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TNK-BP, Party Autonomy, and Third-Country Mandatory Rules

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Abstract: This Article describes the tension between party autonomy in contractual matters and the ability of states to regulate activities that affect their economy through competition laws. Focusing on the example of a recent dispute between British oil giant BP p.l.c. and Russian oil company TNK-BP regarding a noncompete clause, this Article illustrates what little effect third-country mandatory rules actually have on transnational contractual practice. This is true despite provisions in European private international laws that were intended to give courts and tribunals discretion to give effect to such "mandatory rules" or "overriding mandatory provisions," including the 1980 Rome Convention and the 2008 Rome I Regulation on the Law Applicable to Contractual Obligations. This Article illustrates the power of party autonomy and transnational corporate and contractual structuring to circumvent the application of third-country laws—in this case, Russian competition law.

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I. INTRODUCTION

Mandatory rules are at the center of the tension between party autonomy in contractual matters and states' abilities to regulate activities that affect their economies. The underlying question is to what extent may private parties agree to contractual commercial arrangements that contradict what the law considers mandatory. The issue of mandatory rules arises frequently in international litigation before national courts and even more frequently in international arbitration. The academic literature on this subject is voluminous (an understatement).[1] To summarize, both academic literature and statutes such as the 1980 Rome Convention[2] and 2008 Rome I Regulation[3] (one might add the Unidroit Principles of International Commercial Contracts 2010[4] and the U.S. Second Restatement of the Conflict of Laws[5]) accept the theoretical notion that mandatory rules, even those of third countries—meaning rules that are neither those of the forum country nor those of the law governing the contract—might prevail over the intent of the parties. That is the theory at least. In practice, however, the record of dispute resolution shows that the notion is seldom implemented. This Article examines a recent transnational corporate dispute that illustrates the absence of effect of third-country mandatory rules. The case involved TNK-BP, a Russian oil firm, which came to be at the center of a dispute between British oil major BP p.l.c. (BP), on the one hand, and a

[1] The references that follow are a limited selection. The French classic piece on the subject is Pierre Mayer, *Les Lois de Police Etrangères*, 108 J. DROIT INT'L 277 (1981). For German scholarship, see Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation of International Relations*, 360 RECUEIL DE COURS 1, 164–92, 429–70 (2012). For the English approach, see LAWRENCE COLLINS ET AL., DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 1827 (Lord Collins et al. eds., 15th ed., 2012) [hereinafter DICEY, MORRIS AND COLLINS]; Jonathan Harris, *Mandatory Rules and Public Policy under the Rome I Regulation*, *in* ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE 269 (Franco Ferrari & Stefan Leible eds., 2009) [hereinafter Harris]; Adeline Chong, *The Public Policy and Mandatory Rules of Third Countries in International Contracts*, 2 J. PRIV. INT'L L. 27, 27 (2006). For a recent compendium of U.S. and EU scholarship, see MANDATORY RULES IN INTERNATIONAL ARBITRATION (George A. Bermann & Loukas Mistelis eds., 2011) [hereinafter Bermann & Mistelis] (also addressing international litigation).

[2] Convention on the Law Applicable to Contractual Obligations (Rome Convention), 1980 O.J. (L 266) 1 (EC).

[3] Commission Regulation 593/2008, of the European Parliament and of the Council of June 17, 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6 (EC).

[4] *See* UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 12 art. 1(4) (2010) ("Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law" and accompanying text), *available at* http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/414-chapter-1-general-provisions/866-article-1-4-mandatory-rules).

[5] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187(2) (1971).

consortium of Russian businessmen, Alfa Access Renova (AAR),[6] on the other.

The TNK-BP dispute centered on a Russian oil company that conducted all or most of its activities in Russia, and that was owned in equal parts by Russian individuals and by BP. Frequently however, as here, transnational corporate disputes take place entirely outside of the countries in which the corporations actually operate. The top joint venture holding company, TNK-BP Ltd., was registered in the British Virgin Islands. The main contract, a shareholder agreement between AAR and BP, was governed by English law and provided for dispute resolution at the Arbitration Institute of the Stockholm Chamber of Commerce. The dispute involved a noncompete[7] clause in the shareholder agreement that on its face, as far as can be surmised from the information that was made public, appeared illegal under Russian competition law. Nevertheless, the clause survived contentious proceedings both in the London High Court and at Stockholm arbitration, ultimately setting off a chain of consequences that led to the acquisition of TNK-BP by Rosneft, a state-owned company, for $55 billion[8] and a significant expansion of Russian state control over the hydrocarbon sector. For a contractual clause that did not comply with Russian law, these were spectacular consequences. Although the dispute was of central importance to the Russian economy and political climate, none of the judgments or awards have been published, at least not yet. Therefore, at risk of error, we are left to try to reconstitute what appears to have happened using information from press releases and sources in the

[6] Although AAR was often referred to as a "consortium," it seemed not to have been legally constituted. AAR comprised two companies, Alfa Petroleum Holdings Ltd. and OGIP Ventures Ltd. (OGIP), which were both registered in the British Virgin Islands. Access Industries and Renova Group owned OGIP fifty-fifty. *See* Case No COMP/M.6801, Rosneft/TNK-BP Comm'n decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, March 8, 2013, *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m6801_20130308_20310_3005394_EN.pdf. The principal beneficial owners of the AAR companies were Mikhail Fridman, German Khan, Viktor Vekselberg, and Len Blavatnik—all Russian citizens with the exception of Blavatnik, who was Soviet born but holds U.S. citizenship.

[7] In this Article, the expression "noncompete clause" refers to the following broad definition: a clause purportedly restricting the right of a contracting party to enter into activities that may be in competition with the other party or with their common joint venture—for example, in connection with new projects or investments. Depending on the drafters, such clauses may also be titled "covenant not to compete," "restrictive covenant," "negative covenant," or depending on the clause's content, "right of first refusal" or "exclusivity clause." In European competition law, such clauses are referred to as "ancillary restraints." *See infra* Part II. The spelling that is adopted for "noncompete" is the U.S. standard. *See* BLACK'S LAW DICTIONARY (10th ed. 2014). In Europe, the accepted spelling is "non-compete" or "non-competition." *See* BOUVIER LAW DICTIONARY (Desk ed. 2012).

[8] The reported value of the transaction depends on the source. In January 2013, Mergermarket estimated the transaction's combined value at $59 billion, making it the largest combined M&A transaction in 2012. Press Release, Mergermarket M&A Roundup for 2012, 6 (Jan. 14, 2013). The most often cited figure ranges from $55 to 56 billion.

professional and general press.

Part II of this Article provides a brief description of the debate on third-country mandatory rules in European private international law with a specific focus on competition law issues. Part III sets out the content and evolution of the third-country mandatory rules that were relevant in the example of TNK-BP, in the form of the Russian law prohibition of noncompete clauses. Using press releases and secondary sources, Part IV attempts an account of the fate of the TNK-BP noncompete clause and how it came to be upheld in contentious proceedings, ultimately leading to the final outcome. Part V discusses some of the wider lessons that can be drawn from this case and concludes.

II. THIRD-COUNTRY MANDATORY RULES & COMPETITION LAW

In this Article, "mandatory rules" are understood to mean rules which cannot be derogated from by contract regardless of the law governing the contract.[9] The focus is on third-country mandatory rules—i.e., mandatory rules that are not those of the forum country nor those of the law governing the contract, but rather those of a third country. In the TNK-BP case the

[9] There is no universally accepted definition of "mandatory rules." However, the Rome Convention defines mandatory rules as rules of law—in this case, not the law chosen by the parties but the law with which all the other elements of the situation are connected—that "cannot be derogated from by contract." *See* Convention on the Law Applicable to Contractual Obligations (Rome Convention), art. 3(3), 1980 O.J. (L 266) 1, 2 (EC). Article 7 sets out the ability to give effect to such provisions. *Id.* art. 7. In contrast, this definition of mandatory rules no longer appears in the Rome I Regulation. Instead, the Regulation uses the narrower expression "overriding mandatory provisions," which is defined as "provisions the respect of which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract." *See* Commission Regulation 593/2008, of the European Parliament and of the Council of June 17, 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 9(1), 2008 O.J. (L 177) 6, 13 (EC). The French expression is "lois de police" pursuant to Article 3 of the Civil Code, or "lois d'application immédiate" (first coined by scholar Phocion Francescakis to reflect the notion that such rules are immune to conflicts and must be applied in all cases regardless of what conflicts rules might say). This is to be distinguished from "public policy" or "ordre public," which may evict foreign law when appropriate but does not exempt courts from observing the contents of that foreign law for the purpose of examining their compatibility with the governing law or forum law. English commentators point out that mandatory rules as a category were introduced by the Rome Convention and did not exist under the English common law, and that this fact has significantly complicated their interpretation and particularly the distinction with public policy. *See* Harris, *supra* note 1, at 297–298. Harris defines "overriding mandatory rules" simply as "rules which cannot be derogated from by agreement and which are designed to be applied irrespective of the law applicable to the contract." *Id.* n.3. Dicey, Morris, and Collins address the topic under the general heading of "Mandatory Provisions." *See* DICEY, MORRIS AND COLLINS, *supra* note 1, at 1827. Basedow refers to the "overarching concept" of "imperative norms," which includes "national public policy (or public order)" and "overriding mandatory provisions." *See* Basedow, *supra* note 1, ¶ 523.

third country was Russia, the country in which the performance of the noncompete clause was ultimately expected to operate. The law governing the contract was English law. As for the law of the forum, it is unclear from publicly available information if it was Swedish law or English law—i.e., it is unclear whether the seat of the arbitration was in London or Stockholm.[10]

A. The Rome Convention & Rome I Regulation

European private international law has had statutory provisions on mandatory rules for several decades. These provisions are contained in Article 7(1) of the Rome Convention[11] and, for contracts signed after December 23, 2009, in Article 9(3) of the Rome I Regulation.[12] It may be helpful to briefly explain these clauses in their general context. The basic premise, set out in Article 3 of the Rome Convention and Rome I

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[10] The seat of the arbitration determines the law of the forum. In practice this is the law that governs the arbitration proceedings themselves, which gives jurisdiction to the national courts of the forum to review or annul the arbitral award.

[11] Article 7 of the Rome Convention, entitled "Mandatory Rules," states the following:

> 1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
>
> 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Convention on the Law Applicable to Contractual Obligations (Rome Convention), art. 7, 1980 O.J. (L 266) 1, 3 (EC).

[12] Article 9 of the Rome I Regulation, entitled "Overriding Mandatory Provisions," states the following:

> 1. Overriding mandatory provisions are provisions the respect of which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
>
> 2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
>
> 3. Effect shall be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Commission Regulation 593/2008, of the European Parliament and of the Council of June 17, 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 9, 2008 O.J. (L 177) 6, 13 (EC).

Regulation, is that parties are free to select the law to govern their contract; the general principle therefore is "party autonomy." Party autonomy, however, is subject to several sets of limitations. First, limitations set forth in Article 3(3) were designed to prevent the selection of a foreign law that circumvents the mandatory rules of the "natural" choice of law when all of the elements of the contract—other than the choice of law—point to a single country.[13] Second, there are limitations connected to the public policy (*ordre public*) of the forum state; these are set out in Article 16 of the Rome Convention and in Article 21 of the Rome I Regulation. And third, there are limitations connected to the mandatory rules of third countries; these limitations are set out in Article 7(1) of the Rome Convention and Article 9(3) of the Rome I Regulation, and are discussed in this Article[14]. Articles 7(1) and 9(3) indicate several things. First, third-country mandatory rules *can* be applied by national judges as an expression of their discretion, but this is not an obligation. Second, third-country mandatory rules are either those of the country with which the situation has a close connection—if those rules apply regardless of the law applicable to the contract (Article 7(1))—or those of the country in which the obligations must be performed—if those rules render the performance of the contract unlawful (Article 9(3)). Third, both Article 7(1) and Article 9(3) provide that in considering whether to apply the rules, judges will have regard "to their nature and purpose and to the consequences of their application or nonapplication." This last limb points to a government interests-type analysis involving the review of policy objectives that underpin the third-country rules. Overall, Article 7(1) and Article 9(3) signal that third-country mandatory rules can, and perhaps should, play a meaningful role in international litigation. Party autonomy provided by Article 3 is not absolute and can (or perhaps should) be displaced in certain circumstances to take into account negative effects created by the contract in third countries.

B. International Litigation

The manner of implementation of third-country mandatory rules, however, is highly ambiguous. This is reflected in the plain language of the regulations by the use of the expression "effect may be given" in the

[13] *Id.* art. 3(3). Article 3(3) addresses situations where all of the elements of the contract, other than the governing law that is selected, are connected to a single country. This situation is outside the scope of this Article; the TNK-BP case included connecting factors to numerous jurisdictions.

[14] *See* Convention on the Law Applicable to Contractual Obligations (Rome Convention), art. 7, 1980 O.J. (L 266) 1, 3 (EC); Commission Regulation 593/2008, of the European Parliament and of the Council of June 17, 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 9, 2008 O.J. (L 177) 6, 13 (EC).

original Article 7(1) and now in Article 9(3). This ambiguity exists primarily because of the novelty of the provision when it was first adopted in 1980 and, importantly, the absence of consensus between the European contracting countries on the scope of the application of third-country mandatory rules. The official Giuliano-Lagarde Report commenting on the Rome Convention stated that "[t]he principle that national courts can give effect under certain conditions to mandatory provisions other than those applicable to the contract by virtue of the choice of the parties or by virtue of a subsidiary connecting factor, has been recognized for several years both in legal writings and in practice *in certain of our countries* and elsewhere [i.e. in some countries only, not in all]."[15] As sole supporting authority, the Giuliano-Lagarde Report cited[16] the 1966 Dutch *Alnati* decision,[17] which had stated the principle but also declined to apply it. The Giuliano-Lagarde Report recognized "frankly" that "no clear indication in favour of the principle in question" was discernible, inter alia, in English case-law.[18]

Twenty-four years later, national EU courts still largely ignore the principle.[19] One of the reasons for this lack of practical implementation, it is argued, is that a few countries that happen to play a central role in transnational contracts, either because of the strength of their foreign trade or because of the frequent use of their law, opted out of Article 7(1) during adoption of the Rome Convention and never accepted the rule in the first place. This is the case of the United Kingdom and Germany.[20] At the time, these countries argued that the rule was too uncertain and created

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[15] *See* Council (EC), Report on the Convention on the Law Applicable to Contractual Obligations, No. C 282 (Dec. 10, 1980) (Mario Giuliano & Paul Lagarde) [hereinafter Giuliano–Lagarde Report].

[16] The Supreme Court of the Netherlands held that "it may be that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract." *See id.* art. 7, ¶ 1.

[17] HR 13 Mei 1966, NJ 1967, 3 m.nt. HB (Alnati) (Neth.). For the French translation, see 56 REVUE CRITIQUE DE DROIT INT'L PRIVÉ 522 (1967) (with comment by T. Struycken).

[18] Giuliano–Lagarde Report, *supra* note 15, art. 7, ¶ 1.

[19] *See* Bernard Audit, *How Do Mandatory Rules of Law Function in International Civil Litigation*, 18 AM. REV. INT'L ARB. 37, 45–47 (2007) ("A more tolerant attitude [vis-à-vis third-country mandatory rules] has emerged in the last decades, although it is found more in legislative pronouncements than in clear-cut court decisions" and later, "all this has remained somewhat platonic"); Dominique Bureau & Horatia Muir Watt, *L'impérativité Désactivée? A Propos de Cass. Civ. Lère, 22 Octobre 2008*, 98 REVUE CRITIQUE DE DROIT INT'L PRIVE 1, 17 (2009) ("L'examen de la jurisprudence [conduit] à douter de la réalité pratique de l'application des lois de police étrangères." [The examination of case law leads to doubts as to the practical reality of implementation of third-country mandatory rules.]); Harris, *supra* note 1, at 281–82 ("Article 7.1 . . . does not appear to have wreaked havoc in Contracting States . . . . In fact, evidence as to the impact of this provision is notably lacking.").

[20] Luxembourg, Latvia, Portugal, and Slovenia also opted out. DICEY, MORRIS AND COLLINS, *supra* note 1, at 1831 n.336.

unpredictability that could be damaging to international trade.[21] They also argued that the same result could be achieved by application of plain domestic contract law without referring to any third-country mandatory rules, or indeed any conflicts of law machinery.[22] In England, a number of common law judgments had taken into account third-country laws and refused to uphold obligations requiring performance in a jurisdiction where such performance had become impossible or unlawful.[23] This case law, however, was viewed as forming part of the English domestic law regarding supervening illegality, comity, or public policy, rather than an application of foreign laws as a result of the conflicts of laws.[24] A similar outcome could also apparently be reached under German law by operation of force majeure or other domestic contractual defenses.[25] Even France, possibly the country where commentators most favored Article 7(1), had to wait until 2010 to see the first reference to Article 7(1) made by its highest court. Even there, though, the court's decision was to send the case back to the

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[21] Giuliano–Lagarde Report, *supra* note 15, art. 7, ¶ 3 ("novelty of this provision, and the fear of the uncertainty to which it could give rise"); Harris, *supra* note 1, at 282 ("there was undoubtedly a strong perception in the UK that financial markets and business confidence would have been adversely affected even by the possibility of the courts of the forum invoking a discretion to apply the mandatory rules of any state of close connection.").

[22] There is an ongoing debate in European private international law regarding the two different methods that "give effect" to the mandatory rules of third countries. The first method involves the forum court directly applying the mandatory rules of third countries, in which case the foreign law becomes applicable as the result of the forum's rules on conflicts of law. The second method is for the forum court to take account of the foreign law, but as *datum* rather than applicable law, in which case the relevant branch of law is the forum's domestic contract law and not its conflicts of laws. For litigants, the practical difference between these two methods pertains to the consequences of the breach of the foreign law: under the first method sanctions and remedies are determined under the foreign law; under the second method sanctions and remedies remain determined by the law of the contract (i.e., often nullity). Importantly, both methods are considered compatible with Article 7(1) and Article 9(3).

[23] *See* Foster v. Driscoll, [1929] 1 K.B. 470 (Eng.) (Contract governed by English law for the supply of whisky to the United States at the time of Prohibition. The contract did not require delivery into the United States; however, the parties intended to smuggle the goods into the United States. The English court held that the contract should not be enforced.); Regazzoni v. K.C. Sethia (1944) Ltd. [1958] A.C. 301 (Eng.) (Contract governed by English law for the sale of jute by Indian sellers to Swiss buyers. The contract did not provide for delivery to South Africa, but the intention of the Swiss buyers was to ship the goods there. At the time sales of jute to South Africa was prohibited by Indian law. As in *Foster v. Discoll*, the English courts refused to uphold the contract.). *See also* Ralli Bros. v. Compania Naviera Sota y Aznar, [1920] 2 K.B. 287 (Eng.) (Contract between Spanish shippers and an English charterer, governed by English law, for the carriage of goods to Spain. After the conclusion of the contract, Spanish law was changed in a way that limited the total price of the freight. The English charterers tried to recuperate the full contractual price but failed in the English courts, which upheld the Spanish rule.). For a review of recent cases, see Gregory Mitchell QC & Christopher Bond, *The Effect of Foreign Illegality on English Law Contracts*, BUTTERWORTHS J. INT'L BANKING & FIN. L. 531 (2010).

[24] There is debate amongst English commentators regarding the proper classification of these cases, which all predate the Rome Convention. For a thorough analysis of these debates, see Harris, *supra* note 1, at 297–304.

[25] DOMINIQUE BUREAU & HORATIA MUIR WATT, 1 DROIT INT'L PRIVE ¶ 915 (2010).

lower courts for determination of the possible "effect" that could be given to a third-country mandatory rule—in this case, a Ghanaian food embargo—so the decision was ultimately inconclusive on the possible nature of such effect.[26]

In contrast to the Rome Convention, the Rome I Regulation leveled the playing field. There is no more opt-out available, and all signatories had to ratify Article 9(3). Unsurprisingly, this also explains why Article 9(3)'s scope was narrowed compared to Article 7(1). The third-country provisions that can now be given effect to are only "overriding mandatory provisions" that render the performance of contractual obligations unlawful in that country. Amongst other things, Article 9(3)'s narrower language was seen to be more compatible with the English and German traditions.[27]

One of the main difficulties with third-country mandatory rules is that they are difficult to identify.[28] It is possible, however, to point to a few areas of law where countries are likely to adopt rules that might qualify as mandatory—for example, consumer laws aiming to protect consumers as presumed "weaker parties";[29] currency control laws;[30] laws for the

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[26] Cour de cassation [Cass.] [supreme court for judicial matters] com., Mar. 16, 2010, JCP 2010 530 (Fr.). The case involved a transportation contract under French law for the transportation of meat from France to Ghana. Ghana decreed an embargo on French meat on sanitary grounds, which resulted in the meat being returned to France and sold at a loss. The French shipper sued the carrier for the loss, arguing that the Ghanaian embargo did not qualify as supervening illegality under French law—more precisely, under Article 1133 of the Civil Code. Ultimately, the Cour de Cassation held that in such a case, pursuant to Article 7(1) of the Rome Convention, the French courts were obligated to determine which effect should be given to the Ghanaian embargo.

[27] For a review of the legislative history of Article 9(3) and the successive versions of what was originally Article 8 in the earlier drafts of the Rome I Regulation, see Harris, *supra* note 1, 271–91. French commentators point to Article 9(3) as a gesture made towards the English and German positions. *See* Louis d'Avout, *Le Sort des Règles Impératives Dans le Règlement Rome I*, RECUEIL DALLOZ, Sept. 11, 2008, at 2167 n.31, ¶12. In England, "[t]he United Kingdom Government took the view that Art. 9(3) represented a satisfactory outcome to the negotiations on this provision. It considered that the draft reflected the English law position in the light of *Ralli Bros v Compania Naviera Sota y Aznar,* and to that extent would not introduce any significant additional uncertainty into the law, and also constituted an improvement in terms of legal certainty over the existing law." DICEY, MORRIS AND COLLINS, *supra* note 1, ¶32-096.

[28] *See* George A. Bermann, *The Origin and Operation of Mandatory Rules*, *in* MANDATORY RULES IN INTERNATIONAL ARBITRATION 1, 6–7 (George A. Bermann & Loukas Mistelis eds., 2011) ("The reality is that only some statutes unambiguously announce their mandatory character, and some rules are undoubtedly mandatory without taking written form at all. When a court or tribunal seeks to characterize a rule of law as mandatory (or not), it has little choice but to try to gauge the strength and depth of the attachment of the legal system in question to the values that the rule of law is thought to embody. The difficulty entailed in making this determination should not be underestimated."); Hannah Buxbaum, *Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization*, *in* MANDATORY RULES IN INTERNATIONAL ARBITRATION, 21, 38 (George A. Bermann & Loukas Mistelis eds., 2011) ("As many commentators have suggested, the difficulty of this task goes a long way toward explaining the reluctance of courts to apply foreign mandatory rules").

[29] BUREAU & WATT, *supra* note 25, ¶911; Buxbaum, *supra* note 28, at 35 (and accompanying

protection of cultural objects;[31] or more topically for this Article, laws on the protection of competition.[32] Jürgen Basedow writes that in principle, as a result of international acceptance of the "effects doctrine" in competition law,[33] "European courts now seem fundamentally prepared to respect foreign competition law as a contractual defense in contractual disputes."[34] In practice, however, there are few illustrations that this is indeed the case (which Basedow does not seem to deny). Reported precedents tend to show that before deciding whether to give effect to mandatory rules of a foreign competition law, courts first review the content of those rules on substance, implicitly to determine whether or not they are worthy of application. In 2000, a Belgian tribunal considered whether to give effect to a Tunisian law prohibiting exclusivity clauses in distribution agreements.[35] The case involved a contract for the distribution of equipment in Tunisia between two (apparently) Belgian companies (one was an affiliate of Daewoo), which was governed by Belgian law and included an exclusivity clause. One of the two companies claimed that the clause was invalid because it breached the Tunisian law prohibition of exclusivity. First, the court held that Article 7 of the Rome Convention did not *require* it to apply third-state mandatory rules, but only gave it discretion to do so. The court then found that "the absolute prohibition of exclusive concession [distribution] agreements does not belong to international public policy and is unknown in European countries" and that "Tunisian law was isolated in this regard,"[36] and therefore, the rule should not be applied in the case at hand.

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footnotes, which include sources that challenge whether rules protecting the weaker party should be considered mandatory at all).

[30] Basedow, *supra* note 1, at 450–54.

[31] *Id.* at 454–60.

[32] *Id.* at 460–68.

[33] Basedow summarizes the effects doctrine as follows:

> Competition authorities, first in the United States and later in Europe, claimed the right to enforce their respective competition laws in respect of conduct engaged in by foreigners abroad, provided that some — directly foreseeable and substantial — detrimental effect on competition could be ascertained. This claim, encapsulated in the so-called effects doctrine, was upheld first in the United States, in the *Alcoa* case of 1945; some years later in the explicit statutory scope of the German Act against Restrictions of Competition; thereafter also in numerous national competition laws of other countries; and — in the guise of the implementation doctrine — also by the European Court of Justice.

Basedow, *supra* note 1, at 462–63. The effects doctrine is visible in Article 6(3)(a) of the Rome II Regulation on the Law Applicable to Non-Contractual Obligations: "the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected." Commission Regulation 864/2007, On the Law Applicable to Non-Contractual Obligations (Rome II), art. 6(3)(a), 2007 O.J. (L 199) (EC).

[34] Basedow, *supra* note 1, at 464.

[35] Tribunal de Commerce [Comm.] [Commerce Tribunal] Mons, Nov. 2, 2000, REVUE DE DROIT COMMERCIAL BELGE [RDC] 2001, 617–21 (Belg.).

[36] *Id.* at 620.

The court did not elaborate on how it identified "international public policy" in competition law matters, although that concept was central to the outcome.[37]

C. International Arbitration

The question of whether arbitrators have the duty, or the right, to raise or to handle arguments based on third-country mandatory rules beyond the law of the contract or law of the forum has given rise to equally voluminous literature. To risk a short summary, the position of third-country mandatory rules may be comparatively stronger (or less weak) in international arbitration than it is in international litigation. This result can be explained by several factors. For example, arbitrators are not judges in national courts and may not be bound by the same duties toward their forum's law.[38] Also, the jurisdiction of arbitrators is based on a contractual arbitration agreement, so widely drafted arbitration agreements may expand arbitrators' jurisdiction as compared to that of national courts.[39] Finally, arbitrators have a duty to take into account the subsequent enforceability of awards by national courts; this too may act as an incentive to ensure that awards are consistent with the competition laws of the countries in which enforcement may be sought.[40]

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[37] Public policy is referred to in Article 16 of the Rome Convention and in Article 21 of the Rome I Regulation, which state the following: "the application of a provision of the law of any country specified by this Convention/Regulation may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum." Convention on the Law Applicable to Contractual Obligations (Rome Convention), art. 16, 1980 O.J. (L 266) (EC); Commission Regulation 593/2008, of the European Parliament and of the Council of June 17, 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 21, 2008 O.J. (L 177) (EC). This is usually considered to refer to domestic public policies only insofar as they conform to international public policy. Article 16 "addresses what is often referred to as 'transnational public policy' or 'truly international public policy,' . . . . The concept of transnational public policy is said to encompass those principles that represent an international consensus as to universal norms that always apply, regardless of jurisdiction. Examples of transnational public policy include: prohibitions against bribery; money laundering; drug trafficking; terrorism; trade in stolen art objects; human trafficking; and traffic in human organs." Audley Sheppard, *Mandatory Rules in International Commercial Arbitration An English Law Perspective*, 18 AM. REV. INT'L ARB. 121, 129 (2007).

[38] Bermann, *supra* note 28, at 16; Audit, *supra* note 19, at 37 (pointing out that as opposed to international arbitration, "the forum [court] is not neutral regarding the mandatory rule(s) involved.").

[39] Bermann, *supra* note 28, at 16; Alexander K.A. Greenawalt, *Does International Arbitration Need a Mandatory Rules Method?*, *in* MANDATORY RULES IN INTERNATIONAL ARBITRATION 103 (George A. Bermann & Loukas Mistelis eds., 2011).

[40] Bermann, *supra* note 28, at 16; Alan Scott Rau, *The Arbitrator and "Mandatory Rules of Law,"* *in* MANDATORY RULES IN INTERNATIONAL ARBITRATION 51, 77 (George A. Bermann & Loukas Mistelis eds., 2011) (pointing out the great difficulty however in determining where exactly parties may seek to enforce awards).

The 1985 U.S. Supreme Court ruling in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[41] is a logical starting point for the consideration of foreign competition laws by arbitral tribunals. In *Mitsubishi Motors Corp*., the Court held, after reviewing a contract dispute under Swiss law between an American company and a Japanese company, that an arbitration tribunal in Japan must apply the U.S. Sherman Act as part of its substantive determination of the case. Fourteen years later, the European Court of Justice (ECJ) held that EU national courts must annul arbitration awards if they are considered contrary to (then) Article 85 of the EC Treaty[42] by application of domestic rules on public policy.[43] Swiss arbitration commentators have pointed to the systematic consideration of foreign competition laws, including EU and U.S. laws, in the determination of cases arbitrated in Switzerland or under Swiss law.[44] In 2009, German scholars, having conducted an empirical study of ICC arbitral awards over a period of fifteen years, confirmed that there were numerous cases dealing with matters of foreign competition law.[45] For these commentators, there are strong arguments in favor of the consideration of foreign competition laws in international arbitration.[46] They acknowledge, however, that there

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[41] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[42] *See* Treaty Establishing the European Community art. 81(1), Nov. 10, 1997, 1997 O.J. (C340) 173, 208 [hereinafter EC Treaty]. Article 81 (ex-85) provided the following:

> 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

Id. These provisions are now in Article 101 of the Treaty on the Functioning of the European Union. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 101, 2012 O.J. (C 326) 47, 88.

[43] Case C-126/97, Eco Swiss China Time Ltd. v Benetton Int'l NV, 1999 E.C.R. I-03055, *reprinted in* 14(b) INT'L ARB. REP., B-1 (June 1999), 1999 REV. ART. 631.

[44] Marc Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 J. INT'L ARB. 23, 28–33 (1997).

[45] Gralf-Peter Calliess & Moritz Renner, *Transnationalizing Private Law - the Public and the Private Dimensions of Transnational Commercial Law*, 10 GER. L.J. 1341, 1348 (2009).

[46] *See* Blessing, *supra* note 44, at 35 ("Can competition laws be avoided by resorting to arbitration? [. . .]. The short answer is: NO!"); *see also* Blessing, *supra* note 44, at 36–37 ("the prevailing view today in Switzerland is that an arbitral tribunal in Switzerland has to have regard to and, moreover,

is no accepted consensus and that the case law is inconsistent.[47]

At least one arbitration decision exists that strikes down contractual clauses as incompatible with third-country mandatory rules:[48] ICC Case No. 8626 (1996).[49] The case involved a license agreement between an American licensor and a German licensee. The contract was governed by New York law; dispute resolution was under ICC arbitration rules, and the seat of the tribunal was in Geneva. The agreement included a noncompete clause prohibiting the German licensee from selling competing products for a period of five years following termination. In its award, the tribunal referred to its obligation, post *Mitsubishi*,[50] to review the compatibility of the clause with Article 85 of the EC Treaty. The tribunal also wanted to deliver an award that would be enforceable, particularly in Germany, where it surmised that the courts would refuse enforcement if the award gave effect to a contract that was in breach of Article 85.[51] The tribunal reviewed the clause under the EC Treaty and held that the clause breached Article 85(1)[52] as an unauthorized restraint on trade that had a direct effect on the EU markets.[53]

This award is a clear precedent of a contractual clause being annulled by a tribunal for breach of a mandatory competition rule of a jurisdiction that was neither the law of the contract (New York law) nor the law of the forum (Swiss law). It confirms the intuition that it may be less difficult for tribunals to apply third-country mandatory rules than for national courts. But it may also be relevant that the mandatory rules in question were those

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should directly apply the relevant competition laws even if they pertain to a foreign legal order (i.e., to an order which is outside the law governing the contractual relationship)"). According to Calliess and Renner, "empirical evidence demonstrates that international arbitral tribunals are willing and able to apply antitrust provisions in commercial disputes." *See* Calliess & Renner, *supra* note 45, at 1348.

[47] *See* Calliess & Renner, *supra* note 45, at 1349 ("Many arbitral awards concerning matters of antitrust law . . . lack a thorough reasoning on the applicability of mandatory norms, which leads to troubling inconsistencies of the case-law.").

[48] This case is cited by Calliess and Renner, and by Blessing. Additional precedent may exist, although I do not claim to have performed exhaustive research in this matter.

[49] Case No. 8626 of 1996, Final Award, 14 ICC Int'l Ct. Arb. Bull., no. 2 Fall 2003 at 55 (ICC Int'l Ct. Arb.); 126 J. DROIT INT'L 1073 (1999). The award was issued in English but reported in French.

[50] The Swiss tribunal set great store on *Mitsubishi*, pointing out that after *Mitsubishi* third-country competition laws (in that case U.S.) had to be taken into consideration when adjudicating international disputes as part of "international public policy." *Id*. at 1074–75.

[51] *Id.* at 1075. Note that this was before *Eco Swiss*.

[52] *See id.* ("Les tribunaux aux Etats-Unis (y compris la Cour Suprême), et dans l'Union Européenne les tribunaux nationaux ainsi que la Cour de Justice des Communautés ont appliqué les règles du droit de la concurrence, sans égard au domicile des parties, lorsque le contrat en cause a un effet direct sur le commerce dans leurs différents Etats. [. . .] Les limites apportées à la fabrication de produits concurrents telles que celles qui résultent de la clause contractuelle de non-concurrence ont un effet direct dans l'Union Européenne et sont potentiellement capables de restreindre les échanges entre Etats membres et sont dans cette mesure prohibées par l'Article 85(1) du Traité de Rome [. . .]").

[53] *Id*.

of the EU (i.e., rules that would not normally be perceived as unusual or isolated compared to the practice of other developed states, including those of the forum and governing law). Such was not the case, one will recall, with the Tunisian prohibition of exclusivity that was not enforced by the Belgian Tribunal de Commerce de Mons. It is perhaps this element of substantive judgment as to whether a third-country mandatory rule is compatible with the policies of the forum and governing law and therefore "worthy" of application, which lies at the heart of the question.

III. RUSSIAN LAW'S PROHIBITION OF NONCOMPETE CLAUSES

A. Russian Competition Law

This discussion leads to the case of Russian competition laws and more precisely the Russian Federal Law No. 135-FZ "On Protection of Competition" dated July 26, 2006.[54] As with all other areas of Russian business legislation, Russian competition law was developed and adopted in several phases, piecemeal, throughout the twenty years following the collapse of the Soviet Union. The very first post-Soviet competition law remained largely Soviet; it was more precisely a "Law on Competition and Limitation of Monopolistic Activity in the Commodity Markets" that was adopted by the Supreme Soviet of the USSR in March 1991 and remained in place until 2006. The 2006 law was meant to overhaul and modernize Russian competition law, looking for inspiration in foreign examples and in EU competition law in particular. Article 11 of the 2006 law, which is arguably its heart, spells out the general "hard-core" prohibition of anticompetitive actions and agreements between competitors.[55] The

[54] Federal'nyi Zakon "O zashite konkurencii" [Federal Law On Protection of Competition] as of December 28, 2013, no. 135-FZ, published in SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERACII [SZ RF] [Russian Federation Collection of Legislation], 2013, No. 31 (Part 1), Item 3434, *available at* http://fas.gov.ru/legislative-acts/legislative-acts_9498.html. For an unofficial English translation, see http://en.fas.gov.ru/legislation/legislation_50481.html.

[55] Article 11 of the Federal Law on Competition, entitled "Prohibition of Agreements Restricting Competition or Concerted Practices between Economic Entities" reads as follows:

> 1. Agreements between economic entities or concerted practices of economic entities in the goods markets are forbidden if such agreements or concerted practices lead or can lead to:
>
> 1) Establishment or maintaining of prices (tariffs), discounts, markups (extra charges), and margins;
>
> 2) Raising, lowering or maintaining of prices at tenders;
>
> 3) Division of the goods market according to the territorial principle, the volume of sales or purchases of commodities, the range of sold products or composition of sellers or purchasers (customers);
>
> 4) Economically or technologically unjustified refusal from concluding contracts with

prohibition applies to all forms of agreement between competitors on price; discounts; surcharges or markups (which constitute price fixing); but also, importantly, all divisions of markets according to geography (i.e., by territories); by volume or quantity of sales or purchases; by types of goods; or by categories of buyers and sellers; and also the refusal to enter into contracts with particular sellers or buyers. Until recently, these prohibitions were considered hardcore because exceptions were not permitted and none could be given by the Russian competition regulator, the Federal Antimonopoly Service (FAS).[56]

Importantly, in contrast to EU law, the 2006 Russian law did not include any statutory provision for allowable "ancillary restraints." The European Commission defines ancillary restraints as agreements entered into "in connection with a concentration, which do not form an integral part of the concentration but can restrict the parties' freedom of action in the market."[57] Ancillary restraints are allowable when they are "necessary to the implementation of the concentration, which means that, in the absence of those agreements, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty."[58] The Commission adds that "[a]greements necessary to the implementation of a concentration are typically aimed at protecting the value transferred, maintaining the continuity of supply after the break-up of a former economic entity, or enabling the start-up of a new entity."[59]

Noncompete clauses are a classic type of ancillary restraint in EU competition practice. Many are approved every year in EU competition filings (or in national filings for concentrations that do not meet community-level thresholds), provided that they comply with appropriate limitations on scope, duration, and territory.[60] Noncompete clauses are also

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> certain sellers or purchasers (customers) if such refusal is not provided for directly by the Federal Laws, statutory legal acts of the President of the Russian Federation, statutory legal acts of the Government of the Russian Federation, statutory legal acts of the authorized federal executive authorities of judicial acts;
>
> 5) Imposing contractual terms on a counteragent, which are disadvantageous for the latter or are not connected with the subject of agreement (unjustified requirements of transfer of funds, other property, including property rights, as well as consent to conclude a contract on conditions of including in it of provisions, concerning the goods in which the counteragent is not interested and other requirements).

Id. art. 11.

[56] *See id.* art. 11(1).

[57] Commission Notice on Restrictions Directly Related and Necessary to Concentrations ¶ 10, 2005 O.J. (C 56) 3.

[58] *Id.* ¶ 13.

[59] *Id.*

[60] *Id.* ¶¶ 18–25.

allowable in the specific context of joint ventures—as in the case of TNK-BP.[61]

B. Russian Noncompete Clauses in Practice

Under the 2006 Russian competition law, noncompete clauses were not permitted. Despite the legal risk that was associated with them, noncompete clauses were often used by international businesses in their Russian transactions because of important commercial considerations when agreeing to joint ventures, greenfields, mergers, or acquisitions. Corporate and competition practitioners reacted to the idiosyncrasy of Russian law in different ways. Most lawyers advised their clients to build their joint ventures or conduct their transactions outside of Russia—often in Cyprus or the Netherlands—in order to place the contract under foreign law and insulate it from Russian law.[62] Some advised their clients to keep parts of the commercial agreements, including the noncompete clause, outside of the gaze of the Russian regulator FAS.[63] Others favored more transparent approaches. When the clause was commercially vital, they would suggest to file the agreements under Article 35 of the 2006 competition law, a special nonmandatory clearance procedure. Of course, the benefit of submitting these agreements to the FAS was to avoid the risk of future imposition of fines should the agreements become subsequently known to the regulator and also to attempt enforcement in Russia should the need arise.

In one such case of which I am aware—where the names of the parties must remain confidential—a shareholder agreement was voluntarily filed for review by the FAS. The agreement included a classic noncompete clause between the two shareholders in favor of the joint venture, which was intended to operate for several years in a predefined geographic market

61 *Id.* ¶¶ 36–39.

62 Regarding investment "round-tripping" and the use of Cyprus (or other) holding companies, see Delphine Nougayrède, *Outsourcing Law in Post-Soviet Russia*, 6 J. EURASIAN L. 383 (2013). According to the Central Bank of Russia, at the end of 2012, inbound foreign direct investment from Cyprus into Russia totaled $150 billion and represented 30% of all inward foreign direct investment. The Netherlands was a distant second at $60 billion. Some of these funds are "genuine" foreign direct investment and some of it is investment round-tripping by Russian investors who prefer to hold their assets outside of Russia subject to foreign law.

63 Under the 2006 law, merger control applications are usually filed under Article 28 (in relation to acquisitions). Filings typically include a copy of the share purchase and occasionally ancillary agreements such as a shareholder agreement; however, when the agreements include a noncompete clause, it is unclear whether the authorities actually review the clause—indeed the verifications performed by the regulator are mostly economic in nature (size of the transaction, respective positions on the market before and after the transaction). In my experience as a practitioner, the better view is that even if noncompete clauses are included in the filing package, the receipt of FAS merger clearance does not mean that FAS has "blessed" the noncompete clause itself.

based on the seven Russian federal districts. The agreement included a right of first refusal for each shareholder in the event that the other shareholder wished to build a competing project in neighboring territories. The clauses were specifically designed to be compliant with the EU approach to ancillary restraints. Neither shareholder had a preexisting presence in the Russian market for these products, and the joint venture was a greenfield development, which created new supply in a region where none had previously existed. By all reasonable standards, the FAS should have confirmed the clauses. Nevertheless, the FAS found that the clause violated Russian law: the exclusivity given to the joint venture was interpreted as a refusal to sell by the shareholders; the geographic right of first refusal was viewed as a geographical division of the market. Both findings breached the hardcore prohibitions of Article 11 of the 2006 law. Representatives of the FAS orally indicated that they understood the commercial justification for the clause and that they would have preferred to give their formal consent; however, in the absence of any statutory language allowing ancillary restraints, the FAS's hands were tied. The shareholder agreement was filed in September 2010, and the FAS's negative response was received in December 2010.

For the two companies, the FAS's negative response meant additional costs and delays in addition to the obligation to renegotiate their own agreement under the watchful eye of the regulator. The advantage of such transparency, however, is the open dialogue that was entered into with the FAS. FAS officials met with representatives of the two groups (both industrial companies with excellent global reputations). The FAS officials understood the economic purpose of the clause and saw that it was grounded in sound business practice. Furthermore, they realized that they would need amendments to the law in order to give them the discretion to allow such types of ancillary restraints that were self-evidently in the interests of new supply and increased competition in the market. A working group within the FAS embarked on the drafting of appropriate amendments to the law, which made their way through the Russian legislative process and were ultimately adopted into law in December 2011. The 2011 amendments were not quite as wide as initially hoped; the carve outs to the hardcore prohibitions seemed to be limited to certain types of Russian law governed joint ventures and moreover were subject to strict economic criteria.[64] Nevertheless, the concept of ancillary restraints had been introduced into the law and some form of noncompete arrangements had become possible under Russian law. Overall, the law's effectiveness in promoting competition had been improved. The amendments were adopted

[64] *See* 2013 regulations adopted by FAS, *available at* http://fas.gov.ru/netcat_files/File/razyasneniya_SP.pdf.

on December 6, 2011 and became effective on January 6, 2012.[65] As will be shown in the following section, these changes occurred during the same time that the TNK-BP dispute was swirling.

In summary, the majority view at the time of the TNK-BP dispute was that Russian noncompete clauses in share purchase agreements or in shareholder agreements were, at best, problematic. In September 2014, a leading legal information database still gave the following Q & A guidance on Russian noncompete clauses:

> Question: Is it common to provide that the seller will not compete with the target business for a given period after closing? If so, are there any restrictions on the duration and scope of such clauses?
>
> Answer: Non-compete clauses are not enforceable in Russia, and may even be construed as a competition restriction, and therefore a breach of antitrust law. However, these clauses are sometimes used, but they are likely to be declared void under current competition protection rules.[66]

To this day, in its comments on international Russian joint ventures, the same legal database continues to write that "restrictive covenants are not enforceable under Russian law and it is unusual to include them."[67]

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[65] A new Article 13(1) was inserted into the competition law. It reads as follows:

> 1. Actions (lack of action) of economic entities provided for in Part 1 of Article 10 of this Federal Law (except actions (lack of action) stated in Clauses 1 (except fixing or maintaining price of the goods, which are the results of innovative activities), 2, 3, 5, 6, 7 and 10 of Part 1 of Article 10 of this Federal Law), agreements and concerted practices provided for in Parts 2 and 3 of art. 11, deals, other actions provided for in Articles 27-30 of this Federal Law can be recognized as permissible if such actions (lack of action), agreements and concerted practices, transactions, other actions do not create for particular persons opportunity to eliminate competition in the relevant goods market, do not impose restrictions superfluous for achievement of the goal of these actions (lack of action), agreements and concerted practices, transactions, other actions on the participants or third persons and also if they result or can result in:
>
> 1) perfection of production, sale of goods or stimulation of technical, economic progress or rising competitive capacity of the Russian goods in the world market
>
> 2) obtaining by consumers of benefits (advantages) which are proportionate to the benefits (advantages) obtained by the economic entities in the result of actions (lack of action), agreements and concerted practices, transactions, other actions.

Federal'nyi Zakon "O zashite konkurencii" [Federal Law On Protection of Competition] as of December 28, 2013, no. 135-FZ, *supra* note 54, art. 13(1)–(2).

[66] *Share Acquisition Documents: Russian Federation: International Acquisitions*, PRACTICAL LAW (Apr. 16, 2014), http://uk.practicallaw.com/6-107-4582.

[67] *Shareholders' Agreement and Bye-laws: Russia: International Joint-Ventures*, PRACTICAL LAW,

IV. THE TNK-BP DISPUTE

A. The Early Years

All of this leads us to the TNK-BP dispute. A brief summary of the history of TNK-BP is in order, for it is complex. The privatizations of the 1990s resulted in the sale of a number of regional Russian oil companies, including Sidanco and *Tyumenskaya Neftovaya Kompanya* (TNK or Tyumen Oil Company). Sidanco was sold in 1996 in the now notorious "loan-for-shares" program. Vladimir Potanin, a former Russian Deputy Prime Minister, reportedly paid $130 million for 51% of the company.[68] TNK was acquired by AAR from the government in several stages between 1997 and 1999.[69] In 1997, BP (at the time, BP Amoco) first emerged into the picture by acquiring 10% of Sidanco from the Potanin group for $481 million.[70] At some point thereafter, Potanin and Fridman fell out regarding the ownership of Sidanco. Fridman apparently claimed that Alfa had provided funds in the loan-for-share acquisition back in 1996 and should therefore be entitled to part of the proceeds of the 10% sale to BP.[71] In retaliation, Alfa allegedly engineered a takeover of Chernogorneft, one of Sidanco's subsidiaries, via the Russian bankruptcy law and courts.[72] BP responded by complaining to Western governments, which ultimately led to the European Bank for Reconstruction and Development (E.B.R.D.) "blacklisting" Alfa[73] and the cancellation of a U.S. Export-Import Bank guarantee to TNK. The shareholder fight between Potanin, Alfa, and BP continued for some time, and finally in 2000—apparently with some prodding from the Russian government—they reached a settlement, which involved Potanin selling his stakes for an estimated $640 million and BP staying on with Alfa, its former adversary, as core shareholders in both

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Question 10(g) (Dec. 3, 2014), http://uk.practicallaw.com/7-107-4534?q=russian+federation,+restrictive+covenants. In addition to the difficulties they raise under Russian competition law, restrictive covenants have been traditionally been viewed as breaching a Russian civil law principle prohibiting parties to waive certain rights.

[68] CHRYSTIA FREELAND, SALE OF THE CENTURY: THE INSIDE STORY OF THE SECOND RUSSIAN REVOLUTION 175 (2005). There are different accounts of how Sidanco was first privatized. Some sources report that Potanin acquired Sidanco jointly with Fridman (Alfa), Potanin having paid $200 million for two-thirds of the company and Fridman having paid $100 million for the remaining one-third. *See* THANE GUSTAFSON, WHEEL OF FORTUNE 420 (2012).

[69] *History of Alfa Group Consortium*, ALFA GROUP, http://www.alfagroup.org/about-us/history/?print=Y (last visited Mar. 19, 2015). On AAR, see *supra* note 6 and accompanying text.

[70] According to Freeland, the price was $481 million. According to Gustafson, the price was $571 million. *See* GUSTAFSON, *supra* note 68, at 420.

[71] FREELAND, *supra* note 68.

[72] GUSTAFSON, *supra* note 68, at 421–22.

[73] Stefan Wagstyl, *Russia: Europe — Russian Bank Complains Over EBRD Blacklist*, ALFA BANK (Dec. 12, 2001), http://alfabank.com/media/clippings/2001/12/12/.

TNK and Sidanco.[74]

In 2003, all of these assets were then pooled together into a newly formed company owned fifty-fifty by BP and AAR, which was called TNK-BP. Ultimately, TNK-BP became the third largest Russian oil company. BP's 2003 investment, estimated at $7 billion, was hailed as the largest single foreign investment in Russia at the time, and the joint venture was signed in great fanfare in the presences of Tony Blair and Vladimir Putin.[75] Robert Dudley, originally from Amoco and now the chief executive of BP, became CEO of the new joint venture.

B. The Relationship Deteriorates (Again)

After a few years, however, relations between the shareholders BP and AAR began to deteriorate again. Rumor had it that BP tried, behind AAR's back, to replace the AAR shareholders by state-owned company Gazprom. AAR, for its part, had apparently taken the view that BP exercised too much control over management and ran the company more like a subsidiary of BP rather than a fifty-fifty joint venture. Pressures of various sorts were applied and in July 2008, Robert Dudley fled Russia. Shortly thereafter, Mikhail Fridman was named interim CEO.

Then in early 2009, the shareholders announced that they had settled their dispute.[76] A new board composition was announced for the top holding company in the British Virgin Islands, TNK-BP Ltd., which included three independent directors who would act as tiebreakers in the event of deadlock between the shareholders. The new independent directors even included former German chancellor Gerhard Schroeder.[77] In terms of the formal changes made to the shareholders' agreement, it is unclear whether a new agreement was signed to replace the 2003 agreement, or if the parties signed amendments to the original 2003 agreement. Either way, new shareholder arrangements were put in place.

At that point the overall group structure of TNK-BP was as set out in the diagram that follows. Importantly, Alfa, OGIP, Access, Renova, TNK-BP Ltd. and most (or all) of the interim tiers of holding companies were registered in the British Virgin Islands.

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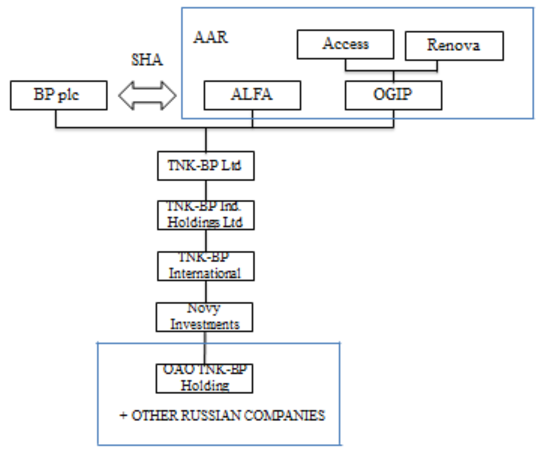
[74] On the last phase, see FREELAND, *supra* note 68, at 340–42.

[75] *Jones Day Counsels on a Historic Oil and Gas Joint Venture in Russia*, JONES DAY (June 2003), http://www.jonesday.com/jones-day-counsels-on-a-historic-oil-and-gas-joint-venture-in-russia-06-30-2003/.

[76] BP P.L.C., BP ANNUAL REPORT AND ACCOUNTS 2008, 93 (2009), *available at* http://www.bp.com/ content/dam/bp/pdf/investors/BP_annual_report_accounts_2008.pdf.

[77] Ed Crooks & Catherine Belton, *Future for TNK-BP lies in hands of board*, FIN. TIMES (Jan. 15, 2009, 7:59 PM), http://www.ft.com/cms/s/0/02be3d02-e338-11dd-a5cf-0000779fd2ac.html#axzz3Fg2ri1t6.

Summarized Group Structure of TNK-BP[78]



C. London High Court

For approximately two years, the arrangement apparently worked and things were quiet. Then in January 2011, BP astonished the market (again) by announcing that it had agreed to a new joint venture project in the Russian arctic region with state-owned company Rosneft.[79] The proposed BP–Rosneft deal involved a share swap—BP would obtain 9.5% of Rosneft, and Rosneft would obtain 5% of BP and a long-term agreement for the joint exploration of several blocks in the Arctic Kara Sea.[80] Unsurprisingly, the announcement of the BP–Rosneft deal triggered the third and final phase of the TNK-BP dispute. Immediately after BP's announcement, AAR claimed that BP was in violation of the TNK-BP shareholder agreement and promptly moved to block the deal. BP's 2011 annual report described the move as follows:

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[78] Author's compilations based on TNK-BP's Annual Review and Summary Financial Statements 2011. *See Corporate Structure of the TNK-BP Group*, TNK-BP, http://tnk-bp3.3ebra.com/en/corporate_governance/ (last visited Jan. 1, 2015). For the top level, see the EU's merger clearance obtained in 2013, Case No COMP/M.6801, Rosneft/TNK-BP Comm'n decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, Mar. 8, 2013, *available at*, http://ec.europa.eu/competition/mergers/cases/decisions/m6801_20130308_20310_3005394_EN.pdf (with indication of principal holding companies only).

[79] *Rosneft and BP Form Global and Arctic Strategic Alliance*, BP EUR. SE (Jan. 14, 2011), http://www.bp.com/fr_ch/switzerland/medias/communiques-aux-medias/pm-rosneft-joint-venture.html.

[80] *Id.*

> An application was brought in the English High Court on 1 February 2011 by Alfa Petroleum Holdings Limited and OGIP Ventures Limited against BP International Limited and BP Russian Investments Limited[81] alleging breach of [the] Shareholders Agreement on the part of BP and seeking an interim injunction restraining BP from taking steps to conclude, implement or perform the transactions with Rosneft Oil Company, originally announced on 14 January 2011, relating to oil and gas exploration, production, refining and marketing in Russia (the Arctic Opportunity). Those transactions included the issue or transfer of shares between Rosneft Oil Company and any BP group company (pursuant to the Rosneft Share Swap Agreement). [An expedited hearing took place at the London High Court,[82] during which] [t]he court granted an interim order restraining BP from taking any further steps in relation to the Rosneft transactions pending an expedited UNCITRAL arbitration procedure in accordance with the Shareholders Agreement between the parties.[83]

On February 1, 2011, AAR stated the following:

> The High Court in London has Tuesday granted a request by the Russian shareholders in TNK-BP Holding, BP PLC's Russian joint venture, for an injunction to halt the major share swap and exploration agreement between BP and Rosneft. Following a private hearing, the judge Mr. Justice Burton said the companies 'had sensibly reached an agreement' for an injunction to be placed on BP blocking any further progress on the landmark deal until Feb. 25, or the determination of the arbitration tribunal. The injunction had been sought by Alfa-Access-Renova, BP's Russian partner in TNK-BP. A BP spokesman Friday said the group's law firm . . . had written to AAR's lawyers, . . . suggesting the two sides seek 'expedited arbitration' in Sweden in accordance with the terms of the TNK-BP shareholder agreement. AAR has argued the deal may violate the exclusivity provision of

[81] Presumably, these were wholly owned affiliates of BP p.l.c. through which it held its shares in TNK-BP.

[82] Andrew Pugh, *Skadden Wins Injunction for TNK-BP Shareholders*, LAWYER (Apr. 4, 2011), http://www.thelawyer.com/skadden-wins-injunction-for-tnk-bp-shareholders/1007545.article.

[83] BP P.L.C., ANNUAL REPORT AND FORM 20-F 2011, 166 (2012) [hereinafter BP ANNUAL REPORT 2011], *available at* http://www.bp.com/ content/dam/bp/pdf/investors/BP_Annual_Report_and_Form_20F_2011.pdf.

its shareholder agreement with BP. The provision requires AAR and BP to pursue new opportunities in Russia exclusively through TNK-BP, unless one of the partners rejects the plans.[84]

D. Stockholm Arbitration Proceedings

Following the London High Court's interim order, arbitration proceedings were initiated, apparently with a seat in Stockholm although most of the meetings took place in London.[85] On March 25, 2011, the arbitration tribunal confirmed the London High Court's injunction restraining BP from implementing its agreement with Rosneft.[86] On April 4, 2011, a hearing was held before the tribunal at which BP argued that it should be allowed to pursue the Rosneft share swap separately without the joint Arctic exploration limb. On April 8, the tribunal held that BP may not separately pursue the share swap with Rosneft and upheld the injunction on the entire deal.[87] On April 14, 2011, BP and Rosneft agreed to extend the deadline for the share swap and exploration agreement to May 16, 2011.[88] And finally, on May 5, the tribunal issued its award, holding that the transaction between BP and Rosneft would only be allowed to proceed if TNK-BP joined the Arctic joint venture.[89] In effect, therefore, the tribunal upheld the noncompete clause and right of first refusal.

Rosneft, however, had long maintained that they were not interested in TNK-BP joining the Arctic joint venture. The Rosneft chief financial officer had pointedly declared that "[TNK-BP] [had] neither the technology, nor the experience, nor the personnel."[90] On May 17, 2011, BP announced,

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[84] *UK Court Grants AAR Injunction on BP-Rosneft Deal*, AAR (Feb. 1, 2011), http://www.aar.ru/en/press/news/item/341-uk-court-grants-aar-injunction-on-bp-rosneft-deal.html.

[85] The tribunal was "made up of three English barristers and has met only in London." *See* GUSTAFSON, *supra* note 68, at 599.

[86] Tim Webb, *BP's Russian Deal With Rosneft Blocked by Court*, GUARDIAN (Mar. 24, 2011, 3:36 PM), http://www.theguardian.com/business/2011/mar/24/bp-russian-deal-rosneft-blocked-court.

[87] *BP-Rosneft Share Swap Cannot Proceed, Arbitration Tribunal Orders Further Hearings*, AAR (Aug. 4, 2011), http://www.aar.ru/en/press/news/item/489-bp-rosneft-share-swap-cannot-proceed-arbitration-tribunal-orders-further-hearings.html. In its own press release, BP called the decision of the tribunal a "deferral." *See* Julia Werdigier & Andrew E. Kramer, *Setback in Rosneft Deal Suggests BP Misread Russia*, N.Y. TIMES DEALBOOK (Apr. 8, 2011, 7:29 AM), http://dealbook.nytimes.com/2011/ 04/08/bp-rosneft-deal-faces-another-setback/?_php=true&_type=blogs&_r=0); *Court Extends Injunction on BP-Rosneft Deal*, SPUTNIK (Apr. 8, 2011, 4:58 PM), http://en.ria.ru/business/20110408/ 163436288.html.

[88] *BP, Rosneft Extend $16 Billion Share Swap Deal to May*, SPUTNIK (Apr. 14, 2011, 11:51 AM), http://en.ria.ru/russia/20110414/163525502.html.

[89] *Court Rules BP-Rosneft Deal Legal if TNK-BP Joins Arctic Project*, SPUTNIK (May 6, 2011, 8:12 PM), http://en.ria.ru/business/20110506/163899295.html.

[90] Rowena Mason, *Russia's Rosneft Refuses to Allow TNK-BP to Join £10bn Arctic Deal With BP*, TELEGRAPH (Feb. 2, 2011, 05:44 PM), http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/8299198/Russias-Rosneft-refuses-to-allow-TNK-BP-to-join-10bn-Arctic-deal-with-BP.html.

following the expiration of the deadline for the satisfaction of conditions precedent, that both the Rosneft share swap agreement and the Arctic exploration contract had terminated.[91] The BP-Rosneft deal announced in January 2011 was defunct, having fallen victim to the London High Court's interim order of February 1, 2011 and the arbitral tribunal's award of May 5, 2011.

The arbitration proceedings continued for approximately an additional eighteen months. BP filed counterclaims against AAR consortium members in connection with new alleged breaches of the shareholders' agreement.[92] Lawsuits were filed by Russian minority shareholders of OAO TNK-BP Holding[93] against BP and the BP directors of TNK-BP in the Tyumen district court, claiming damages for alleged breaches of their minority shareholder rights.[94] Rumors appeared of a new Artic joint venture between Rosneft and Exxon.[95] And then, in the fall of 2012, BP and AAR announced that a settlement had been reached.[96]

E. The Russian FAS's Position

Before discussing the settlement, however, it is interesting to consider the position and role of the Russian competition regulator FAS throughout

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[91] BP ANNUAL REPORT 2011, *supra* note 83, at 166; Julia Kollewe & Tom Bawden, *BP-Rosneft Deal Collapses*, GUARDIAN (May 17, 2011), http://www.theguardian.com/business/2011/may/17/bp-rosneft-deal-collapses.

[92] *Update 1 - BP Sues TNK-BP Partner for Breach of Agreement*, REUTERS (Aug. 9, 2011, 5:04 PM), http://in.reuters.com/article/2011/08/09/bp-renova-arbitration-idINLDE7780 K720110809.

[93] The head Russian company, OAO TNK-BP Holding, included minority shareholders following a 2005 corporate restructuring during which minority shares in OAO TNK-BP Holding were issued to the former minority shareholders in TNK, Sidanko, and Onako.

[94] Similar minority shareholder lawsuits, also in the Tyumen district court, appeared during Alfa's dispute with Telenor of Sweden a few years earlier in connection with telecom company Vimpelcom and its expansion in Ukraine. In the Vimpelcom dispute, the Siberian minority shareholder lawsuits were successful. However, the TNK-BP minority shareholder lawsuits were thrown out quite quickly (different time, different practices perhaps). *See* BP ANNUAL REPORT 2011, *supra* note 83, at 166 ("Five minority shareholders of OAO TNK-BP Holding (TBH) have filed two civil actions in Tyumen, Siberia, against BP Russia Investments Ltd. and BP p.l.c., and against two of the BP-nominated directors of TBH. These two actions sought to recover alleged losses of $13 billion and $2.7 billion respectively. On November 11, 2011, the Tyumen Court dismissed both claims on their merits. The shareholders appealed both of these decisions to the Omsk Appellate court. On January 26, 2012, the Appellate court upheld the Tyumen Court's dismissal in relation to the BP nominated directors of TBH."). *Id.* at 42. The Omsk Appellate court subsequently confirmed the Tyumen court's dismissal of the minority suits against BP Russia Investments Ltd. and BP p.l.c.

[95] SHAMIL YENIKEYEFF, OXFORD INST. ENERGY STUDIES, COMMENT, BP, RUSSIAN BILLIONAIRES, AND THE KREMLIN: A POWER TRIANGLE THAT NEVER WAS (2011), *available at* http://www.oxfordenergy.org/wpcms/wp-content/uploads/2011/11/BP-Russian-billionaires-and-the-Kremlin.pdf.

[96] *See infra* subpart IV(F).

the dispute in 2011 and 2012. Recall that in 2011, the FAS was drafting an amendment to the 2006 Russian competition law to allow ancillary restraints. These amendments came into effect on January 6, 2012.[97] The FAS publicly aired its views twice in relation to the TNK-BP dispute. First, in June 2012, it announced that Rosneft had filed a complaint and that the FAS would investigate the TNK-BP shareholder agreement to determine whether it was in violation of Russian competition law.[98] In that announcement, the FAS also indicated that they were considering whether to request public disclosure of the TNK-BP shareholder agreement to the extent that it seemed to impose obligations "not only on the actions of contracting parties, but also on the actions of third parties"—presumably implying Rosneft.[99] The FAS's second announcement was made in September 2012. By then, the agency had relented on the subject of mandatory disclosure, but its views were still negative on substance regarding a possible violation of Russian law by the noncompete clause. The head of the FAS, Igor Artemiev, stated rather extraordinarily that "[m]y own personal view is that agreements of this kind violate Russian competition law. But, I am not a great expert in English law, so we are working in order to form a balanced and professional position for ourselves."[100] These sanguine views contrasted with the more pessimistic ones that were reportedly articulated by unnamed "highly-placed" sources within Rosneft. Obviously still reeling from the collapse of their Artic joint-venture with BP, Rosneft sources remarked:

> It is surprising that a secret shareholder agreement and a legal dispute between Cypriot and British companies should exert so much influence on the implementation of strategic projects within the Russian energy sector. It seems that the Russian national oil company [i.e., Rosneft] is not able to work with world class companies [i.e., BP] on its very territory. This is reminiscent of the legal chaos and difficult legacy of the nineties. This legacy must be overcome as quickly as possible and must be discarded once and for all into the past.[101]

[97] *See supra* note 54.

[98] One cannot help but wonder why it took Rosneft one year to file its complaint after the collapse of its initial deal with BP.

[99] Press Release, Federal Antimonopoly Service of Russia (FAS), FAS proverit aktsionernoe soglashenie TNK-BP (June 8, 2012, 12:25 PM), http://fas.gov.ru/fas-in-press/fas-in-press_34637.html.

[100] Press Release, Federal Antimonopoly Service of Russia (FAS), *FAS RF: Aksioneram TNK-BP ne grozit obyazatelnoe raskritie soglashenia aksionerov* (Sept. 13, 2012), http://fas.gov.ru/fas-in-press/fas-in-press_35145.html.

[101] "Удивительно, что секретное акционерное соглашение и юридический спор кипрской и британской компаний оказывают такое влияние на реализацию стратегических проектов российской энергетической отрасли. Выясняется, что российская национальная нефтяная компания не может работать с компаниями мирового класса на территории самой же России. Все

All parties involved were also reminded that the penalty for breaching Russian competition law could be as high as 15% of sales in the "relevant market."[102]

F. The Saga Comes to a Close

October 2012 marked the saga's final stage. On October 17, the Moscow press reported that AAR had agreed to sell its 50% stake to Rosneft for an eye-watering $28 billion.[103] The deal had allegedly become possible "as restrictions spelled out in the shareholder agreement between AAR and BP [had] expired . . . ."[104] A few days later BP announced that it too had agreed to sell its 50% stake of TNK-BP to Rosneft in return for $11–13 billion in cash and a 19% stake in OAO Rosneft.[105] As would be expected, the next step was for the two (future ex-) shareholders AAR and BP to bury the arbitration hatchet. This was formally announced on November 13, with BP agreeing to pay $325 million to AAR.[106] Merger clearances were obtained, first from the FAS and then from the European Commission,[107] clearing the way for completion of the deals in March 2013. Completion of the sale marked the official ending of BP's sixteen-year saga with Alfa and its partners (1997–2013). The sale price of $55 billion was spectacular to say the least, and the transaction represented a significant expansion of the Russian state's already dominant ownership position in the Russian hydrocarbon sector.

это напоминает правовой беспредел и тяжелое наследие 90-х. Это наследие необходимо как можно быстрее стряхнуть и раз и навсегда оставить в прошлом." Oksana Gavshin & Margarita Lyutova, *FAS rasmotrit zhalobu Rosnefti na aksionerov TNK-BP*, VEDOMOSTI (June 7, 2012), http://www.vedomosti.ru/companies/news/1827732/fas_perepishet_istoriyu?full#cut.

[102] *Id.*

[103] Anatoly Medetsky, *AAR Reportedly Signs With Rosneft to Sell TNK-BP Stake*, MOSCOW TIMES (October 17, 2012, 7:57 PM), http://www.themoscowtimes.com/business/article/aar-reportedly-signs-with-rosneft-to-sell-tnk-bp-stake/469921.html.

[104] *Id*.

[105] Guy Chazan & Catherine Belton, *BP to Sell TNK-BP Stake to Rosneft*, FIN. TIMES (Oct. 22, 2012, 7:54 AM), http://www.ft.com/intl/cms/s/0/c56800c6-1b70-11e2-ab87-00144feabdc0.html#axzz3FfY9MWlV.

[106] Alexis Flynn, *BP to Pay $325 Million to Partner in TNK-BP*, WALL ST. J. (Nov. 13, 2012, 11:17 AM), http://online.wsj.com/news/articles/SB10001424127887324556304578116803005475678.

[107] Решение и предписание по ходатайству ОАО «Нефтяная компания «Роснефть» [Decision and order on the application of "Oil Company" Rosneft"], Nr. AD/45393/12, FAS, Dec. 29, 2012, *available at* http://fas.gov.ru/solutions/solutions_36493.html>; Case No COMP/M.6801, Rosneft/TNK-BP Comm'n decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, Mar. 8, 2013, *available at*, http://ec.europa.eu/competition/mergers/cases/decisions/m6801_20130308_20310_ 3005394_EN.pdf.

V. SPECULATIONS ON AN OUTCOME

There seems to be very little doubt that at the time they were entered into, the type of restrictions set out in the TNK-BP noncompete and right of first refusal clauses were in breach of Russian law. The central question that follows, therefore, is whether this violation was in any way relevant to the noncompete clause's validity in a shareholder agreement governed by English law between non-Russian parties. Clearly, neither the English High Court nor the Stockholm tribunal gave any decisive weight to the argument of violation of Russian law. The London High Court held that there were sufficient grounds to issue an injunction preventing BP from continuing to implement the Rosneft deal pending review on the merits, and the arbitral tribunal upheld the clause by requiring that the new joint venture with Rosneft be opened up to TNK-BP. The solutions of both the London High Court and the Stockholm tribunal were therefore akin to the dismissal of Tunisian competition law by the Belgian Tribunal de Commerce de Mons, rather than the preference for EU competition law expressed by the 1996 Swiss ICC tribunal (in both cases, in the face of a contrary clause that had been agreed between the parties).[108]

There are many possible explanations for this outcome. Not knowing the exact date of signature of the noncompete clause—i.e., whether it was signed before or after December 23, 2009—one can only speculate whether Article 9(3) of the Rome Regulation I was relevant to the analysis. Recall that the United Kingdom opted out of Article 7(1) in the Rome Convention, therefore, Article 7(1) would never have entered into play in the first place. It is possible that for understandable commercial reasons, BP's legal team did not raise the defense that the clause was invalid (e.g., to avoid that AAR come up with its own alternative projects that BP might not welcome). Another possibility is that the BP legal team argued, based on the facts, that AAR or TNK-BP had given their consent to the Rosneft deal—for example, by waiving or declining to exercise their right of first refusal. We simply do not know if the tribunal examined the argument of invalidity of the clause under Russian law and English law. If the tribunal did examine this argument, it may have ultimately found that the clause was admissible under English law because, strictly speaking, the clause did not require any type of performance or enforcement in Russia. The tribunal may have viewed the clause as operating only between holding companies located exclusively in England or the British Virgin Islands (Alfa, OGIP, and TNK-BP Ltd.). The fact that no action or performance (or abstention) was required of any Russian company or foreign company physically present on

[108] *See* Tribunal de Commerce [Comm.] [Commerce Tribunal] Mons, Nov. 2, 2000, REVUE DE DROIT COMMERCIAL BELGE [RDC] 2001, 617–21 (Belg.); Case No. 8626 of 1996, Final Award, 14 ICC Int'l Ct. Arb. Bull., no. 2 Fall 2003 at 55, (ICC Int'l Ct. Arb.); 126 J. DROIT INT'L 1073 (1999).

Russian territory may have led the tribunal to distinguish the TNK-BP clause from the classic English authorities, particularly *Ralli Bros*. Perhaps, unlike in *Foster v. Driscoll* or *Reggazonni*,[109] the tribunal found that comity or English public policy did not require that the provisions of Russian competition law be given effect. Like the Belgian decision on the Tunisian prohibition of exclusivity clauses, it is also plausible that the tribunal found the Russian law rules on noncompete clauses too strange or unusual, and unworthy of being given effect.[110]

Regardless of the exact reasoning, the TNK-BP noncompete clause was ultimately upheld. The interposition of a number of intermediary tiers of foreign holding companies and the choice of English law in the shareholder agreement successfully insulated the transaction from the unwanted effects of Russian law. This was true despite the fact that Russia was the only territory in which the economic effects of the noncompete clause could actually be felt. The TNK-BP decisions therefore support the views of the skeptics who question the effect of third-country mandatory rules in international litigation and arbitration, even in the field of competition law, despite the effects doctrine and despite the numerous doctrinal pronouncements in favor of the consideration of these rules by national courts and arbitral tribunals.

VI. CONCLUSION

Over and beyond the ownership of TNK-BP, which has now reverted to the Russian state, there are wider issues at stake. Beginning in 1992, offshore corporate structuring and foreign law—i.e., non-Russian law—were commonly utilized in post-Soviet Russian business practices in order to circumvent Russian law. One question that these practices raise is whether they contributed to the stunting of Russian domestic law development.[111] If more Russian joint venture transactions had been performed in Russia and under Russian law in the period between 1992 and 2014, the modernization of Russian competition law (and one might add contract law) regarding joint ventures and ancillary restraints might have occurred earlier. Another related theme involves what has been termed the "liftoff" of transnational commercial law.[112] The dominance of party autonomy in recent decades is part of an overall evolution of private international law in which national laws and infrastructure are increasingly

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[109] Foster v. Driscoll, [1929] 1 K.B. 470 (Eng.).

[110] Tribunal de Commerce [Comm.] [Commerce Tribunal] Mons, Nov. 2, 2000, REVUE DE DROIT COMMERCIAL BELGE [RDC] 2001, 617–21 (Belg.).

[111] *See generally* Nougayrède, *supra* note 62.

[112] Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM J. TRANSNAT'L L. 209 (2002).

displaced through choice of law and forum selection clauses, sometimes by transnational pluralist systems, including a disembodied *lex mercatoria*, or more frequently, by other legal systems—for example, English law—that are overwhelmingly favored over, say, Russian law.[113] When this happens, "National laws may become less and less a part of the routine experience of those involved in international transactions, and these parties may fall out of the habit of thinking of these laws as being of relevance, and, more perniciously, worthy of respect. This is especially problematic when the arbitrators or adjudicators, chosen by the parties, also fall into the same system of thought."[114] Some commentators have written that the international arbitral system would gain greater legitimacy if it paid greater attention to foreign mandatory public rules, for example, at the moment of enforcement review by national courts, "to give due regard not only to [these courts'] own legal system's interests, but also to the important public policies of another State, reflecting that State's sovereignty and societal values," adding that "this [would be] a needed and realistic approach in an age of pervasive economic globalization."[115] The eviction from transnational commercial practice of national systems that are viewed as less developed must be viewed as a downside of the increasingly unconditional acceptance of party autonomy in private international law. There should be increased scholarly examination of the institutional effects this eviction has on developing legal systems and of the tools that could be deployed to reverse the trend while preserving the benefits of legal globalization.

Another theme is that in an increasingly multipolar world, circumvention of mandatory rules in large transactions can have wider systemic consequences. When some states feel that they are being ignored, they can come back with a vengeance, and Russia is one of those states.

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[113] The extent of the dominance of English law in transnational contractual practice is difficult to quantify, but it seems globally uncontested. In one survey, 40% of in-house legal departments reported that they most frequently use English law. *See Exorbitant Privilege*, ECONOMIST (May 10, 2014), http://www.economist.com/news/international/21601858-american-and-english-law-and-lawyers-have-stranglehold-cross-border-business-may. Scholars, having performed quantitative research involving more than 4000 ICC arbitration cases between 2007 and 2012, found a more modest proportion for English law—approximately 11% of total contracts with Swiss law not far behind—but well ahead of all other laws. *See* Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455 (2014). However, the assumptions that were formulated—which aimed to identify "a market" for laws and therefore reviewed only cases involving contracting parties in third states—may have impacted the results in disfavor of English law. In the Russian environment, empirical evidence points to a very significant proportion of contracts placed under English law, especially when one takes into account the larger transactions.

[114] Wai, *supra* note 112, at 259.

[115] Christopher S. Gibson, *Arbitration, Civilization and Public Policy; Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 PENN ST. L. REV. 1227, 1232, 1266 (2009).

We will never know whether the Russian FAS concluded that the noncompete clause in TNK-BP's shareholder agreement breached Russian competition law and whether fines should have been imposed. We do know, however, that the decisions of foreign legal venues blocking Rosneft's Arctic joint-venture with BP, albeit on technical contractual grounds, were felt as a blow in senior Russian political circles, ultimately leading to Rosneft's acquisition of the entirety of TNK-BP and further expansion of Russian state ownership over the economy.[116] In 2012, senior Russian politicians began publicly campaigning against "excessive foreign legal interference."[117] A number of Russian policy initiatives were introduced purporting to overhaul Russian legal infrastructure and modernize the country's laws.[118] These initiatives predate the conflict in Ukraine and the international sanctions that followed. To this day, the TNK-BP acquisition continues to reverberate throughout the Russian economy.[119]

A final note, or rather, suggestion that arises from the TNK-BP noncompete saga is the need for transparency. It is regrettable that the London High Court injunction and Stockholm tribunal award have not been published. Publication of these decisions, or at least some parts of them, would increase transparency and predictability in important transnational matters such as these. The Russian public arguably has an interest at stake here. Russia proper has always lacked transparency in important state transactions. Historically, what little light that was shed on such transactions was often the result of proceedings conducted in foreign venues[120]—typically, the London High Court.[121] For international legal practitioners, policymakers, and the Russian public at large, a similar spotlight should be cast on the TNK-BP shareholder arrangements that ultimately led to a systemically important transaction and further expansion of the state's role in the Russian economy.

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[116] Incidentally, with half of the purchase being paid in cash to the Russian shareholders.

[117] Anna Gunners & Anna Zavin, *Deklaratsya o sudebnom suverenitete*, KOMMERSANT (May 18, 2012), http://www.kommersant.ru/doc/1935924; *Russia Slams Foreign Courts for "Unfair Competition*,*"* EURASIAN L. (May 18, 2012, 4:09 AM), http://eurasian-law-breaking-news.blogspot.com/2012/05/russia-slams-foreign-courts-for-unfair.html.

[118] Nougayrède, *supra* note 62.

[119] The acquisition was largely funded with U.S. denominated debt. Rosneft was accused of contributing to a precipitous decline of the ruble the week of December 15, 2014, through significant ruble sales that it performed to fund a U.S. dollar debt installment that had come due. Elena Mazneva and Ekaterina, *Rosneft Denies Role in Ruble's Rout After Record Bond Sale*, BLOOMBERG (Dec. 17, 2014), http://www.bloomberg.com/news/ 2014-12-16/rosneft-denies-role-in-ruble-s-rout-as-pressure-on-sechin-mounts.html.

[120] *See* Berezovsky v. Abramovich [2012] EWHC (Comm.) 2463 (Eng.); Cherney v. Deripaska [2008] EWHC (Comm.) 1530 (Eng.); OJSC Oil Co. Yugraneft v. Abramovich, [2008] EWHC (Comm.) 2613 (Eng.).

[121] *Id.*; *see also* Hulley Enterprises Limited (Cyprus) v. Russian Federation*,* Final Award, PCA Case No. AA 226 (July 18, 2014), *available at* http://www.pca-cpa.org/showpage.asp? pag_id=1599.