BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

APPEAL NO. 36/2001

In the matter of:

Rhodia S.A. **Appellant**

Vs.

Securities & Exchange Board of India **Respondent 1**
ASK Raymond James Securities India Ltd **Respondent 2**
Mr.Madhusudhan I Dalal **Respondent 3**
Mr.Sameer Deshpande **Respondent 4**

APPEARANCE

Shri I.M.Chagla
Sr.Advocate

Mr. Jai S Pathak
Advocate

Ms Niti Dixit
Advocate
I./b.Pathak Associates

Mr. Nigel Toft
Country Manager

Rhodia S.A. **for Appellant**

Mr. Kumar Desai
Advocate
I/b. Maneksha & Sethna

Mr.Ananta Barua
Jt.Legal Adviser, SEBI

Mr. Vinay Chauhan
Legal Officer, SEBI **for Respondent 1**

Mr. R.A.Kapadia
Sr. Advocate

Mr. P.K.Samdani
Advocate

Mr. Girish Dave
Advocate
I/b. Dave, Girish and Company **for Respondent 2**

Mr. C.D. Mehta
Solicitor
I/b. Dhruve Liladhar & Co., **for Respondent 3**

None for Respondent 4

(In the matter of appeal arising out of the order dated 19.7.2001 made by the Chairman, Securities and Exchange Board of India)

ORDER

This appeal is directed against the order made by the Chairman, Securities & Exchange Board of India, on 19.7.2001, under section 11B of the Securities and Exchange Board of India Act, 1992 (the Act) and regulation 10, 12 and 44 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the 1997 Regulations). By the said order the Appellant was directed to make a public offer to the shareholders of Albright & Wilson Chemicals India Ltd at an offer price taking 14.3.2000 as the base date, and also to pay interest on offer price @ 15% from 14.7.2000 till the actual payment of purchase consideration for the shares tendered in response to the offer.

For a better understanding of the issues involved it is felt necessary to have a brief idea of various corporate entities involved and their interconnection / association with each other in the context of the acquisition of Albright & Wilson Chemicals India Ltd and the related compliance of the statutory requirements. The particulars in this regard as available from the appeal records are briefly as follows:

Rhodia S.A, a French limited liability company (the Appellant) engaged in the production of a range of specialty chemicals was incorporated, as a 100% owned subsidiary of Rhone-Poulenc SA (Poulenc). Poulenc is a leading global life sciences and specialty chemicals company. Even though Poulenc was holding 100% equity capital in the Appellant, in June 1998 the holding was reduced to 67.35%.

In the Donau group, Donau Chemic AG of Austria is the apex-company. Said Donau Chemie AG is engaged in the production of a vide range of industrial chemicals and products with customer oriented applications. It has a 100% subsidiary with the name Donauchem GmbH, which in turn has a 100% subsidiary company viz. Danube USA (Danube). Danube in turn holds 100% capital in ISPG Ltd. ISPG is a limited company incorporated in UK, specially for the purpose of effecting acquisition of another UK company viz. Albright & Wilson UK Ltd.

Albirght and Wilson Plc incorporated in the United Kingdom (UK Company) is also engaged in the manufacture and selling of chemical and allied products. It has two wholly owned subsidiaries viz., Albright & Wilson UK Ltd, registered in U.K. and Albright &Wilson Asia Pacific Holding Pte Ltd, registered in Singapore. Albright & Wilson UK Ltd is engaged in manufacturing and selling of chemicals and allied products. Albright & Wilson Asia Pacific Holdings is a non-trading intermediate holding company in the Albright & Wilson Group of companies. These two subsidiaries together hold 72.79% of the paid up capital of an Indian Company viz. Albright & Wilson Chemicals India Ltd (the Indian Company). The paid up capital of the said Indian Company is Rs.33,756,000 comprising 33, 75, 600 fully paid up shares of Rs. 10 each. The shares of the Indian Company are listed on the Bombay Stock Exchange and also traded on the National Stock Exchange. Albright & Wilson U K Ltd, and Albright & Wilson Asia Pacific Holdings Pte Ltd hold 39.74% and 33.05% respectively in the paid up capital thereby leaving 72.79% of the paid up capital indirectly with the UK company and thus making the company its subsidiary. The remaining 27.21% shares are with the public. The interconnection/association of these companies is depicted graphically as follows: -

Thus it could be seen from the companies plotted in the map, that there are 3 groups involved in the transaction covered in the impugned order. These three groups are (i) Donau Group (ii) Rhone-Poulenc Group and (iii)Albright & Wilson Group.

The Appellant acquired the UK Company and as a result the Indian Company also became its subsidiary. In that context the Appellant made an application to the Respondent No.1 (SEBI) on 3.10.2000 under the 1997 Regulations seeking exemption from the requirement of making public offer to the shareholders of the Indian company. The material facts based on which the exemption was sought by the Appellant have been stated in the impugned order as follows: -

" (i) In June 1998, Rhone Poulenc reduced its interest in Rhodia to 67.35%. In December 2000, Aventis (the company resulting from the merger between Rhone Poulenc and Hoechst AG) owned 25.5% of Rhodia.

(ii) In early 1999, Rhone Poulenc was negotiating the merger of its life sciences business with that of Hoechst AG. At the same time, Rhodia was considering the acquisition of the share capital of A&W UK which manufacturers chemicals and related products.

(iii) Initially, Rhodia intended to acquire A&W UK after the merger of Rhone Poulenc's life sciences business with that of Hoechst AG, but due to an unsolicited bid by Albermarle Corporation for A&W UK, Rhodia was compelled to structure its acquisition of A&W UK by way of an arrangement with Donau Chemie AG, an Austrian company which was a former subsidiary of Rhone Poulenc from which Rhodia was partially spinned off in 1988.

(iv) Rhodia and Donau Chemie AG (by itself and through its subsidiaries) entered into certain arrangements to acquire A&W UK. Pursuant to these arrangements, a special purpose vehicle company was specifically incorporated for the purpose of acquisition of A&W UK. The special purpose vehicle was ISPG Limited, an English Company (hereinafter referred to as ISPG).

(v) ISPG was a wholly owned subsidiary of Danube Chemicals Acquisition corporation, a Delaware Corporation (hereinafter referred to as Danube USA). Danube USA was in turn a wholly-owned subsidiary of Donauchem GmbH, an Austrian company, which in turn was a wholly- owned subsidiary of Donau Chemie AG.

(vi) The acquisition of A&W UK by ISPG was to be made through a public tender offer in the UK (the UK offer). The funds for the Uk Offer were arranged by Rhodia for ISPG. Rhodia entered into certain arrangement with Donau Chemie AG, Donauchem GmbH and Danube USA in March 1999. Through these arrangements, rhodia provided 50 million pound (i.e. approx. 358 crores) by way of convertible bonds and 585 million pound by way of guarantee of two letters of credit.

(vii) Rhodia and Donauchem GmbH entered into a Heads of Agreement, dated March 11,199 setting out the terms upon which Rhodia and Donauchem GmbH would arrange the acquisition of A&W UK through a bidder (i.e. ISPG). The Heads of Agreement, among other things, dealt with (a) the financing of a public offer for the acquisition of A&W UK, (b) the operations and management of Danube USA, ISPG and A&W Uk, and (c) a call option arrangement for the acquisition by Rhodia of the shares of Danube USA. Under the Heads of Agreement, ISPG was prohibited to take any action regarding the UK Offer unless such action was approved by Rhodia.

(Viii) Donauchem GmbH and Rhodia entered into a Call Option Agreement, dated March 12,1999, wherein Rhodia was given a right to purchase the shareholding of Danube USA from Donauchem GmbH (call option). This right could be exercised between January 1, 2000 and April 1, 2000 (Call Option Exercise Period). The only condition precedent for the exercise of this right was the closing of the UK Offer by which ISPG would acquire A&W UK. The Call Option Agreement was restated on March 30,1999.

(ix) Rhodia and Danube USA entered into a Phosphate Call Option Agreement, dated March 12, 1999, wherein Danube USA was given the right to purchase the entire phosphate business of Rhodia at fair market value. The financing for this purchase was to be arranged by Rhodia. This option could be exercised by Danube USA only after the expiry of the Call Option Exercise Period (i.e. after April 2, 2000) until July 1, 2000.

(x) Danube USA and Rhodia USA entered into a Bond Purchase Agreement, dated March 12, 1999, wherein Danube USA sold bonds worth 50 million pound to Rhodia. These bonds could be converted into equity by Rhodia upon the exercise by Rhodia of the Call Option during the Call Option Exercise Period.

(xi) Rhodia, Doanu Chemie AG, Donauchem GmbH, Danube USA and ISPG entered into a supplemental Heads of Agreement, dated March 16, 1999, wherein Rhodia was given substantial rights over ISPG in the conduct of the UK Offer.

(xii) ISPG made the UK Offer on March 16, 1999. The UK Offer was subject to the prior approval of the European Commission. The application to the European Commission for seeking the permission for ISPG to acquire the shares of A&W UK was made by Rhodia. The European commission granted the approval to Rhodia on July 15, 1999.

(xiii) By the time Rhodia received the approval from the European Commission for ISPG to acquire the shares of A&W UK, ISPG had received offers for approximately 97.24% of the shares of A&W UK. Upon receipt of the European commission approval, the condition precedent for the acquisition of A&W UK by ISPG was satisfied.

(xiv) A&W UK indirectly holds approximately 72.80% of the issued share capital of A&W India through its two wholly owned subsidiaries: Albright & Wilson UK Limited, an English company (holding 39.75% of the share capital of A&W India) and Albright & Wilson Asia Pacific Holdings Private Limited, a Singapore company (holding 33.05% of the share capital of A&W India).

(xv) After procuring the approval of the European Commission and finalizing the acquisition of A&W UK through the UK Offer, Rhodia indirectly, through ISPG, made a public announcement for acquiring 27.21% shares of A&W India under the Takeover Regulations. The public offer was made by ISPG, acting in concert with Rhodia, through the letter of offer dated October 5, 1999.

(xvi) The public offer to acquire 27.21% shares of A&W India was made at an offer price of Rs. 240/-. The public offer for the shares of A&W India closed on November 24, 1999. The subscription received as 0.14%

(xvii) March 13, 2000 Rhodia received the approval from the Federal Trade Commission, USA. Rhodia exercised the Call Option on March 14, 2000

(xviii) Upon the exercise of the Call Option on 14th March, 2000, Danube USA transferred its entire share capital in ISPG to Rhodia Holdings Limited, which is a wholly owned subsidiary of Rhodia."

The exemption application dated 3.10.1999 received by SEBI, from the Appellant was forwarded to the Takeover Panel for its views in terms of regulation 4(4). The Panel on 19.10.2000 reported back that since the Appellant had already acquired 100% of the equity of Danube and a controlling stake in the Indian Company, it was not making any recommendation for grant of exemption.

SEBI in its order has stated that in July/August, 2000 it had received complaints from shareholders of the Indian Company alleging that the Appellant had taken over the Indian Company without making the requisite public offer. Specific mention has been made in the order about the complaints from Respondents 2, 3 and 4. It is seen from the order that these complainants were also heard in the proceedings leading to SEBI's decision rejecting the Appellant's exemption application.

The Chairman, SEBI, after inquiry concluded that the Appellant was not entitled to exemption as sought for and made the following order on 19.7.2001.

"In view of the above facts and circumstances, in exercise of the powers conferred under section 4(3) of the SEBI Act read with section 11B of the Act and Regulations 10,12 and 44 of the Takeover Regulations, I hereby direct Rhodia to make a public offer to the shareholders of A&W India in accordance with the relevant provisions of the regulations at an offer price to be computed by taking the higher of the price arrived at by taking March 14, 2000 (i.e. the date of the exercise of the call option when there was a change in control of A&W India from Danube USA to Rhodia) and the actual date of public announcement, as the reference dates.

Further in terms of Reg. 22(12) the payment of consideration to the shareholders of the Target Company has to be paid within 30 days of the closure of the offer. The maximum time period provided in the Regulations for completing the offer formalities in respect of an open offer, is 120 days from the date of Public Announcement. The Public Announcement in the instant case ought to have been made taking 14/3/2000 as a reference date and thus the entire offer process would have been completed latest by 14.7.2000. Since no Public Announcement for acquisition of shares of A&W India had been made adversely affecting interest of shareholders of Target company. Thus it would be just and equitable that the Rhodia be directed to pay interest on the offer price arrived @ 15% p.a. to the shareholders for the loss caused to the shareholders for delay in payment of consideration from July 14, 2000 till the date of actual payment of consideration for the shares to be tendered in the offer directed to be made by Rhodia.

I find that the minimum 20% offer to the existing shareholders of A&W India, may also entail taking approval of FIPB and may also lead to situation as envisaged in regulation 21(3) of the regulations. In view of the above, it is directed that the public announcement for the offer as above, shall be made by Rhodia within 45 days of the passing of this order"

Respondents 1, 2 and 3 have filed written replies and also made oral submissions through their Counsel. Respondent 4 neither filed any reply nor made any oral submission. The Appellant has filed rejoinder to the replies filed by the Respondents. The Appellant has also filed an application on 21.9.2001 "for leave to file additional documents along with rejoinders dated September 10, 2001 to the replies filed by Respondents No.1 and 2". The relevance of the documents and the reasons for filing the same have been explained in the application itself. The prayer is to take on record the following documents put in the volume marked "Compilation II:

(i) Agreement between Rhodia and Donau Chemic GmbH, dated March 11, 1999, as restated on May 11, 1999

(ii) Extract of newspaper reports filed before the European Commission;

(iii) European Commission Notice on the Concept of Concentration (EEC No.4064/89);

(iv) Application to the European Commission;

(v) Letter from Freshfields Deringer to the European Commission, dated April 1, 1999;

(vi) Letter from Freshfields Deringer to the European Commission, dated April 13, 1999;

(vii) Restated Heads of Agreement, dated March 30, 1999; and

(viii) Extracts from newspaper reports published in India

It has been stated in the application that the Appellant had argued before SEBI that SEBI had failed to observe the procedure for investigation of complaints required to be followed as set out in Chapter V of the 1997 Regulations, that the Appellant has been at a loss to determine the precise case it is required to meet, that if SEBI had carried out an investigation in the manner provided, the Appellant would have produced all documents required for the investigation, that in the present case SEBI has never asked any question or sought any clarification from the Appellant, leaving it to the Appellant to assume what may or may not be required. It has been further stated that SEBI and Respondent No.2 have leveled fresh allegations against the Appellant in their replies, that the principles of natural justice require that the Appellant be permitted to meet such allegations and rebut them, that the allegation that the Appellant has made different disclosure at different times is one such statement and that the Appellant should be permitted to meet such an allegation.

Learned Counsel for the Respondents raised objection to taking the additional documents on record in the appeal proceedings. Shri Kumar Desai, appearing for SEBI cited the provisions of Order 41, Rule 27 (1) (b) of Civil Procedure Code 1908, and submitted that the additional documents may not be looked into at this stage of the proceedings. He also cited Privy Council decision in Parsotim Thakur and Others v. Lal Mohar Thakur & Others (AIR 1931 Privy Council 143) that a litigant who has been unsuccessful in the lower court cannot patch up the weak parts of his case and fill up omission in the court of appeal. Shri Rohit Kapadia, learned Senior Counsel appearing for Respondent No.2 argued that only those ‘material documents listed at para 15 of the letter of offer dated 15.10.1999 issued by ISPG alone should be taken notice of for deciding the matter, as the information contained in those material documents alone were available to the investors to form an informed decision as to whether they should continue in the company or exit from the company, in the context of take over.

I have carefully considered the contentions of the parties in this regard. On a perusal of the impugned order it appears that the enquiry conducted by SEBI was to reach at a conclusion as to whether the Appellant was entitled to be exempted from the scope of Chapter III of the 1997 Regulations. The complaints only served as a source of information/input in the process. The proceedings before SEBI was not an investigation in terms of regulation 38, it was under regulation 4(6). This is evident from SEBI’s order itself as the impugned direction is under regulation 44. Had it been a proceeding contemplated under regulation 38, the action consequential to the investigation would have been under

regulation 42. In any case a proceeding under regulation 4(6) of the 1997 Regulations is not an adversarial proceeding. The purpose of the inquiry should be to collect the relevant factual material to enable SEBI to reach at a just and fair determination of the issues before it and the concerned person should be provided sufficient opportunities to put forth the facts in its entirety. This Tribunal is the appellate forum where SEBI's orders are appealed against. On a perusal of the scheme of Chapter VIB of the Act, it is clear that the appellate review by the Tribunal is a plenary review that the Tribunal sits like trial court and is entitled to look at all the relevant material, consider the law and decide those facts based on which such an order can be passed. The tribunal has already held in Shankar Sharma & Ors. v. SEBI (appeal No.29/2001 decided on 19.9.2001) that the Tribunal being the plenary appellate forum is empowered to go into the question of fact and law. In this context the observation made by the Hon'ble Supreme Court in Madhukar and Ors. v. Sangram & Ors. (2001) 4 SCC 756 provides the guidance:

> "First appeal is a valuable right and the parties have a right to be the heard both on question of law and facts and the judgement in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings"

It is well settled that the appeal is a continuation of the original adjudication (Hasmat Rai v. Raghunath Prasad (1981)) 3 SCC 103). It is also to be noted that the Tribunal is not strictly bound by the procedure mandated by the Civil Procedure Code 1908 and is to be guided by the principles of natural justice. I have perused the documents in question, and consider the same useful for a just determination of the issues raised in the appeal. It is not that the Appellant had suddenly sprang a surprise by producing the additional documents. These are contemporaneous documents. The Respondents have been given reasonable time to study the same and counter the contents if so required. Remanding the matter to SEBI to consider the case in the light of the documents now filed by the Appellant would only result in further delay to the detriment of all concerned. Therefore, in the interest of justice, the documents filed in Compilation II are taken on record.

Shri Iqbal Chagla, learned Senior Counsel appearing for the Appellant argued at length urging that the impugned order be set aside as it suffers from material illegality. Shri Chagla explained the background of the appeal elaborately.

Learned Senior Counsel stated that in early 1999, Rhone Poulenc was negotiating the merger of its life science business with Hoechst AG, that at the same time the Appellant was considering the acquisition of the share capital of the UK company. Since the proposed acquisition by the Appellant of the UK company would have had an adverse impact on the proposed merger of Rhone Poulenc's life sciences business with that of Hoechst AG, it was not considered appropriate for the Appellant, a subsidiary of Rhone Poulenc, to immediately and unconditionally acquire the UK company at that stage. The Appellant therefore decided to acquire the UK company after the merger of Rhone Poulenc's life sciences business with that of Hoechst AG. But due to an unsolicited bid by Albermarle Corporation for the UK company, the Appellant was compelled to structure its acquisition by way of an arrangement with Donau Chemie AG, a former subsidiary of Rhone Poulenc from which the Appellant was partially spinned off in 1998. The Appellant Donau Chemie AG entered into certain arrangements to acquire the UK company, that pursuant to these arrangements ISPG Ltd a special purpose vehicle company was specifically incorporated in UK for the purpose. ISPG was a wholly owned subsidiary of Danube, which in turn was a subsidiary of Donau Chemie AG through Donauchem GmbH.

Learned Senior Counsel stated that the acquisition of the UK company by ISPG was to be made through a public tender offer in the UK (UK offer), that though ISPG was to directly make the UK offer, the funds for the UK offer were arranged by the Appellant subject to certain conditions that no decision regarding the UK offer could be taken without the Appellant's consent and the Appellant had the right to recommend and approve the employees in senior management position in each of ISPG, Danube and the UK company after the UK offer closed, that to ensure all this the Appellant entered into certain arrangements with Donau Chemie AG, Donauchem GmbH and Danube in March, 1999. Through these arrangements, the Appellant interalia provided ... 50 million by way of convertible bonds and ... 585 million by way of guarantee for the purposes of the UK offer through ISPG. The Appellant and Donauchem GmbH entered into a Heads of Agreement dated 11.3.1999 setting out the terms upon which the Appellant and Donauchem would arrange the acquisition of the UK company through a bidder (i.e. ISPG) incorporated for this purpose, that the Heads of Agreement among other things dealt with (a) the financing of a public offer for the acquisition of the UK company, (b) the operations and management of Danube. ISPG and the UK company and (c) a call option arrangement for the acquisition by the Appellant of the shares of Danube. The call option agreement was entered into on 12.3.1999 wherein the Appellant was given a right to purchase the share holding of Danube from Donauchem (call option), exercisable between January 1, 2000 and April 1, 2000 (call option exercise

period), that the only condition precedent for the exercise of this right was the closing of the UK offer by which ISPG would acquire the U.K company. The call option agreement was restated on 30.3.1999. Learned Senior Counsel stated that to create a strong incentive for the Appellant to exercise the call option the Appellant and Danube entered into a Phosphate Call option Agreement dated 12.3.1999 wherein Danube was given the right to purchase the entire phosphate business of the Appellant at fair market value, the financing for this purchase was to be arranged by the Appellant itself, that this option could be exercised by Danube only after the expiry of the call option exercise period i.e. after April 2, 2000 until July 1, 2000. He further stated that Danube and the Appellant also entered into a Bond Purchase Agreement, dated 12.3.1999 wherein Danube sold bonds worth ... 50 million to the Appellant, which could be converted into equity by the Appellant upon the exercise of the call option during the call option period. The learned Senior Counsel stated that the Appellant, Donau Chemie AG, Donauchem GmbH, Danube and ISPG had entered into a Supplemental Heads of Agreement dated 16.3.1999, wherein the Appellant was given substantial rights over ISPG in the conduct of the UK offer, that after all these arrangements were put in place, ISPG made the UK offer on 16.3.1999 by issuing a press release, subject to the prior approval of the European Commission. The European Commission granted the requisite approval on 15.7.1999. In the public offer ISPG received offers for approximately 97.24% of the shares of the UK Company.

Learned Senior Counsel stated that since the UK company indirectly holds 72.80% of the issued capital of the Indian company through two of its wholly owned subsidiaries, the said Indian company, incidental to the acquisition of the UK company, became its subsidiary.

Shri Chagla stated that after procuring the approval of the European Commission and finalising the acquisition of the UK company through the UK offer, the Appellant indirectly through ISPG made a public announcement for acquiring 27.21% shares of the Indian company under the 1997 Regulations on 21.7.1999 and thereafter public offer was made through the letter of offer dated 15.10.1999. The public offer was closed on 24.11.1999 that only about 0.14% shares were tendered in the public offer. He stated that all elements of the arrangements among the Appellant, Donau Chemie AG, Donauchem GmbH, Danube and ISPG were disclosed in the letter of offer and it was clear from the disclosures in the public announcement also that the Appellant was not directly making the public offer but was making it indirectly through ISPG, "the acquirer", and that the public offer was made on the business strength of the Appellant and Rhone Poulenc and their confirmation with the UK company. In this context learned Senior Counsel specifically referred to the disclosure in the letter of offer dated 15.10.1999 that "on May 27th 1999, the acquirer and Rhodia together had contracted to acquire not less than nine tenths in value of the ordinary shares to which the UK offer related"; that "taking cognition of the competition/concentration concerns on account of this indirect acquisition by Rhodia, the European Commission had issued a press release on 15th July, 1999, according their approval of the takeover"; that referred to the Appellant and Rhone Poulenc as persons acting in concert and stated that "Acquirer and persons acting in concert are jointly and severally responsible for discharging all the obligations required under the offer as per the Takeover Regulations".

Referring to SEBI's version that the Appellant had agreed to make an open offer by stating in the letter of offer that " Should Rhodia exercise the call option, the resultant indirect acquisition/change of control of A&W on account of acquisition of Danube by the Acquirer would be governed by the provisions of the Takeover code as applicable". Learned Senior Counsel stated that it was a mere statement made on SEBI’s instructions.

Learned Senior Counsel submitted that in continuation of the process initiated by the Appellant before the UK offer to acquire the UK company, on 13.3.2000, the Appellant received the approval from the Federal Trade Commission, USA and immediately, upon receiving this approval, the Appellant exercised the call option on 14.3.2000 and as a result thereof the entire share holding of Danube came to be owned by the Appellant, after which Danube transferred its entire share capital in ISPG to Rhodia Holdings Ltd, which is a wholly owned subsidiary of the Appellant, and Danube was thereafter dissolved and liquidated.

Learned Senior Counsel submitted that on 3.10.2000 the Appellant filed an exemption application with SEBI, wherein, among other things, the Appellant clarified that the exercise of call option was part of the same transaction which led to the earlier public offer pursuant to the Letter of Offer and this was disclosed to the shareholders of the Indian company, that the exemption application was rejected on

19.7.2001, on an erroneous assumption that change in control of the Indian company took place only on exercise of the call option by the Appellant, ignoring the fact that ISPG had acted at the behest of the Appellant, and that exercise of the call option by the Appellant was an integrated indivisible transaction . In this context he referred to several paras in the various contractual arrangements between the parties, such as the Heads of Agreements, the Call Option Agreement, the Bond Purchase Agreement, the Phosphate Call Option Agreements etc. and the statements made in press release, offer documents, applications to the authorities and also the correspondence entered into by the parties in this regard. Copies of these documents have been filed in the appeal proceedings. Referring to the Heads of Agreement, learned Senior Counsel stated that it describes Donauchem as the Appellant's partner in the setting up of the arrangement leading to the UK offer, that in the press release issued prior to the UK offer clearly states in the "background of the offer" that ISPG had been created as a result of a co-operation between Donau Chemie and the Appellant. Counterin.g the Respondent's contention that the Appellant acted as a mere financier and not as an acquirer for the purpose of the UK offer. Shri Chagla submitted that it is evident from the documents on record that the Appellant had initially intended to acquire the UK company in the year 1999, that it was compelled to structure the acquisition of the UK company by way of an arrangement with Donau Chemie AG, as a direct acquisition of the UK company by the Appellant would have had an adverse impact on the proposed merger of Rhone Poulenc's life sciences business with that of Hoechst AG., that the Appellant therefore intended to acquire the UK company after the merger of Rhone Poulenc's life business with that of Hoechst AG. He stated that deferment of acquisition was not possible in the wake of bid by Albermarle Corporation. He further stated that Donau Chemie AG is a small company not involved in the business of the targeted the UK company that the said company set up a chain of subsidiaries which ended with a special purpose vehicle incorporated to effect the acquisition, that it was the Appellant who arranged funds for the public tender offer required for the acquisition and controlled such public tender through contractual arrangements. He submitted that the Appellant was not a financier as is being made out by the Respondent. It could be seen, that no borrower would enter into an agreement which gives unconditional right to the lender to acquire the shares of its subsidiaries, as such a right if at all would be given only upon a breach of the lending agreement and not otherwise; that no lender would enter into an agreement such as the Phosphate call option Agreement giving the borrower the right to buy the most important part of the lender's business in case the lender failed to exercise the right akin to the call option, that it is unusual to disclose the business strength and further plans of the lender in the public announcement and letter of offer if he is not connected in any manner with the acquisition, that it is unusual to have a lender take active interest in the management of the tender offer, that it is unusual to have a lender approach the European Commission to seek its no objection to a tender in the UK made by the borrower and the European Commission giving the approval to the lender, that it is highly unusual to describe the business strength and future plans of the lender in the letter of offer, which disclosure has nothing whatsoever to do with the public offer. In this context he also referred to the veto power and substantial control vested in the Appellant over the decision making by Danube etc., to show that, it was not a mere financial arrangement. Shri Chagla submitted that there is ample evidence flowing from the documents on record to show that the Appellant was virtually having control over the acquirer and also that the Appellant was a person acting in concert with the acquirer.

Shri Chagla submitted that the Respondent No.2 also in their letter dated 23.7.1999 stated that the ISPG offer would culminate in the Appellant acquiring control of the Indian company, though subsequently they changed their stand to further their vested interests. He submitted that the sole aim of Respondents 2, 3, and 4 is to fetch a high price for the shares held by them and to achieve this benefit they are shifting their stand and misguiding the authorities. He submitted that the Takeover Regulations were not designed to allow undue profit to speculators but only provide the shareholders an exit on a change in management at a price equivalent to the price at which change in management took place.

Learned Senior Counsel submitted that SEBI misdirected itself in law by applying the Explanation to regulation 11 relating to indirect acquisition to the provisions of regulation 12, that the said explanation limits itself to acquisition under Regulations 10 and 11 and has no application to an acquisition under regulation 12. He further submitted that the acquisition of the shares of Danube by the Appellant by exercising the call option right is not intended to be regulated by the 1997 Regulations, that the call option was exercised by the Appellant to complete the acquisition of the UK company and the acquisition of the Indian company was entirely unintended. He submitted that the acquisition of Danube by the Appellant was too remote to fall within the definition of the term 'indirect acquisition' for the purposes of applying the 1997 Regulations to the said transaction.

Learned Senior Counsel submitted that the Appellant is exempt from the application of regulations 10,11 and 12 since the exercise of the call option by the Appellant was an interse group transfer within the

meaning of regulation 3(1)(e)(i). He submitted that it can be safely viewed that SEBI has accepted statements made in the UK offer as being determinative of control in the context of Indian law as well. He further submitted that control under Indian law refers to both de-facto and dejure control, that the appropriate criteria to examine whether the Appellant exercised control for the purpose of availing the exemption in regulation 3(1)(e)(i) are those set out in section 2(ef) of the MRTP Act read with the explanation thereto. Shri Chagla cited from the documents on record to show that the Appellant had control over Danube etc., as it controlled the concerned companies' management and decision making by reserving the right to itself through the agreement, that apart from the funding and the call option during the period of the UK offer upto the end of the call exercise period the Appellant's rights included the right to recommend and approve the senior management positions in the UK company, Danube, ISPG, that the board of directors and management of each of these companies could not take any significant corporate decision without the prior written consent of the Appellant, including the declaration of dividends and disposal of more than 20% of their assets. He submitted that thus it is evident that through contractual arrangement the Appellant was in control of Danube ISPG and the UK company. In this context he specifically referred to clause 6 of the Heads of Agreement and clause 7 of the Bond agreement, entered into between the parties. He reiterated that transfer by Donauchem GmbH to the Appellant of the share of Danube was an interse transfer between the group companies and as such exempted under regulation 3(1)(e)(i).

In the context of SEBI's version that the Appellant's non compliance of the requirements of regulation 3 (3) and 3(4) indicated that the transaction is not exempted, Shri Chagle cited this Tribunal's decision in J.M.Financial & Investments Ltd v. Ananta Barua (2001) 30 SCL 357(365) and stated that the requirements of notifying stock exchange and reporting to SEBI in terms of regulation 3(3) and 3(4) are consequential to availing of exemption and not a requirement to avail exemption under regulation 3(1)(e (i).

Shri Chagla submitted that SEBI has ignored the Appellant's submission that the transaction under consideration was covered by the explanation to regulation 12, being a change from the joint control of Danube, ISPG, the UK company and the Indian company to the sole control of the Appellant and as such was not a change in control of management as is evidenced from several contractual arrangements referred to earlier. According to the learned Senior Counsel the joint control exercised by the Danue Chemie group along with the Appellant over Danube was transferred to the sole control of the Appellant once the call option was exercised. He submitted that the main purpose of the acquisition of the shares of Danube by the Appellant was not to secure control of the Indian company and as such the direction to the Appellant to make a public offer is unduly oppressive and deserve to be set aside.

Referring to SEBI's direction to pay interest @ 15% per annum on the offer price arrived at for the shares to be tendered in the offer directed to be made by the Appellant from July, 14, 2000 till the date of actual payment of consideration, the learned Senior Counsel submitted that such a direction is not within the purview of SEBI, that SEBI is an administrative authority with regulatory powers and not plenary ones, that it is not a court of equity nor is it a "court" for the purposes of section 34 of the Code of Civil Procedure Code or even of section 2(a) of the Interest Act, 1978. Learned Senior Counsel submitted that there is no inherent power in an administrative body to direct payment of interest, unless such power is specifically statutorily granted. Since no such power has been granted to SEBI it cannot direct the Appellant to pay interest. He further submitted that even if the said direction to pay interest is intended to be by way of compensation to the shareholders, there is no evidence to show that the shareholders suffered a loss. He submitted that in fact the shareholders had an opportunity to sell the shares in the market, have received dividends on the shares and have not suffered monetarily.

Learned Senior Counsel further submitted that infact SEBI sought to impose a penalty on the Appellant by directing payment of interest, that under SEBI Act, SEBI may impose a penalty for non disclosure of acquisition of shares and takeovers in terms of section 15H, that in view of the fact that section 15H now covers the field it is impermissible for SEBI to employ the omnibus power under section 11B of the Act and to impose penalties, that there is no power in SEBI to impose a penalty dehors the provision s of section 15H and 15I of the Act. He further submitted that the direction to pay interest cannot be effectively implemented since there is no means for the Appellant to determine which of the thousands of shareholders might have tendered in the event of a public offer in July 2000 and have purportedly suffered a loss which ought to be compensated by the Appellants, because after the exercise of the call option several shareholders had the opportunity and did trade in the share of the Indian Company. The direction would result in unjust enrichment of the shareholders.

Learned Senior Counsel submitted that the proceedings initiated and conducted by SEBI against the Appellant suffered from substantial procedural irregularity, that the 1997 Regulations set out a detailed procedure to be adopted by SEBI prior to issuing any directions, that the procedure is prescribed in Chapter V of the 1997 Regulations and if directions are to be issued under Chapter V, SEBI is bound to follow the procedure specified under regulation 38 through 42 of the Takeover Regulations, that directions under regulation 44 and 45(6) cannot be issued without the prior investigation contemplated under regulation 38 through 42 being undertaken. Learned Senior Counsel stated that no investigation under Chapter V has been concluded against the Appellant and no findings contemplated therein have been communicated to the Appellant prior to issuing a final order. Shri Chagla stated that non holding of such an investigation and communicating the findings arising out of the same has adversely affected the Appellant in as much as it could not rebut those findings with evidence. Therefore the directions issued under regulation 44 and 45(6) in the impugned order are illegal and in excess of the power vested in SEBI.

Learned Senior Counsel further submitted that SEBI has no power under section 11B to issue a direction to make a public offer, that such an order may be passed by SEBI after making or causing to be made an enquiry as set out in Chapter V of the 1997 Regulations, that if it is to be viewed that SEBI could issue final orders under section 11B, ignoring the procedure set out for prior enquiry under Chapter V of the 1997 Regulations it could render the provisions of the regulation superfluous. Shri Chagla submitted that SEBI has also no power to issue directions to the Appellant under section 11B of the SEBI Act, as the Appellant is not an entity covered under sub section (a) or (b) of section 11B. He submitted that the Appellant is not covered under (a) as it is not an intermediary under section 12, that it is also not covered under (b) as it is not a company as defined under section 3 of the Companies Act being not a company registered under the Companies Act, 1956 or under the statutes preceding it. He further stated that the direction issued in the impugned order to the Appellant can not be covered by sub clause (b) of section 11B because the subject matter of the impugned order is not covered by matters stated in section 11A.

Shri Chagla submitted that the incorrect appreciation of facts and law in the order has significantly prejudiced the Appellant that the errors in the impugned order are both factual and legal, that since the order suffers from material illegality it is liable to be set aside.

Shri Kumar Desai, learned Counsel appearing for SEBI submitted that SEBI came into the picture on 3.8.1999 on receiving a draft letter of offer and Form of Acceptance from SBI Capital Market Limited, the manager to the public offer by ISPG to equity share holders of the Indian company. He read out several portions from the offer document, wherein ISPG has been shown as the acquirer. He also referred to a letter dated 1.9.1999 from ISPG to SEBI, (forming part of documents filed with the appeal) wherein it has been stated that "ISPG are making the offer and not Rhodia, that Rhodia simply has a call option, under which it may at its discretion acquire 100% of ISPG's immediate holding company Danube Chemicals Acquisition Corporation between January 2000 and 1st April, 2000". In this context Shri Desai also referred to the Respondent's letter dated 5.10.1999to the SBI Capital Market Ltd (copy of which has been filed by the Appellant) wherein it was directed to make suitable disclosure regarding call option to Rhodia inter alia stating that further substantial acquisition of shares / control of the target company whether direct or indirect would be governed by the relevant provisions of the Regulations that this requirement was complied with by the Appellant as could be seen from the disclosure under the caption "THE OFFER –Background of the Offer" in the letter of offer issued in this regard.

Shri Desai submitted that the acquisition of the UK Company by ISPG is the first acquisition. The second acquisition was effected on the Appellant exercising call option on 14.3.2000, whereby it acquired 100% of the capital of ISPG's immediate holding company Danube. As a result of the said acquisition ownership and control of the UK Company changed and consequently that of the Indian company also, necessitating compliance of the provisions of the 1997 Regulations by the Appellant. Shri Desai submitted that on 23.8.2000 SEBI had written to the Appellant seeking information as to whether the Appellant had exercised the call option and if so complied with the requirements of the regulations, to which the Appellant replied on 15.9.2000 stating that it had on 14.3.2000 exercised the call option to acquire Danube and that the Appellant "is now the indirect owner" of the Indian company. Shri Desai referred to the said letter and stated that therein the Appellant had also stated of its decision - "after internal deliberation within Rhodia SA" to apply to SEBI 'pursuant to regulation 3(1)(I) to seek an exemption from the requirement to make a public announcement to acquire at least 20% of the voting capital' of the Indian company. According to Shri Desai the fact that the Appellant had decided to seek exemption itself shows that it was aware of the fact that its case was not one automatically attracting

one or more of the exemptions provided in regulation 3(1). He also submitted that if the transaction, as the Appellant claims, is an interse group transaction it should have complied with the requirement of regulation 3(3) and 3(4) notifying the acquisition to the concerned stock exchange and SEBI which they did not do. Shri Desai also referred to the exemption application dated 3.10.2000 and stated that it has clearly stated in the said document that by virtue of acquiring 100% of the equity of Danube by exercising the call option, the Appellant has indirectly acquired a controlling stake in the Indian company, which is a transaction governed by the provisions of the Regulations. He also referred to the grounds for exemption stated in the said letter and stated that there is not even an indication to show that the Appellant was the "real acquirer". Shri Desai submitted that since the Appellant was not at all involved in controlling the acquirer till the call option was exercised, and that there is no material to show that the Appellant and the acquirer belonged to the same group as has been claimed by the Appellant, exemption under regulation 3(1)(e)(i) is not available.

Shri Desai submitted that the application for exemption made by the Appellant was dealt with by SEBI in accordance with the procedure provided in the Regulations that the matter was referred to the Take Over Panel and the panel had declined to consider the application as the same was made after acquiring the shares. The other requirements of the regulation in this regard have also been fully met with, before issuing the impugned order.

Learned Counsel referring to the complaints received in the SEBI's office in the matter, stated that the Appellant was given opportunity to rebut the allegations and the opportunity so provided was fully made use of by the Appellant, that the Appellant was also heard in the matter. Therefore the Appellant's contention that the matter was decided without following the principles of natural justice is unfounded, that the Appellant itself has admitted of its participation in the proceedings before SEBI.

Regarding the SEBI's power to levy interest, the learned Counsel cited this Tribunal's decision in BP Plc v. SEBI ((2001) 33 SCL 570 and stated that the view taken by the Tribunal in the said case is in equal force applicable to the instant case.

He also submitted that SEBI has issued the order in exercise of the powers conferred on it under the Act and the Regulations made thereunder and as such the Appellant's contention that the order was issued without authority is unfounded, that the applicable provisions have been stated in the order itself.

Shri Desai submitted that till the call option was exercised by the Appellant acquiring 100% shares of ISPG's holding company, the ISPG was not a part of the Appellant. He referred to the documents on record and submitted that ISPG was a wholly owned subsidiary of Danube which is a 100% subsidiary of Donauchem GmbH, an Austrian company which in turn is a wholly owned subsidiary of Donau Chemie AG group, that there was no shareholding of Rhone Poulenc or the Appellant in ISPG, that it has also been so stated in the letter of offer. It is an undisputed fact that ISPG was a wholly owned subsidiary of Danube and not a group company of Rhodia at the time of acquisition of the UK Company by it. Shri Desai also referred to the statement in the offer letter dated 15.10.1999 that "Albright & Wilson exercised indirect control to the extent of approximately 72.79% of the paid up share capital of A&W through 2 of its 100% subsidiaries. Thus by virtue of this acquisition, the acquirer i.e. ISPG has indirectly acquired control in A&W". Shri Desai stated that in the letter of offer it has been mentioned that the offer is made by the acquirer i.e., ISPG which is a wholly owned subsidiary of Danube/Donau Chemie and there was no director from the Appellant in the acquirer company and until exercise of the call option the acquirer was to operate the UK Company as an independent business subject to Rhodia's prior consent being required in relation to significant corporate transactions including certain acts affecting the asset or the capital of the acquirer, the UK company and Danube, that this consent cannot be construed as an exercise of control over ISPG. Shri Desai submitted that the Indian shareholders did not much favourably respond to ISPG's offer to purchase the shares mainly for the reason that they expected the Appellant to make an offer on exercise of the call option and therefore they were waiting for the said offer to materialise, that this belief of the shareholders was based on the disclosure made in the letter of offer on the impending call option by the Appellant and the consequential change in ownership of the company.

Shri Desai referred to the statement in the Director's Report on the Annual Report of the Indian Company for the year 1999, that "unless exempted by SEBI, Rhodia will be required to make an open offer to the shareholders". Shri Desai referred to the Appellant's letter dated 15.9.2000 and stated that

the Appellant became indirect owner of ISPG only on exercise of the call option on 14.3.2000 and before that the target company was indirectly owned and controlled by Danube the holding company of ISPG, and not the Appellant.

The learned Counsel submitted that while submitting the draft letter of offer to SEBI, the acquirer did not state that Rhodia was the acquirer and not Danube. It was also not stated therein that the exercise of the call option was part and parcel of the same transaction and that the exercise of the same would not trigger the Takeover Regulations, that on the contrary when SEBI advised the merchant banker to make suitable disclosures that further substantial acquisition of shares/control of the target company whether direct/indirect would be governed by the relevant provisions of the 1997 Regulations, the acquirer stated in the letter of offer that " in the event of exercise of call option the resultant indirect acquisition or change in control of A&W on account of acquisition of the acquirer would be governed by the provisions of the Takeover Regulations as applicable", that the said statement was incorporated in the letter of offer without pointing out that the said acquisition was part of the same transaction and exercise of call option would not trigger the code. It was only in the exemption application dated 3.10.2000 for the first time the Appellant stated that it was part of the same single transaction. Shri Desai submitted that the arguments adopted by the Appellant after filing of exemption application are clearly an afterthought and deserve to be ignored.

Shri Rohit Kapadia, learned Senior Counsel appearing for Respondent No.2 submitted that from the documents filed by the Appellant in the appeal proceeding it is clear that ISPG was distinct and separate from the Appellant that the said ISPG was the acquirer of the UK Company and its Indian subsidiary. The Appellant acquired the UK Company by acquiring 100% shares of Danube, the holding company of ISPG, on exercising the call option. Shri Kapadia, in support of his argument referred to the public announcement issued by SBI capital market on behalf of ISPG regarding the cash offer by ISPG for the acquisition of the shares of the Indian Company, a copy of which is Exhibit 8 to the appeal and pointed out that in the public announcement it has been stated that it is being issued "on behalf of ISPG" and described the said ISPG as the "acquirer", that "it was not considered appropriate for Rhodia at this stage to acquire Albright and Wilson Plc UK with immediate and unconditional effect". It has also been stated in the public announcement that "until the earlier of the exercise or the expiration of Rhodia’s option, the acquirer will operate Albright & Wilson as an independent business subject to Rhodia’s prior consent being required in relation to significant corporate transactions including certain acts affecting the assets or capital of the acquirer, Albright & Wilson and Danube". Shri Kapadia stated that the statement indicates management will be totally clear of any other influence. He also referred to the statement that neither the acquirer nor Rhodia own shares in the other and no directors of the acquirer are also the directors of Rhodia and vice versa, and submitted that the ISPG and the Appellant are at arms length and not connected with each other. The reference to main call option and the phosphate call option does not indicate in any manner that the Appellant had control over the acquirer. Shri Kapadia further submitted that it has been clearly stated in the public announcement that only the two subsidiaries of the UK Company are the persons acting in concert and the Appellant’s name has not been mentioned as a person acting in concert, as claimed by the Appellant. He also referred to the affirmative statement in the public announcement that the acquirer has indirectly acquired control in the Indian Company. Shri Kapadia submitted that the statement in the public announcement that the acquirer is a wholly owned subsidiary of Danube which in turn is a wholly owned indirect subsidiary or Donau Chemie AG, Austria, that the acquirer was specially incorporated for the purpose of acquisition of the UK company also suggests that ISPG is not controlled in any manner by the Appellant.

The learned Senior Counsel stated that the acquirer i.e. ISPG, by 15.7.1999 had acquired approximately 97.24% share capital of the UK company and by virtue of the said acquisition, the acquirer indirectly acquired a controlling stake in the Indian company. The Appellant was not in the picture till it acquired the holding company of ISPG by exercising the call option. Shri Kapadia stated that the offer to the shareholders of the Indian Company was subject to the acquirer obtaining necessary statutory approvals, that if anybody else had been there, it would have stated so clearly. In this context he referred to ISPG’s letter dated 27.8.1999 to the Foreign Investment Promotion Board and stated that the application was made by ISPG for permission for "ISPG and or its associates" to acquire upto 27.21% of the paid up capital of the Indian company, that it has been made very clear in the said application that ISPG is the acquirer and no where it has been even indicated that the Appellant is also an acquirer or that it is a person acting in concert with the acquirer. The Appellant’s role has been stated as that of a financier.

Shri Kapadia referred to regulation 16 and stated that if the acquirer had any plan to dispose of its holding it should have been so clearly stated in the public announcement in terms of clause (ix) that

"object and purpose of the acquisition of the shares and future plans if any, of the acquirer for the target company, including the disclosures whether the acquirer proposes to dispose of or otherwise encumber any assets of the target company in the succeeding two years", that clause (xix) requires to disclose "such other information as is essential for the shareholders to make an informed decision in regard to the offer". Learned Senior Counsel submitted that since the public announcement has not disclosed the would be acquisition of shares acquired by ISPG by the Appellant as required by the regulations, the presumption is that there was no such clear plan at that time, and the Appellant's claim that ISPG acquired the shares on behalf of the Appellant stands demolished. He also referred to the instruction of SEBI to ISPG to explain clearly about the call option to Rhodia and the requirement of legal compliance in this regard, in the public announcement. He submitted that if the Appellant had any reservation in making such a disclosure, it should have requested SEBI to reconsider the same and in the event of SEBI's failure to do so, an appeal could have been filed with the Tribunal challenging the SEBI's direction, which it did not do. He submitted that since the Appellant did not challenge the said order the present appeal is not maintainable, being resjudicata.

Shri Kapadia submitted that the Appellant is not a part of the acquirer group and as such there was no question of claiming exemption under regulation 3(1)(e) on the basis that it was an interse transaction between the members of the same group. In this context he explained the scope of the expression "Group" as defined in the MRTP Act and stated that the Appellant and the acquirer, in the light of the said definition do not come under the same group.

Shri Kapadia also cited several paragraphs from the letter of offer issued by ISPG to show that the UK Company was acquired by ISPG originally and the Appellant acquired the said company from ISPG on 14.3.2000 on exercise of the call option. According to him the acquisition of shares on exercise of call option is distinct from the acquisition by ISPG and as such public offer under the 1997 Regulation was required to be made. In this context he also referred to the grounds for exemption put forth by the Appellant in its application before SEBI and refuted the claim that its acquisition of the UK company by exercising call option was a part of the same transaction under which ISPG acquired the said UK company, that the two stage structure for the acquisition of the UK company and the relationship between ISPG and the Appellant was fully explained to the shareholders of the Indian company. Shri Kapadia submitted that the Appellant's claim is baseless, that on the contrary the public announcement and the letter of offer give a different version by disclosing that ISPG was the acquirer and not the Appellant. Shri Kapadia stated that the Appellant is now estopped from pursuing the matter and cited the apex Court's decision in The Godhra Electricity Co. Ltd v. State of Gujarat (AIR 1975 SC 32). He also cited the decision of the Bombay High Court in Indo Pharma Pharmaceutical Works P. Ltd v. Pharmaceutical Co. of India reported at pg. 73 in volume L XXX (1977) of the Bombay Law Reporter.

Shri Kapadia also submitted that the concept of control as defined in the regulation is relevant and not as to how it is understood by others like the European Commission. He also referred to concept of Group in the MRTP Act and stated that Group also refers to control, that element of control is built in there. Shri Kapadia referring to the Respondent's direction to pay interest, justified the same and stated that the Appellant by not making a public offer and making payment of purchase consideration to the shareholders has made unjust enrichment and levy of interest is justified.

Shri Kapadia submitted that the 1997 Regulation has been framed with a view to provide fair and equitable treatment to all the shareholders and this principle has already been stated by this Tribunal in its order in Sharad Doshi v. SEBI (1998) 29 CLA 383). But the Appellant has not followed the said principle. Shri Kapadia submitted that the Appellant has failed to make the requisite public offer in terms of the regulations and in that context the impugned order is justified and need be upheld.

Counsel for Respondent No.3 stated that he is adopting the arguments putforth by the Counsel for SEBI and Respondent No.2.

I have considered the contentions put forth by the Appellant and the Respondents and my views thereon are as follows:

The core issue that need be considered in this appeal is the applicability of regulation 12. If it is found that regulation 12 is not attracted to the transaction, the requirement of making public offer etc, by the

Appellant, does not t arise.

I think in this context it will be useful to quickly go through the governing regulatory regime applicable to substantial acquisition of shares and takeovers having a bearing on the matter before the Tribunal. In terms of section 11(1)(h) of the Securities and Exchange Board of India Act 1992 (the Act) one of the functions of the Respondent is regulating substantial acquisition of shares and take over of companies. For the purpose, the Respondent has notified the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 These Regulations provide certain ground rules to be followed by the concerned parties in the matters relating to substantial acquisition of shares and takeovers. The objective of the Regulations is to provide an orderly framework within which the process of substantial acquisition of shares/control could be conducted. Justice Bhagwati Committee report, based on which the 1997 Regulations have been drafted, had clearly stated that the Regulations for substantial acquisition of shares and takeovers should operate principally to ensure fair and equal treatment of all share holders in relation to substantial acquisition of shares and takeovers; the Regulations should ensure that such process do not take place in a clandestine manner without protecting the interest of the share holders. Justice Bhagwati Committee in para 1.2 of its report stated that it would be:

> "The Committee also recognised that the process of takeovers is complex and is interrelated to the dynamics of the market place. It would therefore be impracticable to devise regulations in such detail as to cover the entire range of situations, which could arise in the process of substantial acquisition of shares and takeovers. Instead there should be a set of General Principles which should guide the interpretation and operation of the Regulations, especially in circumstances which are not explicitly covered by the Regulations. These principles are:
>
> i. Equality of treatment and opportunity to all shareholders.
>
> ii. Protection of interests of shareholders
>
> iii. Fair and truthful disclosure of all material information by the acquirer in all-public announcements and offer documents.
>
> iv. No information to be furnished by the acquirer and other parties to an offer exclusively to any one group of shareholders.
>
> v. Availability of sufficient time to shareholders for making informed decisions.
>
> vi. An offer to be announced only after most careful and responsible consideration.
>
> vii. The acquirer and all other intermediaries professionally involved in the offer, to exercise highest standards of care and accuracy in preparing offer documents.
>
> viii. Recognition by all persons connected with the process of substantial acquisition of shares that there are bound to be limitations on their freedom of action and on the manner in which the pursuit of their interests can be carried out during the offer period.
>
> ix. All parties to an offer to refrain from creating a false market in securities of the Target Company.
>
> x. No action to be taken by the target company to frustrate an offer without the approval of the shareholders.
>
> In the event of any ambiguity or doubt as to the interpretation of the regulations, the concerned authority shall pay adequate attention to and be guided by any one or more of the aforesaid general principles having a bearing on the matter".

In para 3.34 of the report under the heading "Indirect acquisition" it has been stated:

> "The Committee had noted that there exists a lacuna in the existing regulations which would allow persons to acquire indirect control of listed company by acquiring the holding company or a set of investment companies which has block holding and which may be unlisted, because the scope of the Regulations apply only to acquisitions of shares in listed companies. The Committee thought it

fit to clarify by way of an explanation that acquisition of an unlisted company would not be exempted if by virtue of such acquisition, or change in control of the unlisted company whether in India or abroad, there is brought about a change in control of the listed company or acquisition of control over the voting rights of the listed company".

Regulations 10, 11 and 12 are core regulations. Regulations 10 and 11 require the acquirer acquiring shares beyond the prescribed limit to make a public announcement to acquire shares of the target company from the shareholders in accordance with the regulations. While regulations 10 and 11 deal with the substantial acquisition of shares, regulation 12 is on the acquisition of control over a company.

As per the said regulation 12, "irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the Regulations.

Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a resolution passed by the shareholders in a general meeting".

For the meaning of the expression "acquirer" appearing in the regulation, regulation 2(1)(b) has to be referred to, therein "acquirer" has been defined as any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer.

The Regulations also provide a time frame to be followed in the process. Regulation 14(3) refers to the public announcement of offer required to be made in the context of acquisition covered under regulation 12. As per regulation14 (3) requisite public announcement is required to be made by the merchant banker (appointed by the acquirer) not later than four working days after any such change or changes are decided to be made as would result in the acquisition of control over the target company by the acquirer.

Regulation 16 lists the contents of the public announcement of offers referred to in regulations 10, 11 and 12. As per the said regulation one of the particulars to be stated in the announcement is "the minimum offer price for each fully paid up or partly paid up share". The manner in which the minimum offer price is required to be arrived at has been explained in detail in regulation 20. In the case of the shares of a listed company (Castrol India is a listed company), in terms of clause (d) of sub regulation (2) of regulation 20, the minimum offer price shall be the highest of the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the 26 weeks preceding the date of public announcement. In terms of regulation 28, the acquirer is required, by way of security for performance of his obligations under the Regulations, deposit in an escrow account, a sum of money worked out as a percentage of the total quantum of the offer amount.

In terms of regulations 18(1) and 18(2), within fourteen days from the date of public announcement made under regulations 10, 11 and 12 as the case may be, the acquirer is required, through its merchant banker, file with the Respondent a copy of the draft of the letter of offer, containing disclosures as specified.

The letter of offer is required to be dispatched to the shareholders not earlier than 21 days from its submission to the Respondent under sub-regulation (2) of regulation 18. Provided that if, within 21 days from the date of submission of the letter of offer, the Respondent specifies changes, if any, in the letter of offer, the merchant banker and the acquirer have to carry out such changes before the letter of offer is dispatched to the shareholders.

I agree with Shri Chagla’s submission that the applicability of take over regulations need be objectively considered and not only on mere technicalities. The issue for consideration before us is not the adequacy or inadequacy of the information furnished to the public in the public announcement or letter of offer. But at the same time the particulars furnished in these documents and the disclosures made are to be given weightage while drawing conclusions. In the instant case counsel for the parties had heavily relied on the disclosures made in the documents on record to substantiate their point of view. Therefore it is felt that

the contents of the relevant documents are to be viewed very objectively to reach at the right conclusion.

Mr. Chagla, had laboured considerably to establish that the real acquirer of the UK company is the Appellant and not ISPG, that ISPG was only a 'namesake' acquirer an adhoc institution-created for the purpose of acquiring the UK company as for certain reasons the Appellant was not in a position to acquire the said company at the relevant point of time and also it was not possible to defer the acquisition in view of an unsolicited bid by another company viz Albermale to acquire the UK Company. Shri Chagla had also submitted that the complainants are driven by profit motive in as much as their attempt is to force the Appellant to make a public offer taking 14.3.2000 as the date on which the Appellant exercised its call option, so that the offer price will be much higher than the current market price of the shares to benefit them. In this context he had referred to the conduct of Respondent No.2 who had initially admitted vide letter dated 27.3.1999 that the Appellant is the acquirer, and desired to have an offer price befitting to the position of the acquirer, but subsequently changed the stand because such a shift in change was more beneficial to him.

Shri Chagla's main submissions to hold that the Appellant is the acquirer are that (i) the bid structure was developed as the Appellant had to find a way of proceeding with the acquisition of the UK company while at the same time avoiding the integration of the UK company's results with Rhone Poulenc in the context of the their ongoing proposed transaction with Hoechst AG (ii) Doanue Chemie's interest in the UK offer was purely financial and it had no long term industrial interest and was remunerated for its participation in the transaction (iii) virtually all of the finances for the UK offer were arranged by and either provided or guaranteed by the Appellant , (iv) under the agreement dated 16.3.1999 Donauchem, Danube & ISPG were subjected to the control of the Appellant in so far as the conduct of the UK offer was concerned (v) pending exercises of the call option the Appellant was given veto rights relating to certain aspects of the management of A&W's business, including even the declaration of dividends and significant investment and corporate transactions. According to Shri Chagla, the Appellant had already control over the acquisition company – Danube, and the exercise of the call option by the Appellant was essentially a part of the same single transaction and that was infact the final stage of the transaction and not an independent transaction.

It is seen from the Heads of Agreement dated 11.3.1999 and Restatement of the Heads of Agreement dated 30.3.1999 that the Appellant and Donauchem GmbH (partner) had agreed to arrange for the acquisition of all the outstanding shares of the UK company through a public tender offer by ISPG, a wholly owned subsidiary of the Donauchem GmbH. In the said agreement Donauchem GmbH has been described as "partner" whereas the Appellant has been described only as "Rhodia". This description 'partner' is suggestive of the fact that both the companies were jointly making arrangements to acquire the UK Company. This assumption is further fortified from the rest of the text of the agreement. It is seen from the agreement, that the Appellant and Donauchem GmbH had agreed to enter into certain agreements to the financing of the Tender offer through Bank draft and the subordinated convertible bond issued by Danube, the ownership and management of Danube, ISPG and the UK company and the issuance by "partner" to "Rhodia" a call option and the issuance by "Rhodia" to "partner" of the Phosphates Call. It is seen from the ownership structure of the concerned entities as stated in the agreement, that ISPG will be the direct wholly owned subsidiary of Danube and ISPG was to be capitalized by capital contribution from the said Danube and such capitalization was to equal or exceed minimum amount required under applicable laws. As far as Danube is concerned, the agreement provided that it was to be capitalized by an equity contribution from "partner" and at all times prior to the earlier of the exercise of the call option or the expiration of the call option exercise period, Danube was to remain the direct wholly owned subsidiary of the said 'partner'. Thus it is evident that Danube was structurally independent of the Appellant holding any share in it. Shri Chagla had argued that even though the Appellant had no per se participation in the ownership or management of Danube directly, it had sufficient control over the said company through the financial agreement entered into between the parties. Let us have a look at the financial arrangement provided in the agreement.

About financing the tender it has been stated in the agreement that "the tender by the bidder (ISPG) for target (the UK Company) shall be financed by, in addition to the Minimum Bidder Capitalization:

> "(i) the issuance by Acquisition Company (i.e. Danube) to Rhodia of a zero coupon subordinated convertible bond (the "Subordinated Convertible Bond") in a principal amount of ….50 million (the "Convertible Principal Amount"), the proceeds of which shall be made available to the Bidder by Acquisition company as debt or equity, as to be jointly

determined by Rhodia and Partner. Certainterms of the Subordinated Convertible Bond are described under Section III below; and

(ii) a bank loan to Acquisition Company(the "Bank Debt") which shall be on-lent by Acquisition Company to the Bidder as intercompany debt under repayment terms as identical as possible to the terms of the Bank Debt. The Bank Debt shall be in such amount as will enable the Bidder, following the transfer by Acquisition Company to the Bidder of such Bank Debt and of the proceeds of the Subordinated Convertible Bond, and in addition to the Minimum Bidder Capitalization, to effect the Tender.

The terms of the Bank Debt shall be jointly agreed upon by both Rhodia and Partner; provided, however, that Rhodia will provide a guarantee with respectto the payment of principal and interest on the Bank Debt on such terms as it may agree with the lender or lenders of the Bank Debt.

Each of Rhodia and Partner shall make all arrangements as may be necessary to ensure that the funding to be provided by the Subordinated Convertible Bond, the Bank Debt and the Partner Contribution is made fully available to Acquisition Company at such time prior to the closing of the Tender as to permit Bidder to close the Tender on a timely basis. As used herein, "closing" means the time at which Bidder shall acquire more than 50% of Target's outstanding capital stock in connection with the Tender.

2. Management of the Tender

All decisions with respect to the Tender, including without limitation the timing and the amount of the bids, the bidding strategy and public communications with respect thereto, shall be made jointly by Rhodia and Partner, it being understood that no party shall be prevented from complying with its respective legal or regulatory obligations.

3. Due diligence

Each of Rhodia and Partner shall have equal access to all information made available for performing due diligence on Target, which will be carried out pursuant to an appropriate confidentiality agreement.

The Subordinated convertible Bond

1. Principal Amount

The Convertible Principal Amount is as set forth above under Section II. 1(i).

2. Convertible Right and Conversion Price

Provided that Rhodia has previously exercised the Call Option, as set forth more fully under Section IV below, the Subordinated Convertible Bond may be converted by Rhodia at its sole direction (the "Convertible Right"), during the Conversion Period (as defined below) and without the payment of additional consideration, into equity of Acquisition Company.

3. Conversion Period

Provided that Rhodia has previously exercised the Call Option, Rhodia shall have the right to exercise the Conversion Right at any time from and including January 1, 2000, until and including January 1, 2001 (the "Conversion Period").

4. Maturity

Should Rhodia not exercise the Conversion Right, and subject to paragraph 5 below, the Convertible Principal Amount of the Subordinated Convertible Bond shall be due and payable by Acquisition Company on the date three months after the maturity date of the Bank Debt.

5. Subordination to Bank Debt

Repayment of the Convertible Principle Amount shall be subordinated in right to the

payment in full of all principle and interest, and of any additional amounts which may become due, with respect the Bank Debt.

6. Other terms and conditions

Rhodia and Partner shall jointly decide on other terms and conditions of the Subordinated Convertible Bond.

IV. Call Option

1. Accord of Call Option

Immediately upon closing of the Tender, Partner shall accord to Rhodia a call option (the "Call Option').

2. Rights under the call Option

Rhodia may exercise the Call Option at is sole discretion at any time during the Call Option Exercise Period upon notification to Partner of exercise and payment to Partner of the exercise Price (as defined below). Upon exercise of the Call Option Partner shall transfer to Rhodia, or to such person as may be designated by Rhodia, all outstanding equity capital of Acquisition Company, free and clear of any pledge, lien, security interest or other encumbrance, such that Acquisition Company shall as a result become a directly or indirectly wholly owned subsidiary of Rhodia.

3. Exercise Price

The exercise price of the Call Option (the "Exercise Price") shall be equal to the fair market value of Acquisition Company at the time the Call Option is exercised.

4. Call Option Exercise Period

Rhodia may exercise the Call Option at any time during the period beginning on January 1, 2000, and ending at the close of business (Paris time) on April 1, 2000 (the "Call Option Exercise Period").

V. Call on Phosphates Business

1. Phosphates Call

In the event Rhodia has not exercised its Call Option prior to the expiration of the Call Option Exercise Period, Acquisition Company shall have the right, beginning on the termination of the Call Option Exercise Period, to purchase form Rhodia for cash Rhodia's phosphates business at fair market value (the "Phosphates Call"). The right granted to Acquisition Company under the Phosphate Call shall expire at the close of business (Paris time) on July 1, 2000.

2. Financing of the Phosphates Call

In the event of the exercise by Acquisition Company of the Phosphate Call, Rhodia shall agree to provide purchase money financing to Acquisition company to finance the purchase of Rhodia's phosphates business for up to two years following the date of exercise of the Phosphates Call. Such purchase money financing shall carry interest, payable upon the date of repayment thereof by Acquisition Company. Such interest shall be at a reasonable annual rate to be agreed upon by Rhodia and Acquisition Company at the time of exercise of the Phosphates Call. Such purchase money financing shall be secured by a first priority security interest in the phosphates business. The repayment by Acquisition Company to Rhodia of the purchase money financing and interest thereon shall be pari passu in right of payment with Acquisition Company's senior debt.

VI. Ownership and Management of Target (i.e. the UK company)

1. Ownership

At all times prior to the earlier of the exercise of the Call Option or the expiration of the Call Option Exercise Period, all equity interests in Target acquired by Bidder in connection with the Tender, including without limitation shares of Target which may be purchased in open market transactions or through "squeeze out" transactions, shall be directly owned by Bidder and indirectly owned exclusively through Bidder by Acquisition Company and may not be sold, pledged, transferred or subject to any lien, security interest or other form of instrument, encumbrance or transaction granting to, or resulting in a direct or indirect interest therein being held by, any other person.

2. Management

Upon the closing of the Tender, and until the earlier of the exercise of the Call Option or the expiration of the Call Option Exercise Period:

(i) Target will be operated by Partner as an independent business.

(ii) The senior management of Target will be encouraged to remain with Target. In the event of the termination of employment with Target of any of such senior management, either by resignation or otherwise, Rhodia may recommend to Partner for the replacement of any such persons one or more qualified Candidates (as defined below). Each such Candidate, if hired by target, would become an employee of Target under an employment contract reasonable and customary for the position involved.

(iii) Rhodia may recommend to Partner one or more Candidates for the position of Chief Executive Officer of Bidder under an employment contract reasonable and customary for such position. As used herein, "Candidate" shall mean such persons as may be recommended by Rhodia who are not as of the date hereof or at any time thereafter directors, officers or employees of Rhodia or of any other company within the Rhone-Poulenc Group.

3. Rhodia Approval Required for Certain Transactions

Until the earlier of the exercise of the Call Option or the expiration of the Call Option Exercise Period, any decision by the Board of Directors or management of Acquisition Company, the Bidder or Target regarding the declaration and payment of dividends; any acquisition or disposal of assets representing more than 20% of the total consolidated assets of Acquisition Company, Bidder or Target, as the case may be; the issuance of any equity securities, senior or subordinated debt or other securities or instruments exchangeable for or convertible into any of the foregoing; or other significant corporate transactions, shall require the prior written approval of Rhodia.

The following covenants in para 7 of the agreement namely the Financial agreement, Danube Chemicals Acquisition Corporation Zero Coupon Convertible Subordinated Bond" is also considered relevant in this context

"Convenants: (A) Upon the consummation of the tender offer made by Field Cent a company organised under the laws of the United Kingdom that is the subsidiary of the company ("Bidder") for the shares of Albright & Wilson PLC, a public corporation organized under the laws of the United Kingdom ("Target") (the "Tender Offer"), up to ten (10) of the Holder’s employees ("Employees") proposed by the Holder (i.e. Rhodia) in its sole discretion to be transferred to, and become the employees of, the Company, the Bidder, or the Target, as may be designated by the Holder. The Employees shall be placed in positions of senior management acceptable to the Holder. The company at which the Employees are placed shall have the right to reasonably refuse any such proposed employee., at which instance the Holder shall nominate a suitable replacement. The Employees shall be employed pursuant to employment contracts reasonable and customary for the positions to which they are placed.

(B) Prior to the day on which the Holder's rights to exercise the Call Option terminate, any decision by the board of directors or management of any of the Company, the Bidder or the Target (in the case of the Target, following the consummation of the Tender Offer), regarding any of the following matters shall require the prior written approval of the Holders (i) the declaration or payment of any dividend (or any distribution on any class of

capital stock); (ii) any acquisition or disposal of assets representing more than 20% of the total consolidated assets of the Company, the Bidder or the Target, as the case may be; (iii) the issuance of any equity securities or subordinated debt or other securities or instruments exchangeable for or convertible into any of the foregoing; or (iv) other significant corporate transactions, including stock splits, or reclassifications of capital stock."

On a perusal of the terms and conditions extracted above it is clear that the Appellant, though not directly owned any shares or controlled Danube, it was in a position to control its affairs. The extent of the Appellant's role in the management of Danube etc, is evident from the contractual requirement of obtaining its approval in all major matters, affecting these companies' affairs. The expression "significant corporate transaction" has been explained by the Appellant in its letter dated 13.4.1999 addressed to European Commission as follows:

"the reference to "other significant corporate transactions" was designed to act as a "sweep-up" provision, to cover any other major corporate issues which had not been addressed explicitly elsewhere in the documentation. It is the intention of the parties that such term would include decisions on, inter alia:

"· changes in business strategy by terminating or initiating a significant business and entry into (or withdrawal from) key markets;

· major transfers of assets to create joint venture;

· stock splits or substantial changes in the balance sheet structure;

· major and strategic plant closures;

· major and strategic investment programmes, particularly if they require external financing;

· transfer of patent rights/licenses/technology which underline a major position of the business;

· major changes in the management structure or in management compensation, including new golden parachute plans;

· basic reorientation of research and development activities;

· any changing of the corporate form and/or splitting the business into separate companies;

· the relocation of head quarters to another country;

In summary, major decisions on structural and strategic changes require theapproval of Rhodia. On the contrary, decisions on the day-to-day management or Albright & Wilson are not covered by Rhodia's ved to rights"

From the contractual obligations cited above there is no doubt as to whether the Appellant was in a position to exercise control over the management of Donaue USA, etc.

In this context it is to be noted that in terms of regulation 12

"Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the Target Company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the Regulations.

Provided that nothing contained herein shall apply to any change in control, which takes place in pursuance to a resolution passed by the shareholders in a general meeting.

Explanation:

(i) For the purposes of this Regulation where there are two or more persons in control over

the Target Company, the cessor of any one such person from such control shall not be deemed to be a change in control of management nor shall any change in the nature and quantum of control amongst them constitute change in control of management.

Provided however that if the transfer of joint control to sole control is through sale at less than the market value of the shares, a shareholders meeting of the target company shall be convened to determine mode of disposal of the shares of the outgoing shareholder, by a letter of offer or by block-transfer to the existing shareholders in control in accordance with the decision passed by a special resolution. Market value in such cases shall be determined in accordance with Regulation 20

(ii) where any person or persons are given joint control, such control shall not be deemed to be a change in control so long as the control given is equal to or less than the control exercised by person(s) presently having control over the company."

The expression "control" for the purpose of the Regulations has been defined in regulation 2(1)(c) as follows:

> "Control shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their share holding or management rights or share holders agreements or voting rights in any other manner."

It is evident from the terms of the agreement between the Appellant and Donauchem GmbH extracted above that major decisions on structural and strategic changes in Danube etc., required the approval of the Appellant. From the terms of agreement it is clear that the Donaue, the immediate holding company of ISPG which acquired the UK company was under the joint control of the Appellant and the said Donauchem GmbH. Donauchem GmbH was holding 100% shares in Danube till the Appellant exercised call option. But Appellant was in a predominant position to exercise control over the management and the policy decisions of Danube at its will, in terms of the Agreement even before the exercise of the call option. As a result of the exercise of the call option, the entire shareholding of Danube came to be owned by the Appellant, after which Danube transferred its entire share capital in ISPG to Rhodia Holdings Ltd, which is a wholly owned subsidiary of the Appellant. Danube on completion of the purpose for which it was incorporated was liquidated and dissolved. Thus it could be seen that transfer of shares held by Danube to the Appellant's subsidiary is nothing but transfer of joint control to sole control. The fact that the Appellant was actually behind the acquisition of the UK company and the acquisition through Danube, was only structured to get over the difficulties which it would have otherwise faced in the proposed transfer of business of Rhone Poulence and Hoechst A.G has been established with documentary evidence. The Appellant's role was not confined to that of a mere financier is evident from its involvement in the process. The fact that the Appellant had agreed for payment of fees and expenses to Donau Chemie GmbH vide "Second amended and restated agreement" (dated 11.5.1999) indicatges that it was the Appellant who is the acquirer and Donau was acting at its behest. It has been stated in the said agreement:

> " 1. Payment of fees:
>
> As soon as practicable and in any event no later than 15 days, after the successful closing of the Tender, Rhodia and Donau shall agree on an amount to be paid by Rhodia to Donau as a fee in connection with Donau's participation in the Tender such amount not to exceed FF 40 million.
>
> 2. Expenses:
>
> In the event the Tender does not come to a successful closing, Rhodia shall reimburse Donau for its reasonable out-of-pocket expenses in connection with its participation in the transactions contemplated by the Amended and Restated Heads of Agreement, including fees paid by Donau to its external legal and financial advisors and accountants, upon presentation of any reasonable detailed accounting of such expenses"

The fact that it was the Appellant and Donauchem AG jointly had applied to the European Commission for approval of the acquisition of UK Company also need be noted. In this context the "background to the structure of the offer" furnished to the European Commission by the said companies also establishes the fact that it was Rhodia which was in effect acquiring the UK Company. The statement reads as follows:

"Rhodia has been planning to acquire Albright and Wilson by way of public offer for several months. The ultimate goal of the offer is to integrate the complementary business of these two companies…. However, as the Commission is aware, Rhodia's parent company Rhone Poulenc is presently in the course of negotiating the merger of certain parts of its business with that of Hoechst AG. Against this background Rhone Poulenc does not wish Rhodia's acquisition of Albright Wilson to lead to the consolidation of Albright & Wilson's financial results in its own. Accordingly Rhone Poulenc had asked Rhodia to make its bid for Albright &Wilson when Rhone-Poulenc's merger with Hoechst was further advanced in order not to interfere with that merger.

On 8th March, 1999 however, Albermarle a US Chemicals company made a public offer valued at … 408 millions for Albright & Wilson. This bid has required Rhodia to accelerate the planning for its transaction.

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Rhodia has thus had to find a way of proceeding with the acquisition while at the same time avoiding the integration of Albright & Wilson's results in those of Rhone-Poulenc. The structure explained below was developed specifically to meet these concerns.

The offer announcement provided to the Commission on 19 March 1999 describes Rhodia's goals in the following terms: " … the directors consider the strategic fit between the two groups [Rhodia Albright & Wilson] to be particularly good. […] Rhodia's position as one of the world's leading chemical manufacturers should benefit Albright & Wilson in terms of technology expanded sales opportunities and greater financial resources. The acquisition would add considerable global reach to both companies. Rhodia and Albright & Wilson are complementary in geographical terms and, combined, would have a spread of activities in both the developed and the emerging markets, where growth is highest for phosphates".

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In summary, the offer for the outstanding shares in Albright & Wilson has been made through an acquisition vehicle, which is an indirect 100% subsidiary of Donau Chemie. However, Donau Chemie's interest in the transaction is financial – it has no long-term industrial interest and is being remunerated for its participation in the bid. Virtually all of the finances for the bid have been arranged by and either provided or guaranteed by Rhodia. In addition, Rhodia has a call option under a legally binding agreement to acquire the entire share capital of the acquisition vehicle, which option is exercisable between 1 January 2000 and 1 April 2000. If this call option is not exercised, the acquisition vehicle has a call option over the entire phosphates business of Rhodia which if it is exercised must be financed by Rhodia itself.

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(h) Rhodia, Donauchem, Acquisition Company and ISPG have also entered into an agreement which regulates the conduct of the parties in connection with the tender and the financing agreements related to it. This agreement essentially subjects Donauchem, Acquisition Company and ISPG to the control of Rhodia insofar as the conduct of the bid for Albright & Wilson is concerned".

It is also seen from the public announcement made on 16.3.1999, on behalf of ISPG in the context of its acquisition of the UK company that "N.M.Rothschild & Sons and Warburg Dillon Road, the investment banking division of UBS AG… are acting for ISPGand Rhodia in connection with the offer and no one else and will not be responsible to anyone other than ISPG and Rhodia for providing protection to their customers…."

It is also to be noted that based on the information furnished by the said companies, the European Commission had accorded its approval. In the European Commission's letter dated 15.7.1999 it has been stated that " The European Commission has approved the acquisition of the British Company Albright & Wilson Plc (A&W) by the French Companyy Rhodia SA (Rhodia) a subsidiary of Rhone Poulenc".

Counsel for the Respondents had also relied on the agreements referred to by the Appellant and particularly on the offer document, application to FIBP and the public announcement issued by ISPG

with reference to the acquisition of the Indian company. I do not find therein any material to controvert the Appellant's version substantiated as above. It is true that in these documents ISPG has been described as the "acquirer". A mere reference to ISPG as the acquirer or a description as such can not be taken to conclude that ISPG is really the acquirer. The Appellant has explained as to why ISPG was put in position as acquirer and how the Appellant was in a position to control ISPG. For reference purpose ISPG has been described as acquirer in the documents. Technically ISPG is the acquirer but not in reality. But if one goes a little bit ahead it could be seen that ISPG's holding company is Danube, which is jointly controlled by Donauchem GmbH and the Appellant. Reference to ISPG as acquirer in the offer letter and the public announcement, etc has to be viewed from the actual factual matrix explained above. The statement in ISPG's letter dated 1.9.1999 that ISPG "are making the offer and not Rhodia" is thus only a confirmation of what is mentioned in the public announcement/letter of offer etc. In fact in para 1 of the public announcement issued by the merchant banker, it has been stated that "taking cognition of the competition/concentration concerns on account of this indirect acquisition by Rhodia, the European Commission have issued press release on July 15, 1999 according their approval". Reference to indirect acquisition has to be read along with the attendant material/information available from the documents discussed above.

The Appellant's claim that the transfer of shares in the instant case was an interse group transfer and as such exempted in terms of section 3(1)(e)(i) of the Regulation is untenable for the reason that there is no evidence of compliance of the requirement stated in the Explanation to the said regulation that "the benefit of availing of exemption from applicability of Regulations for increasing shareholding or interse transfer of shareholding among group companies, relatives and promoters shall be subject to such group companies or relatives or promoters filing statements concerning group and individual shareholding as required under Regulations 6, 7 and 8". The exemption being conditional, non-fulfillment of the conditions takes away the benefit. Even if it is assumed that the transaction is an interse group transaction, the exemption available under regulation 3(1)(i)(e) is not available because of non-compliance of the requirements as stated above. Therefore I do not consider it necessary to examine whether the Appellant and Donauchemie AG belonged to the same group as defined in the Monopolies and Restrictive Trade Practices Act.

The Respondent's version that ISPG has not made the requisite disclosure in terms of regulation 16(ix) that "object and purpose of the acquisition of the shares and future plans, if any of the acquirer for the target, including disclosures whether the acquirer proposes to dispose or otherwise encumber any assets of the target company in the succeeding two years except in the ordinary course of business of the target company" is unfounded as adequate disclosure including call option provision has been made. Shri Kapadia's argument that since the Appellant had not challenged SEBI's directions under section 18(2) communicated vide its letter dated 5.10.1999 to modify the draft letter of offer the Appellant is not now entitled to file an appeal, being resjudicata, is untenable. Resjudicata means that if an action be brought and the merits of the question be discussed between the parties, and a final judgement be obtained by either party, the parties are concluded and cannot agitate the same question in an other action. Principle of resjudicata is not applicable to the case. A person is entitled to file an appeal against an order of SEBI in terms of section 15T, provided he is aggrieved by the said order. In the instant case, the Appellant has come forward with the appeal claiming that the order has adversely affected it.

SEBI in its letter dated 5.10.1999 "On the open offer to equity shareholders of Albright & Wilson Chemicals India Ltd" addressed to the SBI Capital Markets Ltd., had made several observation/suggestion for compliance. One of the same relates to the call option of Rhodia, extracted as under:-

> Call option to Rhodia:- It has been indicated by you that Rhodia, will be granted a call option under which Rhodia may, as its discretion, acquire 100% of the Acquirer's immediate holding company, Danube, between January 1, 2000 and April 1, 2000. It is felt that in the event this call option is exercised, there would be an indirect acquisition/change of control over the Target company thus attracting the provisions of regulation 11 and/or 12.. You are therefore advised to make suitable disclosures in this regard, inter alia, including that further substantial acquisition of shares/control of the target company, whether direct or indirect would be governed by the relevant provision of the SEBI (Substantial Acquisition of shares and Takeovers), Regulations 1997 and amendments thereto". (exphasis supplied)

The Appellant agreed to the view expressed by SEBI and accordingly in the letter of offer issued to the shareholders of the Indian company, it was stated that "should Rhodia exercise the call option, the resultant indirect acquisition/change of control of A&W on account of acquisition of Danube of the

acquirer would be governed by the Takeover Regulations" (emphasis supplied). In this context it is to be noted that Directors of the Indian Company in their report to the share holders on the company's annual accounts for the year 1999 had also stated as follows:

> "Share holders are aware that Rhodia SA had acquired Albright &Wilson Plc through ISPG Ltd UK. As required under the SEBI Takeover Regulations, ISPG had made an open offer to the shareholders in october, 1999, against which a few acceptances have been received . Having received all the European and US regulatory approvals, Rhodia SA has exercised its option to acquire ISPG/ Unless exempted by SEBI Rhodia will be required to make another open offer to the shareholders". (emphasis supplied)

Both these statements are made to the shareholders of the Indian Company. The Appellant has admitted that ISPG and the Indian Company were under the joint control of the Appellant before it exercised the call option on 15.3.2000. That being the case the Appellant cannot disown the statement made by ISPG and the Indian Company and the above statements have to be considered as the statement of the Appellant as well. In this view of the matter, it is a commitment by the Appellant that it would be making a public offer in the event of it exercise the call option. Though the acquisition, as explained in this order come under the category of change of control from joint control to single control and thereby exempted from the compliance of the requirements of the regulations, the Appellant has in effect waived the benefit of exemption by making the statements referred to above and as a result, in my view, the Appellant is required to make a public offer as promised to the public. Incidentally, the poor response to ISP's offer referred to in the impugned order can be attributed to the hope created by the Appellant's statement that it would make a public offer in the event of closure of call option, which appeared to be a certainty in the facts and circumstances explained to them. In that case, the public offer from the Appellant would have been more attractive to the investors, compared to the offer from a shell company like ISPG. In this context, it is to be noted that Shri Chagla had produced press reports to support his argument that the public perception was that the Appellant was the acquirer. Public perception based on the disclosure by the Appellant in the offer document cannot be viewed differently. It is very clear that the Appellant had waived its right of exemption, by making the above statements to the investors of the Indian Company.

The legal position in this regard is clear. In the Maxwell's Interpretation of Statutes – ed (1962) p 2375-3764 it has been stated:

> "Another maxim which sanctions the non observance of a statutory provision is that quilibet licet renuntiare juri pro se introducte. Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed without infringing any public right or public policy".

In the instant case the waiver of the benefit of exemption by the Appellant does not in any way infringe any public right or public policy, on the contrary it is in the interest of the public shareholders. Therefore, having waived the benefit of exemption provided in regulation 12and the investors having taken note of the same, the Appellant now cannot retract and claim that it is entitled for the statutory exemption which it had already waived. Therefore I am of the view that the Appellant is required to make the public offer in terms of the provisions of regulation 12.

The argument that since the acquisition of the Indian company was unintended but incidental to the acquisition of the UK company and as such the Regulations are not applicable is untenable as the Regulations take care of both direct and indirect acquisitions and the intention behind the acquisition is not the deciding factor. From the scheme of the Regulations it is clear that if the Target Company is in India, the acquirer is required to comply with the requirement of the Regulations even if the acquirer is not residing/located in India. Regulation is directed to take over and acquisition of Indian companies, be it direct or indirect and SEBI is empowered to issue appropriate directions in terms of regulation 42 and 44 of the Regulations. The Appellant's contention that SEBI has not followed the investigation procedure provided in Chapter V of the Regulations and as such the directions issued under regulation 44 are legally untenable is also not correct. The impugned order is relatable to the application for exemption filed by the Appellant. Such applications are dealt with in the manner provided in regulation 4 and not under Chapter V. The procedure set out in regulation 4 has been complied with.

Power to issue directions under regulation 44 is not confined to the findings of the investigation under regulation 38, as is evident from the text of the regulation. Its scope is wide and also its reach. Even though the order refers to the powers available under regulation 44 and section 11B of the Act, SEBI is

empowered to issue the impugned direction under regulation 44 itself. Regulation 44 reads as under:

> "The Board may, in the interests of the securities market, without prejudice to its right to initiate action including criminal prosecution under section 24 of the Act give such directions as it deems fit including:
>
> (a) directing the person concerned not to further deal in securities;
>
> (b) prohibiting the person concerned from disposing of any of the securities acquired in violation of these Regulations;
>
> (c) directing the person concerned to sell the shares acquired in violation of the provisions of these Regulations;
>
> (d) taking action against the person concerned."
>
> (emphasis supplied)

It could be seen that it is an inclusive provision empowering SEBI to issue directions as it deems fit in the interests of the securities market. It cannot be said that the interests of the securities market is to the exclusion of the interests of investors in the securities traded in the stock market. Therefore, there is no reason to believe that the impugned direction is not within the powers of SEBI. Since regulation 44 itself arms SEBI to issue the impugned direction, it is not necessary to seek assistance from section 11B of the Act. Therefore I do not consider it necessary to examine the scope of section 11B for the purpose.

The learned Senior Counsel did not seriously press the challenge on SEBI's power to direct the Appellant to pay interest to the shareholders of the Indian company, in view of the Tribunal's decision in B.P.Plc (formerly B.P.Amoco) v. Securities and Exchange Board of India (supra). The view held by the Tribunal in the said case upholding SEBI's power to levy interest applies in equal force to this case also. However, the learned Senior Counsel had pointed out that in the said order the Tribunal had viewed that interest is the return or compensation for the use or retention by one person of money belonging to another, and in this view of the matter the requirement of payment of interest should be only to those persons who were holding shares on 14.6.2000 and in a position to tender the same in case the Appellant makes a public offer as directed by SEBI. Learned senior Counsel submitted that those who purchased shares after the due date for closure of the offer as specified by SEBI have not suffered any such loss and any direction to pay interest to those shareholders also on those shares purchased after 14.6.2000 and tendered in an offer as required to be made by the impugned order would amount to unjust enrichment of those shareholders. I find some force in this argument. A person who was not holding shares and as a result not in a position to tender shares in a public offer which was required to be made by 14.6.2000 should not be entitled for any compensation for the delay involved in making the public offer and the consequential delay in the payment of the purchase consideration. He was not in a position to tender shares in response to the public offer had the Appellant made the public offer at that point of time. Therefore, those persons who were holding shares of the Indian company as on 14.6.2000 and continue to be shareholders on the closure day of the public offer made in terms of the directions given by SEBI vide the impugned order alone should be eligible to receive interest, in case the shares which he was holding on 14.6.2000 are tendered in response to the belated public offer. The impugned order stands modified to the said extent

For the reasons stated above the impugned order as modified survives.

The appeal is disposed of in the above lines.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: November 7, 2001