

Enquiry Report

RE: Complaints filed by TransGlobal Services (Pvt) Ltd and Pakistan International Container Terminals Ltd.

1. Introduction

- 1.1 This Enquiry Report is prepared pursuant to the complaints filed by TransGlobal Services (Pvt.) Limited (hereinafter referred to as '**TransGlobal**') and Pakistan International Container Terminals Ltd (hereinafter referred to as '**PICT**'), under Section 37 of the Competition Ordinance, 2007 (hereinafter referred to as the '**Ordinance**') against Hutchison Port Holding (hereinafter referred to as '**HPH**'), Karachi Port Trust (hereinafter referred to as '**KPT**') and Karachi International Container Terminals (hereinafter referred to as '**KICT**').
- 1.2 TransGlobal is a company incorporated in Pakistan and is in the business of providing logistical services to the importers and exporters around the Karachi Port. PICT and KICT are companies incorporated in Pakistan and are container terminal operators at the Karachi Port. HPH is a company incorporated in Hong Kong, engaged in the business of port development and port operations worldwide. KPT is a statutory body established under the Karachi Port Trust Act, 1886 to provide for the management of the affairs of the Karachi Port.
- 1.3 The thrust of the complaints is on the allegedly unlawful award of concession by KPT to HPH, for a period of 25 years, for the setting up of Pakistan Deep Water Container Port in Private Sector on Built Operate and Transfer (BOT) basis in the Kemari Groyne area of Karachi Port (hereinafter referred to as the "**KG Project**"). The award of concession was given effect through the concession agreement dated November 08, 2007, entered into by and between KPT and HPH (hereinafter referred to as the "**Concession Agreement**") which the complainants, TransGlobal and PICT, allege to be prohibited under the Ordinance. Karachi New Port Container Terminals Ltd

(hereinafter referred to as 'KNP') is a company incorporated by HPH as a Terminal Operating Company (TOC) as a result of award of KG Project to HPH.

2. Factual Background

2.1 Briefly, the facts are that on February 27, 2008, TransGlobal filed a complaint against KPT for violations of prohibitions under Chapter-II of the Ordinance i.e. for abuse of its monopoly power, engaging in collusive bidding with HPH and entering into prohibited agreement under the Ordinance. Another complaint was filed by PICT on March 25, 2008 on the same subject matter. Replies from all concerned parties/respondents in respect of both complaints reached the Commission by May 20, 2008¹.

2.2 The Commission appointed Ms. Shaista Bano as Enquiry Officer under Section 37 of the Ordinance to examine the veracity of the complaints filed and to give its findings on the alleged violations in the said complaints. With respect to the enquiry, various correspondences were exchanged with the parties concerned and all parties were provided with the copies of such correspondence. The parties were also called in individually for seeking clarification and for and for explaining their respective positions.

3. Complaint by TransGlobal

3.1 The contentions raised in the complaint by TransGlobal are summarized below:

- Karachi port is an exclusive geographical and service market. KPT has the exclusive right to construct berths within its limits. From time to time, KPT has entered into partnership with, and granted exclusive concessionary rights to

¹KICT's reply to TransGlobal-11th April 2008; HPH's reply to Transglobal-29th April 2008; KPT's reply to Transglobal-7th May 2008; KPT's reply to PICT-19th May 2008; HPH's to PICT-19th May 2008; KICT's to PICT-20th May 2008.

private firms for the establishment and operation of container terminals on the berths of KPT.²

- While granting concessions for the establishment of a new container terminal, KPT has abused its dominant position in the relevant market; it entered into a prohibited agreement with HPH whereby it granted concession for more than 80% container handling capacity to a single operator.³
- KICT had a monopoly over the container traffic, being the only container terminal handler. KICT abused its dominant position by charging high tariffs. This was until the entry of PICT in 2003 when KICT had to lower its tariff.⁴
- KPT failed to make a formal announcement of the award of KG Project, however, on September 3 and 4 2007, two international newspapers (located in Singapore and London, respectively) published the news regarding the award of the project to HPH. This lack of transparency contravenes Section 4 (2) (e) of the Ordinance. HPH does not have a good repute for fair business practices and has also been investigated in Indonesia and Sri Lanka.⁵
- KICT is a 100% subsidiary of HPH and is about to establish a TOC as its other subsidiary. This will amount to a merger in terms of Section 2 (h) of the Ordinance and meets the pre-merger notification requirement and should have sought clearance from the Commission⁶.
- Grant of KG project to HPH is a violation of Section 4 as it will restrict, prevent and reduce competition.⁷

² Ibid. Page 2 Para 2

³ Supra note 1, Page 2 Para 3

⁴ Supra note 1, Page 3 Para 4

⁵ Supra note 1, Page 4 Para 7

⁶ Supra note 1, Page 4 Para. 8

⁷ Supra note 1, Page 5 Para. 9

- Grant of the KG project to HPH will amount to creating an unreasonable monopoly of HPH. Currently KICT has a share of 43% in the Karachi port market; under the new project KICT and the new company, Karachi New Port Container Terminals (KNP), together will be able to handle 73.3% to 80% of the business in Karachi port. This is a violation of Section 3 of the Ordinance..⁸
- The dominant position and prohibited agreements being established and encouraged by KPT are in violation of Chapter II of the Competition Ordinance.⁹
- KPT is in an “indecent haste” to proceed with negotiations for the finalization and execution of concession agreement. A complaint about the matter was brought before the Ministry of Ports and Shipping (which controls KPT) but it was not considered. The haste and clandestine manner is an attempt to achieve a *fiat accompli* on the matter so that the situation can not be reversed.¹⁰

4. Contraventions under the Ordinance alleged by TransGlobal:

4.1 Charges against KPT (Karachi Port Trust):

Violation of Section 4 (2) (e): Collusive Tendering

Violation of Section 4(1); Entering into a prohibited agreement

4.2 Charges against HPH (Hutchison Port Holding)

Violation of Section 11 (1)&(2): Violation of prohibition and Failure to Apply for Pre-Merger Notification

Violation of Section 4: Entering into prohibited agreement

Violation of Section 3: Abuse of Dominant Position

⁸ Supra note 1, Page 5-6 Para. 10-11

⁹ Supra note 1, Page 6 Para. 12

¹⁰ Supra note 1, Page 7 Para. 13

5. Analysis of Assertions

5.1 Assertion I: Karachi port constitutes a distinct relevant market; geographically and product wise.

- Primarily TransGlobal maintains Karachi Port as a relevant market for the Container Handling Services. HPH and KPT have contested that all port in Pakistan constitutes the relevant market for the subject complainant. In view of the facts, the following factors have been taken into account when defining the relevant market.
- **Product market:** As admitted by all parties the relevant product market is the market for “*container terminal handling services*”.
- **Distance:** The distance between Port Qasim and Karachi Port is 35km (by road). Karachi Port is nearer to the city center. Port Qasim, on the other hand, is on the outskirts of the city.¹¹ Both the ports enjoy similar advantages of connectivity with air, railway and road links, and customers can choose which port that they want to approach.
- **Price:** The tariffs that are imposed by both ports can not be generalized. It depends greatly on whether the good is being exported out or imported in; the duration of its stay on the berths etc. However below is a comparison of some of the tariffs at Karachi Port and Port Qasim

¹¹Port Qasim is at a distance of 15 km from National Highway, 22 kilometers from Jinnah International Airport, and it also has 14 km Railway link to National Railway network through six railway tracks located immediately behind the berths.
<http://www.portQasim.org.pk/glance.htm#location>

Tariffs at Port Qasim are:

	Port Dues per GRT or fraction of a tonne	Berth fee per GRT per day	Pilotage per GRT	Tug Charges For two tugs (inward)	Tug Charges For two tugs (outward)	Anchorage Charges per GRT per day
Karachi Port ¹²	US \$ 0.46 ¹³	US. \$ 0.08	US \$ 0.15	US \$ 1119.00 ¹⁴	US \$ 1119.00	US \$ 0.015
Port Qasim	US\$ 0.40	US\$ 0.08	US\$ 0.13	US\$ 980	US\$ 980	US\$ 0.013
Difference between the two	Us \$ 0.06	-	US\$ 0.02	US\$ 139	US\$ 139	US\$ 0.02

As can be seen there is a significant difference in tariffs of both the ports.

- **Facilities:** The facilities offered by both ports are almost similar. It seems that in recent times, Port Qasim has raced ahead of Karachi Port in terms marine technology and transshipment facilities and so it is attracting more customers. However the port services (which include cargo handling, storage etc) provided by both are similar in nature.
- **Demand-side substitutability:** Customers can choose which port that they want to approach because Karachi Port is located nearer to Karachi city, Cargo meant for Karachi city (or neighboring areas) goes to Karachi port. Cargo whose final destination is in interior Pakistan or up north tends to use Port Qasim because this way the cargo does not have to go through the hassle

¹² <http://www.kpt.gov.pk/>

¹³ <http://www.kpt.gov.pk/html/Tariff/cHARGESONVESSELSTARIFF5.htm>

¹⁴ <http://www.kpt.gov.pk/html/Tariff/HAULAGETARIFF7.htm>

of passing through the city center of Karachi. This is a critical factor and shipping companies often choose either of the two ports on the basis of the final destination of their goods. Goods destined for the rest of Pakistan very seldom, come to Karachi Port. Hence there is a differentiation in the clientele of both ports. Cargo from some countries comes only to a specific port; for example cargo from USA only comes to Port Qasim because American shipping companies have a customized booth over there and does not go to Karachi Port. Hence there is not sufficient demand-side substitutability.

- **Supply-side substitutability:** The services that both ports provide are very similar. Port Qasim has modern technology and might be more efficient for the shipping company but the variety of services available is the same.
- **Customers:** The customers between both Port Qasim and Karachi Port are the shipping lines. Both ports deal with ships carrying imports, exports, edible goods, cement etc. Both ports also offer similar services to customers. However, the destination of shipping lines is pre determined and it cannot be changed at the last minute. If such a change is to be made in the destination port, then another shipping line has to be added for the change in route thus incurring heavy costs. This additional cost makes it prohibitive for shipping companies to change the destination at the last minute; hence customers choose either Port Qasim or Karachi Port. As mentioned above their final preference is dependant upon the final destination of the goods, price etc.
- **Regulatory Environment:** KPT is regulated by KPT Act, 1886 and Port Qasim is regulated by Port Qasim Act, 1973. So there are two different and distinct regulatory authorities governing the two ports.
- **KNP part of relevant market:** HPH's assertion has been that KNP shall deal with a totally new service of transshipment, which the current container terminal operators are not providing, therefore, KNP should not be included as

part of the relevant market. While it may be correct that on the completion of the project KNP will be able to offer a new service (facilitation of transshipment), it has not satisfactorily explained by HPH as to why it should be excluded from the relevant market when despite the addition of the new transshipment services, it will continue to provide container terminal handling services and will remain a competitor for other container terminal handling companies. Hence KNP will fall within the relevant market.

- **Exclusion of Gwadar Port:** Gwadar Port has not been considered as part of the relevant market. Unlike other ports it does not have a fully developed infrastructure and does not enjoy the advantages of connectivity with air, railway and road links. Owing to its distance the cost of transportation from the port to the final destination of the cargo is very high. The Gwadar Port has not yet even become fully operational and it seems that the port authority has still not announced its tariff rate making it difficult to compare its price interchangeability with other ports.¹⁵ Notwithstanding the tariff rates, it would not be economical for the customers to ship through Gwadar Port as the handling and transportation charges are much higher as compared to the other two ports.¹⁶ Also it caters for a different set of customers which primarily include goods that are to be exported to the land locked Central Asian Republics, Afghanistan and China.¹⁷ The question of substitutability with Karachi Port does not arise in the instant case for including it in the relevant geographic market.

5.2. Keeping in view the above factors, including but not limited to, the distance factor between the ports, additional costs of changing the final destination, the lack of demand side substitutability, consumer preference, and the price/tariff differential, it is concluded that the Karachi Port is the relevant geographical market for the container terminal handling services i.e. the market product.

¹⁵ <http://www.dawn.com/2008/09/22/ebr9.htm>

¹⁶ <http://www.dawn.com/2008/09/22/ebr9.htm>

¹⁷ http://www.strategycenter.net/research/pubID.4/pub_detail.asp

6. Assertion II:- KPT has the exclusive right to construct berths within its limits. It has abused its dominant position by granting concessions for the establishment of a new container terminal:

6.1 There is no doubt that KPT has been granted certain powers under the Karachi Port Trust Act 1886, however it would be incorrect to term it as having a “dominant position” in terms of Section 2 (1)(e) of the Ordinance. KPT is a Federal Government Agency and an administrator of the Karachi Port. It has statutory powers given to it by the KPT Act, under which it performs its functions. Likewise the port administrator at Port Qasim, the Port Qasim Development Authority (PQDA) is empowered under the Port Qasim Authority Act of 1973 to administer the port. Port administrators are given these statutory powers to facilitate the operation and smooth running of the ports. The exclusive right of the KPT to construct berths at Karachi Port is not because of its dominant position but because of the power given to it under the Karachi Port Trust Act 1886. Further more KPT in its capacity as a regulatory authority is not a competitor for KICT and PICT. However in the product market of container terminal handling services it has a nominal share, but does not have a dominant position in terms of the threshold provided under the Ordinance.

7. Assertion III: Grant of KG project to HPH is a violation of Section 4 as it will restrict, prevent and reduce competition

7.1 For the purpose of clarity the connotation of the term ‘concession’ needs to be understood. Under the Black’s Law dictionary it is defined as “ a government grant for specific privileges”; it is generally awarded by the government in a public private partnership with the objective to build assets for the governmental institutions on certain terms and conditions and for consideration which form the subject of a concession agreement.

7.2 Under the Concession Agreement, HPH has been granted the right to build and operate the container terminal for the K.G. Project. The effects of granting the concession rights to HPH under the Concession Agreement is alleged to be anti competitive because it will place HPH in a position of dominance thereby increasing its share in the relevant market upto 80 % during the term of the Concession Agreement (25 years). Thus the Concession Agreement unless exempted under Section 5 of the Ordinance appears to be prohibited in terms of Section 4(1) of the Ordinance as prima facie it has the object and effect of preventing, restricting and reducing competition within the relevant market.

7.3 In order to ascertain the market share of the players in the relevant market it is important to understand the relationship between HPH and KICT. The complainant alleged that they were parent-subsidary companies. When the respondents were asked to clarify their relationship they were not forth coming. In their initial replies both HPH & KICT stated that they are independent companies. Nevertheless, the company structure as explained in paragraph 7.4 emerges.

7.4 As per the Financial Report for the year 2006, Both HPH and KICT are subsidiary companies of Hutchison Whampoa Limited HWL. Being the subsidiaries of the same parent company , HPH and KICT are associated companies of each other. As per KICT's own website, KICT is a subsidiary of the internationally known **Hutchison Port Holdings (HPH) Group** and provides its clients with the benefits of expertise.KNP is a subsidiary of HPH as HPH holds 90% shares in KNP. This makes HPH, KNP and KICT the associated companies which are eventually under the control of HWL.

7.5 The bidding document also classifies KICT as a container terminal being operated by HPH¹⁸. The complainant has also provided a detailed structure of the HPH group of companies which in view of the position stated above appears to be correct and reinforces the link between HPH and KICT. This relationship between the two

¹⁸ Bidding Document Page 38.

companies gives credence to the complainant's arguments that a large part of the container handling capacity will in effect be given to a single container terminal operator. But it is important to determine whether this market share will be 80% or less.

7.6 The present position of the shares of the various companies in the relevant market is as follows:

Entities providing container terminal services at Karachi Port:

KICT TEU (approx) 560,000¹⁹
PICT TEU (approx) 550,000²⁰
KPT TEU (approx) 250,000²¹

Total existing capacity in the relevant market = 1,360,000 TEUs

The current market share of HPH through KICT = $560,000/1,360,000 * 100 = 41.18\%$

The estimated capacity at Karachi Port will be²²:

KICT TEU (approx) 920,000
PICT TEU (approx) 550,000
KPT TEU (approx) 30,000
KNP TEU (approx) 2,000,000²³

¹⁹ This is claimed in the reply by HPH and has not been denied by the Complainants and so will be deemed to be accurate.

²⁰ This figure has been taken from the PICT website. The PDWCP Master Plan Document submitted by PICT states the current capacity of PICT to be 400,000 TEU. However this document dates April 2007. On the PICT website, it says that after development work finishes in December 2007, PICT will have a capacity of 550,000 TEUs. Hence the current figure quoted is not contradictory and is the most recent estimate of PICT's capacity.
<http://www.pictctrack.com/>

²¹ This figure was quoted by both the complainants and was also used in the HPH reply. However, in the PDWCP Master Plan Document, KPT's capacity is cited as 300,000 TEU. Since the PDWCP master plan document is over a year old, we will consider the mutually agreed upon capacity of 250,000 TEU

²² The figure for KICT, PICT and KPT are taken from the PDWCP Master Plan Document. The figure for QICT is taken from the Advertisement Supplement referenced. Supra no. 18. The estimation is for 2009-2010.

²³ This figure has been taken from Page 49 of the Bidding Document. The development will be done in several phases; the value quoted above is after the completion of Phase I only which is to be done by 2009-2010.

Future total existing capacity in the relevant market = 3,500,000 TEUs

The market share of HPH through KICT and KNP = $(2,000,000 + 920,000) / 3,500,000 * 100 = 83.4\%$

7.7 This enquiry has led to the conclusion that prima facie, the grant of the KG project to HPH unless exempted under Section 5 of the Ordinance appears to be in violation of Section 4(1). Section 4 (1) provides that “*no undertaking ... shall enter into an agreement* in respect of the production, supply, distribution, acquisition or control of goods or the provision of services, which have the object or *effect* of preventing, restricting, or *reducing competition* within the relevant market.” The Concession Agreement would fall under the category of a prohibited agreement because it “will have the effect of reducing competition” in the relevant market as it will further strengthen the dominant position of HPH by taking its market share upto 83% thereby distorting, reducing and restricting competition in the relevant market. Unless such agreement is exempted under Section 5 of the Ordinance it is void in terms of sub-section (3) of Section 4 of the Ordinance.

8. Assertion IV: KPT did not make a formal announcement of its decision to award the financial bids and awards in local newspapers. This lack of transparency contravenes Section 4 (2)(e).

8.1 According to TransGlobal the principles of transparency for the bidding include, amongst others, the following three basic principles:

- The bids are to be opened publicly in the presence of the bidders;
- The financial proposals of the bids are to be announced in the presence of the bidders;
- The awarding body, its employees or consultants should not have any direct or indirect interest in or relationship to any of the bidders.

It has been submitted on part of the complainant that '*KPT opened the bids in the presence of the bidders but defaulted on account of the second and third of the aforementioned principles*'. It did not announce the financial proposals upon the opening of the bids. The consultants of KPT - who also participated in the bidding process - were conflicted which makes the bidding, for the project, a colorful exercise.

8.2 The letter dated September 11, 2008 written by Hassan Kaunain Nafees, Legal Practitioners and Advisers on behalf of TransGlobal clearly elaborates the deviations and irregularities which on part of KPT have not been adequately responded or addressed by Nafees Siddiqi Law Associates in their letter dated October 24, 2007.

8.3 It is noted that Clause 2.4.3 of the bidding document provides that the proposals were to be opened in front of the bidders, on the final submission date²⁴. The respondents claim that this was done. The respondents have also provided a copy of the duly signed attendance sheet, which shows that all the pre-qualified parties were present at the time of bid opening. However HPH and KPT have asserted that there was no obligation on the parties to announce with respect to financial offers at the time of bid opening. In this regard Paragraph 2.4.8 stipulates that the announcement on financial offer would only be made after detailed evaluation and approval of competent authority. This conditionality has admittedly not been satisfied on the pretext that previously a disgruntled bidder took KPT to the Court. Importantly, attention has also been drawn to Rule 28 of the Public Procurement Rules 2004 by the complainant which states that "*All bids shall be opened publicly in the presence of the bidders...The procuring agency shall read aloud the unit price as well as well as the bid amount.*" So it seems that while KPT has not satisfied an important conditionality under the bidding documents it has also acted in contravention of the Public Procurement Rules 2004, which are indicative and serve as a benchmark for a transparent and competitive bidding process.

²⁴ Page 45 of the Bidding Document

8.4 It is also relevant to add that the formal complaint to the Ministry of Shipping submitted by the complainant is still pending with the Ministry. The Ministry forwarded the reply to the allegations given by KPT dated October 24 2007 to the complainant. TransGlobal received a reply to their complaint on November 21, 2007, after the execution of the concession agreement. Subsequent to that no further step has been taken by the Ministry as maintained by the parties. Till to date only an exchange of correspondence has taken place but the matter does not seem to have been resolved.

8.5 The allegation of an 'indecent haste' has also been made against KPT in finalization and execution of the Concession Agreement. However, not enough evidence has been provided to substantiate this allegation.

Chronology of events is as follows:

July 18, 2006:	Open advertisements in the Press calling for expression of interest (EOI)
April 10 2007:	Letter of invitation to the pre qualified parties
April 19 2007:	Bidding documents are issued; parties that do not pre-qualify will realize their disqualification without formal notification issued to them.
May 28 2007:	Pre bid meeting was conducted by KPT with the qualified Bidders
June 25 2007:	Public opening of the Bids
September 2 2007	Letter of Acceptance
September 3-4 2007:	Advertisement in International Newspapers by HPH
November 8, 2007:	Execution of concession agreement between KPT and HPH.
December 12 2007:	Novation agreement entered into.

8.6 As can be seen, the entire process took over a year and a half to complete; there does not seem to be any undue haste as is alleged by the complaint. Perhaps the lack of involvement of the complainant had led them to feel that the bidding process had

taken place in haste. The haste seems to be because the complainants were not involved in the process as stated in the Bidding Documents.

8.7 With reference to the irregularities that the awarding body i.e. KPT, its employees or consultants should not have had any direct indirect interest in or relationship to any of the bidders. The complainant's stance is as follows:

“An objective application of mind, by KPT Evaluation committee, would have led to the following inescapable conclusions:

- *The consortium of consultants of KPT includes Messers Scott Wilson and Royal Haskoning (acting jointly) a member whereof is also a consultant of HPH;*
- *The above affected unfairly the competitive position of other bidders which would have amounted to a “material deviation” as the term is defined in Paragraph 2.5.1;*
- *A “material deviation” makes a bid “not substantially responsive” to the requirements of the bidding documents and as such should have been rejected by the KPT Evaluation Committee.”*

8.8 KPT stand is that “as professional international consultants of repute, it can be argued that KPT is entitled to rely upon the professionalism of Royal Haskoning”. According to KPT international consultants are professional bodies and are required to maintain some professional standards of credibility and impartiality. Nevertheless, it is noted that the connection between Scott Wilson and KICT appears to be problematic. Paragraph 2.5.1 of Information and Guidelines for Bidders issued by KPT, states that “prior to the detailed evaluation of bids, the KPT Evaluation Committee will determine whether in each bid a) The Bidder (including all members of a Joint Venture) are not affiliated with a consultancy firm that has been hired by the KPT for the purpose of providing container terminal related services for PDWCP.” It appears that either the KPT evaluation

committee was unaware of this connection or it deliberately chose to ignore the connection between KICT and Scott Wilson. Either way KPT has not complied with its own guidelines. The above deviations and material irregularities in the bidding process on part of KPT have not been adequately explained.

8.9 The lack of complete disclosure regarding the announcement of financial bids in violation of KPT bidding documents and PPRA Rules, 2004, the non-disclosure of conflict of interest on part of the consultant prima facie smack of collusion between KPT and HPH entailing material deviation and irregularities in the bidding process.

9. Assertion V Pre-merger notification requirement under the Ordinance has not been complied with.

9.1 In pursuance of the Concession Agreement a new TOC was established under the name of KNP. i.e. Karachi New Port Container Terminal Limited (herein after referred to as the "KNP"). The concession rights were transferred in favor of KNP through Novation Agreement dated December 12, 2007 entered into by and between HPH and KNP. As a result of Novation Agreement HPH acquired control in KNP (acquiring 90% of its shares through allotment). Therefore, the complainant is correct in the assessment that the transaction reaches the threshold laid out in the Ordinance as the gross value of the assets exceed three hundred million rupees and it falls under the threshold listed in Regulation 4 (3) (a). Hence pre-merger notification should have been given to the Commission before the acquisition took place. Further more under the Concession Agreement, HPH needed to have a partnership with a local company which should have held 10% of the shareholding in KNP. The local partner/company which was allotted 10% shares in KNP is Sky Forward (Pvt) Limited. Accordingly, there has been an acquisition on part of Sky Forward of 10% shares in KNP which also attracted pre-merger notification under the Ordinance.

10. Assertion VI: Grant of the KG project to HPH will amount to creating an unreasonable monopoly which would violate Section 3 of the Ordinance.

10.1 Violation with reference to Section 3 of the Ordinance has not been substantiated. Therefore, relevance of the above allegation is not clear. However, the concern perhaps is more appropriately addressed in Assertion No.II. The complainant has not specified what practices on part of HPH have constituted an abuse of dominant position. The emphasis is more on the fact that as a result of entering into Concession Agreement competition in the relevant market would be restricted, reduced and prevented hence a violation in terms of Section 4(1) of the Ordinance and not Section 3.

11.Submissions made by PICT

- KPT has the exclusive right to construct berths within its limits. From time to time, KPT has entered into partnership with and granted exclusive concessionary rights to the private sector for the establishment and operation of container terminals on the berth of KPT.²⁵
- KPT is giving a complete monopoly to HPH by granting them concessions for more than 80% of the container handling capacity at Karachi port.²⁶
- KICT had a monopoly over the container traffic, being the only container terminal handler. KICT abused its dominant position by charging high tariffs. This was until the advent of PICT in 2003 when KICT was forced to lower its tariff.²⁷

²⁵Ibid Page 1; Para 2

²⁶ Supra note 29. Page 2; Para 3

²⁷ Supra note 29. Page 2; Para 4

- Despite a lack of transparency in the process of the award of contract, KPT gave the award to HPH. It has also forced PICT to vacate certain areas of Keamari Groyne Area with a view of giving them to HPH. HPH would then hold an area of 850,000 sq meters; when this is added to the area already given to KICT (260,000sq meters) this makes an enormous area of 1,110,000 sq meters. PICT has an area of just 180,000 (1/16th of the area available to HPH -KICT).²⁸
- The new TOC (Karachi New Port Container Terminal (KPN) will be an associated company with KICT because both of them are subsidiaries of HPH and fall under the definition of Undertaking as given in Section 2 (P).²⁹
- The large area that this Undertaking (HPH- KICT) has at its disposal means that they have a dominant position in the relevant market. The granting of the KG project to HPH- KICT will be an abuse of dominant position under section 3 (2) for the following reasons:
- HPH-KICT will be able to act independently of their competitors, Including PICT³⁰
- If the KG project is awarded to HPH-KPT, then this undertaking will control up to 83 % of the capacity of Karachi Port. This would be tantamount to KPT applying dissimilar conditions to equivalent transactions on other parties (such as the petitioner) at a competitive disadvantage. This is a violation of Section 3 (3) (e) of the Ordinance.³¹

²⁸ Supra note 29. Page 3; Para 7

²⁹ Supra note 29. Page 4; Para 8

³⁰ Supra note 29. Page 5; Para 11 (I)

³¹ Supra note 29. Page 6; Para 12

- The above violation by KPT would result in HPH-KICT indulging in “predatory pricing, driving competitors out of the market, would prevent new entry, and monopolize the market” under Section 3 (3) (f).³²
- Giving the KG project to HPH-KICT, will mean that they get 80% of the container capacity thereby resulting in “trade practices which have the result restricting and reducing competition” in the container handling market of the Karachi Port and is a violation of Section 3 of the Ordinance.³³
- “Dominant Position, monopoly power and atmosphere of restrictive competition” is being facilitated by KPT and is in breach of Section 3 (1) of the Ordinance.³⁴

12. Summary of the charges made by PICT:

12.1 Charges against KPT (Karachi Port Trust):

- Breach of Section 3(1): Abuse of Dominant Position
- Breach of Section 3 (3) (e): Applying Dissimilar Conditions to Equivalent Transaction

12.2 Charges against HPH (Hutchison Port Holding)

- Violation of Section 3: Abuse of Dominant Position
- Violation of Section 3 (3) (f): Predatory Pricing

12.3 Charges against Karachi International Container Terminal (KICT)

- Violation of Section 3: Abuse of Dominant Position

³² Supra note 29. Page 6; Para 12
³³ Supra note 29. Page 7; Para 13
³⁴ Supra note 29. Page 7; Para 14

13. Analysis of Assertions made by PICT

13.1 PICT in its complaint has not addressed aspect of the relevant market in depth. However, for all intents and purposes it seems that Karachi Port is viewed as the relevant market. The reasons behind reaching this conclusion have been dealt with in para 5.1 above.

13.2 Primarily, the complaint revolves around the assertion of dominant position being acquired by HPH through grant of Concession Agreement and abuse thereof by HPH in violation of Section 3 of the Ordinance. Although HPH and KNP would acquire upto 83% of the shares in the relevant market. It does not meet the essentials to constitute violation of Section 3. Instead, entering into such an agreement unless exempted under Section 5 of this Ordinance is violative of Section 4 of the Ordinance as discussed in para 10.1 above.

13.3 Similarly, allegation pertaining to abuse of dominant position on part of KPT stands explained in para 6.1 above. The relevance of the assertion that PICT was forced to vacate certain areas of Keamari Groyne Area with a view of giving them to HPH does not stand explained. Even so, for competition purposes, PICT has not made it clear how the awarding of land under the KG project will have an anti competitive effect on the relevant market and will harm competition. The correlation of the leasing of land to KNP and the services that the companies provide are weak and unclear. Hence the land use granted to KNP, does not seem to invoke the provisions of the Ordinance. Under the Ordinance, in order to establish a violation of abuse of dominant position, firstly, the dominant position of the undertaking has to be ascertained. Currently, KPT has a market share of 27% only and is not in a position of dominance. Since the first leg of the abuse of dominant position test can not be established, it would not be appropriate to invoke the provisions of Section 3 of the Ordinance. However, entering into the Concession Agreement with a party does not amount to abusing its dominant position but instead is to be addressed in terms of

Section 4 of the Ordinance for entering into prohibited agreement which has the object or effect of preventing, reducing, or restricting competition.

13.4 With regard to lack of transparency on the part of KPT in the award of the contract of HPH. PICT has not clarified what the exact lack of transparency was. However, finding in respect of such an assertion made by TransGlobal has been given in para 8 above.

14. Findings and Recommendations

In light of the foregoing it is concluded and recommended that:

14.1 Violation of Section 4 (1)

Unless exempted under Section 5 of the Ordinance entering into the Concession Agreement by and between KPT and HPH constitutes a violation in terms of Section 4 (1) of the Ordinance

14.2 Violation of Section 4 (2) (e)

With respect to collusive bidding corroborative evidence is to be taken into account as direct evidence is often hard (if not impossible) to find. As discussed above the discrepancies and non-compliance with the established procedures are prima facie indicative of collusive bidding on part of KPT and HPH in terms of Section 4 (2)(e) of the Ordinance and create a strong suspicion as to the transparency of the process.

14.3 Violation of Section 11 (1) and (2) of the Merger Regulation on part of HPH

Acquisition of 90% shares of KNP by HPH and 10% shares by Sky Forward Limited falls clearly within the purview of Section 11 (2). Pre-merger notification

should have been to the Commission because the merger meets the threshold laid out in the Competition (Merger Control) Regulation, 2007. Such merger is prohibited in terms of Section 11 (1) of the Ordinance. Since HPH and KNP have consummated the merger without complying with the provisions of Section 11(1) to 11(4) it is also liable to be proceeded in terms of Section 11 (12) of the Ordinance

In light of the fore going, we conclude that a prima facie case for violation of Section 4 (1), Section 4 (2) (e) and Section 11 (1) ,11(2) is made.

15. Recommendation for initiating proceedings under Section 30.

15.1 The award of concessionary rights and interests pertaining to the K G project under the Concession Agreement would in effect have an impact on the community as a whole. It is in the interest of the general public that such agreements are awarded in accordance with law in a fair and transparent manner. Violations under the Ordinance in terms of the findings of this enquiry report warrants initiation of proceedings under Section 30 of the Ordinance.



(SHAISTA BANO)

Enquiry Officer/Joint Director

10-11-2008