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No.15/13/2009-DGAD
GOVERNMENT OF INDIA
MINISTRY OF COMMERCE & INDUSTRY
DEPARTMENT OF COMMERCE
DIRECTORATE GENERAL OF ANTI-DUMPING & ALLIED DUTIES
UDYOG BHAVAN

New Delhi 23rd February, 2012

NOTIFICATION

FINAL FINDINGS
(New Shipper Review)

Subject: New Shipper Review of anti dumping duty imposed on imports of Pre-sensitized Positive Offset Aluminium Plates from Bulgaria, China PR, Malaysia, Singapore and South Korea.

No. 15/13/2009-DGAD:- Having regard to the Customs Tariff Act, 1975 as amended from time to time (hereinafter referred as the Act) and the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules 1995 (hereinafter referred as the Anti Dumping Rules or the Rules) thereof;

Background and Procedure followed

2. M/s. Kodak (China) Graphic Communications Company Ltd., (Producer / Exporter from China PR) filed an application for a New Shipper Review under Rule 22 of Customs Tariff (Identification, Assessment and Collection of Anti Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, and requested the Designated Authority to initiate a New Shipper Review of the anti dumping duty levied vide Customs Notification No. 108/2007 dated 25th September, 2007, on imports of Pre-sensitized Positive Offset Aluminium Plates originating in or exported from China PR, pursuant to the Final Findings dated 23rd August, 2007 issued by the Designated Authority.

3. The Applicant claimed that the Applicant was not related to any of the exporters/producers in China PR presently subject to anti dumping measures in force with regard to the concerned product. Furthermore, it claimed that it had not exported the concerned product during the period of investigation of the original investigation, i.e., 1st

April, 2005 to 31st March, 2006. The Applicant further claimed that the applicant company was incorporated in the year 2005 and commenced its operations in the year 2007 and, therefore, it could not have exported the subject goods to India during the investigation period of the original investigation. The Authority, after prima facie examination of the information submitted by the Applicant and based on the documents submitted, considered it sufficient to justify the initiation of a new shipper review investigation in accordance with the provisions of Rule 22 of the Anti Dumping Rules.

4. The Designated Authority initiated the New Shipper Review under Rule 22 of the AD Rules vide Notification No.15/13/2009-DGAD dated 8th January, 2010. The Authority recommended provisional assessment of all exports of Pre-sensitized Positive Offset Aluminium Plates made by M/s. Kodak (China PR) Graphic Communications Company Ltd (Producer / Exporter) from China PR till the completion of the Review initiated in accordance with Rule 22 of the Indian Anti Dumping Rules. The same was notified vide Customs Notification No.35/2010-Customs on 19th March, 2010. The Domestic Industry in the present New Shipper Review is M/s TeckNova Imaging Systems Ltd.

5. The period of investigation (POI) in this New Shipper Review is from 1st October, 2009 to 31st March, 2010 (6 months).

6. The Authority intimated to the exporting country about the initiation of the New Shipper Review investigation and gave an opportunity to all the interested parties concerned to make their views known in writing within 40 days from the expiry of the POI.

7. The Authority obtained details from the Applicant in the form of Exporter Questionnaire to elicit the relevant information. The said producer / exporter also filed information in the form of a Market Economy Questionnaire, claiming to be operating under market economy conditions.

8. The Authority provided an opportunity to all the interested parties to present their views orally in an oral hearing held on 8th July, 2010. All parties who attended the hearing and presented their views orally were requested to file written submissions. The parties were also advised to collect copies of the views expressed by the opposing parties in their submissions and offer rejoinders, if any. Thereafter, the Disclosure Statement was issued on 1st November, 2010 inviting comments, if any, from the Applicant and other interested parties.

9. Before issuance of the Final Findings in the present Review, a new incumbent had taken over as the Designated Authority. Therefore, in line with the guidelines given by the Supreme Court in the matter concerning Nylon Tyre Cord Fabrics from China PR, the new Designated Authority held 2nd oral hearing on 7th April, 2011. Subsequent to the 2nd oral hearing, the Applicant and the domestic industry again made their submissions which were duly considered, wherever found relevant, and thereafter, a second Disclosure Statement was

issued on 8th July, 2011, inviting comments, if any, from the Applicant and other interested parties. The submissions made by the Applicant and the Domestic Industry have been duly considered, wherever found relevant, in the Final Findings appropriately.

10. The Authority verified the records of the Applicant New Shipper at its factory premises and Corporate Office in China PR.

11. The Authority made available the public file as per AD Rule 6(7) of the Rules containing non-confidential version of the information/submissions made by various interested parties.

12. *** in the present Final Findings represents information furnished by the interested parties on confidential basis and so considered by the Authority under the Rules.

Product under Consideration & Like Article

13. The product under consideration (PUC) in the original investigation was “Pre-sensitized Positive Offset Aluminium Plates”, (also referred to as “PS Plates” or subject goods). The subject goods are primarily used in the printing industry. There are various kinds of Aluminium Offset Plates, designed to suit the quality, speed and requirements of the users and the imaging technology available to them, e.g., Non-Sensitized Grained Plates, Pre-Sensitized Plates (positive and negative working) and Digital Plates (Thermal or Violet or UV sensitive). The thickness of the subject goods ranges between 0.15 mm to 0.40 mm. The product under consideration in this New Shipper Review is “Pre-Sensitized Positive Offset Aluminium Plates with thickness ranging from 0.15 mm to 0.40 mm with a variation of 0.03 mm on either side”, as determined in the original case. However, the PUC does not cover negative plates and digital plates, negative offset plates and all plates other than “Pre-Sensitized Positive Offset Aluminium Plates with thickness ranging from 0.15 mm to 0.40 mm with a variation of 0.03 mm on either side”.

14. There is no argument made by any of the interested parties on the product under consideration and like article. It is noted that the Applicant M/s. Kodak (China PR) Graphic Communications Company Ltd has claimed that goods produced and exported by it are within the meaning of the Rules. In view of the foregoing, the Authority holds that product under consideration in the present investigations is the same as considered in the original investigation, i.e., “Pre-Sensitized Positive Offset Aluminium Plates with thickness ranging from 0.15 mm to 0.40 mm with a variation of 0.03 mm on either side” classifiable under Chapter 84 of the Custom Tariff Act, 1975.

15. The subject goods fall under Chapter 84 of the Custom Tariff Act, 1975 under subheading No. 84425020. The customs classification is, however, indicative only and is in no way binding on the scope of the present investigation.

Views expressed by the Interested Parties for the Review

Views of the Applicant:

16. The Applicant, in its written submissions, post-public hearing dated 8 July, 2010, has inter alia, argued:

i. That the present New Shipper Review petition has been filed by M/s Kodak (China) Graphic Communications Company Limited, China PR (Producer and Exporter) for determination of individual dumping margin.

ii. That the Applicant has relied upon Rule 22 of the Anti-Dumping Rules read with Article 9.5 of the WTO Agreement on Anti-Dumping, and submitted the legal requirements that the Applicant has not exported the product to India during the period of original investigation, and the Applicant is not related to any of the exporters or producers in the exporting country who are subject to anti-dumping duties on the product.

iii. That in the present case there is no basis for the allegation that the Applicant or any of its group companies are related to Lucky Group or Second Film Company. Kodak had earlier invested 20% shares in Lucky Film Company (and not Lucky Group). Lucky Film Company is a subsidiary of Lucky Group. Further, Second Film Plant is a subsidiary of Lucky Group. However, the 20% investment in Lucky Film was a mere financial investment and no controlling interest was given to Kodak as is also evident from the public notice issued by Lucky Film Company. In fact, even when Kodak was given one berth in the Board of Directors, there was a clear understanding between Kodak and Lucky Film that the Director of Kodak shall not interfere in the day to day operations of Lucky Film Company. Therefore, there was no controlling right to Kodak and its Director in the Board was just a formality.

iv. That the Applicant has explained its relation with the Lucky Group and in order to substantiate the position on this issue, the Applicant has sought to rely upon the rationale of the Designated Authority in the case of *Circular Weaving Machines*. The Applicant reiterated that it has no control over Lucky Group.

v. That the Applicant has not claimed any excessive confidentiality and has rightfully sought confidentiality on the specified issues.

vi. That the Applicant has claimed “*market economy*” status for themselves.

vii. That the Applicant has claimed that ELP had no authorization on behalf of the domestic industry to attend the hearing and should not be allowed to make any submissions.

viii. That the Applicant has claimed that as the written submissions are made by ELP nearly 2 months after the initiation, the submissions must be disregarded by the Authority.

Views of the Domestic Industry:

17. M/s TechNova Imaging Systems, the domestic industry, in their written submissions, post-public hearing dated 8th July, 2010, has, inter alia, argued:

i. That the New Shipper Review initiation is not in compliance with the law. The manufacturer (Kodak China), exporter (Kodak Singapore) and importer (Kodak India) are related to the manufacturer, exporter and importer from the original investigation. Details of the relationship and proof have been provided.

ii. That Kodak (China) Co. Ltd. (KCL) and Kodak (China) Investment Co. Ltd. (KICL) are the principal subsidiaries of Eastman Kodak. KCL and KICL jointly held 100% stake in Kodak (China) Graphics Communications Ltd. (KGCCL), i.e., the Ostensible New Shipper. Therefore, Eastman Kodak and KGCCL are clearly related companies. Eastman Kodak also owned 20% share in Lucky Film Company (LFC) during the original POI, and Second Film Plant, a wholly owned subsidiary of LFC, exported the subject goods to India during the POI, but did not cooperate with the Authority in the investigation.

iii. That Eastman Kodak held 20% stake in LFC (which is owned by Lucky Group) from November 2003 - November 2007. LFC has three wholly owned subsidiaries – Second Film Company (SFC), Lucky Research Institute (LRI) and Lucky Shanghai Paper Mill (LSPM). SFC has made exports of subject goods to India during the original Period of Investigation.

iv. That the alleged New Shipper has sought to cover up its relationship with each Kodak entity by stating that the same is available on the website, which in fact is not available and reiterated that Kodak Singapore and the Kodak India are related to each other and furthermore are under the control of the same parent.

v. That in the case of a New Shipper Review, it is not only the control but also the relationship between the parties that is critical. The underlying test is that a party must not derive economic benefit from its own wrong doing. There can be no dispute that through its shareholding in the Lucky Group and in particular in its wholly owned subsidiary the Second Film Company, the Kodak Group has derived economic benefit from the act of dumping in India. Further, it did not participate in the original proceedings and is coming under the garb of a New Shipper to seek indulgence from the Indian anti-dumping Authority.

vi. That with regard to the claim of the Applicant New Shipper for considering the subject country as a '*market economy*', the claim of the Applicant does not satisfy the necessary criterion for granting market economy status as required under Rule 8, Annexure I of the Anti-dumping Rules, 1995 and further that the Applicant has not provided the required information to justify such a claim, nor is the same available in public domain and has sought leave to respond to such information as and when it is placed on record by the New Shipper.

vii. That the Applicant has been claiming excessive confidentiality with regard to certain issues and that this excessive confidentiality is hindering the ability of M/s TechNova Imaging Systems, the domestic industry to suitably participate in this proceeding. On the

issue of confidentiality, the alleged New Shipper has purportedly replied to certain issues raised by M/s TechNova Imaging Systems vide letter dated 7th July, 2010. M/s TechNova Imaging Systems submits that claiming confidentiality, especially on such a letter, is *ultra vires* the Anti-dumping Rules and contrary to the *ratio* in *Reliance Industries vs. Designated Authority*; 2006 (202) ELT 23 (SC).

viii. That ELP, representing the domestic industry, vehemently denied that it had no authorization to represent and placed on record the Authorization Letter dated January 12, 2010 that TechNova Imaging Systems had issued to ELP. ELP also clarified that the same had been forwarded to the Authority vide letter dated 13th January, 2010.

ix. That the Authority shall not summarily dismiss or reject any submission made by ELP in the instant case and that the Authority has appropriately accepted the submission made by the interested party which was made within time and it has not erred in doing so. It has relied upon *Designated Authority v/s HaldorTopsoe*; 2000 (120) ELT 11 (SCC) and the WTO DSP Report in United States – Anti-Dumping Measures On Certain Hot-Rolled Steel Products - WT/DS184/AB/R and United States – Sunset Reviews of Anti-Dumping Measures On Oil Country Tubular Goods From Argentina - Report of The Appellate Body - WT/DS268/AB/R.

View/Submissions by the Applicant post First and Second Oral Hearings and post First and Second Disclosure Statements:

18. Submissions by the Applicant post First and Second Oral Hearings and post First and Second Disclosure Statements are summarised as under:

i) The Applicant does not agree that they are related to a company subject to anti dumping duties. The documents issued by the Designated Authority contain serious factual and legal errors and require reconsideration by the Designated Authority. It is incorrect appreciation of the facts that:

- a) Eastman Kodak held 20% stake in Lucky Film Company (LFC) from November 2003 - November 2007. This is confirmed in Kodak's Annual Report of year ended 2003.
- b) LFC has three wholly owned Subsidiaries – Second Film Company (SFC), Lucky Research Institute (LRI) and Lucky Shanghai Paper Mill (LSPM).
- c) SFC has made exports to India during the original Period of Investigation.
- d) Kodak (China) Co. Ltd. (KCL) and Kodak (China) Investment Ltd. (KICL) are principal subsidiaries of Eastman Kodak, whereas, KCL and KICL jointly hold 100% stake in Kodak (China) Graphics Communications Ltd. (KGCCL) i.e. the Ostensible New Shipper. Therefore, Eastman Kodak and KGCCL are clearly related companies. Eastman Kodak also owned 20% in LFC during the POI and a

wholly owned subsidiary of LFC (i.e. SFC) exported to India during the POI, but did not cooperate with the Designated Authority in the investigation.

ii) Thus, the Authority has held without any basis that Second Film Company (SFC) is a wholly owned subsidiary of Lucky Film Company and concluded the two as related companies in term of Rule 22 of AD Rules.

iii) The correct facts of present case are different and are as under:

- a) Lucky Film Group Corporation (Lucky Group) is the holding company. Lucky Film Co. Ltd (LFC) is not involved in product under consideration and is a subsidiary company of Lucky Group that has controlling ownership.
- b) Second Film Company (SFC) is a 100% wholly owned subsidiary of Lucky Group Corporation (Lucky Group) and was involved in production and sales of the product under consideration. SFC has made exports to India during the original Period of Investigation.
- c) Kodak (China) Co. Ltd. (KCL) and Kodak (China) Investment Ltd. (KICL) are principal subsidiaries of Eastman Kodak. Whereas, KCL and KICL jointly hold 100% stake in Kodak (China) Graphics Communications Ltd. (KGCCL) i.e. the Ostensible New Shipper
- d) Eastman Kodak is having 20% Share in Lucky film Co. Ltd (LFC) through Kodak (China) Co. Ltd. (KCL) and Kodak (China) Investment Ltd. (KICL)

iv. The Authority has wrongly interpreted Rule 2(b) of the AD Rules, its relevance and applicability in the present case. The Authority has noted that the relationship referred to in Rule 2(b) is specific for the purposes of establishing the domestic industry and has nothing to do with establishing the relationship for the purposes of Rule 22. The Authority further noted that even if the explanation of relationship described in Rule 2(b) is applied, the relationship is established. The conclusion drawn is factually and legally incorrect and contrary to the past established practice in this regard. Explanation of relationship as defined in Rule 2(b) states as under:

“(i) Producers shall be deemed to be related to exporters or importers only if,-

- a) One of them directly or indirectly controls the other; or*
- b) Both of them are directly or indirectly controlled by a third person; or*
- c) Together they directly or indirectly control a third person subject to the condition that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producers to behave differently from non-related producers.”*

(ii) *A producer shall be deemed to control another producer when the former is legally or operationally in a position to exercise restraint or direction over the later.*

v. The Authority has not examined and established the relationship in term of Rule 2(b) and has repeated previous conclusion, without recording any reasons and ignoring vital legal and factual submissions made by the Applicant. The Authority holds the following without any basis:

- a) Eastman Kodak and the Petitioner i.e. M/s Kodak (China) Graphics Communications Company Ltd are clearly related to each other.
- b) Eastman Kodak held stake in Lucky Film Company Ltd. during the original period of investigation through Kodak China Investment co. and Kodak China Co. Ltd,
- c) Second Film Company (SFC) is a fully owned company of Lucky Film Co. Ltd. and made exports during the original period of investigation.
- d) Kodak China Co. Ltd, in its Annual Report has recorded that Company has significant influence over the finance and operations of Lucky Film Co. Ltd. and ignored the statement made by Lucky Film Co. Ltd. that Kodak China Co. Ltd. shall not interfere in the decision making process of Lucky Film Co. Ltd.
- e) The relationship between the M/s Kodak (China) Graphics Communications Company Ltd and Second Film Company (SFC) is established within the meaning of Rule 2(b) of the AD Rules.

vi. In the context of the present case, if the explanation of Rule 2(b) is applied on the following set of entities, it would be concluded that there is no relationship:

- a) The first company is M/s. Kodak China Graphics Communications Company Limited, the petitioner in the present case;
- b) The Second Film Company (SFC) was exporting (the subject goods) in that period;
- c) Eastman Kodak - USA, the eventual holding company of the present petitioner and all companies in its control, including Kodak China and Kodak China Investment;
- d) Lucky Film Group Corporation is the holding company of Second Film Company (SFC) and Lucky Film Company Co. Ltd.(LFC).

vii. It is undisputed fact that (a) one of them, i.e., M/s. Kodak China Graphics Communications Company Limited and Second Film Company (SFC) does not directly or indirectly control the other, (b) both of them, i.e., M/s. Kodak China Graphics Communications Company Limited and Second Film Company (SFC) are not directly or indirectly controlled by third person and (c) together they, i.e., M/s. Kodak China Graphics Communications Company Limited and Second Film Company (SFC) directly or indirectly

do not control a third person. Further, one of the companies is not legally or operationally in a position to exercise restraint or direction over the later. Therefore the disclosure statement without examining the correct set of parties holds that relationship is established in term of Rule 2(b). In fact no relationship is established between the two companies in any manner in term of Rule 2(b).

viii. The Authority has wrongly interpreted Rule 22 and proposed to hold that the Applicant cannot be treated as New Shipper within the meaning of Rule 22 of AD Rules. Rule 22(1) has to be viewed in the context of the words “provided that these exporters or producers show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product”, and the nature of review which is confined to determining individual margins. Therefore, the review is initiated to relieve the new exporters who may not in fact be dumping the product that is already subject to anti-dumping duty which is applied even in cases where the exporter/producer did not dump the product in the Indian market. Thus, Rule 22 is linked with the new shipper’s seeking initiation of review by showing that such new shippers were eligible to seek the review. Cases of only those who did not export the product to India during the period of investigation under Rule 5 are required to be reviewed for determining their individual dumping margins, if they are not ‘related’.

ix. The nature of review under Rule 22 is case specific with the purpose of determining individual margins for such exporter/producer, and no full-fledged investigation, as is required for imposing the anti-dumping duty, is contemplated under Rule 22. The proceedings under Rule 22 are initiated after it is shown to the Designated Authority that such exporter/producer is not related to any exporters/producers in the exporting country who exported the subject goods during the period which was the subject matter of the investigation under Rule 5. The exception/restriction incorporated in Rule 22 is designed to prevent misuse of the provision.

x. The objective and purpose of the word “related” is to see whether potentially circumventing relationship exists, through whom the anti-dumping duties already imposed might be circumvented, for example, by creating a “shell” company or appointing a sole agent for the product. The requirement on the part of the new shippers to show that they are not “related” is a corresponding obligation on the part of the Designated Authority to verify that there is no circumvention of anti-dumping duty being attempted by invoking the review.

xi. The Authority has examined relationship by considering wrong set of parties. Rule 22 requires relationship to be examined between the Applicant company and the exporters/producers who are subject to anti-dumping duties. In the context of the current investigations, it implies alleged relationship between the Applicant Company and the Second Film Company. The disclosure statement has not examined at all relationship between these entities. Instead, the disclosure statement has examined relationship between

petitioner Applicant and Lucky Film Co Limited. The disclosure statement contains no reasoning how the applicant companies are or were related the Second Film Company (SFC). In fact, applicant was not even in existence at the time of original period of investigation. Under the circumstances, there is no question of any relationship between the petitioner and the exporter/producer subject to anti-dumping duties. Therefore, the disclosure statement has examined relationship between incorrect set of parties.

xii. The Authority has not appreciated the difference and significance of “significant influence” and ‘control” and also ignores the definition under Accounting Standards which also establish that the two companies are not related. Mere “significant influence” per se does not tantamount to relationship in terms of object and purpose of Rule 22 of Anti-dumping Rules. There are absolutely unambiguous statements made by the two companies concerned i.e. Lucky Film Co Limited and Kodak China Co Limited. The disclosure statement has misinterpreted the two. Also, the Authority has chosen to rely only upon the statement made by one company (Kodak) and chosen to ignore the statement made by other company (Lucky). Express prohibition in participating in the daily business operations and management has been completely ignored, which is the most fundamental requirement for the present purpose. Public Notice issued by Lucky Film Co Limited dated 30th Oct 2003 “Report on change of shareholding” stated as under:

“6. *Recommendation by Directors:-*

Kodak Investment and/or Kodak China shall together have the right to recommend one director to the board of Lucky Film Co Limited. However, they shall not participate in the daily business operation and management of Lucky Film Co Limited”

xiii. Kodak China Co Limited, in its annual report for 2004, recorded as under:

*“Pursuant to cooperation framework contract between Kodak and Lucky Group in *** and approved by Ministry of Commerce in ***, The company acquired ***% of equity shares of Lucky Film Co Limited from Lucky Group at a cost of *** in ***.*

The company has significant influence over the finance and operations of Lucky Film, the Kodak (China) Co Limited and Kodak (Wuxi) Co Limited and therefore, it accounts for the investments in these companies in equity method”

xiv. From the above, it would be seen that while one company stated existence of “significant influence”, the other stated “lack of control”. There is absolutely no contradiction whatsoever. While significant influence implies “authority to participate”, control implies “authority to give direction”. The disclosure statement has equated “authority to participate” with “authority to give direction”. Further, the disclosure statement has chosen to ignore that

“authority to give direction” is relevant for the purpose of anti dumping law. Authority to participate is entirely irrelevant when such authority lacks authority to give direction. Also, the disclosure statement has chosen to rely only upon the statement made by one company (Kodak) and chosen to ignore the statement made by other company (Lucky). Express prohibition in participating in the daily business operations and management has been completely ignored, which is most fundamental requirement for the present purpose.

xv. The Authority has drawn wrong interpretation of Rule 22 by examining past relationship whereas the present relationship alone is relevant. The disclosure statement ignores the law and has examined the relationship in the context of original period of investigation. Rule 22 of the Indian Rules and Article 9.5 of the WTO Agreement provides for consideration of present relationships. Past relationships are in any case of no consequences. This become more than evident from the plain reading of Rule 22 and Article 9.5, which has prescribed for a determination that (a) such producers or exporters should not have exported in the original investigation period which implies condition for the past period, and (b) such applicants “are not related” to a “company attracting anti-dumping duty” (which implies current relationship). Thus, the entire relationship has to be examined with reference to the current period, i.e., the investigation period chosen by the Designated Authority. Such relationship cannot be examined with regards to the investigation period of the original investigation.

xvi. The Designated Authority has alleged that at the time of filing the application the alleged relationship was not disclosed. It is incorrect to say that the alleged relationship was not disclosed to the Designated Authority at the time of filing the application. Applicant disputes any such relationship. When the Applicant does not consider and accept that there is any alleged relationship, the question of disclosure of the same by the applicant does not arise. On demand from the Authority, the Applicant has cooperated with Designated Authority and provided information even when the Applicant continues to consider that there was no relationship with these companies within the meaning of Rule 22.

xvii. Anti-dumping legislation seeks to restrict unfair pricing, but cannot be read to encourage restriction on fair trade practices. The legislation permits the Govt. of India to impose anti-dumping duties on imports of an article, provided it is established that such exports of the product have caused or threaten to cause injury to the domestic industry or materially retards the establishment of an industry in the Country. The anti-dumping duties can be charged only if the charge of dumping is established. Such anti-dumping duties are required to be restricted to an amount considered necessary to address injury to the domestic industry. Thus, while the objective of imposition of anti-dumping duties is to penalize erring exporters who had resorted to dumping practices, the Govt. of India imposes anti-dumping duties, by practice, even on producers/exporters, who have not resorted to dumping in the relevant period or who were not even in existence at the time of previous investigations. The

practice is in vogue in order to ensure effective remedy and to prevent possible abuse/misuse/circumvention of anti-dumping duties imposed on erring exporters.

xviii. Appreciating that anti-dumping duties would get imposed even on producers who have not resorted to dumping or who were not even in existence during the relevant period, the Govt. of India has made specific provisions in consonance with the WTO Agreement on Antidumping to permit such producers who have not exported their product during the relevant period to seek their own individual anti-dumping duties. Further, appreciating that such permission might be misused by erring producers, the rules provide that such individual duties should, however, be specified only if such producers establish that they were not related to the producer/exporter who had earlier exported the product during the previous relevant period (and therefore who are subject to anti-dumping duties by virtue of such previous exports during the previous relevant period). The Designated Authority is required to consider the purpose and objective of exception provided under the law. The Hon'ble Tribunal at length has laid down the purpose and objective of exception under the law and given sufficient guidelines to the Designated Authority in this regard.

xix. The Designated Authority may consider its own current practice wherein specific anti-dumping duties are recommended only in respect of companies who have exported the product during the relevant period and the same are not extended to the related companies of such producer having individual duties. The current interpretation drawn by the Designated Authority will lead to a situation whereby a group having more than one manufacturing company in a foreign country would have duties only on the group company who had exported the product during relevant period and all other group companies shall be forbidden forever from exporting their products in the Indian market only because of their "relationship" with the company who had exported during the relevant period.

xx. The Designated Authority has also ignored that if a word has been defined under the rules for any particular purpose, the same is not only relevant but also binding, or, at the least, guiding in interpreting the same word appearing at other places in the same rules. Thus, Rule 22 and rule 2(b) both refer to the word "related" and therefore the Designated Authority should rely upon or refer to or seek strength from the definition of 'related' as specified under the rule 2(b) for the purpose of Rule 22. Assuming but not admitting that the Designated Authority is justified in interpreting so, the applicants submit that if the definition of related parties under 2(b) cannot be applied, then the definition of related party appearing under accounting standards or any other statute should be considered as relevant and useful in deciding the meaning of "related" and if even that is considered inapplicable, then the purpose and the objective of the provision should be kept in mind while interpreting the word. The Designated Authority should not hold that there is no necessity of defining the word 'related' for the present purpose and thus not only leave the present investigation, but also all possible future investigations in limbo. The Designated Authority is required to provide guidelines, while deciding the present case, to the Indian consumers and foreign

producers for utilizing the relevant legal provisions in future. Since the objective of the exception provided under Rule 22 is to prevent abuse of the provision by those erring foreign producers subjected to anti-dumping duties, the Designated Authority should examine the nature of relationship between the parties in the present case, evidence of such relationship, conduct of business of such parties, eligibility of such companies and rights to trade conferred on the parties.

xxi. The Designated Authority may also note that the alleged relationship did not exist during the current relevant period which is the most fundamental consideration. Further, even during the period of earlier investigation, the alleged relationship did not exist between the producer who were exporting the product in that period and the applicant companies.

xxii. The petitioner has imported significant volumes of the product under consideration and the present misinterpretation of law would cause significant irreparable financial loss to the applicant group companies. Further, if the applicant companies are not given their individual duties, they would be subjected to pay residual anti dumping duties, for no fault of theirs and even when the group cooperated with the Designated Authority at the time of original investigations and at present.

xxiii. Under Rule 22, the Authority is required to consider two parameters:

- a. Applicant should not have exported the product to India during the original investigation period –this requirement is with regard to the original investigation period;
- b. The applicant should not be related to exporters or producers who are subject to anti-dumping duties – this relationship must be examined with reference to the POI now chosen by the Designated Authority. There is nothing under 22 which can be read to imply that this relationship should not have existed at the time of original investigation period. The relationship is required to be considered at the time of New Shipper period of investigation. Consider the following situations :
 - Consider the situation where a joint venture company (C) is formed by two multinational companies (say, A and B). This joint venture company manufacturers and exports the products to India and attracts anti-dumping duties as a result of such dumping. Further, consider that after some time, the two multinational companies come to a decision to sell off this company. There can be two situations – where the company A sells off entire investments to company (B) or where the same is sold to another company (D). In either situation, company (A), who was not a manufacturing company, now sets up its own manufacturing facility, say company (E). This company

(E) now files an application before the Authority for its own dumping margin. It cannot be said that company (E) is not entitled for its own dumping margin for the reason that the joint venture company C is subject to anti-dumping duties, unless the Authority comes to a conclusion that the entire objective of sale of investment by the two companies is to circumvent the duties imposed in India.

- Consider the situation where a producer company (A) is exporting its products through (a) related trading company B and (b) unrelated trading company C. Due to dumping resorted, the producer company A attracts anti-dumping duties as a result of such dumping. As a result of such imposition of anti dumping duty, the company C now forms another company, Company-D and wishes to export the product through this newly formed company-D. Or there could be another situation, where another producer company in the group, say, company E exists and it is decided to circumvent the high quantum of anti dumping duty by forming a new trading company F. It cannot be said that such other producer company-E is entitled for its own dumping margin.

xxiv. A perusal of the document makes it evident that while holding relationship, the Designated Authority has given no reasons on the basis of which it has determined that these two companies are indeed related companies. The Designated Authority cannot come to a conclusion without giving adequate reasons. Not only that the principles of natural justice demand that the Authority give a reasoned order, Rule 17 makes it evident that the final findings issued by the Authority should contain adequate reasons for the conclusion. Therefore, the Designated Authority should give adequate reasons for holding relationship between the two companies.

xxv. The Authority should apply the definition of related party as given under Rule 2(b) of Customs Tariff (Anti Dumping) Rules 1995 in the absence of any other express definition under the law. The word “related” has not been defined under Rule 22. Further, barring Rule 2(b), elsewhere also the word related has not been defined under the law. It is a well settled legal position that in case one word has been used at multiple places in a law, the same meaning must be assigned to the word as has been specifically assigned under the rules. Since in the context of Rule 2(b), the word related has been defined, the same definition should be applied for the present purpose as well.

xxvi. The definition of related under Rule 2(b) is not only pertinent but also directly relevant. It is important to note in this regard that the purpose of defining related under Rule 2(b) with regard to the issue of relationship between a domestic producer and importer/exporter. Given the objective of possible exclusion of such related companies, it follows that Rule 2(b) seeks to exclude those companies who are having such “relationship” with a domestic producer as would adversely impact the scope of the domestic industry. For

instance, a company may be related to a foreign producer and therefore may not wish to support a petition. Therefore, the rules have been amended to authorize Designated Authority to exclude such companies so that other genuine domestic producers are not prevented from bringing an application. Similar is the position with regard to related importer. Thus, the objective of defining relationship under Rule 2(b) is to authorize the Designated Authority to exclude such companies whose relationship may frustrate the objective of the law. In the same way, the objective of exclusion provided under Rule 22 is to authorize the Designated Authority to exclude such companies whose relationship may frustrate the objective of the law. Such being the case, definition under Rule 2(b) is directly relevant and in fact highly pertinent for the provisions of Rule 22.

xxvii. Accounting Standard 18 (AS18) is directly relevant in the present case for multiple reasons. Firstly, since the entire issue has arisen because of the disclosures by the parties either in the annual report or stock exchanges, the definition under accounting standards is highly relevant. Secondly, since the issue concerns relationship between companies, definition under accounting standards is most relevant. Thirdly, the said accounting standard defines related party and parties with significant influence. Fourthly, either the Authority considers the definition of related party under dumping law itself or holds that the said definition is not relevant. As per the definition of related party under Accounting Standard 18, parties are considered to be “related parties” if at any time during the reporting period one party has the ability to control the other party or exercise significant influence over the other party in making financial and/or operating decisions. Further, “significant influence” as per Accounting Standard 18 means participation in the financial and/or operating policy decisions of an enterprise, but not control of those policies.

xxviii. It is evident from the above that the word “related” and “significant influence” are two different words defined under the same Accounting Standards and therefore the two do not mean the same. Further, the mere fact that a company has significant influence over other does not mean that the two are related.

xxix. The Designated Authority has not given any reasoning on why definitions given under accounting standards are not relevant or applicable. This is all the more relevant and important for the reason that (i) what is relevant to the Authority is control (and not significant influence), (ii) the Authority has considered that “control” and “significant influence” imply the same, (iii) the accounting standards clearly distinguish between “control” and “significant influence”, (iv) the Authority has treated the two companies related on the basis of statements in annual reports and therefore accounting standards (under which the disclosures have been made) become directly relevant.

xxx Should the Designated Authority consider that neither definition under Rule 2(b) nor the definition under AS18 is guiding, the Designated Authority is then required to define and

consider the meaning of the word “related”. In this regard, attention of the Designated Authority is requested to the orders of the Hon’ble CESTAT in the matter of Vitrified Tiles.

xxxii. The Authority has stated that the above decision is not applicable/relevant for the reason that the same is in the context of scope of domestic industry. However, as stated hereinabove, given the objective of exception provided for the purpose of scope of domestic industry and for the purpose of new shipper review, it directly follows that the two exceptions have the same or similar objective. While under Rule 2(b) exception is provided so that (a) the domestic industry can seek protection against dumped imports, (b) those domestic producers who are related to foreign producers do not prevent others from seeking protection, (c) the injury assessment does not get distorted due to possible imports by the domestic producer itself. Similarly, under Rule 22, the exception has been provided so that a foreign producer may not seek its own dumping margin when it preferred non cooperation at the time of original investigations or to prevent circuitous route of getting individual dumping margin by using its related company.

xxxiii. The Designated Authority has failed to appreciate that the applicant companies would be left in limbo in as much as these companies (i) could not have sought their own individual duty at the time of original investigation, (ii) cannot seek individual duties now through New Shipper Review, (iii) these companies cannot seek individual duties through Rule 23. It is a fundamental right of a producer to seek its own individual duties based on its own dumping margin.

xxxiiii. A company which has not been in existence at the time of original investigations could not have sought such individual duty. Since the company has not exported the product to India after imposing anti-dumping duties because of existing anti-dumping duties. Because the Designated Authority considers that Rule 23 provides for full Mid Term Review, such companies cannot seek Mid Term Review under Rule 23. Therefore, if it is held that such companies are not entitled to New Shipper Review under Rule 22, the determination implies that such companies are not at all entitled for their own individual dumping margin. Even at the time of Sunset Review in future, since the Sunset Review would focus only on actual exports made in the period, such companies would not receive their own dumping duties even through Sunset Review. In other words, the determination made by the Authority would imply that companies such as applicant companies can never have their own individual duties and should invariably suffer residual duties for no fault of theirs. This is clearly beyond the mandate of the WTO Agreement which requires the WTO member countries to give individual duties to the producers/exporters who are willing to cooperate with the Authority.

xxxv. The Authority has wrongly considered that the observations made by the CESTAT are relevant for the purposes of initiation only. The observations made by the CESTAT arose out of appeal against the final findings notified by the Designated Authority and were clearly in the context of objective and purpose of exception provided under Rule 22. There is nothing in

the order of the CESTAT which can be inferred to mean that the said observations are made in the context of initiation of investigations.

xxxv. In the present case, the shareholding of Kodak is much below the shareholding in Circular Weaving Machines case wherein the Authority has held that shareholding was not sufficient to grant legal control. The Authority has stated that the above decision is not applicable/relevant for the reason that the same is in the context of scope of domestic industry. However, given the objective of exception provided for the purpose of scope of domestic industry and for the purpose of new shipper review, it directly follows that the two exceptions have the same or similar objective. In the investigation relating to Circular Weaving Machines, the Authority has held as under with regard to relationship:

2) *The Authority notes that the key element in regard to relationship of the domestic producer and the exporter is 'control', legal or operational. The Authority finds that Starlinger, China is a 100% subsidiary of Starlinger, Austria whereby both are related companies. Further, it is evidenced that Starlinger, Austria is holding 34.67% shares in the applicant company i.e. Lohia Starlinger Limited. But mere shareholding does not amount to exercise of control and therefore does not make Starlinger, Austria and/or Starlinger, China related to Lohia Starlinger Limited (LSL) within the meaning of Anti Dumping Rules. Majority shareholding i.e. above 50% only gives legal control. Further, the Authority finds that no Director representing Starlinger, Austria has been appointed in the Board of applicant company since 2002. It is brought on record by both the parties that Starlinger, Austria has filed a Petition before Company Law Board seeking appointment of its nominee on the Board of LSL. All these establish that Starlinger, Austria has no operational control as well over LSL. Further, even if the two parties are related parties, the mere fact of relationship is insufficient to consider the domestic producer as ineligible. There must be sufficient grounds justifying exclusion of such related domestic producer. There must be evidence that the related domestic producer has acted differently due to relationship, or has participated in dumping practices and has taken such steps which would have resulted in self inflicted injury. In the instant case, there is no such evidence that the relationship between the two parties have led to petitioner behaving in a manner different from an unrelated producer. Thus, in the absence of legal or operational control by Starlinger, Austria and/or Starlinger, China over LSL and in the absence of sufficient grounds to treat LSL as ineligible domestic producer in the light of the provision contained in Rule 2(b), the Authority holds that the applicant is entitled to be treated as domestic industry within the meaning of Rule 2(b) of the AD Rules.*

View/Submissions by the Domestic Industry post First and Second Oral Hearings and post First and Second Disclosure Statements:

19. Domestic Industry has submitted as under:

i. The standard propounded in the law is 'relation' to the exporter and not of 'control'. There was an agreement between Eastman Kodak and Lucky Group signed for 20 years, with an investment of USD 1.2 billion for obtaining a stake of 20%. Secondly, there was a Director on the Board of Directors who should have control on the operations of the Joint Venture as regards the production/supply/distribution of the subject goods. With these facts in hand, it is commercially unviable to convince that the Director did not have any control on the operation of the Joint Venture specifically on the subject goods.

ii. It is incumbent on the parties to demonstrate or show that they are not related to earlier exporters or producers who are subject to anti dumping duties and it is the duty of the Authority to satisfy itself in this regard. H and R Johnson Ltd vs. DA is referred.

iii. Legislative intent behind Rule 22 has been amply clarified by the Government of India at the WTO and been detailed by the Tribunal. All attempts must be made by the DA to ensure that no circumvention of AD duties takes place by means of New Shipper Application. Therefore, if NSR is allowed to continue, then KGCCL would be able to export the said product without paying any AD Duties, which its related companies would be liable to pay, amounting to circumvention.

iv) (a) Eastman Kodak signed a 20 year agreement with China Lucky Film Company (LFC) and held 20% stake in LFC from November 2003 to November 2007. LFC has three wholly owned Subsidiaries, namely, Second film Company (SFC), Lucky Research Institute (LRI) and Lucky Shanghai Paper Mill (LSPM). Therefore, SFC and Eastman Kodak were related companies during April 2005-March 2006 which was the original POI. SFC made exports to India during the original POI.

(b) Kodak (China) Co. Ltd. (KCL) and Kodak (China) Investment Ltd. (KICL) are principal subsidiaries of Eastman Kodak. These two jointly hold 100% stake in KGCCL, the ostensible new shipper. Therefore Eastman Kodak and KGCCL are clearly related companies.

(c) Therefore, KGCCL is not qualified to file NSR as it is related to a producer/exporter, i.e., SFC, who in fact has exported the subject goods to India during the original POI from China.

v. Investigation initiated is in contravention of the Article 9.5 of AD Agreement and the Rule 22 of AD Rules.

- vi. Kodak China Investment Company Ltd., Kodak Singapore Pvt. Ltd and Kodak India Private Ltd were not even recorded as having filed for a new shipper review and cannot be investigated as they have not shown that they are not related to any of the exporters or producers in the exporting country
- vii. Kodak Singapore Pvt Ltd is related to Kodak Polychrome Graphics Singapore Pvt. Ltd through the common parent company and thus are prima facie disqualified from seeking any new shipper review.
- viii. In so far as the Indian arm of Kodak is concerned, they are the same part which was originally investigated and cannot be investigated again. Common Shareholder Company holds both the export companies in Singapore and the Indian importer.
- ix. Relationship of Kodak Polychrome Graphics Singapore Ltd with the parent company, i.e., Eastman Kodak is already admitted in the response filed by the ostensible New Shipper before the Designated Authority.
- x. Kodak (China) Graphic Communication Company Ltd (KGCCL) is related to an exporter in the exporting country (Singapore); they prima facie do not satisfy the condition stipulated under Rule 22 for applying as a new shipper.
- xi. Reliance to the Circular Weaving Machines is clearly misplaced, as the definition of 'domestic industry' was in question. The Explanation to Rule 2 (b) as well as Footnote clearly provide that the definition of 'related' is limited for the purpose of defining related parties of the domestic industry.
- xii. The ostensible new shipper has resorted to wide spread manipulation in order to deceive the DA and continue the review.
- xiii. KGCCL has exported to India at or above reference price since the imposition of AD Duty, even when the aluminium price has gone up, which accounts for 70-80% of the cost of finished goods. Volumes were subdued in the current POI, and immediately post the POI, volumes took a huge surge nearly seven times.
- xiv. KGCCL in its MET Questionnaire has admitted to selling the subject goods at losses.
- xv. The New Shipper resorted to submitting that the investment made by Eastman Kodak was a mere investment and no controlling interest was given to Eastman Kodak. However, the Designated Authority has in its custody documents to irrefutably show that Eastman Kodak has significant influence over the finance and operations of LFC. Further, it is a known fact that one of the Eastman Kodak's Directors (the parent company of the New Shipper) was part of the Board of Directors of Lucky group, hence it is clearly established that Kodak had a controlling stake to the extent of dictating policies of the company.

xvi. Given the relationship between the entities, it can be clearly concluded that (a) Eastman Kodak had relationship with SFC during the original Period of Investigation; (ii) SFC had exported to India during the original period of investigation; (iii) Eastman Kodak and the New Shipper are also related companies and the New Shipper had operations set up in 2005 and (iv) these facts were concealed by the New Shipper during the said application as well as in their response to the Exporters Questionnaire and Market Economy Treatment Questionnaire.

xvii. The Designated Authority has correctly concluded that “relationship” as required in the instant case is not to be determined as defined under Rule 2(b) of the Anti-dumping Rules.

xviii. It must be emphasized that the standard propounded under Anti-dumping Law is that of “relation” to the exporter and not of “control.

xix. As regards the contention of the New Shipper regarding “significant influence” implies “authority to participate” and not “authority to give direction”, the Designated Authority has correctly held the “significant influence” of Kodak China Co. Ltd is not only over the finances but also over the finances of the LFC and is in the instant case, it implies authority to give direction to pursue the commercial goals of LFC. Therefore, the factum of “relation” as required under Rule 22 of the Anti-dumping Rules is clearly established.

xx. As regards the claim of the New Shipper that there has been no relationship after 2008 due to the disinvestment process that was completed in 2008, the Designated Authority has correctly noted that the relationship was clearly established during the original Period of Investigation, i.e., 2005-2006 which is required for the purposes of a new shipper review under Rule 22 of the Anti-dumping Rules.

xxi. The New Shipper remains a potent threat to the Domestic Industry if it is allowed to export without an antidumping duty.

xxii. The application of the New Shipper should be rejected forthwith and recommendation of the highest duties may be imposed.

Examination by the Designated Authority:

20. The Authority notes that the subject investigation was initiated after accepting, prima facie, that M/s. Kodak (China) Graphic Communications Company Ltd., China PR, the Applicant, satisfies the following conditions of the provision of Rule 22 of the AD Rules:

- a. That the Applicant had not exported the subject goods in the period of investigation of the original investigation; and

- b. That the Applicant is not related to any of the exporters/producers the subject goods in China who had exported the subject goods during the original period of investigation.

21. The Authority notes that there has been opposition by the Applicant that firstly, the Authority has wrongly interpreted Rule 2(b) of the AD Rules, its relevance and applicability to a New Shipper Review, and secondly, that after applying Rule 22 of the AD Rules to the present New Shipper Review case, the Authority has wrongly interpreted the term “related” as expressed in Rule 22 and then coming to the conclusion that the Applicant has been found to be related to an exporter who had exported the subject goods to India. The Authority notes that in this regard the Applicant has contended that:

(i) Since the word “related” has not been defined under Rule 22 of the AD Rules and barring Rule 2(b) of the AD Rules, elsewhere the term “related” has not been defined under the law, the Authority has ignored that if a word has been defined under the Rules for any particular purpose, the same is not only relevant but also binding, or, at the least, guiding in interpreting the same word appearing at other places in the same rules. In the absence of any other express definition of related party under the law, the Authority should apply the definition of the related party as given under Rule 2(b) of the AD Rules to the present case.

(ii) Both Rule 22 and Rule 2(b) refer to the word “related” and, therefore, the Designated Authority should rely upon or refer to or seek strength from the definition of ‘related’ as specified under the rule 2(b) for the purpose of Rule 22.

22. The Authority, therefore, notes that first of all the Authority has to examine the applicability of Rule 2(b) in a New Shipper Review initiated under Rule 22 of the AD Rules as contended by the Applicant. In this regard, the Authority notes that Rule 2(b) of the AD Rules defines the Domestic Industry, and the Explanation of relationship as defined in Rule 2(b) reads as under:

“Explanation.- For the purpose of this clause,-

- (i) *producers shall be deemed to be related to exporters or importers only if,-*
 - a) *one of them directly or indirectly controls the other; or*
 - b) *both of them are directly or indirectly controlled by a third person; or*
 - c) *together they directly or indirectly control a third person subject to the condition that are grounds for believing or suspecting that the effect of the relationship is such as to cause the producers to behave differently from non-related producers.”*
- (ii) *a producer shall be deemed to control another producer when the former is legally or operationally in a position to exercise restraint or direction over the later.”*

23. The Authority also notes that the relevant part of Rule 22 reads as under:

“ the designated authority shall carry out a periodical review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to India during the period of investigation, provided that these exporters or producers show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product.”

24. From the above, the Authority determines that the relationship referred to in Rule 2(b) is specific for the purpose of establishing relationship of the domestic industry with the exporters or importers of the subject goods, whereas the relationship in a New Shipper Review to be established under Rule 22 of the Rules envisages the relationship between the exporters in the exporting country. The Authority, therefore, concludes that Rule 2(b) is not applicable in a New Shipper Review initiated under Rule 22 of the AD Rules, and as a consequence, in the context of the present case, there is no need to apply the explanation of Rule 2(b) to the set of entities requested for by the Applicant.

25. The Authority further concludes that as the New Shipper Review is initiated under Rule 22, and in Rule 22, there is already the following expression relating to relationship – *“these exporters or producers show that they are not related to any of the exporters or producers in the exporting country”*- it is required of the Authority to establish the relationship under Rule 22 and not under Rule 2(b). The Authority, thus, concludes that in the case of a New Shipper Review, the Authority has to establish the relationship under Rule 22.

26. After having concluded that in the case of a New Shipper Review, the relationship is to be established under Rule 22, the Authority notes that the Authority has also to determine the type of relationship required is to be established under Rule 22. In this regard, the Authority concludes that since the relationship in the case of a New Shipper Review is not required to be established under Rule 2(b) of the AD Rules, and the relationship is to be seen in terms of the following expression governing relationship in Rule 22– *“these exporters or producers show that they are not related to any of the exporters or producers in the exporting country”*, the Authority is required to establish the relationship under Rule 22 by assigning simple meaning to the word “related” in Rule 22 without qualifying or elaborating the meaning any further in terms of Rule 2(b) or otherwise.

27. After having decided that in the case of a New Shipper Review, the Authority is required to establish the relationship under Rule 22 by assigning simple meaning to the word “related” without qualifying or elaborating the meaning any further, the Authority notes that it is also required of the Authority in the present case to determine two more things. Firstly, it is to be determined that the Applicant New Shipper did not export the subject goods to India during the original period of investigation. Secondly, it is to be determined that the Applicant New Shipper is also not related to an exporter or producer in the subject country who had exported the subject goods to India during the original period of investigation. With regard to

the second point, the Authority notes that the Authority is further required to determine as to whether the relationship of the Applicant New Shipper is to be established with the exporter or producer in the subject country who had exported the subject goods to India “with reference to the original period of investigation” or as contended by the Applicant “with reference to the period of investigation prospectively chosen by the Designated Authority for a New Shipper”. The Authority notes that in this regard, the Applicant has submitted that the Disclosure Statement has drawn wrong interpretation of Rule 22 by examining past relationship whereas the present relationship alone is relevant; that the Disclosure Statement ignores the law and has examined the relationship in the context of original period of investigation whereas Rule 22 of the Indian Rules and Article 9.5 of the WTO Agreement provide for consideration of present relationships; that past relationships are in any case of no consequences; that the entire relationship has to be examined with reference to the current period, i.e., the investigation period chosen by the Designated Authority and that such relationship cannot be examined with regards to the investigation period of the original investigation.

28. With regard to the first point, the Authority notes that the Applicant New Shipper did not export the subject goods to India during the original period of investigation. With regard to the second point, the Authority concluded that since the New Shipper Review under Rule 22 is to be carried out for the exporters or producers in the exporting country in question who have not exported the product to India during the original period of investigation, the Applicant’s relationship with the exporters or producers in the exporting country who had exported the subject goods to India is also to be determined not only in the current period of investigation as contended by the Applicant but also in the original period of investigation.

29. The Authority notes that after having decided that in the case of a New Shipper Review initiated under Rule 22, (i) the Authority is required to establish the relationship under Rule 22 and not Rule 2(b); (ii) the relationship of the Applicant New Shipper with the exporters or producers in the exporting country who had exported the product to India is to be determined not only in the current period of investigation but also in the original period of investigation, and (iii) the relationship is required to be established by assigning a simple meaning to the word “related” without qualifying or elaborating the meaning any further, the Authority further notes that now the Authority is required to establish the relationship between the Applicant M/s Kodak (China) Graphics Communications Ltd and Second Film Company, a company in China who had exported the subject goods to India during the original period of investigation.

30. With regard to the relationship between the Applicant M/s Kodak (China) Graphics Communications Ltd and Second Film Company, the Authority notes that the Applicant has contended that Second Film Company (SFC) who had exported the subject goods to India during the original period of investigation is neither related to the Applicant nor a wholly

owned subsidiary of Lucky Film Company as mentioned in the Disclosure Statements. The Applicant has presented his facts as under:

- a) Lucky Film Group Corporation (Lucky Group) is the holding company. The Lucky Film Co. Ltd (LFC) is not involved in product under consideration and is a subsidiary company of Lucky Group that has controlling ownership.
- b) Second Film Company (SFC) is a 100% wholly owned subsidiary of Lucky Group Corporation (Lucky Group) and was involved in production and sales of the product under consideration. SFC has made exports to India during the original Period of Investigation.
- c) Kodak (China) Co. Ltd. (KCL) and Kodak (China) Investment Ltd. (KICL) are principal subsidiaries of Eastman Kodak. Whereas, KCL and KICL jointly hold 100% stake in Kodak (China) Graphics Communications Ltd. (KGCCL) i.e. the Ostensible New Shipper.
- d) Eastman Kodak is having 20% shares in Lucky film Co. Ltd (LFC) through Kodak (China) Co. Ltd. (KCL) and Kodak (China) Investment Ltd. (KICL)

31. In this regard, the Authority has re-examined the facts and also notes that during the verification of records, the Authority came across the Annual Reports of 2004 of Kodak (China) Co. Ltd and Kodak (China) Investment Co. Ltd. Some of the important issues mentioned in these Annual Reports and relevant from the perspective of this investigation are as under:

(Annual Report of ***of Kodak (China) Co. Ltd)

*“Pursuant to the Cooperation Framework Contract between Kodak and Lucky Group and the Marketing Agreement entered into between Kodak and Lucky Group and Lucky Film (collectively “Lucky”) in ***, the Company should use cash, certain assets and provision of certain training services in exchange for the cooperation of Lucky with the Company, and ***% of equity shares in Lucky Film owned by Lucky Group”.*

(Annual Report of ***of Kodak (China) Investment Co. Ltd)

*“Pursuant to the Cooperation Framework contract between Kodak and Lucky Group in ***, and approved by Ministry of Commerce in ***, the company acquired ***% of equity shares in Lucky Film Co Limited from Lucky Group at a cost of RMB *** in ***.*

“The company has significant influence over the finance and operations of Lucky Film, the Kodak (China) Company Limited and Kodak (Wuxi) Company Limited and therefore, it accounts for the investments in these companies using the equity method.”

32. From the available facts, the Authority concludes that the relationship between the Applicant M/s Kodak (China) Graphics Communications Ltd and Second Film Company

which exported the subject goods to India during the original period of investigation is established on the basis of the following:

- (i) Kodak (China) Graphics Communications Ltd., i.e., the Applicant New Shipper, is a wholly owned subsidiary of Kodak (China) Investment Company Ltd and Kodak (China) Co. Ltd.
- (ii) Kodak (China) Investment Co. Ltd and Kodak (China) Co. Ltd are the wholly owned subsidiaries of Eastman Kodak, the Holding Company.
- (iii) Eastman Kodak held 20% shares in Lucky Film Company through Kodak (China) Investment Co. Ltd (***) shares) and Kodak (China) Co. Ltd (***) shares).
- (iv) It is recorded in the Annual Report of *** of Kodak (China) Investment Company Ltd that “Pursuant to the Cooperation Framework contract between Kodak and Lucky Group in ***, and approved by Ministry of Commerce in ***, the Company acquired ***% of equity shares in Lucky Film Co Ltd. from Lucky Group at a cost of Rmb *** in ***”.
- (v) It is also recorded in the Annual Report of *** of Kodak (China) Investment Company Ltd that “The company has significant influence over the finance and operations of Lucky Film, Kodak (China) Company Limited and Kodak (Wuxi) Company Limited and therefore, it accounts for the investments in these companies using the equity method.”
- (vi) From point nos (ii), (iii), (iv) and (v) above, relationship between Kodak (China) Investment Company Ltd and Kodak (China) Co Ltd on one side and Lucky Film Company on the other side is established.
- (vii) Lucky Group, China PR (China Lucky Group Corporation), which was established as a state owned company, is the Holding Company, having controlling ownership over Lucky Film Company.
- (viii) Lucky Group, China PR was also having a wholly owned subsidiary - Second Film Company.
- (ix) From point nos (vii) and (viii) above, relationship between Lucky Film Company and Second Film Company is established.
- (x) As the relationship between Kodak (China) Investment Company Ltd and Lucky Film Company has been established; and Kodak (China) Graphics Communications Ltd., i.e., the Applicant New Shipper, is a subsidiary of Kodak

(China) Investment Company Ltd, the relationship between Kodak (China) Graphics Communications Ltd., - the Applicant New Shipper and Lucky Film Company also stands established.

- (ix) Further, since the relationship between Lucky Film Company and Second Film Company has also been established, the relationship between Kodak (China) Graphics Communications Ltd.,- the Applicant New Shipper and Second Film Company stands established too under Rule 22 by assigning a simple meaning to the term “related” as is required under Rule 22.

33. The Authority notes that there are some other issues also which have been raised by the Applicant in its submissions. In this regard, the Authority notes the following:

34. The Authority notes that the Applicant has contended that the nature of review under Rule 22 is case specific with the purpose of determining individual margins for such exporter/producer, and no full-fledged investigation, as is required for imposing the anti-dumping duty, is contemplated under Rule 22. The proceedings under Rule 22 are initiated after it is shown to the Designated Authority that such exporter/producer is not related to any exporters/producers in the exporting country who exported during the period which was the subject matter of the investigation under Rule 5.

35. With regard to the above contention, the Authority concludes that determination of relationship under Rule 22 is certainly case specific and requires proper examination of the relationship in a particular New Shipper Review case. Accordingly, the Authority has determined the relationship in the present case under Rule 22 and come to the conclusion that by assigned simple meaning to the word “related” without qualifying or elaborating it in detail, the Applicant has been found to be related to an exporter who had exported the subject goods during the original period of investigation.

36. The Authority notes that the Applicant has contended that the objective and purpose of the word “related” is to see whether potentially circumventing relationship exists through whom the anti-dumping duties already imposed might be circumvented, for example, by creating a “shell” company or appointing a sole agent for the product.

37. With regard to the above contention, the Authority reiterates that under Rule 22 the Authority is required to assign simple meaning to the word “related” without qualifying or elaborating the type or purpose of relationship in detail and accordingly, the Authority has come to the conclusion that by the simple meaning of the word “related” in terms of Rule 22, the Applicant is related to an exporter who had exported the subject goods during the original period of investigation.

38. The Authority notes that the Applicant has contended that the Authority has wrongly interpreted Rule 22 and the cases of only those who did not export the product to India during the period of investigation are required to be reviewed for determining their individual dumping margins, if they are not 'related'.

39. With regard to the above, the Authority reiterates that the Authority under Rule 22 is required to assign simple meaning to the word "related" without qualifying or elaborating the relationship in detail and accordingly, the Authority has come to the conclusion that by the simple meaning of the word "related" in terms of Rule 22, the Applicant is related to an exporter who had exported the subject goods during the period of investigation.

40. The Authority notes that the Applicant has contended that the Authority has not appreciated the difference and significance of the terms "significant influence" and 'control' and also ignored the definition of related parties under Accounting Standards which also establishes that the two companies are not related. The Applicant has contended that mere "significant influence" per se does not tantamount to relationship in terms of object and purpose of Rule 22 of the Anti-dumping Rules. The Authority notes that with regard to "significant influence", the Applicant has contended that (i) control implies "authority to give direction" while significant influence implies "authority to participate", (ii) the Authority has equated "authority to participate" with "authority to give direction" and (iii) the authority to participate is entirely irrelevant when such authority lacks authority to give direction. The Authority further notes that the Applicant has also contended that the Authority has chosen to rely only upon the statement made by one company (Kodak) and chosen to ignore the statement made by the other company (Lucky).

41. With regard to the above contention of the Applicant, the Authority notes that "significant influence" as mentioned in the Annual Report of *** of Kodak China (Investment) Ltd is not only over the finances but also the operations of Lucky Film Company. Therefore, the Authority, after considering the statements made by both the companies, concludes that it is logical to say that in the case of a commercial venture, significant influence over the finances and operations of a commercial venture does amount to the authority to give direction to pursue the commercial goals of that venture. To that extent, the Authority concludes that the relationship is established.

42. The Authority notes that the Applicant has contended that assuming but not admitting that if the definition of related parties under 2(b) cannot be applied, then the definition of related party appearing under accounting standards or any other statute should be considered as relevant and useful in deciding the meaning of the term "related".

43. With regard to the above, the Authority notes that "significant influence" as per Accounting Standard 18 means participation in the financial and/or operating policy decisions of an enterprise, but not control of those policies. The Authority notes that

“significant influence” as mentioned in the Annual Report of *** of Kodak China (Investment) Ltd is not only over the finances but also the operations of Lucky Film Company. Therefore, even as per the definition of related party under Accounting Standard 18, the Authority reiterates that it is logical to say that in the case of a commercial venture, significant influence over the finances and operations of a commercial venture does amount to the authority to give direction to pursue the commercial goals of that venture. Thus, Kodak China (Investment) Ltd has significant influence over Lucky Film Company as the company has significant influence over the finance and operations of Lucky Film Company.

44. The Authority notes that the Applicant has also argued that the petition did not bear a mention of the exporter Second Film Company who had exported the subject goods to India during the original period of investigation because the Applicant was not related to Second Film Company (belonging to the Lucky Group) and, therefore, the names of these companies were not given in the petition by the Applicant.

45. With regard to the above contention of the Applicant, the Authority notes that (i) the Applicant company is a fully owned subsidiary of Kodak (China) Company and Kodak (China) Investment Company; (ii) the Annual Report of Kodak (China) Investment Company for the year *** clearly states that the Company had significant influence over the finance and operations of Lucky Film, the Kodak (China) Company Limited and Kodak (Wuxi) Company Limited and, therefore, it accounted for investments in these companies using the equity method; (iii) China Lucky Group Corporation (Lucky Group) has management control over Luck Film Company; (iv) Second Film Company is a fully owned subsidiary of the Lucky Group; (v) Second Film Company and Lucky Film Company are clearly related Companies; and (vi) Second Film Company had exported the subject goods to India during the original period of investigation. The Authority concludes that based on the above mentioned evidence establishing relationship, the Applicant should have known that all these facts relating to relationship needed to be disclosed in the first instance in the Petition itself. The Authority notes that these names came to the notice of the Authority only by way of submissions made by the domestic industry and subsequent verification of records.

46. The Authority notes that the Applicant has also argued that the current interpretation drawn by the Authority will lead to a situation whereby a group having more than one manufacturing company in a foreign country would have duties only on the group company who had exported the product during relevant period and all other group companies shall be forbidden forever from exporting their products in the Indian market only because of their “relationship” with the company who had exported during the relevant period.

47. With regard to the above contention, the Authority reiterates that it has to go by the simple meaning of the word “related” as mentioned in Rule 22, and by this interpretation, the Authority has already concluded that the relationship between the Applicant New Shipper

and Second Film Company who had exported the subject goods to India during the original period of investigation existed.

48. The Authority notes that the Applicant has also sought to rely upon the Hon'ble CESTAT judgment in the case of Vitrified Tiles to urge the Authority to determine the issue of relationship. The operational part of the said judgment is reproduced below.

“The designated authority must rule out any possibility of abuse by an adequate investigation into the genuineness of the ‘new shippers’ and their not being related to the exporters or producers in the exporting country who are subject to the anti-dumping duty on the product. The very initiation of review under Rule 22 for determining the individual margins of the new exporters/producers would depend upon their showing that they are not “related”. This is clear from the words “.....provided that these exporters or producers show that they are not related.....” Therefore, until they show that they are not “related”, the designated authority will normally not initiate the review. Having regard to the possibility of abuse of the “New Shipper” review rule, the designated authority is bound to consider whether the new shipper seeking review under Rule 22 is “related” or not.”

49. With respect to the above referred judgement of the Hon'ble Tribunal, the Authority notes that the judgement requires the Authority to ensure that the Applicant New Shipper is not related to an exporter or producer of the subject goods to India under Rule 22 of the AD Rules, which the Authority is in any case duty bound to determine under Rule 22 of the AD Rules.

50. The Authority notes that the Applicant has also argued that in the present case, the shareholding of Kodak is much below the percentage of shareholding in the Circular Weaving Machines case wherein the Authority has held that mere shareholding does not amount to exercise of control within the meaning of Anti Dumping Rules and that majority shareholding, i.e., above 50% only gives legal control. The Authority also notes that the Applicant has contested that the decision of the Authority that the Circular Weaving Machines case is not applicable/relevant in the case of a New Shipper Review for the reason that the same is in the context of scope of the domestic industry is wrong because given the objective of exception provided for the purpose of scope of domestic industry and for the purpose of new shipper review, it directly follows that the exception has the same or similar objective.

51. With regard to the above contention, the Authority reiterates that as the decision in the Circular Weaving Machines case is in the context of scope of the domestic industry, it cannot be made applicable to the present case wherein the relationship is to be determined under Rule 22 of the Rules.

52. The Authority notes that the Applicant has also contested that even if it is assumed that there was relationship earlier, the fact is that Kodak in August 2006 had communicated to the Lucky Group about its intention to disinvest; had sold in November 2007 all its investments in the Lucky Film Company Limited; in January 2008, the disinvestment process was completed and, therefore, there was no relationship after January 2008; and such being the case, the question of exercising restriction or direction cannot arise. It is, therefore, evident that there was only a paper relationship in the intervening period.

53. With regard to the above contention of the Applicant, the Authority notes that the decision to divest was communicated only in August 2006 which shows that there was relationship during the original period of investigation, i.e., 2005-06.

Conclusion and Recommendation:

54. Based on the above, the Authority concludes that:

(i) The relationship referred to in Rule 2(b) of the AD Rules is specific for the purpose of establishing relationship with the domestic industry and has nothing to do with establishing the relationship for the purpose of Rule 22 of the AD Rules.

(ii) For the purpose of determining relationship in a New Shipper Review, the Authority is required to establish relationship under Rule 22 of the Anti Dumping Rules.

(iii) In a New Shipper Review, the Authority is required to establish relationship under Rule 22 of the AD Rules by relying only upon the simple meaning of the term related and the Authority is not required to qualify or quantify such relationship any further.

(iv) Since the New Shipper Review under Rule 22 is to be carried out for the exporters or producers in the exporting country in question who have not exported the product to India during the original period of investigation, the Applicant's relationship with the exporters or producers in the exporting country who had exported the subject goods to India is also to be determined not only in the current period of investigation as contended by the Applicant but also in the original period of investigation.

(v) The relationship between the Applicant M/s Kodak (China) Graphic Communications Company Ltd., China PR, claiming to be a New Shipper, and Second Film Company who had exported the subject goods to India during the original period of investigation is established within the meaning of the term "related" under Rule 22 of the AD Rules.

(vi) Based on the facts as narrated above and the legal position, the Authority concludes that the Applicant M/s Kodak (China) Graphic Communications Company Ltd., China PR, cannot be treated as a New Shipper under Rule 22 of the Anti Dumping Rules and is, therefore, not entitled to individual dumping margin.

55. An appeal against the order of the Central Government arising out of the present order shall lie before the Customs, Excise, and Service Tax Appellate Tribunal in accordance with the relevant provisions of the Act.

(Vijaylaxmi Joshi)
Designated Authority