COMPETITION COMMISSION OF INDIA
Case No. 79 of 2012

In Re:

The Air Cargo Agents Association of India
28-B, NarimanBhavan
Nariman Point
Mumbai –400021 **Informant**

And

1. **International Air Transport Association (IATA)**
Montreal
Canada **Opposite Party No. 1**

2. **International Air Transport Association(India) Pvt. Ltd.**
12/13, Esplande, 3rd Floor
A. K. Nayak Marg
Fort, Mumbai -400001 **Opposite Party No. 2**

CORAM:

Mr. S.L.Bunker
Member

Mr. SudhirMital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances: Shri Jimmy Pochkhanwalla, Sr. Advocate withShri M. M. Sharma, Ms. DeepikaRajpal, Advocates for the Informant alongwithShri S. L. Sharma and Shri Sunil Arora.

Shri Raj Shekar Rao, Ms. Nisha Kaur Oberoi, Shri Bharat Budholia, Ms. Neelambera Sandeepan, Shri Jefrey Shane, Advocates for the Opposite Parties alongwith Shri Daniel Kanter, Shri Francis Shis and Shri Amitabh Khosla.

Order under section 26(6) of the Competition Act, 2002

1. The information in the instant case was filed by Air Cargo Agents Association of India (hereinafter, the '**Informant**'/ '**ACAAI**') under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against International Air Transport Association (hereinafter, the '**Opposite Party No. 1**'/ '**IATA**') and International Air Transport Association (India) Pvt. Ltd. (hereinafter,the '**Opposite Party No. 2**'/'**IATA India**') [collectively hereinafter, the '**Opposite Parties**'] alleging, *inter alia*, contravention of the provisions of sections 3 and 4 of the Act.

Facts

2. As per the information, the Informant is the national association of air cargo agents in India; having 278 active members, 298 associate members, 42 allied members and 9 commercial members. It works to safeguard the interest of its members and provides professional assistance and guidance to its members and various government authorities connected with the international air cargo transportation industry. TheOpposite Party No. 1 was initially formed in 1919

at Hague by 57 operating airlines as a trade association. Its name was changed through incorporation in Havana in 1945. Later on, it was incorporated as a non-profit company registered in Canada on 18.12.1946 through a Special Act. The Opposite Party No. 1 also has its presence in India in the form of Opposite Party No. 2;a registered private limited companyincorporated under the Companies Act, 1956 and a wholly owned subsidiary of the Opposite Party No. 1. The relationship between the members of the Informant and the Opposite Party No. 1 is such that the members of the Informant *i.e.*,cargo agents are to be accredited to IATA in order to do business of international air cargo transportation services of IATA airlines in India.

3. It is alleged that the Opposite Party No. 2 unilaterally prescribes the regulatory system assuming to itself the regulatory power for registering, accrediting and regulating the engagement of cargo agents by the airlines in India. It is alleged that without any authority,the Opposite Party No. 2 runs the licensing system for the IATA registered cargo agents by virtue of its 'Resolutions 801',*inter alia*, prescribing various registration and accreditation requirements for the Indian cargo agents and also enforcing many financial terms and conditions on cargo agents in India who are the members of the Informant.

4. It is stated that the Opposite Party No. 1has three kinds of conferences which govern the relationship of the members of the Informant and IATA, namely, 'Agency Conference' which accredits cargo agents to IATA; 'Service Conference' which prescribes rules relating to the services to be provided by cargo agents; and 'Tariff Conference'which prescribes the terms and conditions of tariff/ commission to be payable to the cargo agents by the airline operators.

5. It is averred that the above mentioned unilateral actions and decisions of the Opposite Party No. 1 prejudice the functions, market practices and interests of the members of the Informant. Further, whenever there is an increase in price of air fuel, IATA deliberately mandates the cargo agents to collect the

increased or extra prices under the head of 'surcharge' from the consumers. As a consequence, the cargo agents suffer losses of commission.

6. It is alleged that IATA was about to unilaterally introduce a Cargo Accounts Settlement System (hereinafter, '**CASS**') in India under its 'Resolution 801'. Under CASS, the cargo agents are required to make full payment on stipulated due dates for freight and other dues to all airlines through IATA-CASS office which, in turn, would disbursethe relevant amount to each individual airline. It is further alleged that CASS rules are so worded that the Informant apprehended to be anti-competitive activity.

7. The Informant has alleged that the unilateral introduction of CASS in India under 'Resolution 801'would have the direct effect of negating two specific reservations of the Government of India pertaining to the established market practices which have stood the test of time. It is submitted that such unilateral action will prejudicially affect the Indian air cargo agents' interest by altering the present market practices. The Informant cited letters dated 11.9.2007 and 03.12.2007 from Ministry of Civil Aviation, Government of India and Air India respectively to IATA stating that Ministryof Civil Aviationhas approved the adoption of 'Resolution 815' with the reservation that a commission of 5% shall be paid to IATA accredited agents/ intermediaries under 'Resolution 815', and all agents/ intermediaries shall be given airway bills stocks by all airlines.

8. It is further alleged that IATA under 'Resolution 016aa' prescribes the rate of commission to be paid to the cargo agents. It is averred that such imposition of financial terms is anti-competitive and affects the interest of the cargo agents. The Informant has also submitted that anti-trust issues were raised against IATA in other jurisdictions like the USA and EU. It is further submitted that the conferences and rules framed by IATA, which are in the nature of agreement between ACAAI and IATA, are required to be scrutinized by the Commission.

9. The Commission after forming a *prima facie* view, *vide* its order dated 21.03.2013 under section 26(1) of the Act, directed the Director General (hereinafter, the '**DG**') to cause an investigation into the matter and submit the investigation report to the Commission within the given time.

DG's Investigation

10. The DG submitted his investigation report to the Commissionon 22.12.2014.

11. Primarily, two issues have been examinedby the DG during the investigation. These are: (a) Whether the Opposite Parties, by determining the rate of cargo agents' commission in India through 'Resolution 016aa',have violated the provisions of section 3(3)(a) of the Act,and (b) Whether the implementation of CASS by IATA through 'Resolution 851' in India have contravened the provisions of section 3(3)(b) of the Act?

12. The DGhas reported that the members of the Opposite Partiesare enterprises engaged in providing air cargo transport services and any decision arrived at amongsttheir members at conferences would amount to an agreement in terms of the Act.

13. On the first issue, the DG has stated thatthe Opposite Party No. 1, through its 'Resolution 016aa',has fixed 5% as commission to be payable to the cargo agents and made it mandatory for the airlines not to pay more than 5% commission to them. The said resolution was applicable to the cargo agents of all the countries, except the USA and ECCA (European Common Aviation Area). Based on the responses of Air India, Jet Airways, Cathay Pacific, Indigo, Lufthansa Cargo AG and Skyways Air Services (P) Ltd., the DG has reported that the rate of commission was prevalent until it was rescinded on 04.02.2013. Further, 5% commission was uniformly practised by the airlines and the cargo agents without any dispute until the 'Resolution 815' was

introducedin 2006 and the rate of commission was never discussed bilaterally between the airlines and the cargo agents.

14. The DG noted that 'Resolution 016aa' was followed only till 2006 and on the basis of specific request from the Informant,'Resolution 815' was introduced. The DG has observed that when the draft of 'Resolution 815' was submitted to Ministry of Civil Aviation by Air India, being the national carrier, it was found by the Informant that the decision of 'Resolution 016aa'with respect to fixing commission for the cargo agents was missing and the same was left to be decided bilaterally as per the 'Resolution 815'. Thereafter, the Informant approached Ministry of Civil Aviation to intervene into the matter. It is reported by the DG that whenthe Opposite Party No. 1 and the airlines wanted to do away with any commitment on fixed commission through the new 'Resolution 815', the Informant requested Ministry of Civil Aviation in August 2006 to allow continuation of 5% commission to the cargo agents. In this regard, the DG referredto a letter dated 02.08.2006 from the Informant to Ministry of Civil Aviation urging the Ministry to place a reservation on 'Resolution 815' to the extent that a minimum commission of 5% would continue to be payable to the cargo agents. In response to the Informant'sletter Ministry of Civil Aviation issued a letter dated 30.08.2007 to Air India approving the 'Resolution 815' with a reservation that a commission of 5% shall be paid to IATA accredited agents/ intermediaries under 'Resolution 815' and all agents/ intermediaries shall be given airway bills stocks by all airlines. Subsequently, the airlines continued to pay 5% commission to air cargo agents.

15. Further, the DG referredthe minutes of meeting of the 12th Joint Council of Indian Air Cargo Program ('**IACP**') held on 17.08.2012 showing that the Opposite Party No. 1 was not in favour of mandatory payment of a fixed commission or mandatory provision of airway bills distribution to all agents/ intermediaries on the basis that different airlines have different sales and distribution strategies.

16. The DG reported that the conduct of the Opposite Party No. 1 in respect to fixation of commission to be paid to the cargo agents after 2006 cannot be held to have contravened the provisions of section 3 of the Act. The DG reasoned that the provisions of section 3 of the Act was notified only in May 2009 and the Opposite Party No. 1 had initiated the changes regarding fixation of the commission payable to the cargo agents in India through 'Resolution 815' well before 2009. Though 'Resolution 016aa' was rescinded only in 04.02.2013, it was no more complied with once 'Resolution 815' was introduced. Thus, the DG concluded that since the practice of 5% commission to cargo agents was continued due to the insistence of the Informant and Ministry of Civil Aviation, the same cannot be attributed to the Opposite Parties. Thus, the Opposite Parties cannot be held to have violated the provisions of section 3(3)(a) of the Act.

17. On the issue of CASS, the DG has reported that it is a simplified billing and settlement system of accounts between the airlines and the freight forwarders or cargo agents. Under this system,the cargo agents are required to make payments to IATA-CASS office which, in turn, disburses the relevant amount to each individual airline. As per the DG report, CASS was first introduced in Japan in 1979 and has been implemented over 81 countries including UK, EU, Australia, Pakistan, *etc*. and it is in pilot stage in India with effect from 16.05.2013 and will continue until IATA is satisfied that the agents and airlines are familiar with the procedures under CASS.

18. As per the DG report, the Informant was aware of the implementation of CASS in India and also supported the same. The minutes of the first Joint Council meeting of IACP held on 26th March 2008 confirmed the same wherein Mr. Nagarwala, the ex-President of the Informant, clarified that the impression in the industry that the Informant was against CASS was incorrect. Extensive negotiations and consultations were undertaken prior to the introduction of CASS andthe Informant wasa part of it.

19. The DG noted that CASS had not been made mandatory in India and was still at pilot stage.Further, clauses of 'Resolution 851' did not indicate that it would limit or restrict the international air cargo transportation services in India. The DG, therefore, concluded thatby introducing CASSthe Opposite Party No. 1 has not violated the provisions of section 3(3)(b) of the Act.

Replies/objections of the Informant

20. The Informant in its preliminary submission has stated that DG's conclusion is based on the submissions given by IATA, without giving it an opportunity to respond to the same. As per the Informant, the DG report contained conclusion based on one-sided story as supplied by the Opposite PartyNo. 1,without checking or verifying the veracity thereof from ACCAI.

21. It iscontended that CASS in India is not voluntary for cargo agents as claimed by the Opposite Party No. 1. It is a compulsory requirement without which airlines cannot transact business with the cargo agents. It is submitted that the DGhas ignored its letter dated 02.08.2006 to Ministry of Civil Aviation wherein a request was made to mandate a minimum 5% commission for the cargo agents as against the existing practice of fixed 5% commission as per the 'Resolution 016aa' to generate healthy competition amongst the airlines.

22. It is contended by the Informant that despite reporting that *'..... CASS is handled and managed by IATA and it cannot absolve its role if the same is implemented in India by its members',* the DG has found that there is no violation of section 3(3)(b) of the Act. Also, the DG did not give any opportunity to confront the veracity of the Opposite Party No. 1's submissions which indicate that the DG report isbiased and one-sided apology for IATA's conduct.

23. On the issue of 5% commission, it is submitted that the DG's conclusion is in contradiction to some of the key findings in the report itself. It is contended

that the DG has failed to acknowledge the unilateral imposition of stringent terms and conditions through implementation of CASS in India wherein the cargo agents have no say whatsoever. The said acts amount to indirectly controlling the provision of services in violation of section 3(3)(b) of the Act.

24. The Informantsubmitted that while arriving at the conclusion, the DG has not considered many of the submissions of the Informant. For example, the DG has omitted the letter dated 22.07.10 sent by the Informant to the Commission as a whistle blower, letter dated 30.08.2007 of Ministry of Civil Aviation with the reservations on 'Resolution 815', that the practice of 5% commission be continued well after May 2009, and the written submissions of the Informant dated 12.02.13 and28.03.13.

25. As per the Informant, the DG has failed to make a fair assessment of the economic situation in the sector and has not considered the fact that the Opposite Party No. 1is trying to control and regulate the air cargo business in India in the name of creating operational efficiencies.

26. The Informant has deniedthat Resolution 016aa was introduced to facilitate smooth handling of air cargo by airlines on behalf of other airlines or in cases of cancellation or delay of flights or in functionally difficult situations under the Multilateral Interline Traffic Agreement (MITA) of IATA and that the same had concurrence of cargo agents. It is submitted that when IATA does not involve agents in dealing with matters which concern the agents then the question of them involving agents in the internal matters with the airlines would not arise.

27. The Informanthas denied that 'Resolution 016aa' became redundant due to some airlines joining large alliances such as Star Alliance, Oneworld and Sky Team thereby obviating the necessity of preserving multilateral interline system under MITA(Multilateral Interline Travel Agreements).It is submitted that the practice of 5% commission has continued in the air cargo industry in India as late as March, 2015 and not till February 2013, as reportedby the DG.

That, letter dated 25.04.14 issued by Lufthansa Cargo AG to one ACAAI member cargo agent and an email dated 16.03.15 received from British Airways by a customer showed that that 5% commission was in vogue till 31st May, 2014 and till 31st March, 2015 respectively.

28. The Informanthas stated that despite 'Resolution 016aa', IATA intended to introduce 'Resolution 815' in India in the year 2006. It isstated thatwhen the Informant had realized that under the guise of introducing 'Resolution 815', the Opposite Party No. 1intended to throttle small air cargo agents in India by denying them commission altogether for their services and also denying air waybill stock, it approached the Government of India to intervene on behalf of the small and medium air cargo agents whose businesses were threatened. It was only on this basis that the Government of India, after duly consulting the Opposite Party No. 1, expressed it reservation on IATA 'Resolution 815'. However, 'Resolution 815'was never formally introduced in India. The Informant, therefore, submitted that the constant harping on unimplemented 'Resolution 815'by IATAby the DG was patently false and misleading as it was only a proposed resolution which was never implemented. It is further submitted thatthe Informant had approached Ministry of Civil Aviation in 2006, when the Act was not in force, to protect the *bona fide* interests of the small and medium air cargo agents who, without this minimum commission, would not have survived against the unequal bargaining power of the airlines. As soon as the Act came in force,the Informant itself approached the Commission *vide* a letter dated 22.07.2010 which shows the *bona fide* intentions of theInformant against the alleged anti-competitive practices of IATA.

29. It is stated that prior to the enactment of the Act, after the enactment and till today, the airlines are paying 5% commission to the cargo agents. Therefore, it was argued that IATA cannot wish away the fact that post 2009, fixing of 5% commission by the airlines under a common agreement with the blessings of IATA was a reality, which continues till today.The Informant has contended that theminutes of the 12th meeting of the Joint Council of IACP were not

minutes at all but draft minutes which were never approved by the participants including ACAAI members.

30. On the issue of infringement of section 3(1) read with section 3(3) of the Act,it is contended that there must be evidence of an agreement being reached between competitors which is clearly established in the instant case since the practice of payment of fixed 5% commission to the cargo agents was decided in 'Resolution 016aa' between the airline and the members of IATA which were direct competitors to each other and it was implemented by the individual airlines who are members of IATA much after 2009.

31. It is submitted that the DG has failed to examine whether the practice of a fixed commission of 5% combined with non-issuance of airwaybills to the small cargo agents had led to driving the existing competitors out of the market, whether this created entry barriers for new cargo agents in the market in the absence of any incentive to earn higher commission for additional cargo bookings *etc.* from the airlines. The DG report is totally silent on this aspect and failed to conduct a mandatory legal analysis of the ongoing practice carried on by the members of IATA in the market for provision of the services of cargo agents.

32. It is submitted that in *Case No. 38 of 2011, Indian Sugar Mills Association & Ors.* v. *Indian Jute Mills Association &Ors.*,it was held that 'a bare reading of the statutory scheme would indicate that under section 3(3) of the Act, the presumption of appreciable adverse effect on competition has to follow once an agreement falling under clauses (a) to (d) of section 3(3) of the Act is found to exist....'. Thus, wherethe existence of an agreement between the airlines and the association of airlines *i.e.,* IATA in terms of 'Resolution 016aa' has been confirmed in the DG report unequivocally in terms of section 3(3) of the Act under which the presumption of appreciable adverse effect on competition has to follow. The DG has not analyzed the anti-competitive factors mentioned under clause (a) to (c) of sub-section (3) of section 19 of the Act. The Informant has stated that the Opposite Party No. 1in its submissions before the

DG has also not even touched the issue and has not mentioned any pro-competitive factors such as accrual of benefits to consumers'*etc*. As such there is a complete failure on the part of the DG to consider and analyze the statutory factors required to establish an appreciable adverse effect on competition in the market. Hence, the conclusion in the DG report that the Opposite Party No. 1, by fixing the rate of commission to cargo agents, has not violated section 3(3)(a) of the Act is legally untenable.

33. The Informant has submitted that the anti-competitive practice of determining the price for the services of the cargo agents which was started under a written agreement between the airlines is still continuing at the behest of IATA and its member airlines.Therefore, the Informant submitted that the DG report, to this effect, was without an application of mind and conclusions have been drawn in a perfunctory manner, as if at the behest of the Opposite Parties.

34. It is submitted that there is already enough evidence in writing available with the Commission to come to the conclusion that IATA controlling the market of the services of cargo agents by licensing and permitting this service to only those cargo agents who agree to become accredited to IATA by prescribing stringent financial guidelines under existing 'Resolution 801', the proposed 'Resolution 815'and 'Resolution 851' for CASS. The DG supressed the obvious violation of section 3(3)(b) by IATA and its member airlines only on the basis of a statement relating to CASS made by IATA before the Hon'ble Competition Appellate Tribunal (COMPAT) and reiterated before the DG that CASS is currently in pilot stage in India.

35. It is the contention of the Informant that if the DGaccepted IATA's contention that CASS has been successfully introduced in other countries, it was DG's obligation to find out whether or not the Competition Authorities of those countries permitted the introduction of CASS. It is stated that Israel's anti-competitive law is similar to that of India and in Israel, when Billing and Settlement Plan (BSP) on the passenger side was sought to be introduced, which is directly similar to CASS, the entire action was held to be anti-

competitive in law. It is further stated that only an oblique reference was made to the Israel judgment in the DG report. In so far as IATA jurisdiction is concerned, Israel comes under the same jurisdiction of IATA as India does *i.e.*, middle-east. It was therefore imperative for the DG to have gone into the details of the Israel judgment. The DG should realise that CASS as is sought to be introduced in India is directly in *parimateria* with BSP as was introduced in Israel and found to be anti-competitive.

36. The Informant has submitted that the words 'pilot' and 'voluntary' used by IATA are merely cosmetic in nature and even at the so-called pilot stage, the evidence produced by the Informant from various airlines establishes that CASS was enforced by the airlines and the same is grossly anti-competitive in nature. The DG ought to have gone into the details of the so-called pilot situation.

37. The Informant pointed out that it was clear from the member airlines own documentary evidence that their own CASS programme was same as IATA-CASSand that all the payments were made in the name of IATA-CASS India. Therefore, it is submitted that no airline could claim that they were following their own CASS program. Furthermore, the DG has completely failed to appreciate that 'Resolution 851' declares that CASS will be mandatory for the agents though it will be voluntary for airlines which shows that how an airline will not deal with the cargo agents unless they join the CASS program.

38. It is denied that the Informant has not opposed CASS in principle but has some reservations about the rules which are not in the interest of air cargo agents in India.It is submitted that the facts have been twisted by IATA in its submissions to give suchan impression.

39. It is argued thatmerely because of the fact that 8 airlines and 8 agents participated in the pilot CASS, it does not take away from the anti-competitive nature of CASS. As per the Informant, what is required to be seen is that when

something is anti-competitive on the face of it, it is not correct to wish it away by declaring that the same is only at the pilot stage.

40. The Informant has questioned how the DG could hold that CASS *per se* is not anti-competitive when the DG had found that the provisions of CASS as such would be anti-competitive and recommended that IATA should be called upon to hold bilateral discussion to ensure that anti-competitive provisions are not inserted in CASS. The Informant has submitted that the business activity of its members aredependent on payment to the airlines and other parties and the alleged illegal regulatory powers taken on by IATA under the guise of CASS are all anti-competitive within the framework of section 3(3)(b) of the Act.

41. In its additional submissions on the issue of CASS, the Informant has submitted that it is unilateral and the same is clearly indicated in clause 5 of the 'Resolution 851'which provides that '*Where a CASS-Export has been adopted for a given country, then effective from the date of implementation , all agents in that country shall be governed by the provisions of Section 2 of Resolution 801r with respect to transactions made on behalf of CASS-Export Airlines'* and section 2 makes it compulsory to submit airway bill transmittal only under CASS format of reporting to the CASS settlement office.

42. The Informant argued that the issue with CASS is also with regard to severe penalties imposed on the cargo agents. It is submitted that an agent is put under risk of being asked high and often unaffordable bank guarantees for ensuring future payments or reducing billing period under CASS. Moreover, the agents have to maintain dual account for those airlines which have not opted for CASS. Another issue raised is the possible sharing of commercial data of an agent amongst the competing airlines which the airlines may use to their commercial advantage by forcing the cargo agents to match the cargo volumes, *etc.*The Informant submitted that situation like severe penalties and other conditions may force small agents out of the market.

43. It is further submitted that in case of defaults by airlines CASS affords complete protection to the airlines but the same is not the case for the cargo agents. The Informanthas cited the example of an Italian Airline, Alitalia which apparently suddenly closed its operations in India and left the country without paying or settling the outstanding commissions of many cargo agents.

Replies/objections of the Opposite Parties

44. The Opposite Parties have expressed their agreement in relation to the conclusions drawn by the DG pursuant to the investigation. The OPs have claimed that they have not contravened any of the provisions of the Act.

45. With respect to the allegations of the Informant and findings of the DG that the Opposite Parties are self-regulatory bodies for the aviation industry, it has been contended that the Opposite Party No. 1 is an international non-profit trade association of airlines formed for the purposes of promoting safe, regular and economical air transport. Its objective is to foster air commerce and to study the problems connected therewith and to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport services beside co-operating with the International Civil Aviation Organization. The Opposite Party No. 1 has stated that all the decisions taken by it are consultative in nature and are not binding on the Informant and it has no mechanism to oversee the implementation of these resolutions.

46. The Opposite Party No. 1 has also rebutted the charge that there is no platform for cargo agents to express their views/concerns with respect to the Opposite Party No. 1'sresolutions. It is stated that the Informant has used IFCC (a body comprising of the members of theInformant) as a platform to object the implementation of the Opposite Party No. 1's resolutions successfully as it has veto power.

47. The Opposite Party No. 1 has also denied the allegation that through 'Resolution 0016aa' it has mandated a 5% commission to the cargo agents, which was introduced in 1980. It is submitted that 'Resolution 0016aa' was only introduced as a fall back option for cases of interlining where carriers and the air cargo agents were unable to decide bilaterally the rate of commission payable to air cargo agents. The Opposite Party No. 1 has cited the chronology coupled with circumstances in which the said resolution was passed which showed that it was passed to meet the specific requirements of that time. It has also been submitted that in India the relationship between the airlines and the air cargo agents is primarily governed by section 3 of 'Resolution 801' which is based upon the bilateral agreement between the parties andnot by 'Resolution 0016aa'.

48. It has been submitted that 'Resolution 0016aa' was finally rescinded by the IATA through a mail vote on 04.02.2013. The prevailing system of payment of mandatory 5% commission to cargo agents by airlines is continuing due to the Government of India order which the cargo agents obtained through lobbying. It is the insistence of the cargo agents which kept the system of 5% commission going on.

49. With respect to CASS, it is stated that CASS is a web-based online and real time billing and settlement system which seeks to enhance administrative efficiencies while giving rise to operational cost benefits and ensures safe and secure air cargo transport. Further, CASS is a clearing house which provides both the airlines as well as the cargo agentsthe economies of scale and benefits of standardization and automation in the collection and distribution of money from the agents to the respective airlines.

50. As per the Opposite Party No. 1, CASS was introduced with the option of voluntary participation and was not mandatory. With the advent of information technology and in order to do away with the traditional paper-based invoicing system used by the airlines and manual controlling of those invoices by the cargo agents, this system was introduced.CASS in India is governed by the

provisions of 'Resolution 851'. Section 4.1 of the said resolution states that 'participation by IATA members in CASS is voluntary'. Section 7 of the same resolution provides that participation in CASS is also open for non-IATA air carriers too.

51. The Opposite Party No. 1 has submitted that it does not pose any financial burden on the cargo agents as the airlines have to pay the joining fees and not the cargo agents, which is provided in section 4.2 of the 'Resolution 851'. Though, section 5 of the 'Resolution 851' deals with participation by the cargo agents but nowhere does it prescribe any participation fee for the cargo agents. It is contended that the allegation that a single default in payment by cargo agents under CASS leads to blacklisting of such agents does not hold true. It is submitted that blacklisting takes place only upon the four instances of payment irregularities during any 12 consecutive months.

52. It is contended that the Commission,while forming *prima facie* opinion and passing order under section 26(1) of the Act, did not order for investigation of CASS system. Further, when the Informant sought to seek injunction by way of interim relief against CASS, the Commission refused the same and recorded merit of the CASS system and the order was also not interfered by the COMPAT. It is submitted that CASS is a voluntary accounting system for both the airlines and the cargo agents, who are free to bilaterally decide not to transact through CASS and deal outside CASS. Further, CASS is at pilot stage in India and at this stage it should not be nipped when it is not mandatory. It is further submitted that CASS has never been held to be anti-competitive in any jurisdiction contrary to the claim of the Informant.

Issues and Analysis

53. The Commission has carefully perused the information, the report of the DG and the replies/ objections/ submissions filed by the Informant and the Opposite Parties and other material available on record. The Commission also

heard the arguments advanced by the counsels who appeared on behalf of the Informant and the Opposite Parties on 26.03.2015.

54. On consideration of the above, the Commission is of the opinion that in order to arrive at a decision, the only issue that needs to be determined in the matter is as to whether the Opposite Parties have infracted any of the provisions of section 3(3) read with section 3(1) of the Act.

55. The Informant has alleged that the practice of the Opposite Party No. 1 in fixing the commission for the cargo agents and limiting and controlling the international air cargo transportation services through its various resolutions is in contravention of the provisions of section 3(3) of the Act read with the provisions of section 3(1) of the Act. The allegations of the Informant against the Opposite Parties, as emanated from the facts of the case, are threefold: (i) fixation of 5% commission for the cargo agents through 'Resolution 016aa', (ii) implementation of CASS in India through 'Resolution 851', and (iii) mandatory accreditation of cargo agents from IATA.

56. The Informant has alleged thatthrough 'Resolution 016aa', the Opposite Party No. 1 had fixed the commission of the cargo agents as 5% which is in contravention of the provisions of section 3(3)(a) of the Act. As per the Informant, the same was continued in the air cargo industry in India till March, 2015.

57. However, the DG has reported that 5% commission to the cargo agents, after notification of section 3 of the Act in May 2009, was not because of 'Resolution 016aa' but because of the order of Ministry of Civil Aviation, Government of India, which was passed only upon the insistence of the Informant. It is revealed from the DG investigation that though 'Resolution 016aa' was rescinded on 04.02.2013, its very substratum was gone once 'Resolution 815' was introduced. Further, the practice of fixing 5% commission to the cargo agents was continued after 2006, which was only on account of the intervention of Ministry of Civil Aviation, Government of India.

The DG has recorded evidence, including minutes of meetings of the Joint Council of IACP showing that the Opposite Party No. 1 was not in favour of the payment of a fixed rate of commission to the cargo agents stating that different airlines have different sale and distribution strategies. The DG has also recorded evidence showing that the Informant hadpleaded before Ministry of Civil Aviation to continue with the system of 5% commission for the cargo agents. Accordingly, the DGconcluded that the Opposite Party No. 1cannot be held liable forfixing 5% commission to the cargo agents after notification of the provisions of section 3 of the Act.

58. The Informant has contended that the system of 5% to the cargo agents in terms of the 'Resolution 016aa' was continued till March, 2015, not till 04.02.2013. As per the Informant, the airlines continued to pay 5% commission to the cargo agents even after the provisions of section 3 of the Act came into force in May 2009. On the findings of the DG that the same was continued because of the order of Ministry of Civil Aviation on the insistence of the Informant, the Informant stated that it had requested Ministry of Civil Aviation to place a reservation for a minimum 5% commission to generate healthy competition amongst the cargo agents. The Informant has denied that 'Resolution 016aa' became redundant due to some airlines joining large alliances thereby obviating the necessity of preserving multilateral interline system under MITA.

59. The Commission perused the rival submissions on the issue and also considered the DG findings in this regard. Since the issue pertains to violation of section 3(3) of the Act, it is first necessary to determine whether there exists an agreement amongst the members of the Opposite Party No. 1 or amongst the members of the Opposite Party No. 2or between the Opposite Party No. 1 and the Opposite Party No. 2 which can be considered as anti-competitive in terms of section 3(3) of the Act. In this regard, the DG has reported that the Opposite Partiesare associations of enterprises within the meaning of section 2(c) and 2(h) of the Act and their members are engaged in the business of providing air cargo transport services and any decision arrived at among its members at

conferences would amount to an agreement amongstthem. The Commission is also of the opinion that the trade associations like the Opposite Parties can be covered under the provisions of section 3(3) of the Act and any decision taken by the members of the Opposite Parties would amount to an agreement/ arrangement amongstthem in terms of the Act.

60. On the issue of fixation of commission for the cargo agents, the Commission observes that the system of payment of fixed commission to the cargo agents through 'Resolution 016aa' by the airlines was in place till 04.02.2013. In 2006, a new resolution *i.e.,* 'Resolution 815' was introduced which was approved by Ministry of Civil Aviation, Government of India with the reservations that a commission of 5% shall be payable to IATA accredited agents/ intermediaries and all agents/ intermediaries shall be given airway bills stocks by all the airlines.Thus, the system of 5% commission to the cargo agents was prevalent till 04.02.2013 *i.e.,* during post-notification of the provisions of section 3 of the Act. However, from the DG investigation, it is revealed that though the system of 5% commission was prevalent after May, 2009 *i.e.*, post-notification of the provisions of section 3 of the Act, it was because of the orders of Ministry of Civil Aviation, Government of India. From the evidences collected by the DG in terms of letter dated 02.08.2006 sent by the Informant to Ministry of Civil Aviation, it is apparent that the Informant itselfhad requested the Ministry for 5% commission to the cargo agents.Further, from the letters dated 29.08.2007 from Ministry of Civil Aviation to Air India Ltd. and 03.12.2007 from Air India Ltd to IATA and the minutes of the 12th Joint Council meeting of IACP held on 17.08.2012 at Mumbai,it is revealed that airlines had raised concerns over Ministry of Civil Aviation's reservations thata commission of 5% shall be paid to IATA accredited agents/ intermediaries under 'Resolution 815' and all agents/ intermediaries shall be given airway bills stocks by all the airlines.The Commissionalso notes from the DG report that IATA and airlines wanted to do away with any commitment on fixed commission through 'Resolution 815'.

61. From the record available, it is evidenced that the Opposite Party No. 1 was not in favour of fixed commission system and the Commission finds force in the contention of the Opposite Parties that the system of 5% commission was due to lobby of the members of the Informant before the Government of India. Thus, based on the above evidences and circumstances, the Commission is of the opinion that the allegation of fixing of the rate of commission for cargo agents by the Opposite Parties under 'Resolution 016aa' does not hold valid and therefore, the Opposite Parties have not contravened the provision of section 3(3)(a) of the Act.

62. As far as the issue of unilateral introduction of CASS by the Opposite Parties in India *vide*'Resolution 801(r)/851' is concerned, the Informant has alleged that the rules of CASS are exhaustive and so worded that it would come within the mischief of anti-competitive activity. As per the Informant, through the introduction of CASS, the Opposite Parties have intended to impose stringent financial condition on the cargo agents which will lead to increase in their administrative cost, bring changes in credit period and impose discriminatory conditions and there will be no data protection. As per the Informant, introduction of CASS will adversely affect the interest of the cargo agents and drive them out of the business and it would unilaterally alter the financial relation between the airlines and the cargo agents and violate the long standing market practices.

63. The DG, having examined CASS, came to the conclusion that introduction of CASS in India is not violative of the provisions of section 3(3)(b) of the Act as it does not limit or restrict the services in the air cargo agency market. As per the DG report, CASS is not mandatory in India and it is a pilot project. Further, it is noted from the submission of the Opposite Parties that CASS does not pose any financial burden upon the members of the Informant because the airlines have to pay the joining fees and not the cargo agents,*i.e.*the members of the Informant.

64. The Commission has considered all the contentions of the parties as well as the observations of the DG. The Commission observes that,*via-a-vis* the current physical system of clearance in the air cargo industry, CASS is scientific and efficient. It is observed that CASS is a global phenomenon, having much advantage to both the carriers and agents and it will enhance administrative efficiencies as well as reduce operational costs.The benefits of economies of scale, standardization, and automation in the collection and distribution of revenueare also associated with CASS.It is also noted that having CASS programme would lead to creation of neutral settlement office, elimination of loss of invoice, enhanced financial control, reduced personnel and administrative costs, *etc*.

65. The Commission further notes that in India, CASS is not compulsory for the cargo agents and that entry and exit routes are available for every airline and agent. Moreover, CASS is not fully functional in India as it is still in pilot stage. It is observed from the minutes of the 61st meeting of the IATA Consultative Council that the Opposite Party No.1hasalready clarified that collection of surcharges was strictly bilateral issue between the airlines and the freight forwarder and that there was no unilateral decision to be taken by the parties unless jointly agreed. There is no extra cost to an agent as a result of CASS billing.

66. Considering the above, the Commission holds that the introduction of CASS is not anti-competitive in terms of section 3(3)(b) of the Act, as alleged by the Informant.

67. The Informant also alleged that IATA is controlling the market of the services of cargo agency by licensing and permitting this service to only those cargo agents who agree to become accredited to IATA by prescribing stringent financial guidelines under existing 'Resolution 801', the proposed 'Resolution 815' and 'Resolution 851' for CASS. In this regard, the Commission notes that IATA plays the role of self-regulator in the sector and as such the accreditation

provided by IATA is not mandatory and hence, cannot *per se* be taken as anti-competitive. Further,it may also be observed that such accreditation helps the stakeholders in providing assurance about the quality of services provided by the cargo agents.Accordingly, it cannot be termed as anti-competitive within the meaning of section 3(3) read with section 3(1) of the Act.

68. The Informant, in its submission, alleged that the DG's conclusion was based on new facts put forth by the Opposite Party No. 1 and that Informant was not given any opportunity to respond to the same. It is further alleged that the DG report contained conclusions based on one-sided story giving new facts presented by the Opposite Party No. 1 without checking or verifying the veracity thereof from the Informant. In this regard, it is observed that the allegation of the Informant has no ground. It may be noted that the parties were provided the DG's report and thereafter were given adequate opportunities to defend their case. The Parties not only submitted their written submissions but were also given opportunities for oral hearings before the Commission. Therefore, the allegation of violation of natural justice does not hold any ground.

Order

69. Based on the above discussion, the Commission is of the opinion that the Opposite Parties have not contravened any of the provisions of section 3(3) of the Act. There is no reason to disagree with the findings of DG. Accordingly, the Commission, in agreement with the DG findings, is of the considered opinion that the Opposite Parties have not contravened any of the provisions of section 3(3) read with section 3(1) of the Act.

70. In view of the above findings, the matter relating to this information is disposed of accordingly and the proceedings are closed forthwith.

71. The Secretary is directed to communicate this order to the parties as per the relevant regulations accordingly.

Sd/-
(S.L. Bunker)
Member

Sd/-

(Sudhir Mital)
Member

Sd/-

(Augustine Peter)
Member

Sd/-

(U. C. Nahta)
Member

New Delhi:
Date: 04.06.2015