Arbitration Institute of the Stockholm Chamber of Commerce
Box 16050, SE-103 21 STOCKHOLM, Sweden

PARTIAL AWARD

rendered on 17 June 2008 on the issue of jurisdiction in Arbitration V (135/2006) of the Arbitration Institute of the Stockholm Chamber of Commerce between the following parties:

Claimant: Yara International ASA, Bygdøy allé 2, NO-0202 OSLO, Norway
Counsel: Advokat and Professor Kaj Hobér and Advokat Pontus Ewerlöf, Mannheimer Swartling Advokatbyrå, P.O. Box 1711, SE-111 87 STOCKHOLM, Sweden

Respondent: JSC Acron, 37(2) Prechistenka, 119034 MOSCOW, Russian Federation
Counsel: Advokat Johan Gernandt and Advokat Jonas Eklund, Gernandt & Danielsson Advokatbyrå, P.O. Box 5747, SE-114 87 STOCKHOLM, Sweden

Arbitral Tribunal: Former Justice Hans Danelius, Chairman, Dr. Julian D.M. Lew, Q.C., and Professor Sergei N. Lebedev

Place of Arbitration: Stockholm, Sweden

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I. Relevant facts

(a) The main documents

1. In 1996, the Russian Joint Stock Company Acron (hereinafter called *"Acron"*) and the Norwegian company Norsk Hydro ASA (hereinafter called *"Norsk Hydro"*) agreed to co-operate in the market for apatite, which is a fertilizer. This resulted in the following agreements which were concluded in 1996 and 1997:

(a) a Shareholders' Agreement of 28 June and 1 July 1996 between Acron, Norsk Hydro and North River Investments, S.A. (hereinafter called *"North River"*), a British Virgin Island company nominated by Acron,

(b) an Amendment to the Shareholders' Agreement of 12 July 1996 between the same parties,

(c) an Additional Agreement to the Shareholders' Agreement dated 1 July 1996 but signed on 29 July 1997, between the same parties.

2. The Russian Closed Joint Stock Company Nordic Rus Holding (hereinafter called *"Nordic Rus"*) was established in 1997 with Acron and the Norwegian company Hydro Agri Russland AS (hereinafter called *"Hydro Agri Russland"*) as shareholders. Acron owned 51% of the shares and Hydro Agri Russland, which was a subsidiary of Norsk Hydro, owned the remaining 49%. The Charter of Nordic Rus was approved by decision of the founders of 29 July 1997.

3. On 13 December 2001, Norsk Hydro and Hydro Agri Russland, in a letter to Acron and North River, terminated the Shareholders' Agreement, as amended.

4. Under a Memorandum dated 28 November 2003, a demerger was planned to take place within Norsk Hydro, the purpose being to transfer the company's activities within the business area Hydro Agri to a separate company. The details were set out in a Demerger Plan. The demerger was consummated and entered into effect on 24 March 2004. The new company was given the name of Yara International ASA (hereinafter called *"Yara"*).

5. Further details about these basic documents are given in the following parts of this Award.

(b) The Shareholders' Agreement

6. According to the Shareholders' Agreement of 28 June and 1 July 1996, a holding company called "Nordic Russia Holding S.A." would be set up with the objective to own a trading company engaged in production and trading in fertilizers (apatite and potash). The shares of the holding company – 1,000 shares of USD 100 – would be owned, 49% by Norsk Hydro and 51% by North River, and Acron would be liable towards Norsk Hydro for the activities of North River. Moreover, Norsk Hydro would transfer to the charter capital of the holding company 509,728 shares in the Russian Public Joint Stock Company Apatit (hereinafter called *"Apatit"*), an apatite mining company located in the Murmansk region in Russia. This contribution represented 8.2% of the share capital of Apatit. Acron, through North River, would transfer to the holding company 98,742 shares in Apatit and 102,961,574 shares in the Joint Stock Company Dorogobuzh, a fertilizer company in Dorogobuzh, Russia, the contribution representing 14% of the share capital of that company.

7. The Shareholders' Agreement also contained various provisions about the operation of the proposed holding company and trading company as well as the following general clauses which are quoted in full as pertinent to the issues for determination in this Award:

> **"8 CONFIDENTIALITY**
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> The Parties shall keep confidential all technical, commercial and other proprietary information received from each other and the Parties shall take all reasonable action in order to prevent such information from becoming public and to ensure that their officers and employees comply with this secrecy obligation. - - -
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> This confidentiality obligation shall survive any termination of this Agreement for an additional period of five years.
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> **9 TERM**
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> This Agreement shall be legally binding for an initial period of two years, after which it shall automatically be renewed for consecutive periods of two years unless either Party terminates this Agreement by written notice to the other Party not later than 6 months before the expiration of the ongoing period. Such termination to be effective at the earliest two years after entering into force of this Agreement. The Parties shall meet six months before the expiration of the initial two years period to discuss their experience with the Agreement and possible amendments thereto.
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> However, irrespective of the preceding paragraphs of this article, this Agreement may be terminated forthwith by written notice from either Party to the other, if
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> i) the other Party is declared bankrupt, enters into liquidation, or dissolution proceedings are commenced, or otherwise becomes insolvent, or
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> ii) the other Party is in material breach of this Agreement and has failed to remedy such breach within sixty – 60 – days of receipt of a written notice to such effect.

If this Agreement should terminate for any reason, either Party may require that the [Holding] Company and the Trading Company shall be dissolved. If the companies are dissolved then each Party shall have returned to it all property (including shares of P.O. Apatite and Dorogobuzh) that the Party contributed to the capital of the companies. In addition the remaining net value of the [Holding] Company and the Trading Company to be split between the Parties according to their ownership position of the [Holding] Company.

10 AMENDMENTS

Any amendments or addition to this Agreement shall be valid only if made in writing and signed by duly authorized representatives of both Parties.

This Agreement sets out the entire agreement among the Parties and upon its execution, supersedes and cancels all prior negotiations, documents, minutes and correspondence, both oral and written, between the Parties with respect to the subject matter hereof.

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12 ASSIGNMENT

No party hereto may assign or delegate any of its rights or obligations hereunder without the prior written consent of the other Party, such consent not to be unreasonably withheld, it being understood, however, that Hydro shall have the right to assign or delegate such rights and obligations to any affiliated company without the prior written consent of the other Party, provided the assigning or delegating Party guarantees the obligations of such an affiliated company pursuant to this Agreement.

By 'any affiliated company' is meant a 100%-daughter company of Norsk Hydro ASA.[1]

13 APPLICABLE LAW AND DISPUTES

This Agreement shall be governed by Swedish law.

Any dispute that cannot be solved amicably shall be resolved by binding arbitration in Stockholm, Sweden, pursuant to the procedural rules of the Stockholm Chamber of Commerce. Such proceedings shall be conducted in the English language. However, failure by the Parties to reach an unanimous solution pursuant to Article 4 of this Agreement,[2] shall be resolved according to this Article 13 with the following amendments.

There shall be one arbitrator appointed by the President of the Stockholm Chamber of Commerce. Within two weeks of any Party raising the dispute before the Stockholm Chamber of Commerce, each Party shall submit a written statement to the Stockholm Chamber of Commerce. The appointed arbitrator shall resolve the dispute on the basis of the received written material with the addition of any additional written statement that the arbitrator may request. It is expected that the arbitrator will finalize the proceedings not later than one month after the dispute has been raised before the Stockholm Chamber of Commerce."

8. In the "AMENDMENT TO SHAREHOLDERS AGREEMENT", signed on 12 July 1996, the parties to the Shareholders' Agreement agreed to modify the clauses about Norsk Hydro's and Acron's contributions to the holding company.

9. In the "ADDITIONAL AGREEMENT to the SHAREHOLDERS' AGREEMENT" dated 1 July 1996 but signed on 29 July 1997, the parties agreed, *inter alia*, that various references to North River should be replaced by references to Acron and that, in the case of conflict between certain rules of the Shareholders' Agreement and the specific requirements of the Charter of the holding company, the terms of the Charter should prevail. The Additional Agreement also provided that the words "Nordic Russia Holding S.A." (the name of the

[1] In the Agreement this paragraph has been added by hand.
[2] Article 4 deals with the operation of the holding company.

holding company according to the Shareholders' Agreement) should be replaced by "JSC Nordic Rus Holding".

10. In a letter of 29 July 1997 to Acron and North River, Norsk Hydro confirmed an understanding between the parties that, when they jointly considered it appropriate, a jointly owned trading company would be formed between Norsk Hydro and Acron. Consequently, Norsk Hydro stated that there was agreement between the parties that a certain reference in the Shareholders' Agreement to the holding company should be replaced by a reference to the parties. Acron and North River confirmed in a note on the letter that they agreed to and accepted its contents.

(c) The Charter of Nordic Rus

11. On 29 July 1997, the Charter of Nordic Rus (hereinafter called *"the Charter"*) was approved by decision of the founders. According to Article 4 of the Charter, the shareholders of Nordic Rus were Acron and Hydro Agri Russland.

12. According to Article 9 of the Charter, the Registered Capital of Nordic Rus would be 13,600,000,000 roubles and consist of 13,600,000 shares with a nominal value of 1,000 roubles each. Acron would own 51% and Hydro Agri Russland 49% of the shares.

13. The same Article provided that the owners' contributions to the Registered Capital of Nordic Rus would be as follows. Acron would contribute an amount of 311,100,000 roubles and 132,712 shares in Apatit as well as 102,961,574 shares in Dorogobuzh. Hydro Agri Russland would contribute an amount of 298,900,000 roubles and 509,718 shares in Apatit.

14. Article 18 of the Charter contained rules about the termination of Nordic Rus's activities. It provided that these activities could be terminated through liquidation or reorganization according to the Charter and Russian law (Article 18.1). Voluntary liquidation could be decided at a General Shareholders' Meeting (Article 18.4). In such a case a liquidation commission should be nominated by the General Shareholders' Meeting (Article 18.5). As regards the distribution of the property following a voluntary liquidation, the Charter provided (Article 18.6):

> "The property remaining after the creditors' demands being satisfied shall be distributed by the liquidation commission among the shareholders in order of priority established by the legal acts of the Russian Federation. The shareholders shall receive in kind the property contributed by them to the Registered Capital of the Company under the following provisions:
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> a) after satisfying the demands of the creditors and other demands according to the legislation, each shareholder has a right to receive as a part of the liquidated Company' property, shares of the JSC 'Apatit' and JSC 'Dorogobuzh' (including the shares received by the Company free of charge due to the enlargement of the Registered Capital of the JSC 'Apatit' and JSC 'Dorogobuzh' and distributed by the issuers proportional to the number of shares of the above-mentioned companies) contributed before to the Registered Capital of the Company;
>
> b) if for satisfaction of the creditors' demands in the process of the Company's liquidation a part of shares contributed before by one of the shareholders as the payment for the Registered Capital is sold, then all other shares of the JSC 'Apatit' and JSC 'Dorogobuzh' contributed before by the shareholders as the payment for the Registered Capital are to be sold. The shareholders have the priority right to purchase the alienated shares at the price of their sale."

(d) Termination of the Shareholders' Agreement

15. On 13 December 2001, Norsk Hydro and Hydro Agri Russland sent the following letter to Acron and North River:

> "Norsk Hydro ASA and Hydro Agri Russland AS hereby terminates the Shareholders Agreement entered into by and between Joint Stock Company Acron, North River Investments S.A and Norsk Hydro ASA 12 July 1996, as amended the same date and supplemented by Additional Agreement to the Shareholders Agreement dated 29 July, 1997. The termination is made in accordance with Clause 9 paragraph 1 of the Shareholders Agreement and will take effect on 1 July, 2002.
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> Noting that the rights and obligations of the parties under the Shareholders Agreement are to remain unchanged during the period of notice, Norsk Hydro ASA and Norsk Hydro Russland AS hereby reserves the right to avail itself of any such rights."

(e) Norsk Hydro's demerger

16. Norsk Hydro distributed to all its registered shareholders a Memorandum dated 28 November 2003 concerning a planned demerger of the company. It explained that Norsk Hydro's business activities were concentrated in three core areas, *i.e.* Oil and Energy ("Hydro Oil and Energy"), Aluminium ("Hydro Aluminium") and Agri ("Hydro Agri"), and that Norsk Hydro's Board of Directors had proposed that Hydro Agri should be established as a separate publicly traded company by means of a demerger transaction effected in accordance with Chapter 14 of the Norwegian Public Limited Companies Act and a Demerger Plan, approved by the Board of Directors.

17. The Demerger Plan was attached to the Memorandum as Exhibit 1. It indicated as the main content of the demerger (Article 1.1):

> "Upon the demerger of Norsk Hydro ASA in accordance with the provisions of this Demerger Plan (the 'Demerger'), an independent group with AgriHold ASA as parent company (the 'Agri Group') shall be established to continue the activities carried on by the Hydro Group in connection with fertiliser products and related chemicals and industrial gases and which today constitute the Agri business area, including research and development, production, marketing and trade related to these products (the 'Agri Business'). The companies that shall form part of the Agri Group after the Demerger (the 'Agri Companies') together with certain partly-owned companies where the Hydro Group's ownership interest is part of the Agri Business (the 'Minority Interest Companies') are listed in Appendix 1."

18. Under the heading "ALLOCATION OF ASSETS, RIGHTS AND LIABILITIES UPON THE DEMERGER" (Article 2), the Demerger Plan provided, *inter alia*, as follows:

> **"2.1 Transfer of Assets and Rights**
>
> Upon the Demerger, the following assets and rights shall be transferred from Norsk Hydro ASA to AgriHold ASA:
>
> a. All shares and interests owned by Norsk Hydro ASA in the Agri Companies and the Minority Interest Companies, including
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> - - -
>
> (xviii) 50% of the shares in Hydro Agri Russland AS,
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> - - -
>
> e. All rights in connection with disputes that primarily relate to the Agri Business.
>
> f. All rights under agreements and employment relationships that are transferred to AgriHold ASA in accordance with items 2.3 and 2.4 below.
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> - - -

h. All other assets and rights that primarily relate to the Agri Business, whether known or unknown, contingent or actual.

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2.3 Assignment of Agreements

Upon the Demerger, AgriHold ASA shall acquire from Norsk Hydro ASA all rights and obligations relating to:

a. Employment agreements and other agreements relating to employment relationships that are to be transferred to AgriHold ASA in accordance with item 2.4 below.
b. All other agreements that primarily relate to the Agri Business.

AgriHold ASA shall use all reasonable endeavors to obtain the release of Norsk Hydro ASA from its obligations under such agreements that shall be assigned to AgriHold ASA. In the event that the necessary consent to the assignment of an agreement is not obtained, the parties shall, as far as possible, ensure that the agreements continue in force in the name of Norsk Hydro ASA but for the account and risk of AgriHold ASA. If this is not possible, the parties shall, as far as possible, enter into an agreement between themselves that grants to AgriHold ASA the same rights against and liabilities towards Norsk Hydro ASA as those that Norsk Hydro ASA has against and owes to the contractual party in question."

19. The Demerger Plan further indicated as one of the conditions for the demerger (Article 10):

"c. All consents required for the assignment of agreements from Norsk Hydro AS to AgriHold ASA under the Demerger shall have been obtained, and all rights of termination of agreements to which an Agri Company or a Minority Interest Company is a party shall have been waived or the deadline for exercising any such rights shall have expired without such rights having been exercised. This shall, however, not apply if, in the opinion of the Board of Directors of each of Norsk Hydro AS and AgriHold ASA, neither the potential failure to obtain consents nor the potential terminations of such agreements would individually or in the aggregate have a material adverse effect on the Agri Companies."

20. The list of Minority Companies appearing in Appendix 1 to the Demerger Plan includes Hydro Agri Russland, Apatit, Dorogobuzh and Nordic Rus.

21. The Demerger Plan provided in regard to the consummation of the demerger (Article 11):

"The Demerger shall be consummated when notice from AgriHold ASA that the Demerger shall enter into force is registered with the Norwegian Register of Business Enterprises.

Such registration with the Norwegian Register of Business Enterprises shall take place as soon as possible after the conditions laid down in item 10 above have been satisfied, but in any event no earlier than 24 March 2004. In the event that such registration has not taken place by 30 June 2004, the Demerger shall lapse."

22. The demerger was consummated and became effective on 24 March 2004. AgriHold ASA took over all the assets and obligations of Norsk Hydro ASA related to agri-business in accordance with the Demerger Plan. At that time AgriHold ASA was a wholly owned subsidiary of Norsk Hydro ASA. In connection with the demerger, AgriHold ASA changed its name to Yara International ASA, and the company ceased to be a wholly owned subsidiary of Norsk Hydro as from 25 March 2004, when its shares were listed on the Oslo Stock Exchange.

II. The proceedings

23. On 13 December 2006, Yara submitted a Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter called *"the SCC Institute"*). Yara appointed as arbitrator Dr. Julian D.M. Lew, Q.C. The case was registered by the SCC Institute as Arbitration No. 135/2006.

24. In a First Submission of 15 February 2007, Acron contested the SCC Institute's jurisdiction and requested the dismissal of the Request for Arbitration. Acron indicated that, if its request for dismissal was refused, Acron would appoint Professor Sergei Lebedev as arbitrator.

25. Yara responded on 1 March 2007 to Acron's First Submission.

26. In a Second Submission of 15 March 2007, Acron maintained and developed its view that the SCC Institute lacked jurisdiction in this case.

27. On 22 March 2007, the Board of the SCC Institute decided that the Institute did not manifestly lack jurisdiction over the dispute. The Board also appointed Former Justice Hans Danelius Chairperson of the Arbitral Tribunal.

28. On 4 May 2007, the SCC Institute referred the case to the Arbitral Tribunal.

29. In a Procedural Order of 21 May 2007, the Arbitral Tribunal, noting that Acron intended to raise objections to the Arbitral Tribunal's jurisdiction, decided that the parties' initial briefs should deal with the issue of jurisdiction.

30. Acron's First Submission on the issue of jurisdiction is dated 13 July 2007. Yara responded in its First Submission on the issue of jurisdiction of 7 September 2007. Further briefs on the same issue were submitted by Acron on 16 November 2007 and 20 February 2008 and by Yara on 7 December 2007

31. A hearing on the issue of jurisdiction was held in Stockholm on 27 and 28 March 2008. At the hearing, Yara was represented by Advokat and Professor Kaj Hobér and Advokat Pontus Ewerlöf, and Acron was represented by Advokat Johan Gernandt and Advokat Jonas Eklund. Professor Geir Woxholth and Professor Tore Bråthen were heard by the Arbitral Tribunal as experts on Norwegian law.

32. Post-hearing briefs were submitted by both parties on 28 April 2008.

33. On 29 April 2008, Acron submitted a cost claim which was commented on by Yara on 9 May 2008.

III. Relief sought by the parties

34. Yara requests that the Arbitral Tribunal

(a) order Acron to act in good faith to dissolve Nordic Rus, or to cause Nordic Rus to be dissolved, and, upon dissolution of Nordic Rus, to return, or cause the return of, 509,728 voting shares in Apatit and 49% of the remaining net value of Nordic Rus to Yara,

(b) order Acron to compensate Yara for its costs of arbitration, and

(c) order Acron, as between the parties, alone to bear the fees and costs due to the Arbitral Tribunal and the SCC Institute.

35. Yara also indicated its intention to submit an additional claim for damages once the jurisdictional issue had been resolved.

36. Acron has requested that the Arbitral Tribunal

(a) dismiss Yara's action for lack of jurisdiction, and

(b) order Yara to compensate Acron for all its litigation costs incurred in these proceedings and, as between the parties, to bear the costs of the arbitral proceedings.

37. Acron also requested that a separate award be rendered on the issue of the Arbitral Tribunal's jurisdiction.

IV. The parties' positions and the Arbitral Tribunal's assessment

38. Acron contests the Arbitral Tribunal's jurisdiction on the basis that there is no arbitration agreement between Yara and Acron. It is Yara that has the burden to prove that it has become a party to the Shareholders' Agreement and to the arbitration clause therein, and it is not incumbent on Acron to prove the opposite. Acron disputes the Arbitral Tribunal's jurisdiction on a number of separate or connected grounds.

39. The Arbitral Tribunal has examined the various objections to its jurisdiction raised by Acron. Both parties' arguments relating to each of these objections, as presented in their written and oral submissions, have been taken into account. These arguments are summarised in this section of the Award, and the Arbitral Tribunal's reasoning and conclusions are indicated on each specific issue.

(a) Have Yara' s claims been sufficiently explained?

(i) The parties' arguments

Yara:

40. Yara claims that the Tribunal should order Acron to dissolve Nordic Rus, or to cause Nordic Rus to be dissolved, and, upon dissolution of Nordic Rus, Acron should return, or cause the return to Yara of, 509,728 voting shares in Apatit and 49% of the remaining net value of Nordic Rus. Moreover, Yara has indicated that it also intends to submit a claim for damages.

41. At the time of the demerger, the Shareholders' Agreement had been terminated, but there were certain rights and obligations under the Agreement which were still to be fulfilled. Thus, the parties were to dissolve the jointly owned company Nordic Rus and all property contributed to the capital of the company was to be returned according to Article 9 of the

Agreement. These remaining rights and obligations constitute the basis for Yara's claims in the arbitration.

Acron:

42. Yara has not explained if, and to what extent, its substantive claims are based on, or related to, the substantive provisions of the Shareholders' Agreement. It is not possible to examine the issues of jurisdiction unless Yara clarifies these matters. In so far as Yara holds that its claims are based on the provisions of that Agreement, it should be explained why Yara considers itself entitled to rely of these provisions despite the fact that Norsk Hydro has terminated the Agreement. As Yara has intentionally avoided providing the substantive grounds for the Arbitral Tribunal's jurisdiction, it is not possible for the Arbitral Tribunal to conclude that it has jurisdiction over the dispute.

43. There are in fact only two alternatives for the Arbitral Tribunal, *i.e.* either to dismiss Yara's action or to postpone the decision on jurisdiction until Yara has sufficiently explained the legal grounds for its claims. If the Tribunal should decide that it has jurisdiction over the dispute, Acron reserves the right to raise the issue of jurisdiction again after Yara has indicated the grounds for its substantive claims.

(ii) The Arbitral Tribunal's reasoning

44. The Arbitral Tribunal considers that a distinction must be made between Yara's main claim, which has been formulated in precise terms, and Yara's announcement of its intention to present at a later stage an additional claim for damages.

45. Yara's present claim is that the Arbitral Tribunal should order Acron to dissolve Nordic Rus, or to cause Nordic Rus to be dissolved, and, upon dissolution of Nordic Rus, to return, or cause the return of, 509,728 voting shares in Apatit and 49% of the remaining net value of Nordic Rus to Yara. The explanation given by Yara is that, after the Shareholders' Agreement had been terminated, there remained for the parties to dissolve Nordic Rus and to have the capital of Nordic Rus returned to the owners according to Article 9 of the Shareholders' Agreement. The Arbitral Tribunal considers, having reviewed the wording of Article 9, last paragraph, of the Shareholders' Agreement, that this claim and the grounds for it are sufficiently clear and that there is no basis for dismissing it for lack of precision.

46. On the other hand, as regards Yara's intention to present an additional claim for damages, the Arbitral Tribunal finds no reason to examine whether or not it may have jurisdiction over such claim which has not as yet been submitted to the Tribunal and notes that Yara itself has not asked for such an examination. If Acron raises an objection to this additional claim when it is introduced, the Tribunal will consider it then.

(b) Can Yara's claims be the subject of arbitration?

(i) The parties' arguments

Acron:

47. Yara's – probable – claims on the liquidation of Nordic Rus and the restitution of assets belonging to Nordic Rus relate to the legal status of Nordic Rus, which is a Russian company.

Such issues are subject to the exclusive jurisdiction of Russian law and courts and should therefore be examined on the basis of Russian law and, *inter alia*, the regulation set forth in Article 18 of the Charter of Nordic Rus. Since it is exclusively the task of the Russian courts to determine under Russian law whether Nordic Rus can be dissolved and, if so, how its assets should be distributed, Yara's claims cannot be subject to arbitration.

Yara:

48. The claims are based of the Shareholders' Agreement and as contractual claims can be the subject of arbitration.

(ii) The Arbitral Tribunal's reasoning

49. The Arbitral Tribunal notes that Yara's claim is based on Article 9, last paragraph, of the Shareholders' Agreement which reads as follows:

> "If this Agreement should terminate for any reason, either Party may require that the [Holding] Company and the Trading Company shall be dissolved. If the companies are dissolved then each Party shall have returned to it all property (including shares of P.O. Apatite and Dorogobuzh) that the Party contributed to the capital of the companies. In addition the remaining net value of the [Holding] Company and the Trading Company to be split between the Parties according to their ownership position of the [Holding] Company."

50. This clause must be considered to regulate the parties' rights and obligations between themselves in the case of termination of the Shareholders' Agreement "for any reason", including the circumstances of the present case where the Agreement was terminated by one of the parties giving notice according to the first paragraph of Article 9.

51. The purpose of the clause is clearly to ensure to each party a right to have its contribution to the joint company returned and to get a fair share of any further assets of that company in case the joint venture, for some reason, will no longer continue. It provides for a duty, incumbent on each party, to co-operate in winding up the company and in distributing its assets among the parties. These obligations are consistent with the provisions of the Charter of Nordic Rus on voluntary liquidation which may be decided at a General Shareholders' Meeting and which will also, subject to creditors' claims being satisfied, result in contributed property being returned and other assets being distributed among the shareholders.

52. The Arbitral Tribunal thus considers that the last paragraph of Article 9 imposes a contractual obligation on each party in relation to the other parties. It creates a duty to co-operate in the voluntary liquidation of the jointly owned company, this being a matter falling essentially within the competence of the shareholders. The Arbitral Tribunal finds that such a contractual undertaking is not inconsistent with any Russian legal rules requiring, as conditions for the dissolution of a company, compliance with certain formalities and a final decision by a Russian court or public authority. Since this obligation exists under the contract in a specific factual situation, the Arbitral Tribunal has jurisdiction to determine whether the factual situation is such as described in the contract and, if so, what the parties' rights and obligations are and also which particular rights or obligations, if any, may be given effect as between the parties.

53. The Arbitral Tribunal therefore finds that this particular objection by Acron must be rejected.

(c) Would an award be enforceable?

(i) The parties' arguments

Acron:

54. A fundamental principle in international arbitration law is that an agreement to arbitrate shall be confirmed in writing between the relevant parties. According to the rules of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), only an award based on an arbitration agreement in writing can be enforced under the Convention. This principle is established in Article II.1 of the New York Convention, and Article II.2 of the Convention specifies the meaning of the term "agreement in writing". However, there is no agreement between Yara and Acron. Russian law also requires that the arbitration agreement shall be in writing and that the party seeking enforcement of an arbitral award in the Russian Federation shall submit the original copy of the arbitration agreement to the court. Consequently, even if the Arbitral Tribunal were to accept jurisdiction over the dispute and would adjudicate in favour of Yara, it would not be possible for Yara to seek enforcement of the award. In other words, any arbitration proceedings between Yara and Acron are completely meaningless.

Yara:

55. The Arbitral Tribunal's jurisdiction is based on the arbitration clause in Article 13 of the Shareholders' Agreement, and Yara is a party to that agreement. Consequently, there is a written arbitration agreement between Acron and Yara which would be recognised under the New York Convention. In any case, it is irrelevant for the issue of jurisdiction whether Yara's claim can subsequently result in an enforceable award. Whether a party's claim may result in an award which is enforceable in any specific country is not an element that *per se* affects the validity of the arbitration agreement or the existence or non-existence of jurisdiction over the dispute.

(ii) The Arbitral Tribunal's reasoning

56. The Arbitral Tribunal considers that the question of whether a future award can be enforced is not determinative of the Tribunal's jurisdiction or whether the arbitration can proceed. There is neither in the Arbitration Rules of the SCC Institute nor in Swedish arbitration law any rule requiring that an arbitral tribunal, before establishing its jurisdiction, shall examine whether its future award can be enforced. Such a requirement would also be problematic, since enforcement rules differ between countries, and there would be no basis for choosing, for the purpose of jurisdiction, any particular set of enforcement rules with which a future award should comply. In any case, it is not for the Arbitral Tribunal to determine where the award would or could be enforced. Moreover, if enforcement cannot take place, there may be alternative remedies for the party which has obtained an arbitral award in its favour.

57. The Arbitral Tribunal therefore finds that any difficulty in enforcing a future award is not a factor for consideration and should be left out of account when determining the Arbitral Tribunal's jurisdiction.

(d) Did the Shareholders' Agreement ever come into effect, and, if it did, was it abandoned or did it become ineffective?

(i) The parties' arguments

Acron:

58. The Shareholders' Agreement never came into effect or, alternatively, it was abandoned by the parties or became ineffective. There were substantial differences between the company which were envisaged in the Shareholders' Agreement and the company actually created. First of all, the Shareholders' Agreement, as amended, concerned a company to be established by Norsk Hydro and Acron, while the company actually formed, Nordic Rus, was owned by Norsk Hydro's subsidiary Hydro Agri Russland and Acron. The indirect holding of shares on the "Hydro-side" was never reflected in the Shareholders' Agreement or any of its amendments. This was not the result of an omission by the parties.

59. Initially, the intention was that Acron should own its shares in Nordic Rus through a "Nominee". This holding structure was reflected in the Shareholders' Agreement. When this idea was abandoned, the new situation was carefully regulated in an amendment to the Shareholders' Agreement. However, there is not one single provision in the Shareholders' Agreement or its amendments, reflecting the fact that Norsk Hydro's direct holding was changed to an indirect holding of shares. This is, from a contractual perspective, a major difference which in itself shows that the Shareholders' Agreement was never implemented or, in any event, that the parties abandoned the Agreement as the instrument governing the activities of Nordic Rus.

60. Without addressing the issue of indirect holding, it is not possible to apply the Shareholders' Agreement. In particular, the provision in Article 9 regarding return of shares which Yara probably relies on cannot be applied. Yara has not explained how the Shareholders' Agreement would apply in spite of this new and contractually unpredicted structure.

61. There are also a number of other substantial differences between the company anticipated in the Shareholders' Agreement and the company actually formed, *i.e.* Nordic Rus, with regard to contribution of assets and cash to the company. The contributions paid to the capital of Nordic Rus, as specified in its Charter, differed a great deal from the contributions foreseen in the Shareholders' Agreement. Some time in 1992 or 1993, Norsk Hydro also transferred 50% of its shares in Hydro Agri Russland to another company, NW Nordwest. In fact, the parties acted as if the Shareholders' Agreement did not exist.

62. Instead of the Shareholders' Agreement, the documents which govern the activities of Nordic Rus are its Charter and the Agreement on the Setting Up of Nordic Rus. The parties to these documents are Hydro Agri Russland and Acron. In addition, these documents contain provisions which are incompatible with the Shareholders' Agreement. For instance, Article 18 of the Charter provides for a procedure to be followed in the event of liquidation which is completely different from the procedure set forth in Article 9 of the Shareholders' Agreement.

63. When the Shareholders' Agreement was terminated on 13 December 2001, both Norsk Hydro and Hydro Agri Russland signed the termination letter. This indicated that these companies did not themselves know which of them was to be considered a party to the

Shareholders' Agreement. This is a further confirmation of the fact that the Shareholders' Agreement was never implemented or, alternatively, had been abandoned by the parties.

64. Moreover, Norsk Hydro and Yara, by making several indirect transfers in the joint company Nordic Rus, confirmed that the Shareholders' Agreement never came into effect and, in any event, these transfers made the Agreement ineffective. The Agreement does not "function" unless there is consistency between the parties to the Agreement and the holding of shares in the company whose activities are governed by the Agreement. Yara has not explained the relationship between Norsk Hydro and NW Nordwest or how any allegedly remaining rights and obligations under the Shareholders' Agreement were dealt with in these transactions. These transfers shall, *inter alia,* be regarded as conclusive evidence that Norsk Hydro considered the Shareholders' Agreement or any rights pertaining thereto as not existing. For instance, the liquidation clause in Article 9 of the Shareholders' Agreement does not work if the Shareholders' Agreement and the holding of shares in Nordic Rus are "split" between different parties. Following Norsk Hydro's transfer of 50% of its indirect holding of shares in Nordic Rus to NW Nordwest, it is implausible that Norsk Hydro would be entitled to demand liquidation of Nordic Rus and the "return" of "its" contribution of shares in Apatit and Dorogobuzh. The same applied to Yara when it acquired Norsk Hydro's remaining 50% in Hydro Agri through the demerger. Consequently, following these transfers, the Shareholders' Agreement, or any possibly surviving provisions of that Agreement, were finally rendered ineffective.

65. Yara has not explained how the Shareholders' Agreement was to apply following these transfers, or how a transfer of 50% of Norsk Hydro's indirect holding of shares in Nordic Rus could have resulted in a transfer of 100% of the allegedly remaining rights and obligations under the Shareholders' Agreement.

66. If the main agreement is ineffective, this also applies to the arbitration clause contained in the main agreement. Consequently, if a party claims that the main agreement is ineffective and that the Arbitral Tribunal therefore lacks jurisdiction, the Arbitral Tribunal shall examine this as a jurisdictional issue. Yara has the burden of proof in this respect but has not introduced any relevant facts or arguments. Consequently, the Arbitral Tribunal shall base its considerations in this respect on the facts and arguments introduced by Acron.

67. The Agreement was not subsequently "brought to life" by the fact that Yara "re-acquired" 50% of the shares of Hydro Agri Russland. Moreover, the share capital of Nordic Rus and the parties' contributions to the company differed from what was provided in the Shareholders' Agreement. Consequently, the Shareholders' Agreement never came into effect, or, if it did, it was abandoned. Norsk Hydro and Yara acted in a manner which showed that they considered the Shareholders' Agreement to be non-existing. For instance, in Russian proceedings concerning Nordic Rus they never even referred to the Shareholders' Agreement. It follows that no claims can now be based on that Agreement.

Yara:

68. There is no doubt that the Shareholders' Agreement came into effect. The Agreement was also amended, and it remained in effect until it was finally terminated by Norsk Hydro. It is not true that Norsk Hydro and Yara acted as if the Agreement was non-existent. The Agreement, as amended, continued to govern the parties' relations.

69. The parties entered into the Shareholders' Agreement on 1 July 1996. The Shareholders' Agreement came into force on that date and was effective until 1 July 2002. This is evident from the fact that the Shareholders' Agreement was amended twice, on 12 July 1996 and 29 July 1997. This also follows from the minutes of a Nordic Rus Board meeting as late as 26 September 2001, where the parties referred to the Shareholders' Agreement.

70. There is no evidence for Acron's assertion that, in any event, the Shareholders' Agreement was abandoned. Moreover, even if, *arguendo*, the Shareholders' Agreement had been abandoned or not complied with, this does not affect the arbitration agreement between Norsk Hydro and Acron (subsequently transferred from Norsk Hydro to Yara). This follows from the doctrine of separability.

(ii) The Arbitral Tribunal's reasoning

71. The Arbitral Tribunal notes that the Shareholders' Agreement was not strictly complied with in all respects and, in particular, that the parties to the Agreement chose a somewhat different structure for the joint company they set up. However, this does not mean that the Shareholders' Agreement never came into effect or that it was abandoned. In the Arbitral Tribunal's opinion, the fact that the Agreement was formally amended by the parties on two occasions clearly shows that they considered the Agreement to be in effect. It is particularly striking that on 29 July 1997, *i.e.* the same day as the Charter of Nordic Rus was adopted, the parties signed an amendment to the Shareholders' Agreement in which they regulated the relations between the Shareholders' Agreement and the Charter by providing that in case of conflict the Charter would prevail. They also agreed that the name "Nordic Russia Holding S.A." in the Shareholders' Agreement should be replaced by the name "JSC Nordic Rus Holding". In a letter of the same date, Norsk Hydro confirmed a further agreement between the parties as to the interpretation or application of certain clauses in the Shareholders' Agreement.

72. In these circumstances, there can be no doubt that the Shareholders' Agreement came into effect and remained in effect for a considerable period of time. The Arbitral Tribunal finds no indication that it was abandoned at any moment and considers that it remained in force until it was terminated by Norsk Hydro as from 1 July 2002.

73. As regards the transfer of shares from Norsk Hydro to NW Nordwest, the Arbitral Tribunal considers that any such transaction after the Shareholders' Agreement had been terminated does not affect the Arbitral Tribunal's jurisdiction.

(e) Can any claims be based on the Shareholders' Agreement after the termination of the Agreement?

(i) The parties' arguments

Acron:

74. Yara's claims are based on the Shareholders' Agreement. However, this Agreement was terminated on 1 July 2002. Consequently, there were no rights or obligations under that Agreement which could have been transferred to Yara at the time of the demerger in 2004, and the Tribunal is not competent to adjudicate any substantive claim made by Yara.

75. Acron contests that Yara, after the termination of the Shareholders' Agreement, was free to transfer any remaining rights and obligations under the Agreement. Acron's analysis is in short as follows:

(i) If the parties have agreed on a limited right to transfer rights and obligations, the consequences of a termination is that the right ceases to exist following the termination. This is the logical and natural contractual understanding between the parties.

(ii) In any event, the right to transfer an agreement cannot, following the termination, be wider than it was during the "lifetime" of the agreement. When agreeing on an assignment clause, the parties cannot have intended that a termination should result in "freedom" to transfer any remaining rights and obligations to anyone.

Yara:

76. It is correct that the Shareholders' Agreement was terminated on 1 July 2002. However, there were some clauses in the Agreement which survived the determination and were subsequently transferred to Yara.

77. Firstly, there were specific clauses that clearly stipulated the survival of a termination, such as Article 8 regarding confidentiality. This clause explicitly states that it will survive the termination of the principal agreement for a period of five years.

78. Secondly, other provisions survived the termination by virtue of their underlying purpose and nature. Consequently, the arbitration agreement in Article 13, which constitutes a separate agreement, survived the termination as a consequence of the doctrine of separability. Moreover, the remaining rights (and obligations) yet to be fulfilled under Article 9 survived, as well as any other right arising out of the terminated agreement, such as the right to claim repayment, restitution and damages.

79. Apart from these exceptions, no other provisions survived the termination. This includes Article 12 of the Shareholders' Agreement. It was terminated and therefore ceased to exist. As confirmed by Professor Woxholth, the main rule is that the entire agreement becomes ineffective subsequent to a termination, but there are certain exceptions due to special reasons, for example, competition clauses and arbitration agreements. Article 12 is not one such exception.

80. As Yara has understood Acron's position, Acron agrees that Article 12 did not survive Yara's termination of the Shareholders' Agreement. Rather, Acron seems to be arguing that "the parties' intent" with respect to Article 12 somehow survived the termination, resulting in a total prohibition to transfer rights and obligations without any exception. Acron's position is rejected.

(ii) <u>The Arbitral Tribunal's reasoning</u>

81. The Arbitral Tribunal considers that after the termination of an agreement there may well be remaining rights and claims which could be based on the terminated agreement. For example, accrued rights at the time of termination, such as money due or other entitlements coming from the agreement, are not extinguished by the underlying agreement coming to an end. Rather, the entitlement remains to be determined in accordance with the agreement. If a

dispute arises concerning accrued rights, it would be determined in accordance with the mechanism for dispute settlement in the agreement, including arbitration if that was agreed. The question as to whether or to what extent an agreement continues to have effects after its termination will to a large extent depend on the contents and interpretation of the agreement.

82. In the present case, the last paragraph of Article 9 of the Shareholders' Agreement deals with the rights and obligations of the parties after the termination of the Agreement. In this paragraph the parties have undertaken certain mutual obligations relating to the period following the termination of the Agreement. It would indeed be a contradiction to conclude that these obligations no longer apply after the Shareholders' Agreement has been terminated, since that is precisely the time when they were intended to apply. The Arbitral Tribunal therefore finds that the obligations derived from the last paragraph of Article 9 remained after the termination of the Shareholders' Agreement and that a dispute about them could be subject to arbitration under the arbitration clause in Article 13 which continued to apply to any remaining disputes regarding the application of the Shareholders' Agreement.

(f) Did Norsk Hydro's claims against Acron fall within the category of assets that were to be transferred to Yara under the Demerger Plan?

(i) The parties' arguments

Acron:

83. No rights based on the Shareholders' Agreement were transferred to Yara as a result of the demerger. In this respect, Acron attaches weight to the following elements:

(a) The Demerger Plan contains no wording or even the slightest indication as to the existence of any remaining rights or obligations under the Shareholders' Agreement or any disputes in relation thereto.

(b) The Shareholders Agreement had expired long before the demerger.

(c) While the parties had certain discussions prior to and following the termination of the Shareholders' Agreement, there was no dispute regarding the Shareholders' Agreement at the time of the demerger.

(d) Acron had at that time already disposed of 50% of its indirect holding of shares in Nordic Rus by transferring half of its shareholding in Hydro Agri Russland to NW Nordwest.

(e) The Demerger Plan contained a listing of shareholdings with respect to Nordic Rus, Apatit and Dogorobuzh, a listing which, however, was misleading.

84. The Demerger Plan does not show that any claims resulting from the Shareholders' Agreement were transferred to Yara. There is a complete lack of identification of the Shareholders' Agreement or of any rights pertaining thereto in the Demerger Plan. On the contrary, there are provisions in the Demerger Plan which show that no "automatic" transfer of contractual rights or obligations was intended (item 2.3 second para. – *"AgriHold ASA shall use all reasonable efforts to obtain the release of Norsk Hydro ASA from its obligations under such agreements that shall be assigned to AgriHold ASA"* – and item 10 c. – *"All consents required for the assignment of agreements from Norsk Hydro AS to AgriHold ASA*

under the Demerger shall have been obtained"), and Yara never notified Acron that any transfer had taken place. Moreover, by the transfer of 50% of its shares in Hydro Agri Russland to another company, NW Nordwest, Norsk Hydro had reduced its – indirect – holding in Nordic Rus. It has not been explained how a transfer of 50% of the shares in Hydro Agri Russland could have resulted in a transfer of 100% of the rights and obligations under the Shareholders' Agreement.

85. Given, *inter alia*, the fact that the Shareholders' Agreement had expired long before the demerger and that Norsk Hydro had already disposed of half of its indirect holding of shares by transferring them to NW Nordwest, it cannot possibly be held that the remaining rights and obligations under the Shareholders' Agreement, if any, were a part of Norsk Hydro's Agri business. Therefore, Yara cannot rely on section 2.3 b) of the Demerger Plan.

86. Based on these facts it is simply not possible to draw any conclusions as to whether or not any remaining rights and obligations under the Shareholders' Agreement were included in the transfer. Not even Professor Woxholth could explain how section 2.3 b) of the Demerger Plan could possibly include an agreement that had been terminated much earlier. Consequently, it is clear that the remaining rights and obligations under the Shareholders' Agreement, if any, have not been sufficiently identified in the Demerger Plan.

87. In summary, Yara has failed to prove that the demerger – which in Norwegian law is described as a "partial universal succession"[3] – resulted in a transfer of the Shareholders' Agreement, or any possibly surviving rights and obligations thereof, to Yara.

Yara:

88. There are several elements in the Demerger Plan which show that Norsk Hydro's claims against Acron were included in the assets transferred to Yara. Reference may be made to item 2.1 a) (*"All shares and interests owned by Norsk Hydro ASA in the Agri Companies and the Minority Interest Companies"*), item 2.1 e) (*"All rights in connection with disputes that primarily relate to the Agri Business"*), item 2.3 (*"Upon the Demerger, AgriHold ASA shall acquire from Norsk Hydro ASA all rights and obligations relating to: ... b. All other agreements that primarily relate to the Agri Business"*) and Exhibit 2 which refers to interests in Hydro Agri Russland AS, JSC Apatit, JSC Dogorobuszh and NordicRus Holding. As regards item 2.3 e), it may be added that there was a dispute between Norsk Hydro and Acron at the time of the demerger. The requirement of identification of the transferred assets under Norwegian law is therefore fulfilled.

89. Since the place of arbitration is Sweden, Swedish law is applicable to the question of the validity, the interpretation, and the assignment etc. of the arbitration agreement. The question whether or not the arbitration agreement has been duly transferred to Yara is to be analysed in two steps, *viz.*:

(a) Can an arbitration agreement be transferred with binding effect on the parties thereto by virtue of universal succession? This question is to be decided under Swedish law.

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[3] While "universal succession" signifies a complete succession of all rights and obligations, "partial universal succession" is a complete succession of all rights of obligations but limited, for instance, to a particular business area.

(b) Does a demerger constitute such universal succession? This question is to be decided under Norwegian law, since Norsk Hydro and Yara are Norwegian companies and the demerger has been effectuated in accordance with Norwegian law.

90. Under Swedish law, universal succession (by reason of bankruptcy, merger and demerger etc.) results in the automatic transfer of all assets, rights and obligations of one legal subject to another legal subject. In such case the successor becomes bound by, *inter alia*, an arbitration agreement. Accordingly, it is not required to obtain the consent of a contracting party in the case of universal succession. In other words, universal succession is an exception to the main rule that an arbitration clause cannot bind third parties.

91. Under Norwegian law, a demerger constitutes (partial) universal succession and results in the transfer of assets, rights and obligations from the transferor company (Norsk Hydro in this case) to the transferee company (Yara) by virtue of the procedure itself and on the basis of the Demerger Plan. Hence, under Norwegian law, Norsk Hydro's remaining rights and obligations under the terminated Shareholders' Agreement, including the arbitration agreement, were automatically transferred to Yara upon the consummation of the demerger.

92. Yara's position is supported by Professor Woxholth who in his Expert Opinion concludes that "Acron, as a party to the terminated Shareholders' Agreement and to the arbitration agreement, has to accept Yara as the ('new') contracting party of the arbitration agreement and as the successor to the remaining rights and obligations under the terminated Shareholders' Agreement". Moreover, this position was supported by Professor Bråthen, on the assumption that there is no provision of the agreement that forbids or imposes conditions governing the demerger.

93. On 24 March 2004, Norsk Hydro demerged with Yara. The demerger was effected in full compliance with the requirements of Norwegian law. The scope of the demerger was to establish an independent group with Yara as parent company, the Agri Group, to continue the activities carried out by the Hydro Group in connection with the Agri Business.

94. According to the Demerger Plan, the assets and rights to be transferred from Norsk Hydro to Yara upon the demerger included all rights in connection with disputes primarily relating to the Agri Business and all other assets and rights primarily relating to the Agri Business. Yara should also acquire from Norsk Hydro all rights and obligations relating to agreements that primarily relate to the Agri Business.

95. The Demerger Plan was made in full compliance with Norwegian law, which simply requires a statement of the distribution of the company's assets, rights and obligations between the companies participating in the demerger. There is no requirement for a detailed description.

(ii) <u>The Arbitral Tribunal's reasoning</u>

96. The Arbitral Tribunal notes that the purpose of the demerger was to transfer all Norsk Hydro's activities, rights and obligations in the Agri sector to Yara. The purpose was to separate the Agri sector from Norsk Hydro's other two sectors Oil and Energy and Aluminium, and the transfer included shares and interests in a large number of Agri companies and Minority Interest Companies, including Hydro Agri Russland, Apatit, Dorogobuzh and Nordic Rus. The transfer also included all rights in connection with disputes

primarily relating to the Agri Business as well as all rights and obligations relating to agreements primarily within that sector.

97. The Arbitral Tribunal considers that the Shareholders' Agreement which related to the fertiliser business naturally related to Norsk Hydro's Agri Business and thus fell within the categories of agreements and contractual rights and obligations transferred according to the Demerger Plan. The fact that the Shareholders' Agreement was not expressly referred to in the Demerger Plan is not determinative. The clear intent was that Agri-related agreements fall within the Demerger Plan and the Shareholders' Agreement is Agri-related. It is true that the Shareholders' Agreement had been terminated, but as stated above, there were still rights and obligations which could be derived from the Agreement. Although not specifically referred to in the Demerger Plan, those rights and obligations fell within the Agri area which after the demerger would be the responsibility of the new company, which was called AgriHold ASA in the Demerger Plan but was subsequently given the name Yara.

(g) Was Acron's consent necessary under Article 12 of the Shareholders' Agreement for an assignment of claims?

(i) The parties' arguments

Acron:

98. The starting point in Swedish law is that a transfer of rights and obligations under an agreement cannot be made unless the other party to the agreement agrees to the transfer. Swedish law also recognises the freedom of the parties to a contract to agree on a general or limited right for the parties to transfer contractual rights or obligations. According to Article 12 of the Shareholders' Agreement, the main rule in this Agreement was that no rights under the Agreement could be transferred by Norsk Hydro without Acron's consent. Such consent was required except where the assignment was made to a fully owned subsidiary and Norsk Hydro guaranteed the obligations of that subsidiary pursuant to the Agreement. In the present case, the requirements for the application of this exception were not met.

99. Moreover, neither Professor Woxholth nor any of the legal authorities referred to in his Expert Opinion support the allegation that assignment clauses are set aside by transfers through demerger. Professor Woxholth has stated that (i) there is no rule in Norwegian law generally setting aside assignment clauses in the event of demergers, and (ii) in each case one shall "interpret" the assignment clause in order to find out whether the "intent" behind the clause shall be considered as consistent with a demerger situation.

100. Based on this reasoning, Professor Woxholth was asked to examine whether Article 12, assuming that the provision was "alive", would have prevented a transfer through the demerger. Professor Woxholth stated that this is a "difficult question" and that he could express only "his own personal opinion" on this issue. He then observed the introductory part of Article 12 containing the general prohibition to make any transfers of the agreement and concluded that, if the provision only had contained that prohibition, no transfer would have been made.

101. Thereafter, Professor Woxholth read and interpreted the exception contained in Article 12. On the basis of this exception, he concluded that the transfer through the demerger was "similar" to a transfer in accordance with the exception contained in Article 12. In short,

Professor Woxholth suggested that the "intention" behind the exception was to open up for restructurings and that a demerger as well as a transfer in accordance with Article 12 results in a transfer to an "independent company". However, Professor Woxholth failed to explain why a transfer to a wholly owned subsidiary of Norsk Hydro should be regarded as "equal" or "similar" to a transfer to a company which from the very beginning ceased to be a company within the Norsk Hydro group.

102. Notably, one finds no support for Professor Woxholth's suggestion regarding the interpretation of an assignment clause in the event of a demerger, in his Expert Opinion or in Yara's submissions. Even less so is there in Professor Woxholth's Expert Opinion or Yara's submissions any legal analysis as to whether the limited exception contained in Article 12 should be regarded as "equal to" a demerger.

103. The expert witness invoked by Acron, Professor Bråthen, has all along been very simple and straightforward on this issue. Professor Bråthen has explained that, if there is a prohibition or an assignment clause, that clause applies even in the case of a demerger. It is not more complicated than that. The law allows for no interpretation of the assignment clause.

104. In any event, and given, *inter alia*, the complete lack of support in legal authorities, Yara has not succeeded in showing that, in the case of a demerger, the issue whether the demerger sets aside an assignment clause shall be solved as Professor Woxholth suggested during the hearing. Furthermore, even if Yara should have succeeded in proving that, Yara has in any event failed to prove that Article 12 was set aside by the demerger in this particular case. A "personal opinion" expressed during an oral hearing, which is made without any support in legal precedents or authorities and without any further legal analysis, cannot be considered as sufficient evidence in this respect.

105. The conditions in Article 12 of the Shareholders' Agreement were applicable also in the case of Norsk Hydro's demerger which means that Acron's consent was necessary unless the exception in that Article applied. The fact that the Agreement had been terminated did not mean that Norsk Hydro's right to transfer any remaining claims arising from that Agreement without Acron's consent was wider than it had been when the Agreement was in force. If the parties have agreed on a limited right to transfer rights and obligations under a contract, the consequence of a termination of the contract is that that limited right ceases to exist or, in any event, that the remaining right is not wider than it was when the contract was in effect. There is no logical reason to assume that the parties would have intended that, despite the limitation in the Shareholders' Agreement, they should be completely free to transfer remaining rights or obligations after the Agreement had been terminated, and it should be taken into account that a transfer of rights and obligations normally requires the other party's consent under Swedish law. A shareholders' agreement always contains mutually binding, and inseparable, rights and obligations. The Swedish Supreme Court's judgment in the Emja case[4] is irrelevant, since it concerns the question whether a party acquiring rights under a contract becomes bound by the arbitration clause in the contract, whereas in the present case there was a special contractual provision prohibiting transfers unless they were made in compliance with a specific exception.

[4] Nytt Juridiskt Arkiv 1997 p. 866.

Yara:

106. The transfer in this case was effected through a demerger. In Norwegian law this is a case of "partial universal succession", and when there is universal succession, rights and obligations may normally be transferred without the other party's consent. The demerger is the basis for Yara's claim, and no consent by Acron to the demerger was therefore required. It is true that the parties to a contract are free to agree on when rights and obligations may be assigned and may also impose limitations and conditions applicable to mergers and demergers, but in this case any limitations resulting from Article 12 of the Shareholders' Agreement no longer applied, since the Shareholders' Agreement had been terminated. In any case, such limitations would not be applicable to a case of universal succession. However, if that Agreement was considered applicable, the conditions for assignment in Article 12 were satisfied. It may be added that the judgment in the Emja case shows that an arbitration clause may be transferred without the consent of the other party except where there are special circumstances. This applies to "singular succession" and thus, *a fortiori*, to cases of "universal succession".

107. Following the termination of the Shareholders' Agreement, with effect from 1 July 2002, Article 12 ceased to exist. Consequently, Article 12 was not effective at the time of the demerger on 24 March 2004, and the transfer of rights and obligations from Norsk Hydro to Yara was not limited by the conditions set forth in Article 12.

108. Even if, *arguendo*, Article 12 survived the termination, it is not applicable in a demerger situation. The wording of Article 12 does not include demergers. The most reasonable interpretation of this provision and of the parties' intent is that Article 12 was meant to limit the parties' transfer of rights and obligations through singular succession, i.e. by assignment, and not as a result of universal succession. This is evident, *inter alia*, by the exception in Article 12, which allows Norsk Hydro to transfer rights and obligations to any affiliated company. The obvious purpose of such a regulation is to allow Norsk Hydro to organise its business as it deems practical. The same applies *a fortiori* with respect to a demerger which constitutes a reorganisation of a company's business.

109. As Professor Woxholth testified at the hearing, only a clear assignment clause, intended also to cover demergers, overrules the principle of continuity which is the overarching principle in cases of universal succession. In his testimony, Professor Woxholth concluded that Article 12 must be interpreted narrowly and, thus, does not cover a transfer of rights and obligations by means of a demerger.

110. It is true that a demerger cannot set aside an agreement which imposes conditions intended to apply to demergers. An interpretation of an assignment clause must be made to decide whether or not it applies to a demerger. In section 2.3 b), second paragraph, of the Demerger Plan, it is stated that Yara shall use all reasonable endeavours to obtain the release of Norsk Hydro from its obligations under such agreements that shall be assigned to Yara. However, this provision aims at situations where there is a contractual clause specifically requiring consent in the event of a demerger. Since Article 12 of the Shareholders' Agreement does not prohibit or limit transfer by way of demerger, the clause in section 2.3 b) of the Demerger Plan is of no consequence in this case

(ii) The Arbitral Tribunal's reasoning

111. The Arbitral Tribunal notes that a demerger is regarded in Norwegian law as a special kind of so-called universal succession which under that law may involve the transfer of contractual rights and obligations without any requirement of consent from the other contracting party. One important reason for this is that, according to Section 14-11(3) of the Norwegian Public Limited Liabilities Companies Act, where the company liable for an obligation under the demerger plan fails to meet the obligation, the other company or companies participating in the demerger shall jointly and severally be liable for the obligation. Consequently, a creditor is not exposed to an increased risk as a result of the demerger.

112. Nevertheless, the parties to a contract are free to agree that a contractual right or obligation may not be transferred to a new party without the other contractual party's consent even in a case of demerger. In the present case, limitations of the right to assign rights and obligations were agreed in Article 12 of the Shareholders' Agreement, and it is a question of contractual interpretation whether these limitations should be considered also to apply to demergers. It is uncertain whether the parties had this situation in mind, and the wording of Article 12 does not provide a clear answer, but the Arbitral Tribunal finds it likely that the parties, or at least Acron, considered that there should be no new party to the Shareholders' Agreement without its consent, unless the closely defined exception applied.

113. A further question is whether Article 12 continued to apply after 1 July 2002, when the Shareholders' Agreement was terminated. The Arbitral Tribunal considers that, as long as there were remaining rights and obligations resulting from the Agreement, the limitations in Article 12 should be considered also to have continued to apply to these rights and obligations. It could hardly have been the parties' intention that the right of assignment, which was restricted as long as the Shareholders' Agreement was in effect, had ceased to apply to remaining rights and obligations once the Agreement was terminated. The Arbitral Tribunal therefore considers that Norsk Hydro was not entitled to transfer its claims based on the last paragraph of Article 9 without Acron's consent unless the exception in Article 12 was applicable.

(h) Was the transfer of rights to Yara made in conformity with the exception in Article 12 of the Shareholders' Agreement?

(i) The parties' arguments

Acron:

114. Yara cannot rely on a transfer in accordance with Article 12 of the Shareholders' Agreement since that Article had terminated following the termination of the Shareholders' Agreement. If the Arbitral Tribunal does not share this view, Acron maintains that the transfer through the demerger did not comply with the exception contained in Article 12.

115. The exception in Article 12 of the Shareholders' Agreement has two conditions: first, the transfer must be to a fully owned subsidiary, and secondly, the transferor must guarantee the obligations of the transferee. These conditions were not fulfilled in this case. First, Yara could not be considered a fully owned subsidiary of Norsk Hydro. It may formally have been so on the day of the demerger, *i.e.* the day when Yara claims that remaining rights and obligations under the Agreement were transferred to Yara, but already on the following day, the shares

were registered in the name of new owners. In fact, the purpose of the demerger was that Yara should not be a subsidiary of Norsk Hydro. Secondly, Norsk Hydro did not issue any guarantee in respect of Yara's obligations.

116. According to Article 12 and the handwritten amendment to the Article, Norsk Hydro was allowed to transfer its rights and obligations to a wholly owned subsidiary. It can never have been the parties' intention to allow for a transfer that is made to a company which is a wholly owned subsidiary on "day 1" but not on "day 2". In such case, the limited exception and handwritten amendment would be reduced to a meaningless formality. It cannot suffice that Yara was a wholly owned subsidiary when the transfer was made on "day 1" (*i.e.* the day of the consummation of the demerger, 24 March 2004), but not on "day 2" (*i.e.* the day Yara was listed on the Oslo Stock Exchange, 25 March 2004).

117. Furthermore, on the basis of Professor Woxholth's Expert Opinon it has been established that the kind of guarantee provided for by law, which Yara relies on, does not comply with the requirements set forth in Article 12 of the Shareholders' Agreement.

118. Under the exception in Article 12 of the Shareholders' Agreement there shall be a full guarantee by the transferor of the transferee's obligations under the Agreement. The Norwegian law does not provide for such a full guarantee, since it is limited to financial compensation (and does not include contractual performance) and is also limited as to amount (the net value that accrued to the company upon the demerger) and applicable only in the event that the transferee fails to comply with its obligations. Norsk Hydro has therefore not guaranteed Yara's obligations in accordance with Article 12 of the Shareholders' Agreement.

119. In short, Yara has not succeeded in proving that the transfer through the demerger has resulted in a transfer in accordance with Article 12 of the Shareholders' Agreement.

Yara:

120. Article 12 did not survive the termination of the Shareholders' Agreement and is therefore not applicable. However, if Article 12 should be considered relevant, it is Yara's opinion that the conditions of the exception in Article 12 were fulfilled. Indeed, at the time of the demerger, Yara was a wholly owned subsidiary of Norsk Hydro. It does not matter that Yara's shares were sold to new owners and that they were available on the stock market already on 25 March 2004, *i.e.* the day after the demerger, since Article 12 does not require that the transferee should remain a wholly owned subsidiary.

121. Moreover, according to Section 14-11(3) of the Norwegian Public Limited Liabilities Companies Act, Norsk Hydro as the transferor was responsible for Yara's obligations under the Shareholders' Agreement. Thus, Norsk Hydro automatically guaranteed Yara's obligations pursuant to the provisions of Norwegian law. Consequently, the conditions under the exception in Article 12 of that Agreement were fulfilled. The fact that the guarantee provided by law is a security measure based on a liability to compensate (and not to perform), is irrelevant, since a liability to compensate is sufficient security for Acron. Because of the termination of the Shareholders' Agreement, there is no need for a guarantee in respect of contractual performance.

122. Furthermore, Article 12 of the Shareholders' Agreement does not require a formal guarantee to be issued. Rather, it is sufficient that "the assigning party guarantees the obligations". It follows from Norwegian law that this was the case.

(ii) The Arbitral Tribunal's reasoning

123. The Arbitral Tribunal has already determined that the assignment provision in Article 12 survived termination of the Shareholders' Agreement in so far as remaining rights and obligations under the Agreement are concerned. The Arbitral Tribunal notes that the text of Article 12 merely provides that the transfer should be to a wholly owned subsidiary; it does not require that the transferee company remain a wholly owned subsidiary after the transfer. If the provision were interpreted so as to include a requirement of continued status as a wholly owned subsidiary, new questions would immediately arise. It would, for instance, be unclear whether the company should remain a wholly owned subsidiary for ever or only for a certain period and, if so, for what period; no answers to these questions could be found in the text of the Shareholders' Agreement. It must also be observed that, if the parties had intended to create a permanent or at least a lasting situation of affiliation to Norsk Hydro, it would have been easy to express this in the Shareholders' Agreement and also to provide for appropriate remedies in case the company did not remain fully owned by Norsk Hydro. In the absence of any such regulation, the Arbitral Tribunal considers that the text should be understood according to its literal wording or, in other words, that the requirement of being a wholly owned subsidiary only applies to the time when the assignment takes place. It is clear that at the time of the demerger AgriHold ASA/Yara was in fact wholly owned by Norsk Hydro.

124. As to the second condition, the Arbitral Tribunal refers above to Section 14-11(3) of the Norwegian Public Limited Liabilities Companies Act, according to which each company involved in a demerger guarantees the obligations of another company also participating in the demerger which fails to meet its obligations. Acron has pointed out that the guarantee only concerns financial obligations and not other contractual performance and that it is also limited to the value that accrued to the company in connection with the demerger. However, while these limitations could be of relevance in some cases, the Arbitral Tribunal considers that they have no application to the circumstances of the present case where the Shareholders' Agreement had been terminated and the transfer only concerned a claim Yara alleged to have against Acron on the basis of the last paragraph of Article 9 of the Shareholders' Agreement. Interpreted in the light of these circumstances, Article 12 cannot be considered to have required a guarantee going beyond that provided by the Norwegian Public Limited Liabilities Companies Act.

125. The Arbitral Tribunal therefore concludes that Norsk Hydro was entitled, according to the exception in Article 12 of the Shareholders' Agreement, to transfer its alleged claim against Acron to AgriHold/Yara by means of the demerger and without Acron's consent.

V. The Arbitral Tribunal's conclusion on jurisdiction

126. Having considered the parties' present claims and arguments in their entirety, as presented in writing and orally, as well as the evidence on which they have relied, the Arbitral Tribunal has found no basis for declining jurisdiction to examine Yara's claim that the Arbitral Tribunal should order Acron to take action to dissolve Nordic Rus and, upon dissolution, to regulate the situation on the basis of the Shareholders' Agreement.

127. On the other hand, the Arbitral Tribunal finds no reason to examine at present its jurisdiction in respect of an additional claim for damages which Yara has announced it will submit, but has not yet submitted.

128. Any questions of costs and expenses will be dealt with at a later stage of the arbitration proceedings.

AWARD ON JURISDICTION

The Arbitral Tribunal

(a) rejects Acron's request for dismissal, for lack of jurisdiction, of Yara's main claim that the Arbitral Tribunal should order Acron to act in good faith to dissolve Nordic Rus, or to cause Nordic Rus to be dissolved, and, upon dissolution of Nordic Rus, to return, or cause the return of, 509,728 voting shares in Apatit and 49% of the remaining net value of Nordic Rus to Yara, and decides to proceed to an examination of the merits of that claim, and

(b) decides not to make any ruling on costs and expenses at this stage of the proceedings.

Julian D.M. Lew | Hans Danelius | Sergei N. Lebedev