BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF COMPLAINT FILED BY PAKISTAN OVERSEAS EMPLOYMENT PROMOTERS ASSCOAITION (POEPA)
AGAINST
G.C.C. APPROVED MEDICAL CENTERS ADMINISTRATIVE OFFICE (GAMCA) AND GCC APPROVED MEDICAL CENTERS
(File No.: 2(2)/JD(L)/POEPA/CCP/2011)

Dates of hearing:	20th March, 25th April & 22nd June, 2012
Present:	Ms. Rahat Kaunain Hassan **Chairperson** Mr. Abdul Ghaffar **Member** Dr. Joseph Wilson **Member**
On behalf of:	
Pakistan Overseas Employment Promoters Association (POEPA)	Mr. Qausain Faisal Mufti, Advocate Mr. Fida Ahmad, Secretary General POEPA
GCC Approved Medical Centers & GAMCA	Mr. Salman Akram Raja, ASC Mr. Umar Akram Chaudhary, Advocate Malik Ghulam Sabir, Advocate Dr. Inaam Dr. Shamshad Dr. Mujahid Malik Mr. Imran Sohail Dr. Hashmat Malik

ORDER

1. This Order shall dispose of the proceedings arising out of Show Cause Notices No. 1-25 of 2012, issued to the GCC Approved Medical Centers Administrative Offices (hereinafter referred to as the '**GAMCA**') and the GCC Approved Medical Centers operating in Islamabad/Rawalpindi (the '**GAMCs**') established and working in the regions/cities of Islamabad/Rawalpindi, Karachi, Lahore, Peshawar and Multan, for *prima facie* violation of Section 3 and 4 of the Competition Act, 2010 (hereinafter referred to as the '**Act**').

FACTUAL BACKGROUND

A. PARTIES TO THE PROCEEDINGS:

2. **Pakistan Overseas Employment Promoters Association-(POEPA):** POEPA is a representative body of the overseas promoters in Pakistan. POEPA is licensed by Ministry of Commerce under the Trade Organization Ordinance, 2007 and is also registered under the Companies Ordinance, 1984.

3. **GCC Approved Medical Centers**: The GAMCs are approved, licensed and authorized by the Executive Board, Health Ministers Council for GCC States to conduct pre-departure medical examination of the intending emigrants to GCC Countries (i.e. Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates). The GAMCs charge medical fee for such tests. At present the GAMCs operating in Islamabad/Rawalpindi are; (i) Khaleej Diagnostic Centre (KDC), (ii) Gulf Medical Centre (GMC), (iii) Urgent Diagnostic Centre (UDC), (iv) Shifa International (SI), (v) GCC Diagnostic Centre (GDC). The GAMCs operating in the city/region of Karachi are; (i) Taj Medical Centre (TMC), (ii) Al Hilal Medical Diagnostic Centre (AHMDC), (iii) Medical Diagnostic Centre (MDC). The GAMCs operating in Multan city/ region are; (i) Al-Barakat Diagnostic Centre (ABDC), (ii) Dr. Thagfan Diagnostic Centre (DTDC), and (iii) Multan Diagnostic Centre (MD). The GAMCs operating in the Lahore city/region; are (i) Advanced Medical Diagnostic Centre (AMDC), (ii) Canal

View Diagnostic Centre (CVDC), (iii) Iqraa Medical Complex (IMC) and (iv) Taj Medical Travellers Clinic (TMTC). The GAMCs operating in Peshawar city/region are; (i) Al-Khair Medical Centre (AKMC), (ii) Caring & Curing Centre (CCC), (iii) Frontier Diagnostic Centre (FDC), (iv) Medical Diagnostics Centre (MC) and (v) Peshawar Medical Checkup Centre (PMCC). The GCC countries include; Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates and the Sultanate of Oman (hereinafter referred to as the '**GCC States**'). In addition to conducting the pre-departure medical tests for the intended emigrants to the GCC States except United Arab Emirates, the GAMCs are also engaged in provision of medical services to the ordinary patients.

4. **GCC Approved Medical Centers Administrated Office**: GAMCA is the coordinating office for GAMCs established in the regions/cities of Islamabad/Rawalpindi, Karachi, Lahore, Peshawar and Multan. If two or more GAMCs are established in any city, it is mandatory on the GAMCs to establish a GAMCA office in that region/city. GAMCA is responsible for issuing the registration numbers to the intended emigrants and referring them to the GAMCs for pre-departure medical tests. GAMCA is also responsible for implementation of equal distribution system amongst the GAMCs and monitor their conduct. Hereinafter both GAMCAs and GAMCs are collectively referred to as the '**Respondents**'.

B. COMPLAINT, ENQUIRY, SHOW CAUSE NOTICES AND REPLIES:

5. POEPA filed a Complaint with the Competition Commission of Pakistan (the '**Commission**') against the Respondents. It was alleged in the complaint that GAMCs working under their respective GAMCA have cartelized to allocate the intended emigrants to the GCC States (hereinafter the '**GCC Customers**') among themselves on equal basis. Such allocation of customers falls, *prima facie*, under the arrangement/agreement prohibited under Section 4(2)(b) of the Act. It was also alleged that GAMCA has divided the territory of Pakistan for

provision of services of pre-departure medical tests into five (5) regions, namely; Karachi, Multan, Peshawar, Islamabad/Rawalpindi and Lahore, which appears in violation of Section 4 (2)(b) of the Act. Further, GAMCAs are equally distributing the number of GCC Customers for pre-departure medical tests to the GAMCs operating within their region, which is, *prima facie*, violation of Section 4(2)(c) of the Act. And finally that the anti-competitive behavior of the Respondents affects the GCC Consumers who are forced to pay exorbitant fixed charges of the GAMCs, *prima facie*, in violation of Section 4(2)(a) of the Act. The GCC Customers are also unable to get their medical check-ups from a medical center of their suitability. Ironically, after the arrival of the GCC Customers in the GCC States for employment, they have to undergo the same medical tests again, thus paying twice for the same tests.

6. The Commission initiated an enquiry pursuant to Section 37(2) of the Act by appointing the Enquiry officers to conduct a detailed enquiry on the issues raised in the complaint. The Enquiry officers submitted the Enquiry Report dated 31-01-2012 (hereinafter referred to as the '**Enquiry Report**'). The Enquiry Report concluded as follows:

"6.1.1 Territorial allocation is an arrangement among the GCC Approved Medical Centers which, prima facie, has the object or effect of preventing, restricting or reducing competition within the relevant market in violation of the provisions of Section 4(1) and, in particular, Section 4(2) (b) of the Act;

6.1.2 Practice of equal distribution of consumers/customers among the GCC Approved Medical Centers for the purpose of conducting pre-departure medical test, prima facie, has the object or effect of preventing, restricting or reducing competition within the relevant market in violation of the provisions of Section 4(1) and in particular Section 4(2)(b) & (c) of the Act;

6 1.3 The GCC Approved Medical Centers appear to have fixed the fee to be charged from the consumers/customers for the pre-departure medical tests, prima facie, in contravention of Section 4(1) and in particular Section 4(2)(a) of the Act;

6.1.4 The role of GAMCAs, prima facie, is that of a facilitator of the GCC Approved Medical Centers. In fact GAMCA plays a major role to monitor the 'common policy' of equal distribution and fixed fee being charged from the consumers/customers for the pre-departure medical tests. Such practices of GAMCA, prima facie, have object or effect of preventing, restricting or reducing competition within the relevant market in violation of the provisions of Section 4(1), in particular, Section 4(2) (a), (b) & (c) of the Act.

6.1.5 The GCC Approved Medical Centers are the only authorized medical centers to carry out pre-departure medical tests mandatory to procure visa for GCC Countries except the United Arab Emirates. The GCC Approved Medical Centers appear to carry out their functions under the supervision of GAMCA in their respective region/city and under a common policy of equal distribution and fixed fee. It appears that this captive market arrangement enables them to engage in exploitative conduct by imposing trading conditions on their customers, prima facie, in contravention of Section 3(1), in particular, Section 3(3)(a) of the Act."

7. On the above said findings and in light of public interest surrounding the case it was recommended by the Enquiry Officers to initiate proceedings under Section 30 of the Act against GAMCAs & GAMCs.

8. The Commission while taking into account the conclusions and the recommendations of the Enquiry Report, deemed is appropriate to initiate proceedings under Section 30 of the Act against the Respondents, by issuing Show Cause Notices. Consequently, proceedings under Section 30 of the Act were initiated against the Respondents by issuance of show cause notices. The Respondents were required to file written replies to the show cause notices within fourteen (14) days from 09-02-2012. They were required to appear on separate dates i.e. from 28-02-2012 to 05-03-2012 before the Commission through a duly authorized representative and avail the opportunity of being heard. Relevant paragraphs of the show cause notices are reproduced herein below:

Show Cause Notices issued to GAMCAs:

7. ***WHEREAS****, in terms of Part 5.3 of the Enquiry Report in general and paragraphs 5.3.14 to 5.3.16 in particular, GAMCAs are established in every city where two or more GAMCs are operating. The President and the General Secretary of GAMCAs are elected every year from the representatives of the member GAMCs on rotational basis and it appears that GAMCAs provide a forum to discuss matters of mutual interests of GAMCs and take anti-competitive decisions in violation of the Act.;*

8. ***WHEREAS****, in terms of Part 5.3 of the Enquiry Report in general and paragraph 5.3.17 to 5.3.20 in particular, it appears that the fee charged from the consumers/intended immigrants/expatriates by the GAMCs across Pakistan is uniform and apparently is fixed under the auspices of GAMCAs and subsequently proposed to the Executive Board for its approval;*

9. ***WHEREAS****, in terms of Part 5.4 of the Enquiry Report in general and paragraphs 5.4.10 to 5.4.12 in particular, it appears that GAMCAs create unnecessary hurdles for consumers and refuse to entertain the consumers/intending immigrants/expatriates for medical examination on the plea that they belong to other areas and should get their medical checkups done only from their place of residence;*

10. ***WHEREAS****, in terms of Part 5.3 of the Enquiry Report in general and paragraph 6.1.5 in particular, GAMCAs are, prima facie, facilitating GAMCs and plays a major role in monitoring the 'common policy' of equal distribution and fixed fee being charged from the consumers/intended immigrants/expatriates for the pre-departure medical tests. Such practices of GAMCAs, prima facie, have object or effect of preventing, restricting or reducing competition within the relevant market in violation of the provisions of sub-section (1) of Section 4, in particular, clauses (a), (b) & (c) of sub-section (2) of Section 4 of the Act;*

11. ***WHEREAS****, in terms of Part 5.4 of the Enquiry Report in general and paragraph 6.1.6 in particular, GAMCAs are, prima facie, in order to implement the equal distribution system and to exploit consumers/intended immigrants/expatriates by foreclosing the choice of consumers/intended immigrants/expatriates; thereby restricting competition for the relevant services in the relevant market apart from imposing it unfairly on its customers which prima facie, is in violation of sub-section (1) Section 3, in particular, clause (a) of sub-section (3) of Section 3 of the Act;*

Show Cause Notices issued to GAMCs:

7. ***WHEREAS****, in terms of Part 5.3 of the Enquiry Report in general and paragraphs 5.3.1 to 5.3.10 in particular, the Undertaking along-with other GAMCs under the garb of curbing the malpractices by some of the GAMCs proposed, not only the territorial division of Pakistan among themselves but further recommended an equal distribution of consumers among themselves, thereby eliminating any chance of reduction in their profitability without competing with any other market player;*

8. ***WHEREAS****, in terms of Part 5.3 of the Enquiry Report in general and paragraphs 5.3.14 to 5.3.16 in particular, GAMCAs were established in every city where two or more GAMCs are operating. The President and the General Secretary of GAMCAs are elected every year from the representatives of the member GAMCs on rotational basis and it appears that GAMCAs provide a forum to discuss matters of mutual interests of GAMCs and take anti-competitive decisions in violation of the Act;*

9. ***WHEREAS****, in terms of Part 5.3 of the Enquiry Report in general and paragraphs 5.3.17 to 5.3.21 in particular, the Undertaking along with all other GAMCs is charging the same fee for the pre-departure medical tests from the consumers/intended immigrants/expatriates proceeding to the GCC Countries except United Arab Emirates', which under the auspices of GAMCAs is decided and fixed and also proposed to the Executive Board for approval. Prima facie, these practices, have the object or effect of preventing, restricting or reducing competition within the relevant market in violation of the provisions of sub-section (1) of Section 4, in particular, clause (a) of sub-section (2) of Section 4 of the Act;*

10. ***WHEREAS****, in terms of Part 5.3 of the Enquiry Report in general and paragraphs 5.3.6 to 5.3.16 in particular, it appears that the Undertaking along with other GAMCs is engaged in division of territories as well as dividing equally among themselves the consumers/intended immigrants/expatriates for the pre-departure medical tests. Such practices also, prima facie, have the object or effect of preventing, restricting or reducing competition within the relevant market in violation of the provisions of sub-section (1) of Section 4, in particular, clauses (b) & (c) of sub-section (2) of Section 4 of the Act;*

11. ***WHEREAS****, in terms of Part 5.4 of the Enquiry Report in general and paragraphs 5.4.1 to 5.4.6 in particular, the relevant market is captive market and the prospective consumers can only get the relevant services from the Undertaking and other GAMCs on their terms and conditions and not otherwise. Therefore, prima facie, the GAMCs including the Undertaking, severally and jointly, under the auspices of GAMCAs have the ability to behave to an appreciable extent independently of competitors, customers, thus hold dominant position in the relevant market;*

12. ***WHEREAS****, in terms of Part 5.4 of the Enquiry Report in general and paragraphs 5.4.7 to 5.4.12 in particular, it appears that the Undertaking alongwith other GAMCs is abusing its dominant position by restricting the choice of consumers/intended immigrants/expatriates and imposing, prima facie, unfair trading conditions including; (i) repeat medical tests conducted to charge extra fee; (ii) customer declared unfit has no choice/alternative, (iii) customers required to go through a repeat test are forced to come back to same medical centre; and (iv) refusal to conduct medical test on the basis of city of origin. Such practices, prima*

facie, restrict competition in the relevant market and are in contravention of sub-section (1) of Section 3, in particular, clause (a) of sub-section (3) of Section 3 of the Act;

9. The Respondents collectively filed their written reply to the show cause notice through their Counsel Mr. Salman Akram Raja, Advocate Supreme Court on 15-03-2012. Salient points of the reply are as under:

(i). The Rules and Regulations for Medical Examination of Expatriates Recruited for work in GCC States (the '**Rules & Regulations**') were formed exclusively under the direction and the mandate of the Health Ministers' Council for the GCC States (the "Health Ministers' Council") and not the GCC medical centers in Pakistan as erroneously concluded in the Enquiry Report.

(ii). The Executive Board of the Health Ministers' Council for the GCC States (the '**Executive Board**') acts as the executive organ of the Health Ministers' Council that represents sovereign states.

(iii). Purpose of equal distribution system is to ensure that medical centers are not involved in mal-practices.

(iv). GAMCs are not performing an economic function because they are conducting pre-departure tests to ensure that any disease does not travel to GCC States. Such function is a sovereign prerogative of the GCC States. Therefore, pre-departure test is not an economic activity by its nature and there is no relevant market in this case. All bodies namely; GAMCs, GAMCA and the Executive Board engaged in the process of pre-departure tests are performing the essential functions of the GCC States and are not involved in any economic activity. Hence, are not covered under the definition of undertaking given in the Act.

(v). The legal relationship between the Executive Board and the GAMCs is that of a principal and agent or auxiliary arms of the Executive Board to the extent that these centers conduct pre-departure tests of GCC Customers. As divisions of the same entity, the Executive Board has the right to set a fix price and provide for the equal distribution of medical tests between the GAMCs.

(vi). The anticompetitive practices compelled by foreign countries can not be penalized under the competition law. The Respondents have no option to act outside of the Rules and Regulations of the Executive Board.

C. HEARINGS BEFORE THE COMMISSION:

10. The first hearing in the matter was held on 20-03-2012. Mr. Malik Ghulam Sabir, Advocate appeared on behalf of Raja Mohammad Akram & Co. and Mr. Fida Ahmed, Secretary appeared on behalf of POEPA. Mr. Malik Ghulam Sabir, Advocate informed the Commission that they had sent the request for adjournment through fax and courier which was not received at the Registrar's Office. He requested for adjournment due to the fact that Mr. Salman Akram Raja, Advocate, Supreme Court had been unable to attend the hearing before the Commission as he was previously engaged in Lahore. The Commission expressed its discontentment at the request, noting that none of the four authorized Counsels had been able to attend the hearing. However, the Commission acceded to the request on the condition that the adjournment granted was final, and no subsequent adjournments were to be granted. Mr. Fida Ahmed was asked to file para-wise reply to the reply filed by the Counsel of the Respondents by 02-04-2012.

11. Second hearing in the matter was held on 25-04-2012. Mr. Salman Akram Raja and Mr. Umer Akram Chaudhary, Advocates of Raja Mohammad Akram & Co. appeared before the Bench on behalf of the Respondents along with Dr. Inaam, Dr. Hashmat Malik, Dr. Shamshad, Mr. Mujahid Malik, Mr. Ahmad Sheikh

Advocates. Mr. Qausain Faisal Mufti, Advocate along with Mr. Fida Hussain, Secretary appeared on behalf of POEPA before the Bench.

12. The counsel appearing on behalf of the Respondents argued the matter at length and elaborated the written reply dated 15-03-2012 and the justifications for the conduct under question before us. It was mainly agued that the Respondents are conducting medical test on behalf of the Executive Board and the medical reports are used for procurement of visas, therefore, the activity performed by them is not an economic activity and hence, they are not undertaking in terms of Section 2(1)(q) of the Act. He further argued that the legal relationship between the Executive Board and the Respondents is that of a principal and agent to the extent that the said GAMCs conduct pre-departure medical check-ups of the GCC Customers. The Respondents are closely regulated by the Executive Board, their licenses are renewed on annual basisand the Rules and Regulations also provide for the penalties, which include the penalty of revocation of license, for any violation of the Rules and Regulations by the Respondents. Therefore, the Executive Board and the Respondents are single economic entity and the provisions of competition law are not applicable on them. He further argued that the actions of the Respondents are compelled by the Executive Board, which is a sovereign entity, therefore, there is a specific bar of the Competition Law and the proceedings be dropped. In support of his arguments various judgments were relied upon which are discussed in detail in the later part of this Order.

13. Subsequent to the hearing, vide letter dated 26-04-2012, the counsel for the Respondents was directed to provide the following information/documents:

    (i). Complaints mentioned in letter dated 27-11-99 which were forwarded from GCC Approved Medical Centers in Pakistan to Executive Board of the Health Ministers' Council for GCC States ("Executive Board")

regarding ‘involvement of recruitment agents in medical examination’ and ‘uncertainty in distribution of medical slips’;

(ii). Letter dated 19-09-08 written by Dr. Shehzad Ahmed, President GAMCA (Rwp/Isb) to Executive Board requesting approval to charge Rs.3000 as fee for medical examination by the GCC Approved Medical Centers in Pakistan;

(iii). During the hearing reference was made to a certificate dated 29-02-12 issued by the Executive Board. The relevant correspondence was requested to explain the context for the issuance of the said certificate;

(iv). documentary evidence in support of the claim that post arrival medical tests in GCC States are conducted only randomly and are not compulsory for each GCC Customer;

(v). Information regarding GAMCs who were alleged/ found involved in malpractices in the pre equal distribution system and what disciplinary actions were taken against them? Whether these medical centers still continue to operate as GAMCs?

(vi). Documents supporting inspection of GAMCs carried out in Pakistan by the Technical Committee, Executive Board from January 2008 to April 2012;

(vii). The instances where GAMCs in Pakistan have been penalized for any violation of Executive Board’s Rules and Regulations;

(viii).Number of GCC Customers declared unfit in post arrival medical tests in GCC States;

(ix). What will be the impact of E-Communication System of the Expatriate Program on the existing equal distribution system among the GAMCs?

(x). Describe geographical limits of each GAMCA established in Pakistan and also who decides the territorial boundaries of GAMCAs? and

(xi). List the GAMCs which provide services exclusively to GCC Customers only (do not entertain local patients).

14. Mr. Salman Akram Raja responded to the above queries vide his letter dated 07-05-2012. The salient features of the reply are as under:

(i). GAMCs did not file any complaint to the Executive Board and only the negative representation of POEPA was brought to the notice of Executive Board. The Executive Board was specifically referred the minutes of meeting of POEPA dated 06-07-1999; wherein all the promoters were directed to get the medicals of their clients from VIP Health Clinic and Gulf Medical Center. Minutes of meeting and brochure issued by POEPA in this regard was provided'

(ii). The letter dated 19-02-2008 was written by the GAMCA for revision in fee for pre-departure medical check-ups due to currency fluctuation. Copy of the letter was provided.

(iii). Copy of the letter dated 14-02-2012 was provided, in response of which the certificate dated 29-02-2012 was issued by Executive Board;

(iv). Copy of the relevant excerpt of the Rules and Regulations was provided in support of the argument that on arrival in GCC states, medical tests are conducted on random basis;

(v). List of GAMCs was provided whose licenses were revoked by the Executive Board; however, it was mentioned that no specific reasoning was provided to the Respondents for revocation of the licenses.

(vi). The Technical Committee of Executive Board was not able to conduct the regular inspections of the GAMCs between 2008 to April 2012 due to security reasons;

(vii). Instances were provided where the GAMCs were penalized for not following the Rules and Regulations;

(viii). The number of GCC Customers who were declared unfit in their post-arrival medical check-ups was not provided on the pretext that the same is not available with the Respondents;

(ix). The E-Communication System will minimize the role of the GAMCAs in the distribution of emigrant workers to the GAMCs, the GCC Customers will be distributed among the GAMCs by the Executive Board as per its discretion;

(x). As per Article 1 of the 'Rules and Regulations to Coordinate the Activities between the Executive Board and GAMCAs', "the GAMCAs consist of all approved medical centers in any city in the country which conducts and implements the pre-departure medical check-ups program for expatriates recruited for work in the Arab Gulf countries'. The said article also provides that the GAMCAs must have at least three medical centers as members; and

(xi). GAMCs are dedicated medical institutions to conduct pre-departure medical check-ups for GCC Customers. However, routine medical care is also provided by these Centers but forms a very small proportion of the

overall activity of the centers. The GAMCs treat routine medical care as an activity distinct from the pre-departure medical check-ups for GCC States and maintain separate accounts for both activities.

15. Third hearing in the matter was held on 22-06-2012. All authorized representative from the last hearing appeared before the Commission.

16. The counsel for POEPA submitted the comments on the reply filed by the Respondents. He mainly denied all the assertions made by the Respondents and in detail elaborated his written comments, they are summarized as follows:

(i). The Respondents have not claimed that they do not earn profits against the services rendered to the GCC Customers. In case such claim is made, the Respondents would have to provide tax exemption certificates;

(ii). The Respondents do not fall in the domain of the Non-profit Organization or within the public domain. The GAMCs are commercial medical centers/ hospitals earning taxable gains against services in private sector;

(iii). The recruitment of GCC Customers in GCC States is not a state/ sovereign function. State functions are only those which squarely fall within public domain. The Respondents are sharing equal profits as a result of the monopoly over the both markets by commercial/economic and business activity and by no stretch of imagination these entities either enjoys any prerogative of the state or these have been conferred with any special or exclusive rights by the will of the sovereign.

(iv). The medical reports are used by the GCC Customers for seeking employment in GCC States, which is also an economic activity and can only be termed as economic, commercial and taxable activity.

(v). Further any purchase/hiring/rendering of commodity /services against one's own funds as consideration without intervention of State or a social service provider or Aid or Donor, which exposes the seller or service provider to profit/income which is taxable is an economic/commercial and a business activity.

(vi). The action of making Rules and Regulations for conduct of medical tests was taken by the Executive Board on the complaints made by the Respondents.

(vii). The Respondents have not been compelled by the Executive Board, in fact they have proposed a system which was in their own economic benefit; He further submitted that the foreign sovereign compulsion defense should not apply where the foreign government involvement was mere approval to the anticompetitive conduct.

(viii).No risk or cost is shared by the Executive Board with the Respondents. Where the ingredients of risk and cost are missing, it cannot be argued that a relationship of 'agent' and 'principle' exists;

(ix). He further submitted that the judgments cited by the Respondents' counsel are regarding economic activity are distinguishable owing t the reason that the cited judgments relates to non-profit functions based on principle of solidarity; however, such ingredients are missing in the instant case.

(x). The Executive Board is a "Regulator" and not the "Principal". So there is no relationship of Principal and Agent inter se the Executive Board and the Respondents.

17. The counsel appearing on behalf of POEPA finally submitted that it is settled at the cost of repetition that the Pre departure Medical Tests are quoted with commercial/ economic/ business/ taxable activity in Commercial Hospitals/ Medical Centers replete with anti competition & monopolistic behavior which offends and militates against the provisions of The Act and all the three defenses taken by the respondents are bald & contradictory in nature and those may kindly be ignored while deciding this case and the Respondents are to be dealt with in accordance with law.

18. The counsel for the Respondent rebutted the submission made by POEPA. He argued at length while discussing his reply filed subsequent to the 2nd hearing in the matter.

19. The counsel for the Respondent was asked to submit the written arguments not later than 27-06-2012. The written submissions were received on 27-06-2012 through email. In the written submissions, the arguments raised at length were reiterated in the written arguments.

ISSUES

20. The material issues which emerge from the submissions and pleadings of the parties are as follows:

    (i). Whether or not the Respondents are conducting an economic activity and fall within the purview of 'Undertaking' in terms of clause (q) sub-section (1) of Section 2 of the Act?

    (ii). Whether the Executive Board, GAMCAs & GAMCs constitute 'single economic entity' as the Respondents are acting as an auxiliary arm/ agent of the Executive Board, therefore, the provisions of competition law are not applicable on them?

(iii). Whether the conduct under review qualifies itself as a '*foreign sovereign compulsion*' or '*Act of State'* and the provisions of competition law are not applicable on them?

(iv). Whether the fixing of fee for pre-departure medical check-ups by GAMCs constitutes a violation in terms of clause (a) of sub-section (2) of Section 4 of the Act?

(v). Whether the division of markets and equal allocation of the GCC Customers for pre-departure medical check-ups by the Respondents constitutes a violation under clause (b) & (c) of sub-section (2) of Section 4 of the Act?

ANALYSIS

21. We note that the Respondent's counsel has also taken certain objection on the constitutionality of the Act. In this regard, We find ourselves in agreement with the view taken by the Commission in Bank's cartelization case 2010 CLD 1271, the Stock Exchanges case regarding placing/fixing a price floor for securities 2010 CLD 1377, which were subsequently followed in the matter of Karachi Stock Exchange (G) Ltd. abuse of dominance case, the Jamshoro Joint Venture Limited case & the Proctor & Gamble Pakistan's case 2010 CLD 1695; Wherein while relying on the judgments of Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly N.W.F.P. (P.L.D 1995 Supreme Court 66) and Akhtar Ali Parvez v. Altafur Rehman reported at (PLD 1963 (W.P.) Lahore 390) it was held that, "*it is not for the Commission to address the objections raised as to the constitutionality and validity of the Ordinance or the appointment of its members. Hence, we must proceed on the assumption that the existence of the Commission is legal and valid until a court of competent jurisdiction determines otherwise.*"

22. It may also be added that in Mehr Dad v. Settlement and Rehabilitation Commissions P.L.D. 1974 SC 193), the Supreme Court of Pakistan held that "it is true that a Tribunal cannot go into the vires of the enactment under which it has been created and in Chempak (Pvt) Ltd. v Sindh Employee's Social Security Institution (Sessi) reported in 2003 PLC 380, the Court held that " as observed by the Full Bench of Hon' able Supreme Court, comprising 12 judges, in Federation of Pakistan v. Aitzaz Ahsan (PLD 1989 SC 61) it is a well-settled principle of Constitutional interpretation that until a law is finally held to be ultra vires for any reason it should have its normal operation". We proceed accordingly to address the above framed issues.

(i). Whether or not the Respondents are conducting an economic activity and fall within the purview of 'Undertaking' in terms of clause (q) of sub-section (1) of Section 2 of the Act?

23. In this regard it has been submitted by the counsel for the Respondents that the Enquiry Report has failed to appreciate the law in defining the 'undertakings' and the 'relevant market' for the purposes of the enquiry has made an erroneous conclusion in this regard. The Respondents and the Executive Board are not 'undertakings' in terms of Section 2(1)(q) of the Act. In light of the definition of 'undertaking' under section 2(1)(q) of the Act, it was submitted that it is not the form of a particular entity but the functions performed by it, which determines whether it is an undertaking or not. Therefore, the concept of undertaking only covers those entities which are engaged in an economic activity. In support of this argument reliance was placed on **Hofner and Elser v Macroton [1991] E.C.R. I-1979** wherein it was held that "*the concept of undertaking encompasses every entity engaged in an economic activity, regardless of the way in which it is financed.*"

24. The learned counsel for the Respondents has stressed that the Respondents are not performing an economic function because they are conducting pre-departure

medical check-ups to ensure that GCC Customers with diseases and infections do not travel to the GCC States. The pre-departure medical tests are not an 'economic activity' by their nature because the medical check-ups constitute an integral step in the emigration process which enjoys the prerogative of the State. Pre-departure medical check-ups do not fall under economic activity even if they appear as a service transaction for a fee because these check-ups are subsequently used for a non-economic activity performed by a sovereign country. In support of his arguments reliance was placed on **FENIN v Commission of European Communities [2003] 5 CMLR 1;** wherein it was held that "*the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity*" and on **Diego Cali v SEPG [1997] 5 CMLR 484; wherein** it was held that "*it is necessary to consider the nature of the activities carried on by the public undertaking or body on which the state has conferred special or exclusive rights*". It has also been argued that the Respondents are engaged in the process of performing essential functions of the GCC States as represented by the Executive Board. The Executive Board is also exercising the sovereign prerogative of the Health Ministers' Council and is not engaged in an economic activity in Pakistan. Hence, they are not 'undertakings' in terms of Section 2(1)(q) of the Act.

25. On the other hand the counsel appearing on behalf of POEPA has argued that no where the Respondents have claimed that they do not earn profit against the services being rendered to the GCC Customers. He further submitted that the Respondents also do not fall in the domain of Non Profit Organizations and are not providing any sort of social services. In fact, it was argued that GAMCs are commercial hospitals/medical centers earning taxable gains against their services in private sector. Their hospitals/medical centers in no way fall within public domain as the immigration of the GCC Customers is not a State function. Conversely the recruitment of the labor is also not the function of the GCC States. State functions are only those which squarely fall within public domain.

26. It was further contended by the counsel for POEAPA that nature of provisions of services does matter in determination of the activity. He further submitted that the subsequent use of the medical services also involves economic activity as for instance; the subject medical tests are used for seeking employment in GCC States for the individual economic and taxable gains/ salaries/ remunerations, which may eventually have a beneficial impact for both the economies. Furthermore, any purchase/hiring/rendering of commodity /services against one's own funds as consideration without intervention of State or a Social Service Provider or aid or donor, which exposes the seller or service provider to profit/ income which is taxable is an economic/commercial and a business activity.

27. Taking all the above arguments in consideration, we deem it relevant to refer to the term 'undertaking' which has been defined under Section 2(1)(q) of the Act, in the following words:

> *"undertaking" means <u>any natural or legal person</u>, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity <u>in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services</u> and shall <u>include an association or undertakings</u>"(underlining is ours)*

28. The type of activity which is required to fall under the definition is that it is *'<u>engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services</u>' (emphasis added).* Here it would be relevant to point out that the services provided by the GAMCs are not free and GAMCs are not rendering social services as 'not for profit organization'. They are charging the fee for the services they render and are making profit for carrying out such activities. Further we find merit in the argument advanced by the

counsel for POEPA that the activity of conducting pre-departure tests by GAMCs is a taxable event hence an 'economic activity'.

29. The judgments cited by the Respondents in support of his arguments are clearly distinguishable; as in **Diego Cali** *supra* SEPG (the respondent against whom the complaint was filed) was responsible for conducting the anti-pollution surveillance at oil port of Genoa and also for protecting maritime areas against any pollution caused by accidental discharges of hydrocarbons into the sea. It was exclusively responsible for charging a fixed fee and therefore, it was observed by European Court of Justice in Para 23 of the Judgment that "*Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority."* We do not find any relevance with the case in hand.

30. Similarly, **FENIN** *supra* is also not relevant and distinguishable as in the cited case the undertakings were performing exclusively 'social functions', founded on the principle of national solidarity, and the same were entirely operating on 'non-profit' basis. (Emphasis added)

31. Here it will be pertinent to point out that in order to determine as to whether an 'entity' is an undertaking or not the EU Community Court's revert to the concurrent application of two tests: (i) the comparative criterion and (ii) market participation tests.

32. The comparative criterion test: Where an activity can only be carried out by a '*Public Body*' and that activity cannot be performed by a 'Private Entity', that body cannot be considered to be an undertaking within the meaning of Articles 101 & 102 of TFEU. In **Hofner and Elser** *supra*, which has also been relied upon by the Respondents an activity was held to be an 'economic activity' since *"employment procurement has not always been, and is not necessarily, carried*

out by public entities", while in **Firma Ambulanz Glockner v Landkreis Sudwestpfalz [2001] ECR I-8089**, public health organisations providing services in the market for emergency and ambulance services were held to be undertakings subject to the competition rules on the basis that *"such activities have not always been, and are not necessarily, carried out by such organisations or by public authorities"*.

33. Under the market participation test, it is not the merely the fact that in theory, private operators may carry out economic activities having social functions but it is the market condition where under such activities are carried that determines the application of Articles 101 & 102 TFEU, formerly Article 81 & 82 akin to Section 4 & 3 of the Act . Such market conditions are distinguished by conduct which is undertaken with the objective of capitalisation, as opposed to social functions, founded on the principle of national solidarity, being a not for profit activity,

34. In **Commission v Italy [1998] ECR I-3851**, the Court of Justice held that entities are undertakings for the purposes of the competition rules where they *"offer for payment, services [...] relating in particular to the importation, exportation and transit of goods, as well as other complementary services such as services in monetary, commercial and fiscal areas"*. In certain cases, a clear link between participation in the market and the carrying out of the economic activity is required. In **Hofner and Elser** *supra*, however, the court has shown itself willing to imply the economic nature of the activity engaged in by the public body where the member state allows private undertakings to participate in the same relevant market In **Ambulanz Glockner** *supra*, it was held that "*any activity consisting in offering goods and services on a given market is an economic activity*" for the purposes of competition law.

35. What further intrigues us to conclude that the Respondents are in fact engaged in 'economic activity' is the fact that the Respondents are not concerned with

the 'test' and are more keenly interested in implementation of the division of markets and equal allocation of consumers which has been vehemently defended before the Commission. In view of the above, we find no merit in the argument that the services rendered by the Respondents do not involve an economic activity. We find it otherwise as explained above.

36. The Respondents have also argued that since no economic activity is carried out by the Respondents, therefore, there is no market for goods and/or services and the provisions of the Act are not applicable. The presumption raised by the Respondents that they are not engaged in performance of any economic activity stands negated in the preceding paragraphs, therefore, we are of the considered view that the Respondents are in fact 'undertakings' in terms of clause (q) of sub-section (1) of Section 2 of the Act being engaged in the relevant market of '*pre-departure medical tests for the intended immigrants/expatriates to the GCC Countries*' except United Arab Emirates in Pakistan. We find merit in the observation made in the Enquiry Report and are in agreement with the determination made of the relevant market in the enquiry report.

(ii). Whether the Executive Board, GAMCAs & GAMCs constitute 'single economic entity' as GAMCAs & GAMCs are acting as an auxiliary arm/ agent of the Executive Board, therefore, the provisions of competition law are not applicable on them?

37. It has been argued on behalf of the Respondents that in all respects, the legal relationship between the Executive Board and the Respondents is that of a principal and agent to the extent that the said GAMCs conduct pre-departure medical check-ups of GCC Customers. He has relied on the judgment of **Union Internationale des Chemins de Fer v Commission [Case T-14/93]** wherein, it was held that in order to qualify as an agent, it must be demonstrated that the agency cannot provide the services independently from the principal. He also relied on the judgment of **CEES v CEP, Case C-217/05**, wherein it was held that *"where there is a relationship of principal and agency between the different*

bodies, they are held to be part of a single entity even if they have separate legal personality". He further submitted that Respondents are closely regulated by the Executive Board, their licenses are renewed on annual basisand the Rules and Regulations also provide for the penalties, which include the penalty of revocation of *license*, for any violation of the GCC Regulations by the Respondents; hence they constitute single economic entity and their action falls outside the ambit of the Act.

38. The counsel appearing on behalf of POEPA has submitted that GAMCs are profit earning units based on commercial and economic activity. The Executive Board is a 'Regulator' and not the 'Principal'. So there is no relationship of Principal and that of Agent *inter se* the Executive Board and the Respondents. In jurisprudence, the determining factor in defining the relation of agency & principal is the financial or commercial risk borne by the agent in relation to the activities for which he has been appointed as an agent by the principal.

39. While addressing this issue we are of the considered view that, no such exemption to 'single economic entity' has been provided under the Act from the application of Section 4.

40. Nonetheless, we refer to Section 182 of the Contract Act, 1872 which defines an 'agent' and 'principal' as follows:

> *182. "Agent" and "principal" defined. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".*

41. The judgments relied upon by the Respondents are not relevant and clearly distinguishable and somewhat disappointing. The case of **Union Internationale des Chemins de Fer v Commission** pertains to the arrangement between the

Railway Corporation and its agents for sale of railway tickets. In the said case, the travel agents were selling tickets on behalf of the Railway Corporation and binding third parties to the contract with railway and for this a commission war charged, further the revenue generated from the sale of the tickets were paid to the Railway corporation and only the commission was retained by the travel agent. However, in the present case, the fee for the pre-departure medical examination has been charged and out of that fee nothing is reimbursed to the Executive Board. Furthermore, the case of **CEES v CEP, Case C-217/05** cited by the Respondents, in fact goes against the Respondents. In Para 62 & 65 of the said judgment it was observed by the Court that:

> *62. Nevertheless, it must be pointed out that, in such a case, only the obligations imposed on the intermediary in the context of the sale of the goods to third parties on behalf of the principal fall outside the scope of that article. As the Commission submitted, an agency contract may contain clauses concerning the relationship between the agent and the principal to which that article applies, such as exclusivity and non-competition clauses. In that connection it must be considered that, in the context of such relationships, agents are, in principle, independent economic operators and such clauses are capable of infringing the competition rules in so far as they entail locking up the market concerned.*
>
> *…*
>
> *…*
>
> *65 In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling must be that Article 85 of the Treaty applies to an agreement for the exclusive distribution of motor-vehicle and other fuels, such as that at issue in the main proceedings, concluded between a supplier and a service-station operator where that operator assumes, to a non-negligible extent, one or more financial and commercial risks linked to the sale to third parties.*

42. We would now refer and would rely on **Bolan Beverages (Pvt.) Limited vs. PEPSICO Inc., PLD 2004 Supreme Court 860**; wherein an agreement for distribution of beverages between M/s PEPSICO Inc. and M/s Bolan beverages (Pvt.) Limited came under the scrutiny of the Supreme Court. While referring to

the definitions of principal and agent provided under Section 182 of the Contract Act, the Honourable Supreme Court observed that,

> *"According to the above definition it appears that an agent is appointed by a principal to do any act for the principal or to represent the principal in dealings with the third persons…*
>
> *…*
>
> *There are a few other sections which also enhance the phenomenon of an agency. Section 211 of the Contract Act describes the agent's duty in conducting the principal's business. This section presupposes the belonging of the business to the principal while the conduct thereof to the agent…. In the wake of the existence of an agency, a loss sustained by the principal is bound to be made good by the agent…*
>
> *…*
>
> *Under section 213 of the Contract Act an agent is bound to render proper accounts to his principal on demand… It elaborates that if an agent without the notice of a principal, deals in the business of agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have accrued to him from the transaction… Sections 217 and 218 of the Contract Act also lay down certain conditions that the agent is bound to pay to his principal all sums received on his account.*
>
> *…*
>
> *…an agent is a hyphen that joins and a buckle that binds the relation between the principal and the third party. Where an agent is not a link between the principal and a third party, the institution of agency is not created where a person is not liable to the principal for the submission of accounts such person cannot be dubbed as agent… The Bolan Bottlers also do not receive any*

commission for the sale, rather, they receive the entire amount of sale consideration as well as the profits. They are also likely to sustain losses as well.

…

43. Based on the above observations of the Honourable Supreme Court, we are of the view that in order for establishing the relationship of principal and agent following conditions must be fulfilled:

> *"(i). to do an act for the principle or to represent the principle in dealing with third parties;*
> *(ii). no element of risk and cost attributed to the agent;*
> *(iii). a loss sustained by the principal is bound to be made good by the agent;*
> *(iv). agent is bound to render proper accounts to his principal on demand and is bound to pay to his principal all sums received on his account;*
> *(v) agent not to retain any profit, but only receives commission"*

44. We note that under the "***Vertical Exemption Guidelines***"[1] of EU agency agreements have been defined in Para (12) in the following terms:

> *An agent is a legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal, for the:*
>
> *–purchase of goods or services by the principal, or*
> *–sale of goods or services supplied by the principal.*

[1] http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

45. From the above definition, we are of the view that agency exists where a legal person is empowered by another to negotiate or conclude contracts either in agent's own name or in the name of the principal. Further in terms of Para (16) & (17) of the said guidelines, certain conditions have been provided which must be met in order to establish the agency i.e. (i) the agent does not contribute to towards the costs, (ii) the agent does not undertake responsibilities against third parties or does not take responsibility of non-performance of the contract with the exception of agents' commission, (iii) does not make market specific investments in equipment, premises or training of personnel and (iv) does not undertake the activities in the same product market unless the same are reimbursed by the principle, then there exists a relationship of principal and agent *inter se* the parties.

46. Applying the above principles to the case in hand and the facts on record, We note that the GAMCs have been granted a license by the Executive Board to conduct pre-departure medical tests for the GCC Customers; for issuance of the license a fee has been charged by the Executive Board. The Rules & Regulations may regulate the conduct or provide guidelines but do not establish the relationship between the two that of a principal or an agent. The GAMCs charge their fees for conducting 'pre-departure medical tests' from the GCC Customers and does not undertake the activity free of cost or for a '*commission*' to be charged from the Executive Board. It is also note worthy that any medical center interested in obtaining the license from Executive Board had to make market specific investment in the equipment and the training of personnel at its own risk and cost; and despite of making such investment there appears to be no certainty that medical centers would successfully obtain the license from the Executive Board.

47. From the above, there remains no doubt in coming to the following conclusion:

(i). GAMCs are not acting on behalf of the Executive Board in dealing with the third parties i.e. intended emigrants, in fact GAMCs are conducting their own business after obtaining the license from the Executive Board;

(ii). its not the Executive Board but GAMCs who incur the costs and market specific investment for purchase of relevant equipment and training of personnel;

(iii). GAMCs are not responsible for making the loss good towards the Executive Board;

(iv). GAMCs are not obliged to render the accounts to the Executive Board on their demand and do not receive any payment on behalf of the Executive Board;

(v). The fee charged by the GAMCs for the conduct of pre-departure medical tests is retained by the GAMCs and only annual license fee is paid to the Executive Board for the permission to conduct economic activity for another year;

(vi). GAMCs and along with the services of 'pre-departure medical tests' GAMCs are also engaged in the provision of other health related activities, for which no reimbursement has been made by the Executive Board.

48. Regarding the assertion that the medical tests are conducted on behalf of the Executive Board, we note that at no time in the past the pre-departure medical tests were conducted by the Executive Board in Pakistan or in any country. In fact it was only until 1995 that medical centers were authorized to conduct pre-departure medical tests. Furthermore, the role of association i.e. GAMCAs is to

supervise the GAMCs in order to ensure the equal distribution system of GCC Customers and charging of fee.

49. There is nothing available on the record to suggest that the GAMCs are not engaged in provision of other similar type of health care services. The counsel appearing on behalf of the Respondents has also conceded that the Respondents are engaged in provision of other health care services. It has also not denied that the fee charged by the GAMCs are not reimbursed to the Executive Board after making deduction of "commission", in fact the beneficiary for the entire fee charged is solely GAMCs. Hence, we are of the considered view that the relation of 'principal' and 'agent' does not exist between the Executive Board, GAMCAs and GAMCs.

(iii). Whether the conduct under review in the present proceedings qualifies itself as a 'foreign sovereign compulsion' or 'Act of State' and the provisions of competition law are not applicable on them?

50. In this regard it has been argued by the counsel for the Respondent at great length that "*according to the competition jurisprudence, the anticompetitive practices compelled by foreign countries cannot be penalized under the competition law*." It was submitted by him that the GCC is a political and economic union of the sovereign Arab states bordering the Persian Gulf and located on or near the Arabian Peninsula, namely Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates. In 1976, the GCC Health Ministers formed a General Secretariat which was renamed as the Executive Board of the Health Ministers' Council for the GCC States (Executive Board). The Executive Board acts as the executive organ of the Health Ministers' Council for the GCC States (the '**Health Ministers' Council**') and was and remains empowered to improve cooperation between the Arab countries in matters relating to health and medicine. In January 1995 at the 38th Conference of the Health Ministers' Council, the Executive Board was authorized to initiate

a program of pre-departure medical check-ups of the GCC Customers. The aim behind the introduction of the said program was to prevent and control the spread of infection and diseases in the GCC States which may be brought by the large influx of immigrant workers from other countries.

51. The counsel for the Respondent submitted that it is settled law that the decisions of foreign sovereigns about production levels of natural resources produced within their territorial boundaries—including crude oil—are sovereign acts regardless of whether the decisions are products of unilateral deliberation or consultation with others **International Association of Machinists v. The Organization of Petroleum Exporting Countries (IAM I), 477 F.Supp. 553 (C.D.Cal.1979) at 569.** The GCC States may exercise their sovereign power to restrict the influx of immigrant labor on their soil while ensuring that there is no threat of an outbreak of disease due to that influx of human labor. The above principle has gained further strength from two recent US cases dealing with the OPEC export cartel, namely **In re Refined Petroleum Products (RPP) Antitrust Litigation 649 F.Supp.2d 572 (2009) and Spectrum Stores v. Citgo Petroleum Corporation 632 F.3d 938 (2011)** (United States Court of Appeals for the Fifth Circuit). In *RPP (2009)* the Court broadened the scope of foreign states' authority by ruling that even if the act or alleged anticompetitive conduct is committed outside the territory of the sovereign state, the act of state defense may still be availed by a private party. Hence, it was submitted that the said quantity allocation of GCC Customer's medical tests according to the equal distribution system and the price fixed for them has been undertaken entirely on account of directions of the Executive Board and therefore renders it outside the purview of the Act.

52. It was further submitted by the counsel that according to the U.S. Court of Appeals case of **Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir.1979) at 1293**, the Court held that '*the sovereign compulsion defense is not principally concerned with the validity or legality of the foreign government's order, but rather with whether it compelled the American business*

to violate American antitrust law.' As opposed to the act of state doctrine, a foreign compulsion analysis requires the court to inquire into whether the alleged compulsion, valid or invalid, actually occurred. The *Mannington* case also holds that the party asserting the foreign sovereign compulsion defense must prove that the foreign state's involvement was '*more than merely peripheral to the anticompetitive conduct involved*' and that '*simple approval'* does not meet the threshold necessary for the doctrine to apply. It was argued that on the basis of letter dated 07.05.2012 of the Executive Board, if the Respondents do not comply with the mandatory directions of the Executive Board regarding the equal distribution system and the fixed price, they may face serious sanctions in the form of revocation of their license by the Executive Board. The risk of losing a license meets the *Mannington* threshold as it is not just a matter of simple approval of the regulator involved. The case of **Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F.Supp. 1291 (D.Del.1970)** involved a concerted boycott by companies exploring for oil in Venezuela who refused to deal with the plaintiff because they were told (through a phone call) not to by the Venezuelan Coordinating Commission. The court held that the oral direction received from the Venezuelan authorities was sufficient to constitute the degree of compulsion required to successfully invoke the defense.

53. It was stated that the foreign sovereign compulsion defense has been the subject of recent case law involving Chinese producers and manufacturers operating in the US market. In **re Vitamin C Antitrust Litigation 810 F.Supp.2d 522 (2011)**, Chinese manufacturers were accused by US purchasers of fixing prices and limiting exports i.e., creation of an export cartel. The Chinese defendants backed by the Chinese government authorities claimed that they were compelled to export at a set price and even though the price itself was not set by the authorities they were unable to export at a non-conforming price. However, it was unclear to the court whether there was compulsion.

54. It was submitted by the Respondent's counsel that the instant case can easily be distinguished from the **Vitamin C** litigation as there is material and concrete evidence which establishes that the Respondents will suffer serious penal consequences if they do not follow the directions of the Executive Board regarding allocation and price. In the *Vitamin C* case, the court recognized the defense as applicable when a foreign party is placed '*between the rock of its own local law and the hard place of US law*', yet it found no rock and no hard place in that case (at 525).

55. With reference to the US doctrine of 'Act of State', it has been argued by the Respondents that an adverse ruling by the Commission will seriously undermine the constitutional responsibility of the executive to manage foreign policy and relations with the GCC states. He relied on the judgment of **Underhill v. Hernandez, 168 U.S. 250 (1897) at 252**, wherein it was held that "*domestic courts are barred from ruling upon the validity of the acts of foreign states.*" American courts applied a territorial limitation and a commercial activity exception i.e. the defense was only available if the relevant acts were committed within the territory of the foreign sovereign state and if the relevant act was not a commercial act. However, in keeping with the constantly evolving nature of international business and the organic nature of global commercial transactions, a recent slew of American judgments on the act of state doctrine have done away with the territorial limitation and commercial activity exception thereby making the act of state doctrine applicable even if the relevant act of the sovereign state was of a commercial nature and even if it was committed outside the territory of the sovereign state.

56. He further submitted that since the Enquiry Report calls upon the Commission to rule upon the validity of the governmental acts undertaken by the GCC States, Act of State Doctrine is applicable to the instant case. He relied on the judgment of **W.S. Kirkpatrick 493 U.S. 400 (1990) at 406**, where in it has been held that "*[a]ct of state issues only arise when a court must decide—that is, when the outcome of the case turns upon the effect of official action by a*

foreign sovereign." As sovereign states, GCC States have complete authority to exercise their sovereign powers within their own territories. In re **Terrorist Attacks 538 F.3d 71 (2008) at 85**, it was held that the criteria for an organ of the state is (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law. It was argued that given this criteria, it is clear that the Executive Board is an organ of the sovereign GCC States.

57. On the other hand the counsel appearing on behalf of PEOPA has argued that the foreign sovereign compulsion defense should not apply where the foreign government involvement was mere approval to the anticompetitive conduct. The courts have held that a government's granting of patents-a ministerial activity – was not the type of government action required to invoke the foreign sovereign compulsion defense. Further, Courts would not excuse the defendant from liability if a private actor had solicited the government to enact the legislation that subsequently led to the private anticompetitive Act. For the foreign sovereign compulsion defense to apply, there, is, therefore, the requirement that the law or rule that compelled the anticompetitive conduct must originate with the foreign government and not a private actor. The Commission, by the above statement, was bringing the action of the companies within the ambit of Competition Law rather than precluding it, as it has been made to appear in the reply to the Show Cause Notice. He further submitted that for the existence of foreign sovereign compulsion doctrine, seven/eight conditions must be satisfied. Firstly: No where in the show cause notice it is settled that qua each GCC state, whom one can connote as "Sovereign", Secondly: What economic interest does Govt. of Pakistan have qua it's public exchequer or qua general public interest, Thirdly: Had it been a bilateral economic interest between the two sovereign countries, only then the "Foreign

Sovereign Compulsion doctrine/defense" would have been taken**,** Fourthly: The defense against an Anti competition & Monopolist behavior ought to have been taken by a "Sovereign", Fifthly: In no Way Executive Board can claim to be a "Sovereign". As Sovereignty flows from somewhere else and ought to have been claimed from another "Sovereign", Sixthly: It should be a trade of tangible items between two territories, and Seventhly: Mere approval of a regulator does not entitle any person to claim this defense.

58. To proceed with the determination of the issue, from the above, it follows that two defenses have been clubbed together by the Respondents: (i) the doctrine of "Foreign Sovereign Compulsion" and (ii) the doctrine of "Act of State".

59. At the out set, we must point out that under the Act these doctrines are not available or recognized as defenses for contravention of Section 4 provisions. However, at best we can look and examine these grounds in our discretionary exercise while considering grant of exemptions in terms of Section 9. Although, the exemption applications are not pending before us, the counsel for the Respondent had submitted during the hearing that the parties concerned are willing to file for exemptions in the event the Commission so determines and directs; without getting into the technicalities we deem it appropriate under the circumstances to examine the defense taken on merit.

60. We will take first the doctrine of ***'foreign sovereign compulsion'*** based on the review of the relevant case law; following emerge as the two essential requisites that must co-exist in order to invoke this doctrine:

    (i) The conduct in question is pursuant to a 'unilateral' 'act or legislation' of the foreign sovereign; and

    (ii) Its non-compliance entails penal consequences.

61. Having reviewed the case laws relied upon by the parties and those deemed relevant by us, we are of the considered view that the doctrine of foreign sovereign compulsion is not applicable in the present case. We refer to United States v. Sisal Sales Corporation et al., 274 U.S. 268 (1927); United States v. Watchmakers of Switzerland Information Center, Inc. (Swiss Watchmakers) 1963 Trade Cases (CCH) 70,600 (S.D.N.Y. 1962), modified, 1965 Trade Cases (CCH) 71,352 (S.D.N.Y. 1965); A. Ahlström Osakeyhtiö and others v Commission of the European Communities (Wood Pulp), Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 [1988] ECR 5193 & Asia Motors III Asia Motor France SA and others v Commission of the European Communities (Asia Motor III), Case T-387/94 [1996] ECR II-961; **wherein the dictum laid down is that "when a private party solicits the government to enact a legislation resulting into private anticompetitive acts, the foreign sovereign compulsion as a defense does not apply."**

62. In this regard, the role of the Respondents in soliciting the Executive Board to approve the Rules and Regulations is relevant to establish. As per the pleadings in January 1995, the Executive Board was authorized to initiate a program of pre-departure medical check-ups of the GCC Customers. The object behind the project was to ***"set up the health requirements needed to be fulfilled by workers coming for work in the region, determine the clinical, pathological and radiological tests to be conducted for assurance of their physical and psychological fitness"***.[2]

63. We note that although the program of pre-departure medical check-ups was in place since 1995, still the prevalent system of equal distribution and the Rules & Regulation initiative was not taken by the Executive Board on its own. In this regard the letter dated 27-11-1999 is of extreme importance; through which the Respondents were required to prepare a working plan and pass a resolution. The

[2] Preamble of the Rules and Regulations for Medical Examination of the Expatriates Recruited

said letter was a result of the complaints made by the Respondents to the Executive Board.

64. There is no cavil in reaching a just conclusion that initiative of the formulating the existing Rules & Regulations on the subject was taken on the complaints made by the Respondents. The said letter for ease of reference in its relevant parts is reproduced below:

> *"This Office has been receiving complaints from various GCC Approved Medical Centres that the involvement of recruitment agents/travel agents in the medical examination of candidates has caused uncertainty in distribution of medical slips. Some centres to get more business have lost their professional sincerity and the medical examination has become a business between recruiting agencies and so called health centres. The approved centres have no control on such practices. Therefore, in the interest of utmost care for the safeguard of our approved health centres we suggest that all the GCC Approved Medical Centres form an Association namely GCC Approved Medical Centres Association (GAMCA).*
>
> *In this regard, it will be appreciated it centres contact with each other and form an Executive Committee consists of some members which will develop a working plan on this subject. Upon mutual arrangements a meeting may be arranged at a suitable place in your city. Invitations may be extended to the Head of Counsellor Section of the embassies to participate in the meeting and know the object of the meeting. The executive committee should put forward a resolution in the meeting that the office of GAMCA should receive all the medical slips issued from any source and in turn distribute that to all approved health centres on equal distribution system."*
>
> *We suggest the following few points as regulations of GAMCA:*
>
> *(i). Only GCC approved medical centres shall be entitled for the membership of this association;*
> *(ii). Nobody will take referral slip on other's behalf;*
> *(iii). GAMCA will receive from recruiting agents or other sources requisitions for conducting pre-medical examination of job seekers in GCC States, its offices will administer a computerized system for the equal distribution of medical examination slips among the centres;*

> *(iv). While giving a slip to a person for medical examination, GAMCA and the examination centre will fully identify the person to be examined in order to avoid substitution. The referral letter to a health centre covering the medical slip must carry the official seal of GAMCA;*
>
> *…*
> *…*
> *…*
>
> *The above mentioned are some guidelines, however, any suggestion you may have for the strengthening of our program regarding enrolment of healthy workforce for GCC States will be appreciate"*

65. It is worth mentioning that the afore-referred letter in itself mentioned that the "*involvement of recruitment agents/travel agents in the medical examination of candidates has caused uncertainty in distribution of medical slips"* (emphasis added).

66. Further reading of the said letter reveals that conduct was not forced on the Respondents, in fact, it was recommended by the Respondents to the Executive Board in the first place in order to safeguard the economic interest of the Respondents'; as the Executive Board in response to Respondent's complaints suggested that

> *"in the interest of utmost care for the safeguard of our approved health centres we suggest that all the GCC Approved Medical Centres form an Association namely GCC Approved Medical Centres Association (GAMCA)…. In this regard, it will be appreciated it centres contact with each other and form an Executive Committee consists of some members which will develop a working plan on this subject."*(Emphasis added). Further, *"invitations may be extended to the heads of counselor Section of the embassies to participate in the meeting and know the object of the meeting."*(Emphasis added).

67. Hence, Rules and Regulations sought and subsequently approved were primarily to safeguard medical centres' own "economic interest". The so called equal distribution system was proposed by the GAMCs which, subsequently

with minor improvisation has been implemented in the shape of the Rules and Regulations for Medical Examination of the Expatriates Recruited and thus was not imposed on the Respondents "unilaterally".

68. Also it cannot be overlooked at the initiation stage i.e. in 1999 the Executive Board clearly communicated that,

> *"The above mentioned are some guidelines, however, any suggestion you may have for the strengthening of our program regarding enrolment of healthy workforce for GCC States will be appreciate"*

69. Leaving and the modalities and working of the GAMCs open for them to resolve with the primary objective *of the Rules & Regulations as referred in Para 62 above*. On this issue we would like to refer to on one of the most recent judgment of the U.S. District **Vitamin C Antitrust Litigation, 810 F. Supp. 2d 522 (E.D.N.Y. Sept. 2011) which the Counsel for the Respondent maintains to be distinguishable**. However, in **Vitamin C** case the court expressed doubt regarding applicability of the foreign sovereign compulsion defense, where *"Defendants enthusiastically embrace a legal regime that encourages, or even 'compels,' a lucrative cartel that is in their self interest."* Despite the fact that there was a penalty of cancellation of export license as a consequence for not coordinating the production and prices of their exports in terms of the circulars issued by the Chinese Ministry and their Chamber of Commerce in the instant matter. The Chinese Government even appeared before the court as an *amicus*, but the assertions made were not considered to be sufficient under the circumstances by the U.S. District Court to allow the 'foreign sovereign compulsion' defense to the Chinese manufacturers.

70. In our view, the judgments of **Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F.Supp. 1291 (D.Del.1970); International Association of Machinists v. The Organization of Petroleum Exporting Countries (IAM I), 477 F.Supp. 553 (C.D.Cal.1979) at 569; In re Refined Petroleum**

Products (RPP) Antitrust Litigation 649 F.Supp.2d 572 (2009) and Spectrum Stores v. Citgo Petroleum Corporation 632 F.3d 938 (2011) that have been heavily relied upon by the Respondents are not relevant and applicable to the case at hand and are clearly distinguishable.

71. We are of the considered view that in all the above cited cases, one peculiar fact was common that the action brought before the Court was with reference to the natural resource, being produced in foreign country; which constituted the major source of revenue for those foreign states. The development and control of natural resources is a prime governmental function with which no foreign court can interfere. Further more, the judgments cited by the Respondents also appreciates that the issue of relations with oil-rich states with reference to import or export of oil related products is inextricably linked to wider questions of national security, military strategy, foreign relations, and economic stability.

72. In the present case the matter pertains to a service being provided within the territories of Pakistan deciding as to the modality of distribution (fixing an equal quota) of these services in contravention of the Act as well as prescribing a fixed fee pertaining to a service which constitutes an economic activity and such fixing of price and equal allocation of market at the behest of the GAMCs has no direct nexus in achieving the real objective stated in terms of Para 62 above, purported to be achieved by the sovereign body "the Executive Board" Accordingly, the Respondents have failed to satisfy the first condition of the test i.e. "unilateral act or legislation".

73. In the given facts deliberating upon the second requisite is not called for. Nonetheless, with respect to the second condition, it would be relevant to note that, while the Rules and Regulations envisage penal consequences and the regulations are purported to be mandatory, the Respondents, however, seem to have adopted a pick and choose policy to implement the said rules. In this regard it is pertinent to highlight that in the Rules and Regulations for Medical

Examination of the Expatriates Recruited certain regulations have been framed under the title "Regulation for coordinating the work between the Executive Board of the Health Ministers' Council for the Cooperation Council States and the GCC Approved Medical Centers' Association "GAMCA". Under the said Regulations, GAMCAs are required to do the following as well:

> ***Article (2):*** *A representative one of the member centers is elected by the association (GAMCA) to be the Chairman. He has to be a resident in the same city "the location of GAMCA", in order to be fully aware of the technical matters contained in the specified medical certificate of the check up of the expatriate workers. It is not obligatory to be a physician.*
>
> ***Article (3):*** *Chairmanship is for One year – renewable once only, and it is entitled to re-run after a period not less than two years.*

74. We note that during the enquiry proceedings the representatives of GAMCA were asked to provide the names and address of the President and the General Secretaries of GAMCA for the current year, the details regarding their tenure and the mode of their election. In response it was submitted that "*pursuant to the decision of DG Trade Organisations-Ministry of Commerce and Trade and subsequent change of name from association to administrative office, GAMCA no more elects its office bearers. Previously, the president and other office bearers would be elected annually on rotation basis without voting."* It is beyond comprehension that although the Regulations mentioned above regarding the conduct of GAMCAs were also framed by the Executive Board, still GAMCA opted not to implement them in totality.

75. In view of the above, the argument of the Respondents that the alleged act falls within the purview of ***'foreign sovereign compulsion'*** is not found tenable.

76. Moving now to the *'**Act of State doctrine**'*, while the counsel had not taken this defense initially subsequently this defense was also raised during the hearing. The counsel has also relied upon the abovementioned US cases for invoking the

doctrine of 'Act of State'. As highlighted and discussed above, in these cases it was alleged that OPEC member nations have conspired "to raise, fix and stabilize the price of gasoline and other oil-based products in the United States." Core of the alleged conspiracy consist of agreements entered into by foreign sovereign states to limit the production of crude oil which has caused the price fixing of RPPs (refined petroleum products) in the US. However, the courts dismissed complaints on the Act of state ground. The Court held the 'Act of state doctrine embodies three requirements, i.e. this rule may be applied only to acts that are (1) governmental acts (2) undertaken by a recognized sovereign (3) within its own territory.

77. Accordingly, applying to the present case the three limbs test which must co-exist in invoking the doctrine of "Act of State "; we note the followings:

78. Without going into status of the GCC Council, assuming without conceding, that the rules framed by the Executive Board bear legal sanctity and have sanctioning powers on behalf of sovereign GCC countries, the more important aspect to be determined in this regard is whether the particular act/regulations requiring "equal distribution system" and "price fixing" can be termed as an 'Act of State'?

79. In the above mentioned US Courts' decisions, it is obvious that sovereign act is a decision with respect to its own resources of a sovereign government. OPEC member countries took decisions to exploit their own resources- limit the production of oil. US courts held such decisions as sovereign acts of OPEC member countries. Reasoning given by the court is very simple to understand that these countries exercised their sovereign power with respect to natural resources which they own and control and are free to take any decision with respect to them. As opposed to US cases mentioned above, equal distribution of GCC Customers among GAMCs under the rules framed by the Executive Board

is not the exploitation of own resources by the GCC countries. In fact such decision directly relate to subjects of Pakistan jurisdiction.

80. Further more, the last limb of 'territorial limit' is even more critical in deciding whether GCC Executive Boards, Rules & Regulations is an act of state or not. Referring back to OPEC cases, the member foreign sovereigns took decisions to cap the production oil within their territorial boundaries. In the case of **Allied Bank International V. Banco Credito Agricolo de Cartago (757 F.2d 516 (2d Cir)** the Court held that "[a] foreign sovereign's acts occur within its territory only in so far as they [are] able to come to complete fruition within the dominion of the [foreign] government……." Whereas in this case before us, it is undisputed that rules of GCC Executive Board has been imposed on medical centers operating in Pakistan and therefore have implementation in Pakistan and not in the territories of GCC countries represented by the Executive Board.

81. There is no denying of the fact that the GCC States can prescribe the standardized test and quality measures for the allowing healthy emigrants to enter their States. However, the undertakings doing businesses in Pakistan cannot be allowed to act in violation of the public welfare statute such as the Act on the pretext as taken by the Respondents. Particularly, when the objectives of the sovereign entity can otherwise be achieved through ensuring compliance and rectifying the alleged behavior/act.

82. The grounds that non compliance would result into malpractices are not justifiable when the practice adopted to subvert such purported malpractices results in express contravention of law. This as per settled principles, is held in itself to be against public policy. The malpractices, if at all, have to be addressed it had to be done either through effective monitoring, proper enforcement, imposition of penalties or through cancellation of license/accreditation.

83. We must place it on record that the Respondents should have taken due measures to inform the Executive Board and to implement necessary modifications to bring the rules and regulations in compliance with the municipal laws. There is nothing to hold against the Executive Board as that body on its own may not have had the means of bringing the requisite changes and was entirely dependent on Respondents to be apprised about the issues at hand. We find on record no bona fide effort made on part of Respondents in addressing the concerns.

84. We note that there are instances where GAMCAs acted promptly to inform the Executive Board regarding the decision of DG Trade Organisations-Ministry of Commerce and Trade to omit the word 'Association' from the name of 'GCC Approved Medical Centre Association' which immediately was rectified by the Executive Board directing GAMCAs to change the name from 'association' to 'administrative office'. But throughout the enquiry which spans over a period of one year nothing is placed on record to show that the competition concerns were communicated to the Executive Board or any effort made to address the alleged contraventions. The only communication on record to the Executive Board (that too, in isolation) comes at a much later stage after the issuance of Show Cause Notice to the Respondents.

85. The upshot of the above deliberations clearly negates that the conduct under review in the subject proceedings qualifies for 'foreign sovereign compulsion' or 'Act of State'.

(iv). Whether fixing of fee for pre-departure medical check-ups by GAMCs constitute a violation in terms of clause (a) of sub-section (2) of Section 4 of the Act?

86. Under the Enquiry Report and the subsequent Show Cause Notices issued to the Respondents, it has been alleged that *"it appears that the fee charged from the consumers/intended emigrants/expatriates by the GAMCs across Pakistan is*

uniform and apparently is fixed under the auspices of GAMCAs and subsequently proposed to the Executive Board for its approval."

87. In response to the above, it has been argued by the Respondents' counsel that the aforesaid conclusion of the enquiry report is contradicted by the contents of the Executive Boards' letter dated 14-02-2008 itself (the very document on which the Enquiry Report relies). The aforesaid letter clearly states that the fee for pre-departure medical check-ups is only altered in terms of the Pakistani Rupee due to the fluctuation in foreign currency exchange rates and there is no change in the fee in terms of the US dollar amount. The Executive Board states in the aforesaid letter that *"the prescribed fee for medical examination is US $ 38.5/-, so far you did not request the increase in the prescribed fee i.e. US $ 38.5/- which now according to Pakistani currency is Rs. 3000/- Pak Rupees."* He further argued that in Pakistan the fee is still being charged @ US $ 38.5/-, whereas now in other countries the prescribed fee stands at US $ 45/-.

88. We note that a letter was written on behalf of the Respondents by the then President of GAMCA Islamabad/ Rawalpindi stating that,

> "*In recent past Pakistani Rupee have seen unprecedented loss in its value. Pak Rupee has seen record slide from Rs. 60/- per US dollar to Rs. 76.5/- per US dollar till to-date. Considering the state of economy in Pakistan it is speculated that it may slide down even further in future. The devaluation of the Pak Rupee has huge impact on imported items…Most of the items used by medical centers ranging from X-Rays films; Laboratory kits to consumables are all imported. This factor alone has significantly raised the cost of medical centers. Searing electricity prices due to power crisis in Pakistan and rising inflation has further compounded our problems…It is, therefore, requested that fee structure for Pakistan*

may be revised in line with new Pak Rupee to US dollar parity which is as under:

Current Fee: *US $ 38.5 @ Rs. 60.0 = Rs. 2300/-*
Proposed Fee: *US $ 38.5 @ Rs. 76.5 = Rs. 3000/-"*

89. The history of fee charged for the pre-departure medical tests as provided by the Respondents is as follows:

Year	Amount of Fee In PKR
2004	1950/-
2005	2350/-
2008	3000/-
2011	3000/-

90. From the above chart it appears that same fee was charged by all the GAMCs. Upon review of the rules & regulations we have not came across any regulation addressing the aspect of prescribed/fixed fee. The only documents available on the record are two abovementioned letters.

91. During the course of hearing before us, a certificate dated 29-02-2012 issued by the Executive Board was submitted. In the said certificate, the aspect under issue has been addressed in the following words:

"The standard medical examination prevailing fee is US $ 45, except –in Pakistan— candidates are being charged almost US $ 38.50/- per head."

92. In our considered view the subject prescribed/ fixed fee is not catered for by the Rules & Regulations but there is an acknowledgment by the Executive Board as per the letters on the record that the fee is prescribed by it. It is not specified

whether it is to operate as an upper ceiling or a 'fixed' fee. No doubt, the prescribed fee in Pakistan is lesser than the fee charged in other countries. Such prescribed fee, in the given facts and circumstances, if allowed to operate as an upper ceiling, would outweigh the adverse effects of absence or lessening of competition (as some benefit in the form of lower fee is also passed on to the consumer). This would also result in a more streamlined regulatory process. In **Khan vs. State Oil Co., 93 F.3D 1358 (7th Cir. 1996)**, the US Court of Appeals noted that *"potential pro-competitive effect of vertical maximum price fixing, which would allow a supplier to prevent his dealers from exploiting a monopoly position"*. The Court further observed that *"maximum price fixing agreements will at most block "dealers from reaping monopoly profits. Because the antitrust law do not protect the right to monopoly profits, such loss should not constitute an antitrust injury"*.

93. Given that such medical tests are in the nature of mandatory/ necessary services for the GCC Customers and are only conducted by the accredited medical centers i.e. GAMCs; if a prescribed fee in the form of ceiling is not provided, the GAMCs could start charging fee at exploitative rates (particularly keeping in view the customers it caters for). The purpose of allowing upper ceiling for such prescribed fee would also allow certain level of competition amongst the GAMCs vis-à-vis fee. It would also provide incentives for the Respondents to strive for greater efficiency and better quality of services as once the price is capped as an upper ceiling, the GAMCs may still work towards reducing operational costs along with improvement in quality of services. This would also provide more price flexibility than in the 'fixed price' approach.

94. It needs to be appreciated that such practice of prescribing upper ceiling of the fee requires obtaining of prior approval/ exemption from the Commission. Nonetheless, keeping in view the facts and circumstances of the subject proceedings, we are restraining our selves from imposing any penalty with respect to this particular practice and the Respondents are directed to file an

exemption application with the Registrar of the Commission within thirty (30) days from the communication of this Order.

(v). whether the division of markets and equal allocation of the GCC Customers for pre-departure medical check-ups by the Respondents constitutes a violation under clause (b) & (c) of sub-section (2) of Section 4 of the Act?

95. In this regard, it was highlighted by the Respondents that in pre-GAMCA phase, the GAMCs were engaged in giving kickbacks to the recruitment agents/travel agents and the business was generated by the GAMCs on the basis of the kickback offered, for this reason the present system was implemented. GAMCA in their letter dated 29-07-2011 stated that:

> *"To Curb Malpractices:*
> *Another key objective of the referral system is to curb the malpractices which were common during the pre-GAMCA era, where employment promoters would refer their clients to one of more approved medical centres and receives (sic) commission/ kickbacks for such referrals."*

96. The counsel for the Respondents has also laid much stress that the Rules and Regulations were in fact implemented to curb the malpractices undertaken by some of the GAMCs in this regard. He has relied on the circular issued by VIP Medical Centre and Gulf Medical Centre (both GAMCs), in which a rebate of Rs. 450/- in the fee for conducting pre-departure medical tests was offered to the representatives of POEPA for bringing or referring the GCC Customers for test. By this example at least one thing is evident from such practice/incentive; that is, economic interest did exist as discount could not have been offered without reaping economic benefits out of it. Therefore, this example further negates the argument of the Respondents that they are not carrying out any economic activity. Moreover, it is also noted that one of the GAMCs i.e. Gulf Medical Centre which was purportedly engaged in such mal practice continues

to conduct pre-departure medical tests and as per record available no disciplinary action seems to have been taken against it.

97. As discussed in the preceding paragraphs, in particular paragraphs 62-74, the system of pre-departure medical tests is in practice since 1995; however, it was only in 1999 that Pakistan was segregated into different regions by establishing GAMCAs in every region/city where two and more GAMCs were operating and also the equal allocation of GCC Customers among the GAMCs within a region was felt.

98. The proposal and recommendation with respect to afore-mentioned division of market and equal allocation of the GCC Customers was initiated by GAMCs themselves and the Executive Board implemented the same in pursuance of their proposal. However, we are of the view that in order to achieve the real objective of the Executive Board as stated in Para 62 above, the *modus operandi* of division of market by creating five regions and equal allocation of GCC Customers within each of the regions cannot be considered indispensable. Therefore, proposing and implementing such system seems to have only ensured Respondents' profitability at the cost of violation of the provisions of the Act. Such contravention is restrictive of competition in the relevant market and can not be termed as done for public good.

99. It has also been submitted by the Respondents that despite having provision for inspections of the Respondents no inspection has been carried out by the Executive Board since 2008. It was argued that such inspections could not take place due to security reasons in Pakistan. No supportive evidence, however, in this regard was provided to substantiate such claim.

100. From the above discussion we are of the considered view that mere pretext to curb malpractices cannot be a ground to allow contraventions of law. The division of market and equal allocation of GCC Customers (quota system) has

allowed the Respondents to operate in their comfort zones by ensuring guaranteed revenues. We must recognize that in any given market when competitors compete it is either on 'price' aspect or 'range or quality' of services. As mentioned in **Global Antitrust Law and Economics by Eliner Elhague and Damien Geradin, Foundation Press 2007**, it is stated that *"Horizontal Market divisions can be even more anticompetitive than price-fixing or output restrictions. They allow cartels to avoid the difficulties of fixing and monitoring prices and output, and allocating market share among the cartel members. The cartel need simply monitor where or to whom firms are selling. Further, market divisions end all forms of competition between the firms, including on quality and service. Thus, unlike price and output restraints, market divisions cannot be undermined by non-price competition."(emphasis added)* This principle was followed by U.S. Courts in **United States v. Topco Assocs. Inc., 405 U.S. 596, Palmer v. BRG of Georgia, Inc., 498 U.S. 46, Columbia Steel v Portland GE, 103 F.3d 1446 (U.S. Court of Appeals 9th Circuit)**, wherein division of market and equal allocation of customers (market allocation/division of market) was considered as an agreement falling in the category which are considered *per se* illegal and are always deemed to have the object of preventing, restricting or reducing competition.

101. Robert Pitofsky et al in his book Trade Regulation noted that: *"Though price fixing, of course, suppresses competition, such agreements do not of themselves guarantee that each competitor will receive a satisfactory share of the business. Especially when products are not fungible, as when they are built to specifications or possess brand names of different attractiveness, price control alone may be insufficient and market division may be the only practicable means of "regulating" competition. Whether or not prices are fixed, each competitor will then receive his share of the business and no more. The policy is essentially one of 'live and let live'. The effects of any agreement for sharing the*

markets is manifestly to eliminate competition."[3] *(emphasis added)* Therefore, in this particular market, by implementing the division of market and equal allocation of GCC Customers (quota system), the competition is prevented and restricted; leaving no incentive to bring any innovation or efficiency.

102. Such equal division of market coupled with equal allocation of GCC Customers adversely impacts the GCC Customers in restricting their choices for competitive services. Further it may also result in captive market for services of '*pre-departure medical check-ups*', which could result in exploitative practices, such as arbitrarily requiring repeat tests or insisting tests in particular regions without taking GCC Customer's preference into account as alleged in the complaint.

103. It would be interesting to refer to other jurisdictions where GAMCA practices of referral system to allocate equal GCC Customers among GAMCs have been criticized. In Philippines, for example concerns were raised by Philippine Association of Service Exporters Inc. that overseas Filipino workers have no freedom to choose the clinic for their pre-departure medical check-ups as they are subject to a system of equal distribution or referral/decking system under the auspices of GAMCA. Such referral/decking system overlooks the disparity, inequality and different level of capability of the medical centers. In May 2011 the Department of Health, Philippines sent a Memorandum Circular to all Regulatory/Licensing Officers, OFW clinics and others for the implementation of RA 10022 with respect to the referral/decking system being implemented by OFW Clinics. According to this Memorandum Section 16 of Republic Act No.10022 (otherwise known as the Migrant workers' Act) has been amended to include new paragraphs (c) & (d). Paragraph (c.4) states:

[3] Trade Regulation, Foundation Press, Fifth Edition (2003), Robert Pitofsky, Harvey J. Goldschmid, Diane P. Wood at Pg. No. 298

> *Every Filipino migrant worker shall have the freedom to choose any of the DOH-accredited clinics that will conduct his/her health examinations and his or her rights as patient are respected. The decking practice, which requires an overseas Filipino worker to go to an office for registration and then framed out to a medical clinic located elsewhere, shall not be allowed.*[4]

104. This Memorandum also mentions that GAMCA in Philippines challenged the earlier directive of Department of Health in this regard and filed a writ petition before the Court, however, the same was dismissed by the Court. Similarly, from the news reports available on the internet, it appears that in Nepal the Prime Minister took action against GAMCA and directed the concerned ministries to end its monopoly. Office of the Prime Minister in its letter sent to the Ministry of Foreign Affairs has mentioned that "Market Protection and Competition Promotion Act of the country do not favour the operation of only GAMCA in Nepal." The Department of Commerce, which enforces the Market Protection and Competition Promotion Act, took immediate action and ordered GAMCA to stop their services on November 17 2011.[5] The foregoing shows that concerns with respect to such practices have been raised in other regimes as well and settled in favour of a competitive market, keeping in view their domestic legal framework.

105. Recognizing that the Commission has the responsibility of endeavoring to prevent or eliminate anti-competitive behavior on the part of economic agents that adversely impacts the rights of the general public. For reasons and precedents discussed above, we consider such practice and conduct of the Respondents clearly violative of clause (b) & (c) of sub-section (2) of Section 4 of the Act and warrants imposition of penalty.

[4] http://www.poea.gov.ph/MCs/doh_mc2011-0030%20(1).pdf

[5] http://www.thehimalayantimes.com/fullNews.php?headline=PM+calls+for+end+to+GAMCA+monopoly+&NewsID=322151

106. Regarding the quantum of penalty to be imposed, we take into account the aspect of seriousness and duration of the violation and the conduct of the Respondents. It needs no emphasis that the market division and customer allocation is in a sense inherently anti-competitive; as such agreement(s) are designed to create an area of monopoly in which competition on efficiency are totally absent. Eventually in such markets no benefit is advanced to the general public and not only the customer choices/ preferences are restricted and foreclosed even the innovation and efficiency is also lost.

107. The Respondents have engaged themselves into an arrangement which is as per well settled principles considered *per se* illegal. As per the record, the system of '*pre-departure medical tests*' was put in place since 2000. The competition law has been in force in Pakistan since October 2007 and the Respondents even after the introduction of the competition law, made no effort for rectifying their behavior. Clearly, such illegal practices /activities continued for over a period of four (4) years. Even during the proceedings while the Respondents have taken great pains to justify the market division and equal allocation of GCC Customers, no effort was made by the Respondents to work towards compliance.

108. Therefore, keeping in mind all the given facts and circumstances, we are imposing a fixed penalty only in the sum of:

(i). PKR 20 Million on each GCC Approved Medical Center namely; (1) Khaleej Diagnostic Centre, (2) Gulf Medical Centre, (3) Urgent Diagnostic Centre, (4) Shifa International, (5) GCC Diagnostic Centre, (6) Taj Medical Centre, (7) Al Hilal Medical Diagnostic Centre, (8) Medical Diagnostic Centre, (9) Al-Barakat Diagnostic Centre, (10) Dr. Thagfan Diagnostic Centre, (11) Multan Diagnostic Centre, (12) Advanced Medical Diagnostic Centre, (13) Canal View Diagnostic Centre, (14) Iqraa Medical Complex, (15) Taj Medical Travellers Clinic, (16) Al-Khair

Medical Centre, (17) Caring & Curing Centre, (18) Frontier Diagnostic Centre, (19) Medical Diagnostics Centre and (20) Peshawar Medical Checkup Centre;

(ii). PKR 10 Million on each GCC Approved Medical Centers Administrative Officer i.e. GAMCA Islamabad/Rawalpindi, GAMCA Karachi, GAMCA Lahore, GAMCA Peshawar and GAMCA Multan.

109. Each of the GAMCs are further directed to file an application for exemption of the 'maximum fee ceiling' prescribed by the accreditation granting authority (the Executive Board) within thirty days (30) from the date of communication of this Order.

110. The Respondents are further directed to discontinue the practice/ arrangement of territorial division and equal allocation of GCC Customers among GAMCs forthwith and file the compliance report thereof with the Registrar of the Commission, no later than 15-08-2012. Failure to cease and desist this practice shall make the Respondents liable to an additional penalty in the sum of Rs. 500,000/- (Rupees Five Hundred Thousand Only) for each day of default.

111. Keeping in view the conduct of the Respondents, we hereby direct the Registrar of the Commission to bring the findings of this Order to the notice of the Executive Board.

112. The Show Cause Notices are disposed of accordingly.

(RAHAT KAUNAIN HASSAN) (ABDUL GHAFFAR) (DR. JOSEPH WILSON)
CHAIRPERSON MEMBER MEMBER

Islamabad the June 29, 2012