with a population of less than two million and scarce resources, sue?

1. Vitamin C Antitrust Litigation, No. 06 MD-1738 (E.D. N.Y. Sept. 1, 2011); Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d (3d Cir. 2011).

2. Frédéric Jenny, quoted in “Cartelisation: Professor’s Critique of Hostile Bid Triggers Discussions of Export Cartels”, 99 Bureau of National Affairs, Antitrust & Trade Reg. Rep. 339, Sept. 17, 2010.

Perhaps the developed countries are the best hope.³ Will the developed countries with big purchases of potash sue the cartelists and punish them sufficiently so they will abandon the cartel and not do it again?

This was not a vain hope. The US market for the purchase of potash is large. US Americans consumed 6.2 million tonnes of potash in 2008, of which 5.3 million were imports. And most of the imports came directly or indirectly from the ‘monopolist’ countries—Canada, Russia and Belarus—and were sold by joint ventures of all of the big producers, who controlled 70 per cent of the world’s supply. Between mid-2003 and 2008, prices of potash rose by at least 600 per cent without there having been any significant change in costs or demand.

US American buyers did sue. Some were direct buyers from the alleged cartelists. Others were the victims of the following strategy, as alleged in the complaint: The cartel members negotiated prices in Brazil, India and China. They used the prices thus negotiated as benchmarks for sales into the US. “For example, in May 2004, the cartel arranged for prices to increase by US\$20 per tonne for some foreign customers; shortly thereafter, prices in the US went up by precisely the same amount.”⁴

The potash companies moved to dismiss this case on grounds that the complaints failed to meet the requirements of a now-famous statute—The Foreign Trade Antitrust Improvements Act (FTAIA) of 1982—which puts non-import foreign trade beyond the reach of the Sherman Act unless it has a “direct, substantial and reasonably foreseeable effect” on the US market. The district court denied the motion. The court of appeals reversed, holding that the injury to the US buyers was “indirect” and therefore beyond the reach of the Sherman Act. (But had not the cartelists purposely refrained from selling “directly” into the US to evade the Sherman Act by hiding behind the shield of the FTAIA?)

3. See remarks of Pradeep Mehta expressing pessimism that the developed countries will take any steps to curb their export cartels. Cartelisation, *supra* note 2.

4. *Minn-Chem Inc. v. Agrium Inc.* (“Minn-Chem”), No. 10-1712 (7th Cir. June 27, 2012), slip op. p.5.

The plaintiffs, however, won a rehearing *en banc*; and, on the rehearing, the court of appeals reinstated the district court opinion. The appellate court had to interpret the FTIA requirement that the US effect must be ‘direct.’ The court, by Judge Diane Wood, determined that, in its context (the statute also imposes safeguards of foreseeability and substantiality), ‘direct effect’ requires only a “reasonably proximate causal connection.” The effect simply must be not too remote from the cause.

The court was influenced by incentives. Canada and Russia had no incentive to rein in the cartel. They “would logically be pleased to reap economic rents from other countries; their losses from higher prices for the potash used in their own fertilisers are more than made up by the gains from the cartel price their exporters collect....” Distinguishing *Empagran*,⁵ the US Supreme Court case dismissing foreign-plaintiff suits for over-priced vitamins where both the cartel and the consumers were in foreign markets, the court of appeals said about the potash situation:

It is the US authorities or private plaintiffs who have the incentive—and the right—to complain about overcharges paid as a result of the potash cartel, and whose interests will be sacrificed if the law is interpreted not to permit this kind of case.

The world market for potash is highly concentrated, and customers located in the US account for a high percentage of sales. This is not a House-that-Jack-Built situation in which action in a foreign country filters through many layers and finally causes a few ripples in the US. To the contrary, foreign sellers allegedly created a cartel, took steps outside the US to drive the price up of a product that is wanted in the US, and then (after succeeding in doing so) sold that product to US customers. The payment of overcharges by those customers was objectively foreseeable, and the amount of commerce is plainly substantial.⁶

The US potash litigation is not over. Simply, the complaint was not dismissed at an early stage. The companies might yet file a petition for certiorari seeking interpretation of ‘direct effect’ from

5. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

6. *Minn-Chem*, *supra* note 4, p.31.

the Supreme Court of the US. But the appellate court opinion is an important step forward. It is a step towards a world vision and away from inward-looking Balkanisation that is destined to keep the moats wide and the vested interests content. Moreover, even if the US Supreme Court and a district court at trial should uphold the US potash plaintiffs, this will not be the answer for developing countries. The US plaintiffs would then get damages based on their purchases, not on world purchases. The cost to the world potash cartelists is not likely to deter them from raising prices, starving people, and bankrupting farmers in Africa. The crime will still 'pay'.

A Positive Agenda

A positive agenda becomes, more and more, just a fanciful hope. Nations have shrunk from the global visions of the 1990s, when coherence and community were tabled as shared objectives. In these times of economic hardship, nations retreat.

Nonetheless, we can and must have aspirations. Pradeep Mehta would settle for no less. At least we can imagine, aspirationally, one-world without cartels, especially without cartels that make the least well off worse off. We can, as Pradeep always does, shine sunlight on the costs of offshore cartels, especially those that target people on the edge of a decent life (and worse). And for those not motivated by altruism, the message might be driven home that the case is not only a moral one, it is an economic one. A successful battle against world cartels will improve of the economic welfare of the world.

Meanwhile, there are smaller bridges to be built across the moats. The home lands of the cartels should agree, in bilateral, plurilateral and multilateral agreements, to cooperate in discovery with the offshore victims.⁷ And the victims' competition authorities might productively team up regionally to prosecute suit.

7. See E. Fox, "Economic Development, Poverty and Antitrust: The Other Path", 13 SW. J.L. & Trade in Americas 211 (2007), Part VII: The Developed Country's Duty of Cooperation, at p.233.

