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A Question of Sovereignty, Development, and Natural Resources: A New Standard for Binding Third Party Nonsignatory Governments to Arbitration

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I. Introduction

The issue of compelling a third party nonsignatory (TPN) government or government entity to arbitration has recently arisen in two cases before U.S. courts. National sovereignty, natural resources, and international comity were at stake in both cases, but the U.S. Supreme Court has yet to address the issue.[1] A U.S. court binding a foreign government to an arbitration agreement or award necessarily strikes at the sovereignty of that state.[2] When a state explicitly consents to be bound, compulsion or enforcement is merited under international treaties[3] and broader principles, such as the International Law Commission's Draft Articles on the Responsibility of States.[4] In cases of explicit consent, a violation of sovereignty is more or less moot. On the other hand, when a state is merely a TPN to an arbitration agreement,[5] the U.S. court ordering compulsion or enforcement undercuts a foreign nation's sovereign status.[6] Some fact scenarios may justify undercutting sovereignty, but the U.S. courts faced with this issue in two recent cases failed to emphasize the question of sovereignty when deciding whether to compel a TPN government to arbitration.[7] With the oil and gas resources of two developing nations central in both disputes, the development consequences of these cases cannot be ignored.[8]

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1. *See* Hans Smit, *When is a Government Bound by a Contract, Including an Arbitration Clause, It Did Not Sign?*, 16 AM. REV. INT'L ARB. 323, 337 (2005) (concluding that the TPN issue "appears ripe for the U.S. Supreme Court to take the matter in hand"); *see also* ChevronTexaco Corp. v. Republic of Ecuador, 129 S. Ct. 2862, 2862 (2009) (denying certiorari to decide the issue of binding a TPN government to an arbitration agreement).

2. *See* Hilton v. Guyout, 159 U.S. 113, 163 (1895) ("The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'").

3. *See, e.g.*, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 21 U.S.T. 2517, 30 U.N.T.S. 3 [hereinafter New York Convention] (ratified in the United States Dec. 29, 1970) (requiring state signatories to recognize and enforce foreign arbitral agreements and awards).

4. *See* United Nations Draft Articles on the Responsibility of States, 2001, art. 2, *available at* http://www.un.org/law/ilc/ ("There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.").

5. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1142 (2009) (defining TPNs as those "entities that do not themselves execute a[n] [arbitration] contract").

6. *See* OKEZIE CHUKWUMERIJE, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 2 (1994) ("One of the cornerstones of arbitration is its consensual nature.").

7. *See* cases cited *infra* notes 9–10 (adjudicating on grounds other than international comity).

8. *See generally* Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), ¶ 1–8, U.N. Doc. A/5217 (Dec. 14, 1962) (providing for a state's right to permanent sovereignty

Bridas v. Government of Turkmenistan[9] and *Republic of Ecuador v. ChevronTexaco Corp.*[10] arise out of similar factual arrangements and implicate a TPN government faced with arbitration. In both cases, the courts had to decide whether the government could be a party to the arbitration agreement that it did not sign. Despite the similarities between *Bridas* and *ChevronTexaco*, the Fifth Circuit and the Southern District of New York reached divergent results.[11] In *Bridas*, the Fifth Circuit applied federal common law to decide whether the government of Turkmenistan was bound to an arbitration agreement entered into by a state-owned entity and a foreign corporation.[12] Through federal common law, the court found Turkmenistan bound to the arbitration agreement based on a theory of U.S. corporate law.[13] In contrast to this approach, in *ChevronTexaco* the Southern District of New York deferred to Ecuadorian law on the compulsion question.[14] The court used Ecuadorian law to analyze federal common law's third-party liability theories and held that Ecuadorian law could not compel arbitration against the TPN government.[15] *ChevronTexaco* emerges as the object lesson for *Bridas*, but even *ChevronTexaco*'s approach should have gone further in reference to the substantive choice-of-law issue and broader notions of international comity.

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over its natural resources). *But see* NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES 393 (1997) ("[P]ermanent sovereignty serves no longer merely as the source of every State's freedom to manage its natural resources, but also as the source of corresponding responsibilities requiring careful management and imposing accountability at national and international levels.").

9. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas II*), 447 F.3d 411, 420 (5th Cir. 2006) (finding the Government of Turkmenistan bound to an arbitration agreement signed by the state-owned oil and gas company based on an alter-ego theory of U.S. federal common law).

10. *See* Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco III*), 499 F. Supp. 2d 452, 455 (S.D.N.Y. 2007) (holding that Ecuador and PetroEcuador were not estopped from denying the validity of the arbitration agreement by applying Ecuadorian law to the estoppel theory of federal common law).

11. *See* cases *infra* notes 12–14 (describing that different standards applied, though both stemming from application of substantive federal common law).

12. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas I*), 345 F.3d 347, 353 (5th Cir. 2003) (concluding that federal common law governs the issue of who is bound to the arbitration agreement); *see also Bridas II*, 447 F.3d at 416 (following the choice of federal common law from *Bridas I*).

13. *See Bridas II*, 447 F.3d at 420 (finding Turkmenistan to be the alter ego of the state-owned company and thus bound to the agreement).

14. *See ChevronTexaco III*, 499 F. Supp. 2d at 458 (finding federal common law, namely estoppel, applicable under Ecuadorian law).

15. *See id.* at 468–69 (determining that "an Ecuadorian court would not find the [agreement] binding" on the government).

Choice-of-law issues can be fundamental to decisions to bind TPNs in international commercial arbitrations. While some nuanced differences exist between the pre-enforcement stage and the enforcement stage of an arbitration,[16] the basic choice-of-law issue for a U.S. court boils down to either applying substantive federal common law or applying the substantive law otherwise applicable to the dispute.[17] *ChevronTexaco* offers a third possible approach that loops federal common law through the law of the government in question.[18] *ChevronTexaco* acknowledges the importance of balancing sovereignty when the TPN is a foreign government.[19] In essence, only the laws of the TPN government inform whether that state can be bound to an arbitration agreement it did not sign. While *ChevronTexaco* marks a step in the right direction for addressing the issue of TPN governments, even *ChevronTexaco*'s approach fails to fully recognize the implications of international comity that were at stake.[20] An analysis that merely balances U.S. legal theories with the laws of the foreign government in question still risks subjecting the TPN government to compulsion based on extraterritorial legal constructs.[21]

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16. *Infra* note 53 and accompanying text. *Bridas* and *ChevronTexaco* had different procedural postures. *Bridas* occurred at the enforcement stage of arbitration in that the tribunal already rendered its decision. *See* Bridas S.A.P.I.C. v. Gov't. of Turk. (*Bridas II*), 447 F.3d 411, 414 (5th Cir. 2006) (confirming the "enforcement of the award" by the arbitral tribunal against the Government of Turkmenistan). *ChevronTexaco* occurred prior to enforcement, namely during efforts to enforce an arbitration agreement. *See* Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco I*), 376 F. Supp. 2d 334, 338 (S.D.N.Y. 2005) (stating that plaintiffs "seek a permanent stay of an arbitration proceeding commenced by defendants ChevronTexaco"). Despite their differences, the legal issue for U.S. courts is the same: Whether the government can be considered a party to the arbitration agreement.

17. *Infra* note 62 and accompanying text.

18. *See* Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco III*), 499 F. Supp. 2d 452, 460 (S.D.N.Y. 2007) ("Before an American court could hold that plaintiffs are estopped from denying that they are bound to the 1965 JOA it would have to find any reliance by defendants on the laws of Ecuador (by whose operation it seeks to bind a [TPN] to a contract) was reasonable."). By turning to Ecuadorian law, the court displaced the federal common law theory of binding a TPN based on estoppel. *Id.* The court accomplished this move through a motion under Federal Civil Procedure Rule 44.1. *Infra* note 167 and accompanying text. While the intermingling of domestic and foreign law serves a legally sound practical function, the court's decision exposes the fact that reliance solely on U.S. substantive law would somehow work an injustice.

19. *See ChevronTexaco III*, 499 F. Supp. 2d at 458–59 (indicating that "the laws differ when the party estopped is a government entity, as is the case with PetroEcuador").

20. *See id.* (indicating that the situation of a government or government entity is somehow different, but failing to point out the issue of international comity).

21. In *ChevronTexaco* the court turned to Ecuadorian law, but still used the estoppel theory of federal common law as the baseline for its analysis. *See id.* at 460.

U.S. courts currently rely heavily on substantive federal common law to answer the TPN question in international arbitration.[22] For the TPN government, this standard proves inadequate.[23] This Note advocates amending the Federal Arbitration Act (FAA)[24] to reflect a new standard that relies exclusively on the laws of the foreign government in question to determine whether that government may be bound to an arbitration agreement that it did not sign.[25] A similar amendment to the New York Convention[26] could standardize this rule across nations actively involved in international arbitration and continue to provide the value of arbitration as a neutral and final dispute resolution forum.[27] Part II of this Note explains the current legal framework of international commercial arbitration as it applies in U.S. courts. Part III details the legal and historical backgrounds of *Bridas* and *ChevronTexaco*. Part IV analyzes the outcomes of the two cases, offers a new legal standard, and then defends this new standard against alternatives. Part V uses the crossroads of law and development to conclude that *ChevronTexaco* provides a baseline for how U.S. courts should address the issue of TPN governments but endorses a new standard that looks to the laws of the state in question to decide whether to compel a TPN government to arbitration.

II. International Commercial Arbitration in U.S. Courts

International commercial arbitration is an increasingly common dispute resolution forum for foreign investors investing in developing countries.[28]

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22. *Infra* note 71 and accompanying text.

23. *Infra* Part IV.C.1.

24. Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006). The FAA provides the statutory framework for both domestic and international arbitrations. *Id.* A U.S. court serves as a backstop for arbitration, resolving disputes of arbitrability, parallel proceedings, and enforcement of an arbitral award. *Id.*

25. The laws of the government in question are meant to include both the domestic legal framework and binding international law that otherwise applies to a particular nation, either through its treaties or customary international law.

26. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 21 U.S.T. 2517, 30 U.N.T.S. 3. The New York Convention is a treaty that provides for the recognition and enforcement of foreign arbitral agreements and awards between contracting states. *Id.* "[T]he treaty is by far the most significant contemporary legislative instrument relating to international commercial arbitration." BORN, *supra* note 5, at 92.

27. *See* BORN, *supra* note 5, at 72, 81 (stating two of the objectives of international commercial arbitration as the "neutrality of the dispute resolution forum" and arbitration's "finality of decision").

28. *See* CHUKWUMERIJE, *supra* note 6, at 6 (explaining that for "developing countries,

Arbitration arises out of the law of contract, and the parties to an arbitration are typically those parties that entered into an arbitration agreement.[29] There are times, however, when particular factual scenarios give rise to an arbitration agreement binding a TPN.[30] Determining who is a party to an arbitration and whether the issue is arbitrable are both rooted in the question of arbitrability.[31] *First Options, Inc. v. Kaplan* establishes that U.S. courts determine the question of arbitrability unless there is unmistakable evidence conferring that decision to the arbitrators.[32] For a TPN, *First Options* signals that a U.S. court will review the compulsion question that a TPN faces.[33] The law governing this question has been slowly developing by "accretion and dereliction of specific applications" in both U.S. courts and arbitral tribunals.[34] Ultimately, a U.S. court must determine what substantive law to apply to decide whether a TPN government is, or was, a rightful party to an arbitration.[35] This Part of the Note attempts to shed some light on the current lack of clarity for the choice-of-law issue before U.S. courts.[36] In the United States, the Federal Arbitration Act (FAA)[37] and the New York

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there is a continuing . . . inflow of foreign investments, such as capital [and] joint ventures" and "[i]n a sizable number of these commercial relations, the parties choose arbitration as a means of resolving any disputes that may arise").

29. *See id.* ("Although the principle that arbitration agreements are consensual is straightforward, the application of this principle gives rise to numerous and complex issues.").

30. *See id.* ("[T]here are a wide range of circumstances in which [TPNs] may nonetheless be parties to, and bound by or permitted to invoke, the associated arbitration agreement.").

31. *See id.* at 38 (defining arbitrability as including both what can be arbitrated and who can arbitrate).

32. *See* First Options, Inc. v. Kaplan, 514 U.S. 938, 947 (1995) (holding that "because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts").

33. *See* Dwayne E. Williams, *Binding Nonsignatories to Arbitration Agreements*, 25 FRANCHISE L.J. 175, 182 (2006) (describing the "chicken and egg" problem for a TPN and the question of arbitrability before a U.S. court or an arbitral tribunal).

34. *See* Anthony M. DiLeo, *The Enforceability of Arbitration Agreements By and Against Nonsignatories*, 2 J. AM. ARB. 31, 75 (2003) (concluding that "because there is no state or federal code of civil procedure for arbitration, the law in this area is being developed by courts and by arbitrators into a type of common law of [TPNs]").

35. *See* BORN, *supra* note 5, at 1142 (explaining that binding a TPN is rooted either in "purely consensual theories (e.g., agency, assumption, assignment) and non-consensual theories (e.g., estoppel, alter ego)" and that "[e]ach of these various theories gives rise to both substantive and choice-of-law issues").

36. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 113 (2001) (highlighting the "historic lack of U.S. authority concerning choice of law applicable to international arbitration agreements").

37. Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006).

Convention[38] work in concert to define the recognition and enforcement of international commercial arbitral agreements and awards. After analyzing these two legal frameworks, paying particular attention to the differences at pre-enforcement versus enforcement, this Part then addresses how U.S. courts handle the choice-of-law issue for TPNs.

A. The Federal Arbitration Act and the New York Convention

The Federal Arbitration Act was enacted in 1925[39] for domestic arbitration and updated in 1970[40] and 1990[41] to codify the New York Convention and the Inter-American Convention,[42] respectively.[43] That it has functioned for so long despite remaining "remarkably brief and relatively poorly-drafted" is surprising given the premium on clarity and efficiency in the arbitration context.[44] Nevertheless, Chapter 2 of the FAA, which addresses international commercial arbitration,[45] confers two important powers to a U.S. court: (1) the ability to compel arbitration anywhere in the world if it is expressed in an agreement,[46]

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38. New York Convention, *supra* note 3. The Convention opened for signatures June 10, 1958. *Id.* When the United States ratified the Convention, it issued the following reservation: "The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States." *Id.*

39. Federal Arbitration Act, ch. 213, § 1–15, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–307 (2006)).

40. Federal Arbitration Act, Pub. L. No. 91-368, § 1, 84 Stat. 692, 692–93 (1970) (codified at 9 U.S.C. §§ 201–208 (2006)).

41. Federal Arbitration Act, Pub. L. No. 101-369, § 1, 104 Stat. 448, 448–49 (1990) (codified at 9 U.S.C. §§ 301–307 (2006)).

42. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336.

43. Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006). The FAA Chapter 2, codifying the New York Convention, provides the primary legal background for international commercial arbitrations before U.S. courts. *Id.* §§ 201–202. To the extent that Chapter 2 is silent, Chapter 1 provides residual application. *Id.* § 208. Chapter 3 codifies the Inter-American Convention, also known as the Panama Convention. *Id.* §§ 301–307. While Chapter 3 technically applies to parts of the dispute in *ChevronTexaco*, no real substantive differences exist between the Panama Convention and the New York Convention. *See* Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco I*), 376 F. Supp. 2d 334, 354 (S.D.N.Y. 2005) (indicating that the Panama Convention applies as opposed to the New York Convention, but that it is irrelevant because it "does not alter the choice of law analysis").

44. JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 189–90 (2003).

45. 9 U.S.C. §§ 201–208.

46. *Id.* § 206.

and (2) the responsibility to confirm and enforce an award rendered elsewhere.[47] Under the Convention, both recognition and enforcement apply as between contracting states.[48] For international commercial arbitration, Chapter 1 of the FAA serves as a residual addendum to Chapter 2.[49] Of particular note in the sovereign context is Chapter 1's declaration that the Act of State doctrine[50] does not serve as a defense in a U.S. court enforcing an arbitral agreement or award.[51]

Despite the FAA's brevity, the New York Convention provides additional breadth to Chapter 2 of the FAA.[52] However, some ambiguity exists in the New York Convention with respect to the pre-enforcement stage (Article II) and the enforcement stage (Article V).[53] At the pre-enforcement stage, a contracting state must recognize written arbitration agreements and refer those parties to arbitration.[54] Exceptions exist only if the agreement is "null and void, inoperative or incapable of being performed."[55] What substantive law applies to recognition of an agreement remains unclear.[56] Essentially, any of the

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47. *Id.* § 207.

48. New York Convention, *supra* note 3, art. I § 3.

49. 9 U.S.C. § 208 (2006).

50. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[T]he courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.").

51. 9 U.S.C. § 15. In *ChevronTexaco*, Ecuador raised the Act of State defense, but the court concluded that "enforcement of the arbitration agreement at issue, if otherwise appropriate, 'shall not be refused on the basis of the Act of State doctrine.'" Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco I*), 376 F. Supp. 2d 334, 366 (S.D.N.Y. 2005). The decision to bar the defense is certainly more questionable when there is not explicit consent by the government. At the very least, the bar on the Act of State defense leaves a TPN government more vulnerable to compulsion or enforcement before a U.S. court. However, if a commercial exception exists to the Act of State doctrine, this heightened vulnerability would not exist in many circumstances. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 701–02 (1976) (plurality opinion) ("[T]he United States has adopted and adhered to the policy declining to extend sovereign immunity to the commercial dealings of foreign governments.").

52. *See* 9 U.S.C. § 201 ("[The New York Convention] shall be enforced in United States courts in accordance with this chapter.").

53. *See* New York Convention, *supra* note 3, art. II § 3, art. V §§ 1–2 (allowing for certain exceptions to the enforcement of foreign arbitral agreements and recognition and enforcement of foreign arbitral awards, but being more explicit as to what the exceptions are in Article V as compared to Article II). Important in this ambiguity is the fact that Article V(1)(a) is "closely related to Articles II(1) and II(3)." BORN, *supra* note 5, at 2778.

54. New York Convention, *supra* note 3, art. II § 3.

55. *Id.*

56. *See* LEW ET AL., *supra* note 44, at 189–90 (referring to the incongruence between Article II § 1 and Article II § 3 of the New York Convention).

following could serve as the law under this language: the law that governs the arbitration agreement, the substantive law of the contract, the law of the enforcing country, or the law of the *lex arbitri*.[57] Because the doctrine of separability permits the arbitration agreement to be separated from the rest of the contract, the court at the pre-enforcement stage is permitted to fill the legal gap to determine arbitrability.[58] In slight contrast, the standards applied at the enforcement stage hint to what substantive law should be chosen at the pre-enforcement stage.[59]

The New York Convention provides some clarity about how national courts should address the choice-of-law issue at the enforcement stage. Article V permits national courts to refuse recognition and enforcement of an award in one of three instances: when (1) there was incapacity under the law applicable to the parties, (2) there was not a valid agreement under the law applicable to the parties, or (3) there was not a valid agreement under the law where the award was made.[60] Additionally, Article V permits refusal of recognition or enforcement if the subject matter is not capable of resolution under the law of the enforcing country or if enforcing would be contrary to the public policy of the enforcing country.[61] Thus, at the enforcement stage the law of the enforcing court or the foreign law otherwise applicable provides the substantive legal standard for the enforcing court.[62]

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57. Michael Pryles, *Choice of Law Issues in International Arbitration*, 63 ARB. 200, 202 (1997).

58. *See* LEW ET AL., *supra* note 44, at 102 ("The doctrine of separability recognizes the arbitration clause in a main contract as a separate contract, independent and distinct from the main contract."). This means that the choice of law governing the law of the contract does not necessarily govern the arbitration agreement. BORN, *supra* note 36, at 116. Because parties will rarely designate a choice of law for the arbitration agreement, the choice of law governing the arbitration agreement is necessarily implied. *Id.*

59. *See* BORN, *supra* note 5, at 464 (indicating that "the law of substantive validity at both the stage of enforcing an arbitration agreement and the stage of enforcing an arbitral award" should be the same because "the choice-of law rules contained in Article V(1)(a) of the New York convention are equally applicable under Article II(1) of the Convention").

60. New York Convention, *supra* note 3, art. V § 1(a).

61. *Id.* § 2.

62. *See* BORN, *supra* note 5, at 466 (indicating that the law otherwise applicable has resulted in a "multiplicity of choice-of-law approaches" to answer what law this points to). While Article V uses more direct language than Article II, in practice the apparent simplicity becomes far more complex. If enforcement requires analysis of the arbitration agreement, then the law of the *lex arbitri* could govern, or separability could permit the law assigned to the arbitration agreement to govern. Pryles, *supra* note 57, at 202. Alternatively, a "legal system with which the contract is most closely connected," either as the *lex arbitri* or as the law of the underlying contract, could also govern. *Id.* A full analysis of the complexities of the choice-of-law options is beyond the scope of this Note. For the purposes of this Note, the *law that otherwise governs* refers to any substantive law that is *foreign* to the substantive laws of the

Under the New York Convention, the substantive choice-of-law conclusions from the enforcement stage can help reconcile the choice-of-law ambiguity at the pre-enforcement stage.[63] At both pre-enforcement and enforcement, arbitrability should be determined by either the laws of the enforcing court or the law that otherwise governs the parties to the agreement.[64] Applying the law of the forum at the pre-enforcement stage and at the enforcement stage allows "[e]ach country [to determine] for itself which disputes it considers to be arbitrable."[65] Similarly, deciding arbitrability under the law selected by the parties recognizes party autonomy.[66] Making this leap to harmonize the applicable law to the pre-enforcement and enforcement stages acknowledges the goal of greater uniformity in international arbitration, as evidenced by the New York Convention itself.[67]

B. The TPN Problem as Applied in U.S. Courts

Taking the view that the U.S. courts should apply the New York Convention similarly at both the pre-enforcement and enforcement stages of an

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United States. If the choice-of-law decision yields U.S. substantive law, then the legal standard applied is the same regardless of how U.S. law was chosen (either as the enforcing court, by virtue of United States serving as the *lex arbitri*, or by U.S. law governing the underlying contract). Relevant to this Note is examining the legal consequences of applying U.S. substantive law versus applying foreign substantive law, regardless of how the U.S. court selected that foreign substantive law (which could be selected as the *lex arbitri* or via the law of the underlying contract).

63. *See* BORN, *supra* note 5, at 462 ("Article V(1)(a) and II should be interpreted and given effect in a manner that conforms to the Convention's structure and facilitates the Convention's purposes."). Nevertheless, the timing differences between pre-enforcement under Article II and enforcement under Article V could pose a potential problem to application of this theory because "[t]he parties usually will not have subjected the arbitration agreement to a specified law and it may be difficult to predict where an arbitral award will be made." BORN, *supra* note 36, at 117; *see also* BORN, *supra* note 5, at 462–63 (elaborating on the history of this incongruence and further exploring the issue).

64. *See supra* note 62 and accompanying text (indicating that reality beguiles the simplicity of this statement).

65. LEW ET AL., *supra* note 44, at 194.

66. *See* BORN, *supra* note 36, at 1 (describing how "arbitration is generally *consensual*" because "in most cases the parties must agree to arbitrate their differences").

67. *See* New York Convention, *supra* note 3, art. X (attempting to extend the reach of the treaty to as many nations as possible to streamline and unify the recognition and enforcement of international arbitration); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–18 (1974) (explaining that arbitration agreements are a type of forum selection clause, which offer the benefits of predictability, but that such benefits are eliminated if the "parochial" interest of a state declines uniform enforcement of such agreements). Ultimately, a more uniform platform for international commercial arbitration will promote predictability, fairness, and efficiency.

arbitration,[68] U.S. courts are still left with a substantive choice-of-law decision to determine who can be bound as a party to an international arbitration agreement. The two basic choices are the laws of the United States[69] or the otherwise applicable law, which is consequential when it is foreign law.[70] Despite the availability of alternatives, anything other than federal common law is rarely used—even for international disputes.[71] The discussion that follows explores federal common law's application in enforcing international arbitration agreements. The same analysis applies to cases enforcing arbitral awards because the basic question is still whether the TPN was a party to the agreement.[72]

While state law will often apply for domestic arbitration agreements,[73] federal common law usually governs international arbitration agreements.[74] According to federal common law, a TPN can be bound to an arbitration

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68. While the pre-enforcement stage leaves open other possibilities, they are rarely turned to unless another overriding principle is at stake. *See, e.g.*, Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982) (applying internationally neutral principles over the "parochial interest[s] of the Commonwealth [of Puerto Rico]"). The use of internationally neutral principles is arguably permitted under the New York Convention, though somewhat inconsistent with traditional practice in U.S. courts. Important in *Ledee* was the overriding federal interest favoring arbitration. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1981) (describing the "emphatic federal policy in favor of arbitral dispute resolution").

69. *Supra* note 62 and accompanying text. The law of the United States is applicable law because the U.S. court is an "enforcing court." New York Convention, *supra* note 3, art. V. For international commercial arbitrations, U.S. law signifies federal common law. *Infra* note 71 and accompanying text.

70. This law could also be U.S. substantive law if U.S. law governed the underlying contract or if the *lex arbitri* was the United States. But, to the extent that non-U.S. substantive law governs (as the *lex arbitri* or the law of the underlying contract), then this law is foreign in the sense that it is *foreign* to the United States. *Supra* note 62 and accompanying text.

71. *See* BORN, *supra* note 36, at 114 ("Many recent U.S. decisions apply substantive rules of federal common law to the formation and validity of international arbitration agreements that are subject to the New York Convention.").

72. *See* BORN, *supra* note 5, at 1142 (indicating that the same theories apply to "actions to enforce agreements to arbitrate and in actions to annul or recognize arbitral awards" because ultimately the issue depends on binding the TPN to the arbitration agreement).

73. *See* BORN, *supra* note 36, at 668 ("[T]he U.S. Supreme Court has held that generally-applicable state law governs the formation and validity of domestic arbitration agreements.").

74. *See id.* at 667–68 (noting that "U.S. courts have generally applied federal common law to the question whether a [TPN] is bound by an arbitration agreement" if an action falls under the FAA, the New York Convention, or is an international arbitration agreement). As evidenced by *Bridas* at the enforcement stage and *ChevronTexaco* at the pre-enforcement stage, this general rule of federal common law usage applies at both stages. *Supra* note 16 and accompanying text.

agreement based either on the "group of companies" doctrine[75] or on "general rules of private law."[76] Though prevalent in some arbitral tribunals,[77] the group of companies theory remains more controversial in U.S. courts.[78] Instead, U.S. courts applying federal common law tend to rely heavily on private law doctrines,[79] in particular those set forth in *Thompson-CSF v. American Arbitration Ass'n*.[80] According to *Thompson-CSF*, a U.S. court will bind a TPN to an arbitration agreement if their actions support the theory of incorporation by reference, assumption, agency, veil-piercing/alter ego, or estoppel.[81] Under this analysis, exceptions usually only exist for national security or public policy.[82]

The alternative to applying U.S. theories of third-party liability is to use the law that would otherwise apply, which is of consequence when it means applying foreign law.[83] As a general matter, U.S. courts rarely apply foreign law to determine the validity of an arbitration agreement.[84] This remains true

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75. *See* ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 176 (2004) (explaining that a third party that is a member of a group of companies and that inures benefits and duties from an arbitration agreement may be bound to the agreement); *see also* BORN, *supra* note 36, at 668 (explaining that the group of companies theory "holds that companies which form part of an integrated economic 'group'; may . . . be bound by one another's arbitration agreements").

76. *See* REDFERN ET AL., *supra* note 75, at 176 (explaining that private law doctrines of assignment, agency, and succession are common means of binding a third party to an arbitration agreement).

77. *See id.* at 176–77 (citing decisions rendered by the ICC relying on the group of companies doctrine).

78. *See id.* at 178 (stating that U.S. courts, even within the same jurisdiction, waffle on piercing the corporate veil based on the group of companies doctrine).

79. *See id.* ("[U.S.] courts have generally relied on more traditional principles such as alter ego, agency, estoppel and third-party beneficiaries to find jurisdiction over [TPNs].").

80. *See* Thompson-C.S.F. v. Am. Arbitration Ass'n, 64 F.3d 773, 780 (2d Cir. 1995) (deciding that the parent company was not bound to the arbitration agreement signed by its subsidiary because none of the accepted contractual or agency theories could bind the parent company: incorporation by reference, assumption, agency, veil-piercing/alter ego, or estoppel).

81. *See id.* at 776 (providing, and thereby establishing, a list of the five traditional theories on which a TPN may be bound).

82. *See* BORN, *supra* note 36, at 114 (indicating that a court will order arbitration unless the tribunal will be forced to "rule on matters of national security" or other public policy grounds (citing McDonnell Douglas Corp. v. Kingdom of Den., 607 F. Supp. 1016, 1020 (E.D. Mo. 1985))).

83. *Supra* notes 54, 61.

84. *See* BORN, *supra* note 36, at 116 (explaining that "most U.S. courts have refused to give effect to foreign law (including the law of a foreign arbitral situs)"). *But see id.* (citing Frydman v. Cosmair, Inc., No. 94-CV-3772, 1995 WL 404841, at *4 (S.D.N.Y. July 6, 1995) ("[T]he contract in dispute here was formed in France between French citizens, French law applies in the determination of whether it constitutes an agreement to arbitrate.")). Arguably,

even when foreign law governs the law of the contract and other relevant factors.[85] The rationale seems to be the strong U.S. policy favoring arbitration, which the New York Convention's deference to the recognizing and enforcing state supports.[86] Because arbitrability implicates not only the issue in dispute or the validity of the agreement, but also the parties to the agreement, it follows that U.S. courts will also be reluctant to apply foreign law when deciding whether to bind or enforce against a TPN.[87]

The New York Convention imposes obligations on its signatories but remains respectful of each signatory's sovereignty by providing some deference to domestic law.[88] In the United States, that deference points to the FAA.[89] The FAA, however, remains "silent on the issue of joinder . . . of [TPNs]."[90] Therefore, in international arbitrations substantive federal common law governs the TPN issue.[91] Likewise, U.S. principles of contract and agency determine whether to bind a TPN because the court will have decided that the TPN "legally consented in some capacity."[92] Under this framework, TPNs—and notably governmental TPNs—remain vulnerable to U.S. understandings of contract and agency law. The next Part explores two such instances.

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the fact that it was a *wholly* "French" dispute influenced the decision here.

85. *See, e.g.*, Rhone Mediterranee Compagnia v. Lauro, 712 F.2d 50, 54 (3d Cir. 1983) (applying domestic law and refusing to apply Italian law, "which appeared fairly clearly to render the parties' arbitration agreement invalid").

86. *See* BORN, *supra* note 36, at 114–15 (citing, among others, Meadows Indemnity Co. v. Baccala & Shoop Ins. Serv., Inc., 760 F. Supp. 1036, 1043 (E.D.N.Y. 1991) (describing the "emphatic federal policy in favor of arbitral dispute resolution"); Ferarara S.p.A. v. United Grain Growers, Ltd., 441 F. Supp. 778, 781 n.2 (S.D.N.Y. 1977) (reasoning that the law of the forum is consistent with the language of the New York Convention)).

87. BORN, *supra* note 36, at 668. Nevertheless, while the purported rationales remain the same for the TPN context, the argument seems weaker in that it unduly burdens an unsuspecting third party.

88. New York Convention, *supra* note 3, art. V § 2. The process of obligations and benefits seeks to promote international arbitration while simultaneously reserving sovereignty to individual states. Together, the goals help unify and facilitate a smooth process. *Supra* note 67 and accompanying text.

89. *See* 9 U.S.C. § 201 (2006) ("The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.").

90. Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT'L L. REV. 711, 721 (2003).

91. *Supra* note 74 and accompanying text.

92. *Id.*

III. Bridas *and* ChevronTexaco

Most of the world now understands that a "competitive market economy which fosters private entrepreneurial initiative is more likely to advance the living standards of people than one which does not."[93] For states, the interdependence created by cooperative foreign investment represents a further erosion of state sovereignty.[94] In the context of natural resources, the impulse for absolute sovereignty remains strong, but often a more collaborative undertaking is required.[95] Seeking to retain maximum sovereignty over their natural resources, states often create state-owned companies.[96] These serve two primary purposes: to insulate the government in much the same way a corporation would insulate itself by creating a wholly owned subsidiary,[97] and to serve "as the vehicles through which to obtain the financial resources needed to make large-scale national investments."[98] Even after creating state-owned companies, developing countries often lack the technical expertise to exploit their own natural resources.[99] Partnering with a foreign corporation offers an

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93. *See* Robert Pritchard, *The Contemporary Challenges of Economic Development, in* ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW 1, 1 (Robert Pritchard ed., 1996).

94. *See* Emilio J. Cárdenas, *The Notion of Sovereignty Confronts a New Era, in* ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW 13, 25 (Robert Pritchard ed., 1996) (describing how "[s]overeignty—as a legal fiction—is still with us but certainly it is no longer sacrosanct . . . since no state seems to have absolute control of its destiny any more").

95. *See id.* at 22–24 (discussing sovereignty in the context of natural resources and how the modern world, especially as related to natural gas, necessitates new conceptions of sovereignty); *see also* SCHRIJVER, *supra* note 8, at 378 (explaining that permanent sovereignty over natural resources is changing because "there are now widespread doubts about the effectiveness and appropriateness of state-owned enterprises and in many countries an increased role for the private sector is being advocated, including foreign investment in the development process"); Paul Peters et al., *Permanent Sovereignty, Foreign Investment and State Practice, in* PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW 88, 125 (Kamal Hossain & Subrata Roy Chowdhury eds., 1984) ("[P]ermanent sovereignty emphasizes that, in addition to the narrow pursuit of gain by states and non-state actors, international co-operation has an important role to play in the development process.").

96. *See* Pritchard, *supra* note 93, at 3 ("All countries aim to be as 'sovereign' and economically self-sufficient as they possibly can.").

97. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas I*), 345 F.3d 347, 355 (5th Cir. 2003) (explaining that Bridas intended to create one of these "liability insulating entities" when it created Turkmenneft to contract with foreign corporations for hydrocarbon extraction).

98. *See* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 625 (1983) (considering "a greater degree of flexibility and independence from close political control" as additional reasons beyond the financing mechanism).

99. *See* Pritchard, *supra* note 93, at 4–5 (arguing that foreign direct investment "normally brings the transfer of technology and know-how").

alternative that provides both the needed expertise and additional financing.[100] While the development model of pairing foreign investment with state-owned enterprises appears rather straightforward, *Bridas* and *ChevronTexaco* illustrate that reality is often far more complex.

The disputes in *Bridas* and *ChevronTexaco* both stem from agreements surrounding oil and gas contracts. They also both illustrate the aforementioned arrangement for natural resource extraction in developing countries: A state-owned entity entering into an agreement with a foreign corporation.[101] Ironically, even with this common framework and with both courts applying substantive federal common law to resolve the TPN issue, *Bridas* and *ChevronTexaco* reached quite different results. This Part explores the historical antecedents and legal rationales that precipitated these divergent decisions, first examining the situation in Turkmenistan involving Bridas, and subsequently looking at ChevronTexaco in Ecuador.

A. Bridas and Turkmenistan[102]

An example of a U.S. court addressing whether to compel a TPN government to arbitration arose in *Bridas*. The eventual dispute that reached the U.S. court in *Bridas* began when the post-Soviet government of Turkmenistan sought to profit from its large oil and gas reserves.[103] These reserves were first exploited in 1951, and production peaked in 1989 when Turkmenistan was still part of the Soviet Union.[104] In January 1992, after the final collapse of the Soviet Union, Turkmenistan opened its doors to foreign

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100. *See id.* at 3 (explaining that "the host country has a basic choice between borrowing by the government . . . or, alternatively, attracting foreign investment into its private sector").

101. *See* W. Friedmann, *Government Enterprise: A Comparative Analysis*, *in* GOVERNMENT ENTERPRISE 303, 333–34 (W. Friedmann & J.F. Garner eds., 1970) (describing the state-owned corporation as "an essential instrument of economic development in the economically backward countries which have insufficient private venture capital to develop the utilities and industries which are given priority in the national development plan").

102. *See generally* Central Intelligence Agency, The World Factbook: Turkmenistan (2009), https://www.cia.gov/library/publications/the-world-factbook/geos/tx.html (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). Turkmenistan, which dissolved from the USSR in 1991, is located on the eastern side of the Caspian Sea, just north of Iran and Afghanistan. *Id.* With an economy built on cotton production, along with significant oil and gas reserves, Turkmenistan has a per capita GDP of about $5,800 and a sixty percent unemployment rate. *Id.*

103. *See* OTTAR SKAGEN, CASPIAN GAS 8 (1997) (reporting that Turkmenistan still holds approximately forty-four percent of the Caspian region's gas reserves).

104. *Id.* at 13.

investment.[105] The government decided that joint ventures would be the vehicle to explore and exploit its natural resources.[106] To that end, Turkmenistan created a state-owned oil company, Turkmenneft, to contract with foreign corporations with technical expertise.[107] Likewise, the Bridas Corporation, an Argentine company that specializes in oil and gas industries, sought to profit from oil and gas in Turkmenistan.[108] In 1993, Bridas entered a joint venture agreement (JVA) with Turkmenneft to extract oil and gas resources for a twenty-five-year period.[109] The agreement included an arbitration clause that provided for arbitration under the rules of the International Chamber of Commerce (ICC), to take place in Stockholm, Sweden, and to be governed by the laws of England.[110] Turkmenistan itself was never a party to the agreement between Turkmenneft and Bridas.[111]

Problems arose in 1995 when the government of Turkmenistan allegedly forced Bridas to stop work pursuant to the JVA and revoked Bridas's oil export license.[112] This prompted Bridas to initiate arbitration proceedings with the ICC against Turkmenneft for breach of contract.[113] Contrary to their agreement, Bridas and Turkmenneft decided to arbitrate in Houston instead of Stockholm.[114] In addition, Bridas successfully convinced the arbitral tribunal that Turkmenistan was "a proper party to the arbitration."[115] Ultimately, the

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105. *See* Vladimir Mesamed, *Turkmenistan: Oil, Gas, and Caspian Politics*, *in* OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION 209, 219 (Michael P. Croissan & Bulent Aras eds., 1999) (describing Turkmenistan's approach to foreign investment in the post-Soviet era).

106. *See id.* (explaining that the government viewed joint ventures as a way to ensure "very strict terms for the distribution of revenues among the partners").

107. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas I*), 345 F.3d 347, 352 (5th Cir. 2003) (naming Turkmenneft and Balkannebitgas-Senegat as the collective parties "Turkmenneft").

108. *See generally* Bridas Corporation Website, http://www.bridascorp.com/ (last visited Sept. 29, 2009) (providing basic information on Bridas Corporation to the public) (on file with the Washington and Lee Law Review).

109. *See Bridas I*, 345 F.3d at 352 (noting that the parties used the JVA to form "a joint venture entity called Joint Venture Keimir" to operate in southwestern Turkmenistan).

110. *Id.* at 351–52.

111. *See id.* at 355 ("The Government did not sign the JVA, nor was it defined as a party in the agreement.").

112. *Id.* at 352; *see also* SKAGEN, *supra* note 103, at 9 (stating that as a result of revocation of its export license, Bridas was forced "to sell crude at a loss to the local refinery"). Turkmenistan claimed that "Bridas exploited its position as a firstcomer . . . [and] trick[ed] the inexperienced Turkmen negotiators into accepting an agreement that was unreasonably favourable to the company." *Id.*

113. Bridas S.A.P.I.C. v. Gov't of Turkm. *(Bridas I)*, 345 F.3d 347, 352 (5th Cir. 2003).

114. *Id.*

115. *See id.* (explaining that the arbitral tribunal held: "(1) the arbitrators had jurisdiction

tribunal found both Turkmenistan and Turkmenneft liable to Bridas for an award of nearly $500 million in damages.[116]

In 1999, Bridas sued in Texas to confirm the arbitral award.[117] The district court reviewed the tribunal's decision to join Turkmenistan and confirmed that Turkmenistan was bound to the arbitration agreement based on "principles of agency and equitable estoppel."[118] Both Turkmenistan and Turkmenneft appealed the decision to the Fifth Circuit.[119] Oddly, on appeal, all of the parties agreed substantive federal common law should govern the court's analysis of whether Turkmenistan should be bound.[120] Under federal common law, the court applied the *Thompson-CSF* factors[121] and found that the arbitration agreement could not bind Turkmenistan as the district court had found.[122] The court's analysis hung largely on the fact that Bridas knew the risks of investing in the recently independent Turkmenistan and that Bridas simply failed to bargain for binding the government along with the state-owned company.[123] The court vacated the tribunal's award against Turkmenistan, but remanded for further inquiry into the alter-ego question, which the district court had not analyzed sufficiently.[124]

On remand, the district court found that Turkmenistan was not the alter ego of Turkmenneft, and Bridas appealed.[125] The Fifth Circuit then found that Turkmenistan was bound based on an alter-ego theory, stemming from the fact

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to determine whether they had jurisdiction over the Government, and (2) that 'the Government [was] a proper party to the arbitration'").

116. *Id.*

117. *Id.* at 353.

118. *Id.* at 354.

119. *Id.* at 353.

120. *See id.* (explaining that "[t]he parties agree that federal common law governs the determination of" who is party to the arbitration agreement). Apparently because the parties agreed to the use of substantive federal common law, despite the parties' choice to have the substantive laws of England govern the agreement, the court forwent any discussion of other legal alternatives. *Id.* Further analysis of this issue follows. *Infra* notes 127–29 and accompanying text.

121. *See* Thompson-C.S.F. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995) (recognizing "five theories for binding [TPNs] to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel").

122. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas I*), 345 F.3d 347, 352 (5th Cir. 2003) (analyzing the theories of agency, alter ego, estoppel, and third-party beneficiary, and finding that none applied to Turkmenistan on the facts on record).

123. *Id.* at 358 ("We will not bind the Government to the agreement, simply because Bridas lost a gamble that it was willing to take. To do otherwise would vitiate the predictability of the legal backdrop against which the parties voluntarily agreed to do business.").

124. *Id.* at 366.

125. Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas II*), 447 F.3d 411, 414 (5th Cir. 2006).

that Turkmenistan had drained the resources of Turkmenneft to preclude Bridas from actually obtaining a judgment on its breach of contract claim against Turkmenneft.[126] *Bridas II* again applied substantive federal common law, but the court noted that it was bound to do so because of the law of the case doctrine.[127] The court expressed frustration that the substantive choice-of-law issue was not resolved earlier.[128] Even though the parties had agreed that substantive federal common law applied to the dispute, the court signaled that this decision was erroneous.[129] As a result, the *Bridas* decision failed to account for the broader issues of international comity and state sovereignty that were implicated by the existence of a dispute involving a state party and its natural resources.[130] Nevertheless, jurisprudentially, *Bridas* exemplifies a precedent of strict application of substantive federal common law to the governmental TPN issue.[131]

B. ChevronTexaco and Ecuador[132]

In contrast to *Bridas*, *ChevronTexaco* represents a novel approach to the application of federal common law in that the court demonstrated some deference to the sovereignty of the government in question. Although the facts of *ChevronTexaco* are more complex, the same issue of a TPN government arose. ChevronTexaco is the corporate descendant of a party to an agreement

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126. *See id.* at 416–20 (finding that Bridas was injured because Turkmenistan exercised complete control over Turkmenneft by "intentionally bleeding a subsidiary to thwart creditors").

127. *See id.* at 416 n.5 (noting the "air of unreality" as to jurisdiction over "a wholly foreign dispute" and stressing the "fundamental misunderstanding" on the substantive choice-of-law issue).

128. *See id.* (remarking that "[i]t is highly unlikely that any uniform rule of federal law is or should be involved here").

129. *Id.* The court explained that "while *Bridas I* noted the parties' agreement that 'federal common law' governs this case . . . this agreement rested on a fundamental misunderstanding." *Id.* While it is puzzling why the Government of Turkmenistan would have wanted substantive federal common law to apply, the court highlights the mistake of applying federal common law.

130. *Supra* note 95 and accompanying text. The intersection of natural resources, sovereignty, and development raise complex issues that the *Bridas* court simply failed to address.

131. *See id.* at 414 (holding that Turkmenistan was a TPN that "should be bound as an alter ego of . . . Turkmenneft" based on application of substantive federal common law).

132. *See generally* Central Intelligence Agency, The World Factbook: Ecuador (2009), https://www.cia.gov/library/publications/the-world-factbook/geos/ec.html (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). Ecuador is a South American nation on the Pacific coast, nestled between Colombia and Peru. *Id.* Ecuador's economy relies heavily on oil production, which often accounts for half of the country's yearly export earnings. *Id.* GDP per capita hovers around $7,700 and unemployment around 8.8%. *Id.*

to extract petroleum in eastern Ecuador.[133] While removing this oil from the ground and offering it to world markets has "transformed Ecuador . . . [and] fostered modernization," it has also "wreaked havoc with the environment and . . . the indigenous people of the Amazon."[134] As evidence, ChevronTexaco currently faces a multi-billion dollar lawsuit in Ecuador for environmental cleanup and human rights violations.[135] To avoid a possible judgment on these claims in Ecuadorian courts, ChevronTexaco sought to enforce an arbitration agreement, which neither Ecuador nor the state-owned oil company signed.[136] The Republic of Ecuador and the state-owned oil company sued to permanently stay the arbitration proceedings.[137]

Between 1965 and 1992, the Republic of Ecuador permitted significant oil exploration and extraction in the eastern Amazonian rainforest under the "Napo Concession."[138] This area of Ecuador is marked by extreme biological diversity and "is home to eight groups of indigenous people."[139] In 1965, two U.S.-based companies, Texas Petroleum Company (TexPet) and Gulf Oil Company (Gulf), were given exclusive rights in the Napo Concession.[140] The two oil companies entered into a joint operating agreement (JOA), which provided for dispute resolution by means of arbitration under the American Arbitration Association

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133. *See* Jota v. Texaco Inc., 157 F.3d 153, 156 (2d Cir. 1998) (explaining that Texaco Petroleum Company (TexPet) was party to the first oil extraction consortium in Ecuador and is a "fourth-level subsidiary" of the Texaco Corporation). Texaco merged with Chevron in 2001 to form the ChevronTexaco Corporation. *See* William Langewiesche, *Jungle Law*, VANITY FAIR, May 2007, at 226 (discussing the Chevron/Texaco merger). Langewieshe's article provides a detailed look at the *Lago Agrio* litigation from the perspective of the plaintiffs and their Ecuadorian attorney, and was reported from on-the-ground interviews in Ecuador. *Id.*

134. ALLEN GERLACH, INDIANS, OIL, AND POLITICS: A RECENT HISTORY OF ECUADOR xv (2003).

135. *See* Michael Isikoff, *A $16 Billion Problem*, NEWSWEEK, Aug. 4, 2008, at 27 (detailing the five year legal battle in Ecuador and its political fallout in the United States); *see also* Ben Casselman, *Chevron Expects to Fight Ecuador Lawsuit in US*, WALL ST. J., July 21, 2009, at A6 (noting that damages have been increased to $27 billion).

136. *See* Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco I*), 376 F. Supp. 2d 334, 342 (S.D.N.Y. 2005) (explaining that ChevronTexaco "commenced an arbitration proceeding against Petroecuador before the AAA, claiming a right to indemnification for their costs and expenses" related to the Ecuadorian litigation).

137. *Id.*

138. *Id.* at 338. The "Napo Concession" is the oil concession given to a consortium of companies for oil exploration and extraction between 1964 and 1992, and where TexPet allegedly drilled some 400 wells between 1972 and 1992. Complaint ¶ 4, Aguinda v. Texaco, Inc., No. 93-CV-7527, 1993 WL 13148394 (S.D.N.Y. Nov. 3, 1993).

139. *See* JUDITH KIMERLING ET AL., AMAZON CRUDE 33–34 (1990) (noting the unusually high biodiversity—even as compared to other areas of the Amazon—and that indigenous people number anywhere from 90,000 to 250,000 in this region).

140. *ChevronTexaco I*, 376 F. Supp. 2d at 338.

(AAA).[141] The JOA designated New York law to govern, "except for those matters which would necessarily be governed by Ecuadorian law."[142] The JOA also provided for succession and assignment, as well as a provision indemnifying the operator.[143] TexPet served as the operator until 1990, but the rest of the original contractual structure changed within the first few years of the Napo Concession.[144] In 1972, Ecuador's newly empowered, militarily controlled government began asserting itself in the Napo Concession and instituted new contractual arrangements.[145] The actions of the Ecuadorian government illustrate the tendency and desire of a government to maintain as much sovereignty over its natural resources as possible.[146] By the mid-1970s, the state-owned oil company, Compañía Estatal Petrolera Ecuatoriana (CEPE),[147] had bought out the remainder of Gulf's rights and gained a majority stake in the Napo Concession.[148] While the contractual history remains convoluted, only the 1965 JOA contemplated arbitration.[149] The effect of the JOA agreement, however, became crucial to the TPN problem in the acrimonious aftermath of the Napo Concession.

In 1993, Ecuadorian plaintiffs, comprised of the indigenous people that inhabit the area of the Napo Concession, filed a class action suit against Texaco in New York, *Aguinda v. Texaco, Inc.*[150] Their claims called for environmental cleanup and compensation for damages suffered from the result of living in a contaminated area.[151] While the *Aguinda* litigation proceeded in the United

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141. *Id.* at 338–39.

142. *Id.* at 339.

143. *Id.*

144. *Id.* at 340.

145. *See id.* (declaring that, seeking greater control of its oil resources, the new government altered the previous agreements between the parties, without compensation, but it is disputed whether the 1965 JOA, which included the arbitration clause, was superseded by these new contracts and government-issued Supreme Decrees).

146. *Supra* note 8 and accompanying text.

147. CEPE is now reorganized as PetroEcuador. *See* Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco I*), 376 F. Supp. 2d 334, 340 (S.D.N.Y. 2005). Though independent, the state-owned company was clearly acting at the behest of the government.

148. *Id.*

149. *Id.* It remained unclear to what extent previous agreements controlled the more recent ones. *See id.* (indicating that the parties disputed the effect of the new agreements on earlier ones).

150. *See* Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2001) (dismissing for *forum non conveniens* but requiring that Texaco consent to jurisdiction in Ecuador and waive any statute of limitations).

151. *See* Complaint ¶ 3, Aguinda v. Texaco, Inc., No. 93-CV-7527, 1993 WL 13148394 (S.D.N.Y. Nov. 3, 1993) ("Plaintiffs and the class seek compensatory and punitive damages, and

States during the late 1990s, Ecuador, TexPet, and other oil companies reached settlement agreements as to claims Ecuador might have against them.[152] Notwithstanding these agreements, a 1999 Ecuadorian environmental law enabled Ecuadorian citizens to file their claims in Ecuador as private attorneys general.[153] This law proved important when the *Aguinda* plaintiffs had their claims finally dismissed in 2003 on grounds of *forum non conveniens*, international comity, and failure to join indispensible parties.[154] The *forum non conveniens* decision was reached based on Texaco's agreement to submit to jurisdiction in Ecuador, where the case was subsequently re-filed (*Lago Agrio*).[155]

To protect against any potential judgment awarded to the *Lago Agrio* plaintiffs in Ecuador, Texaco (now ChevronTexaco, as a result of a 2001 merger with Chevron)[156] commenced arbitration in 2004 with the AAA.[157] ChevronTexaco sought to enforce the 1965 JOA between TexPet and Gulf against PetroEcuador.[158] Importantly, the JOA provided for indemnification of the operator, as long as the operator exercised "its best judgment and care" in

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equitable relief, to remedy the pollution and contamination of the plaintiffs' environment and the personal injuries and property damage caused thereby."). *See generally* KIMERLING ET AL., *supra* note 139, at 65 (providing a detailed overview of the various contamination mechanisms, practices, and effects). While various stages of oil exploration and extraction may cause a myriad of environmental damages, much of the alleged damage in this case resulted from improper disposal of toxic "formation waters," or the unusable waste from extracting crude oil. *See id.* (stating that some "[nineteen] billion gallons of this toxic brine have been dumped without treatment"). Rather than re-pump the formation waters back into the ground per "prudent industry practice," the plaintiffs alleged that "Texaco disposed of [the formation waters] by dumping them in open pits, into the streams, rivers and wetlands" resulting in environmental and human health damage. *See* Complaint ¶¶ 6–7, Aguinda v. Texaco, Inc., No. 93-CV-7527, 1993 WL 13148394 (S.D.N.Y. Nov. 3, 1993).

152. *See* Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco I*), 376 F. Supp. 2d 334, 341–42 (S.D.N.Y. 2005) (describing the various agreements reached, which required TexPet to provide environmental cleanup "in exchange for a release of claims by the Government of Ecuador and PetroEcuador").

153. *See id.* at 342 (describing that ChevronTexaco construed this law to allow plaintiffs to raise "claims that belonged to Ecuador but were released").

154. *See* Aguinda v. Texaco, 202 F.3d 470, 480 (2d Cir. 2002) (conditioning dismissal on Texaco's agreement to waive defenses based on statute of limitations when submitting to jurisdiction in Ecuador); *see also ChevronTexaco I*, 376 F. Supp. 2d at 342 (noting that the 1999 Ecuadorian law at issue in *Lago Agrio* was relied on, but not exclusively).

155. *See ChevronTexaco I*, 376 F. Supp. 2d at 342.

156. Langewiesche, *supra* note 133, at 226.

157. *See ChevronTexaco I*, 376 F. Supp. 2d at 342 (stating that Texaco was "claiming a right to indemnification for their costs and expenses in connection with the *Lago Agrio* litigation").

158. *Id.*

carrying out the contract.[159] Thus, by compelling arbitration, ChevronTexaco sought to obtain an arbitration award that would indemnify any judgment rendered against it by an Ecuadorian court in the *Lago Agrio* litigation.[160] This would leave Ecuador and PetroEcuador responsible for the environmental cleanup and human rights reparations.

Ecuador and PetroEcuador objected to the arbitration proceedings and filed suit in New York for an injunction to permanently stay the arbitration.[161] The key issue raised was whether PetroEcuador could be bound to the arbitration agreement as a TPN.[162] In answering that question, the court needed to determine what substantive law to apply.[163] The court reconciled a Second Circuit split of authority between *Motorola Credit Corp. v. Uzan*[164] and *Sarhank Group v. Oracle Corp.*,[165] both of which addressed TPN issues in the

159. *Id.* at 338.

160. *Id.* at 342–43.

161. *Id.*

162. *See id.* at 351 (stating that arbitrability depends on "whether PetroEcuador is, or was, a party to an arbitration agreement covering the dispute in question").

163. *See id.* at 352 (deciding between New York law, federal common law, or Ecuadorian law as the substantive law to govern the TPN issue). In contrast to the court in *Bridas*, the *ChevronTexaco* court undertook a thorough analysis of the choice-of-law issue. *Id.* The choice to consider Ecuadorian law stemmed from the court's consideration of Ecuador as "a 'state' with a significant connection to the relevant contracts" under either New York or federal choice-of-law rules. *Id.* at 353. Ultimately, the court instead turned to Second Circuit authority which pointed to using either substantive federal common law or the substantive law of the arbitration agreement to determine the TPN issue. *Id.* at 355.

164. *See* Motorola Credit Corp. v. Uzan, 388 F.3d 39, 65 (2d Cir. 2004) (applying Swiss law, which was the law of the contract, to the issue of whether a TPN could compel arbitration). In *Motorola*, the defendant attempted to compel arbitration pursuant to FAA § 206. *Id.* at 49. However, the defendants did not enter into an arbitration agreement with the plaintiffs, though the plaintiffs had entered into arbitration agreements with other parties in related contracts. *Id.* The court resolved that the arbitrability question could only be governed by the substantive law assigned to the contract between Motorola and Uzan, that being Swiss law. *Id.* at 50. The court then found that "under Swiss law, defendants, as [TPNs] to the agreements, *may not* invoke the arbitration clauses contained in those agreements." *Id.* at 51.

165. *See* Sarhank Group v. Oracle Corp., 404 F.3d 657, 662–63 (2d Cir. 2005) (deciding that federal common law governed whether an American company that was a TPN would be bound to an arbitration agreement it did not sign). In *Sarhank*, the Egyptian corporation Sarhank entered into an agreement that included an arbitration clause with a wholly-owned subsidiary of Oracle. *Id.* at 658. When the wholly-owned subsidiary terminated the agreement, Sarhank compelled arbitration against both Oracle and the wholly-owned subsidiary and won. *Id.* at 659. Sarhank sought to confirm and enforce the award against Oracle in the United States, and Oracle objected under Article V of the New York Convention. *Id.* at 661. The court turned to U.S. law and determined that none of the TPN theories would apply to compel Oracle to arbitration even though Egyptian law held that Oracle would be bound to arbitrate because of an agreement signed by its wholly-owned subsidiary. *Id.* at 662. The court concluded that "[a]n American [TPN] cannot be bound to arbitrate in the absence of a full showing of facts

private sector corporate subsidiary context. In distinguishing the choice-of-law issues in the two cases, the *ChevronTexaco* court held that substantive federal common law applies when a TPN opposes arbitration.[166]

At trial, the court addressed the TPN issue under a Rule 44.1[167] motion for determining foreign law.[168] This motion partially altered the court's previous decision to apply substantive federal common law to the issue.[169] While the court relied on the federal common law theory of estoppel, it turned to Ecuadorian law for application of estoppel.[170] Estoppel necessarily requires reasonable reliance, and reliance could only be based on Ecuadorian law.[171]

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supporting an articulable theory based on American contract law or American agency law." *Id.* The court articulated a clear preference for American substantive law to govern when and how an American corporation can be bound to an arbitration agreement it did not sign, because "[t]o hold otherwise would defeat the ordinary and customary expectations of experienced business persons." *Id.* This holding has been criticized, however. *Infra* note 224.

166. *See* Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco I*), 376 F. Supp. 2d 334, 355 (S.D.N.Y. 2005) ("The most reasonable way to reconcile *Motorola* and *Sarhank* is to conclude that a choice-of-law clause will govern where a [TPN] to a particular arbitration agreement seeks to enforce that agreement against a signatory, but not where a signatory seeks to enforce the agreement against a [TPN]."). Thus, the court adopted *Sarhank*'s approach to the question of arbitrability between ChevronTexaco and PetroEcuador and decided that substantive federal common law would apply. *Id.* at 354. While the court then used substantive federal common law to arrive at an application of Ecuadorian law, it is Ecuadorian law in the first place that should apply to whether or not the government or government entity can be bound to arbitrate. To hold otherwise would contradict the notions of fairness and predictability that *Sarhank* claimed are due to U.S. companies, and should likewise be due to foreign governments. *Sarhank*, 404 F.3d at 662–63.

167. FED. R. CIV. P. 44.1. Rule 44.1 is for determining an issue of foreign law. *Id.* The Rule provides that the "court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." *Id.* Often the evidence to determine foreign law becomes a battle of legal experts from the foreign jurisdiction.

168. Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco III*), 499 F. Supp. 2d 452, 454 (S.D.N.Y. 2007).

169. *Compare ChevronTexaco I*, 376 F. Supp. 2d at 356 ("Therefore, we will . . . apply federal common law to the question of whether Petroecuador is bound by the arbitration clause in the 1965 JOA."), *with ChevronTexaco III*, 499 F. Supp. 2d at 458 ("While the Court previously stated that federal principles of the American law of estoppel would apply, it is impossible to properly analyze an estoppel claim in American law without reference to the underlying Ecuadorian law.").

170. *ChevronTexaco III*, 499 F. Supp. 2d at 454. Interestingly, however, Ecuador does not recognize the doctrine of estoppel. *Id.* at 465. Instead, a relatively recent doctrine of "actos propios" approximates the notion of estoppel, but requires even less reliance than estoppel. *Id.* The court found "actos propios" sufficiently related to estoppel to analyze the issue under Ecuadorian law. *Id.*

171. *See id.* at 458 (noting that "it is impossible to properly analyze an estoppel claim in American law without reference to the underlying Ecuadorian law because estoppel, particularly when sought against a governmental entity or the government itself, can only lie where there is

The court found that Ecuadorian law would not bind PetroEcuador to the arbitration agreement on a theory of estoppel.[172] In late 2008, the Second Circuit affirmed this decision and denied a petition for rehearing.[173] The Supreme Court subsequently denied ChevronTexaco's petition for certiorari.[174] The decision in *ChevronTexaco* stands in contrast to that of *Bridas*. *ChevronTexaco* used substantive federal common law as the vehicle to address the TPN issue through Ecuadorian understandings of justice and therefore implicitly accounted for the international comity implications of the case.[175]

IV. Current Shortfalls and the Need for a New Standard

Bridas and *ChevronTexaco* both addressed the issue of whether to bind a TPN government to arbitration.[176] At the outset, both courts chose to apply substantive federal common law to resolve the dispute.[177] However, upon application of federal common law, the two courts diverged.[178] Unlike the *Bridas* court's strict application of federal common law,[179] *ChevronTexaco* uncovered that justice requires something more than straightforward application of U.S. theories of third-party liability and instead relied on Ecuadorian law to reach its conclusion.[180] Yet, while *ChevronTexaco* improves on the

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reasonable reliance").

172. *Id.* at 468.

173. Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco IV*), No. 07–2868–CV, 2008 WL 4507422, at *1 (2d Cir. Oct. 7, 2008).

174. ChevronTexaco Corp. v. Republic of Ecuador, 129 S. Ct. 2862 (2009).

175. The deference to Ecuadorian law implicitly acknowledged Ecuador in its sovereign capacity and with respect to sovereignty over its natural resources. *Supra* note 8.

176. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas II*), 447 F.3d 411, 420 (5th Cir. 2006) (finding the Government of Turkmenistan bound to an arbitration as a TPN); Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco III*), 499 F. Supp. 2d 452, 455 (S.D.N.Y. 2007) (holding that Ecuador and PetroEcuador were not bound as TPNs).

177. *See Bridas II*, 447 F.3d at 416 (applying federal common law); *ChevronTexaco III*, 499 F. Supp. 2d at 458 (same).

178. *See Bridas II*, 447 F.3d at 416–17 (applying alter ego as it exists in U.S. corporate law); *ChevronTexaco III*, 499 F. Supp. 2d at 458 ("[I]t is impossible to properly analyze an estoppel claim in American law without reference to the underlying Ecuadorian law.").

179. *Supra* note 131 and accompanying text.

180. *ChevronTexaco III*, 499 F. Supp. 2d at 458–59. Justice here implicates the notion of sovereignty at stake in both cases: Sovereignty both as a foreign state and with respect to its natural resources as a tool for economic development. *Supra* note 95 and accompanying text. But that is not to say that sovereignty does not come with responsibility and accountability. *Supra* note 95 and accompanying text.

deficiencies of *Bridas*,[181] the *ChevronTexaco* opinion does not go far enough in establishing a standard that ensures fair results for TPN governments faced with compulsion or enforcement of arbitration before a U.S. court. This Part seeks to develop and support a new legal standard to address the TPN issue presented in *Bridas* and *ChevronTexaco*. Subpart A sets out this new standard, arguing that only the laws of the state in question should govern the decision to compel a TPN government to arbitration. Subpart B hypothesizes how *Bridas* and *ChevronTexaco* would have come out under this new standard. Subpart C seeks to expose the need for this new standard by first highlighting the divergent results in *Bridas* and *ChevronTexaco* under application of federal common law, and then by revealing the inadequacies of the other legal alternatives available under the FAA and the New York Convention. Finally, subpart D refutes the possibility for abuse of the new standard by examining the international arbitration safeguards of capacity and authority as related to governments.

A. The New Standard

A new standard is needed to address the complex crossroads of sovereignty, development, and natural resources that face U.S. courts deciding whether to bind a foreign government to an arbitration agreement it did not sign.[182] *ChevronTexaco* points to the legal standard that provides more equitable results for foreign governments faced with the TPN issue. By turning to Ecuadorian law, the *ChevronTexaco* court revealed that the law of the government in question should serve as the legal standard to judge whether a TPN government can be compelled to an arbitration agreement or award.[183] However, the court still relied on U.S. third-party liability law as a baseline for addressing the compulsion question.[184] Instead, U.S. courts should turn directly to the law of the government in question to determine whether that government, as a TPN, can be bound to an arbitration agreement. Because a TPN government or government entity necessarily acts in reference to its own laws, only by violating its own understandings of third-party liability should the government be bound.

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181. *Supra* notes 127–29 and accompanying text.

182. *Infra* Part IV.C.

183. Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco III*), 499 F. Supp. 2d 452, 458 (S.D.N.Y. 2007) (relying on "Ecuadorian law because estoppel, particularly when sought against a governmental entity or the government itself, can only lie where there is reasonable reliance").

184. *See id.* (indicating that "federal common law of arbitration" applies).

As a general matter, TPNs should only be compelled to arbitration in rare circumstances.[185] International arbitration's consent-based process is usually antithetical to extending an arbitration agreement to TPNs.[186] Nevertheless, TPNs whose actions give rise to manifesting consent can be "identified" as one of the "true parties" to the arbitration.[187] In this regard, it is necessary to draw a distinction between governments and private actors. Private actors may be subjected to any number of legal frameworks, but governments, independent of a voluntary submission otherwise, are bound only by the international legal order and their own laws. Thus, binding the true parties to an arbitration requires a distinct analysis when the TPN is a foreign government.[188] States should only be bound as TPNs by application of their own laws. As additional support, the law of the TPN country will also frequently, if not always, have a "close connection" with the dispute in question and thus further comport with elements of fairness in international arbitration.[189]

This new standard could be implemented through federal common law, but an amendment to Chapter 2 of the FAA would provide clarity and consensus to this new standard. By adopting the standard of applying the law of the government in question to the TPN government issue, U.S courts will produce fairer results and contribute to the continued use of arbitration as an appealing dispute resolution mechanism for international contracts.[190]

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185. *See* BORN, *supra* note 5, at 1141 (remarking that "subjecting a [TPN] to an arbitration agreement is an exceptional act" and that "care must be exercised in reaching this conclusion").

186. *See id.* ("Arbitration is a matter of consent and, in particular, consent to arbitrate particular disputes with particular counter-parties, not consent to arbitrate generally or with the entire world.").

187. *See id.* at 1139 (arguing that the arbitration agreement is not being "'extended' to a 'third party'" but "rather finding the true parties that have consented to the arbitration agreement are identified").

188. *Supra* note 35 and accompanying text. This distinction is particularly noteworthy when discussing natural resources. While a state maintains some degree of absolute sovereignty over its natural resources, private entities have no such right. *Supra* note 8 and accompanying text.

189. *See* CHUKWUMERIJE, *supra* note 6, at 38 (describing the "close connection test" as an emerging theory in arbitration law that reacts to the complex web of choice-of-law decisions before national courts at various stages of arbitration proceedings); *see also* BORN, *supra* note 5, at 479 (explaining that the "most significant relationship" and "closest connection" standards help resolve the variety of approaches applied to resolve the choice-of-law issue under Article V(1)(a) of the New York Convention); *supra* notes 62, 63 and accompanying text. While this standard typically looks to either the "arbitral seat or the law of the underlying contract" as the most decisive factors, the case of governmental TPNs can be distinguished. BORN, *supra* note 5, at 479. Thus, the close connection test provides an independent avenue by which to justify application of the law of the government in question for TPN governments.

190. Fairness here stems from recognition of the distinctness of governmental TPNs. Furthermore, arbitration as a successful dispute resolution mechanism forum actually promotes

B. Bridas *and* ChevronTexaco *Under the New Standard*

To demonstrate that more equitable results stem from applying the law of the government in question to state TPNs, this subpart postulates how the courts would have decided *Bridas* and *ChevronTexaco* under the new standard. Under the new standard, the dispute in *Bridas* would have required application of Turkmen third-party liability theories. In 2001, Turkmenistan adopted a rather extensive Arbitration Procedure Code, but that code does not address the TPN issue.[191] Turning instead to the general Civil Code of Turkmenistan, Turkmen law provides several methods for finding third-party contractual liability.[192] The Code, however, only contemplates third-party contractual liability in a consent-based context,[193] not the nonconsensual theories at issue in both *Bridas* and *ChevronTexaco* (alter ego and estoppel, respectively).[194] Turkmen law could hold Turkmenistan liable under theories of agency or assignment, but not estoppel or alter ego.[195]

Does the absence of these nonconsensual theories from Turkmen law work an injustice against Bridas? Possibly, but Bridas tried and failed to bind Turkmenistan on consent-based liability theories in *Bridas I*.[196] Furthermore, Bridas should have known entering the deal that the government only funded the state-owned company with $17,000 for an enormous oil and gas project.[197] Bridas also failed to secure a bilateral investment treaty between its government, Argentina, and Turkmenistan.[198] Alternatively, Bridas could have

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development. *Supra* note 28 and accompanying text.

191. CODE OF ARBITRATION PROCEDURE (Turkm.). This Code serves as further evidence that developing countries remain serious about the development and foreign investment benefits of international arbitrations. *Supra* note 28 and accompanying text.

192. CODE CIVIL chs. 7, 16 (Turkm.).

193. *See id.* (providing legal basis for agency, transfer, and assignment).

194. *See* cases cited *supra* notes 9–10 (describing the third-party liability theories relied on).

195. *See supra* note 35 and accompanying text (describing consent-based and nonconsensual theories for binding TPNs).

196. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas I*), 345 F.3d 347, 358–63 (5th Cir. 2003) (refusing to hold Turkmenistan liable on theories of agency, estoppel, or third-party beneficiary).

197. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas II*), 447 F.3d 411, 420 (5th Cir. 2006) ("Turkmenneft was grossly undercapitalized with the equivalent of $17,000 U.S.").

198. *See* Smit, *supra* note 1, at 330 (explaining that Bridas, "as an experienced international operator, . . . should have tried to persuade the Argentine government to conclude a bilateral investment treaty with Turkmenistan," which would have given Bridas the "right to pursue its remedies for wrongful conduct of the kind the Fifth Circuit found in the arbitration against Turkmenneft"). Furthermore, an investor in a country of the former Soviet Union should have taken steps to protect its investment. *Id.*

insisted on a government indemnity provision or had the government agree to arbitrate in the first place.[199] Bridas could have pursued traditional foreign investment options, but instead the company entered into a hasty deal with a newly formed government.[200] When the dispute arose, Bridas received the full benefit of the bargain because of a legal theory that does not exist in Turkmenistan.[201] In turn, Turkmenistan's sovereignty over its natural resources was compromised, and the economic development of the state was similarly burdened.

Unlike *Bridas*, the approach in *ChevronTexaco* approximated the value of turning to the government in question for the legal basis to decide whether to hold the TPN government bound to an arbitration agreement. As a result, *ChevronTexaco* under the new standard yields more or less the same result. Without the new standard in place, however, the decision finally rendered took several iterations and the financial resources that such endeavors require. The case could have been avoided altogether had ChevronTexaco known from the outset that Ecuadorian law would govern and that estoppel does not exist under Ecuadorian law.[202] ChevronTexaco still may have brought a claim, but the dispute could have ended earlier.[203] This would have limited the costly games

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199. *See id.* ("[Bridas] should have insisted upon the state's guaranteeing the contract and agreeing to arbitration.").

200. *See id.* ("Governmental conduct of the type the Fifth Circuit found objectionable is increasingly recognized as internationally wrongful, not entitled to sovereign immunity protection, and actionable on the international level through normal settlement procedures recognized by international law as well as domestic courts.").

201. *See id.* at 335 (indicating that in effect Bridas got what "[e]ven a bilateral investment treaty would not have afforded"). That is not to say that Turkmenistan could not have been held liable under any circumstances given their conduct in this specific case. *Supra* note 177 and accompanying text. If the U.S. court had turned to a binding principle of international law, then Turkmenistan might be liable under that law. Similarly, Bridas could have petitioned the Argentine government to pursue the international dispute mechanisms between states available at the International Court of Justice. *See generally* U.N. Charter art. 7, par. 1, art. 36, par. 3, art. 92–96 (establishing and defining the powers of the International Court of Justice, the primary dispute resolution forum for state-to-state disputes).

202. *See* Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco III*), 499 F. Supp. 2d 452, 465 (S.D.N.Y. 2007) (explaining that "estoppel as understood by American courts does not exist in Ecuador").

203. *See id.* at 458 (indicating that ChevronTexaco could have argued based on an "assumption by assignment" theory as opposed to "assumption by estoppel"). Again, this illustrates the nature of third-party liability theories as either consent-based or nonconsensual. *See* BORN, *supra* note 5, at 1142 (indicating that assumption and assignment are consent-based and estoppel is a nonconsensual theory). The fact that *ChevronTexaco* did not argue these theories indicates that less evidence supported them. *Id.*

of "boomerang litigation" being played by ChevronTexaco to avoid the real issue in dispute between the parties.[204]

The strength of the new standard is that states act in reference to their own laws. Absent an explicit agreement to the contrary, the state's own laws represent the only relevant law to its actions as a government acting within its own territory. Absent consent, the laws of one country should not be imposed on the governments of another country.[205] Any movement towards conformity in third-party liability theories should occur through a consent-based process, not through one country's ability to exert a disproportionate share of the legal backdrop for international arbitrations.[206]

C. Why the Status Quo Frustrates Justice: A Series of Shortfalls

1. Federal Common Law

Federal common law perhaps offers a neutral decision-making framework for a U.S. court adjudicating between foreign parties.[207] However, the veil-

204. *See* M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens in Transnational Litigation?*, 4 INT'L L. & MGMT. REV. 21, 40 (2007) (explaining that *ChevronTexaco* represents a case of "boomerang litigation" in that the "litigation has now gone back and forth between several diverse forums" without arriving at the merits of the case).

205. One could argue that by virtue of agreeing to the New York Convention, parties imply their consent to subject themselves to the laws of another country. *See, e.g.*, New York Convention, *supra* note 3, art. V § 2 (permitting application of the law of the enforcing country). This argument can be countered on two fronts. First, implied consent is relevant when the country is a signatory to the arbitration agreement, but the TPN context raises something not explicitly contemplated in the New York Convention (or the FAA). *Supra* note 90 and accompanying text. Additionally, this Note advocates that the TPN state is a unique circumstance requiring something beyond even traditional TPN analysis. Accordingly, the TPN state should not have foreign law imposed on it. The second point applies specifically to Turkmenistan, which is not a signatory to the New York Convention. *See* UNCITRAL—Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Sept. 29, 2009) (indicating that Turkmenistan is not a signatory, but that Ecuador is) (on file with the Washington and Lee Law Review). Under certain circumstances, this does not preclude the New York Convention from affecting Turkmenistan or Turkmen parties as signatories, but it is relevant in the state TPN context.

206. What arises for countries like Turkmenistan and Ecuador, as exemplified by their recent lawsuits, is an informational asymmetry. A foreign government is forced to know the third-party liability laws of the United States by virtue of the United States serving as a common situs for litigation related to international commercial arbitrations.

207. *See* BORN, *supra* note 5, at 1214 (arguing that federal common law offers neutrality in that some "U.S. decisions decline to apply otherwise applicable U.S. state (or foreign) law to [TPN] issues in favor of neutral, judicially-fashioned principles that focus on the parties' consent and considerations of fairness and equity"); *see also* Republic of Ecuador v.

piercing techniques implemented under U.S. law often differ from those adopted in other legal systems.[208] This poses two problems: it imposes U.S. equitable doctrines on a foreign government without regard to the international nature of the dispute, and it could promote forum shopping and increased litigation in U.S. courts for wholly foreign disputes arising in arbitration. As a result, foreign governments will be forced to comport with U.S. notions of third-party legal liability for international contracts, even if their own domestic framework differs.

In *Bridas*, federal common law may have yielded the right result,[209] but the use of substantive federal common law as the legal standard for binding TPN governments poses problems for future cases. In applying federal common law as the law of the enforcing court, the Fifth Circuit did not necessarily overstep the bounds of the New York Convention.[210] But, as *Bridas II* noted, the parties' agreement to use federal common law "rested on a fundamental misunderstanding."[211] Additionally, the alter-ego doctrine of federal common law requires a "highly fact based" inquiry into the "totality of the circumstances."[212] Because the federal common law understanding of alter-

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ChevronTexaco Corp. (*ChevronTexaco I*), 376 F. Supp. 2d 334, 356 (S.D.N.Y. 2005) (advocating application of substantive federal common law based on "the goal of simplifying and unifying international arbitration law" (citing Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l 198 F.3d 88, 96 (2d Cir. 1999))).

208. *See, e.g.*, Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco III*), 499 F. Supp. 2d 452, 465 (S.D.N.Y. 2007) ("[E]stoppel as understood by American courts does not exist in Ecuador."). Alter ego is another example, where "[d]efinitions . . . vary widely in different legal systems, and are applied in a number of different contexts" or where the concept does not exist at all. BORN, *supra* note 5, at 1154.

209. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas II*), 447 F.3d 411, 420 (5th Cir. 2006) (concluding that the state-owned company "lacks an independent identity" and that the Government was "[i]ntentionally bleeding a subsidiary to thwart creditors"). While this may not be grounds for finding liability under Turkmen law, to the extent that this theory comports with a violation of binding international law, then the decision yielded the right result—but through application of the wrong law. *Supra* notes 192–95, 200.

210. *See supra* note 60 and accompanying text (referencing that refusal to enforce the arbitral award is permitted if otherwise permitted under the law of the enforcing country). One commentator argued, however, that "the Fifth Circuit's applying its own law to an issue that has no relationship to the United States raises a serious due process question." *See* Smit, *supra* note 1, at 331–32 (citing Home Ins. Co. v. Dick, 281 U.S. 397, 411 (1930) (holding that Texas courts violated the Fourteenth Amendment when they modified a wholly foreign contract under U.S. law)).

211. *See Bridas II*, 447 F.3d at 416 n.5; *see also supra* notes 120, 127–29 (addressing the erroneous application of federal common law despite party agreement).

212. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas I*), 345 F.3d 347, 349 (5th Cir. 2003) ("Alter ego determinations are highly fact-based, and require considering the totality of the circumstances in which the instrumentality functions.").

ego does not exist under Turkmen law, arguably the decision to bind Turkmenistan under this theory failed to account for the totality of the circumstances.[213] The practical effect of using federal common law was to bind the TPN government to a half billion-dollar arbitral judgment.[214]

Just as *Bridas* applied a U.S. understanding of alter ego against Turkmenistan, the court in *ChevronTexaco* could have applied estoppel as understood under U.S. law without regard to Ecuadorian law. *ChevronTexaco*, however, uncovers the tension of applying federal common law to the determination of whether to bind a TPN government to an arbitration agreement or award.[215] Sensing that binding PetroEcuador based solely on U.S. legal constructs would work an injustice and undermine the state's sovereignty, the *ChevronTexaco* court turned to Ecuadorian law.[216] While the court still relied on federal common law for the estoppel theory, application of estoppel's reliance component had the effect of bypassing federal common law and deferring to Ecuadorian law.[217] Of course, the court could have applied Ecuadorian law in the first place because the law chosen by the parties to the agreement[218] reserved Ecuadorian law "for those matters which would necessarily be governed by Ecuadorian law."[219] The court may have been reluctant to do so because of the preference in U.S. courts to apply federal common law in these types of disputes.[220]

Nevertheless, the impulse of the court to turn to Ecuadorian law recognizes the fact that to do otherwise would inequitably burden a foreign government with U.S. law when its only frame of reference would be its own

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213. *Supra* notes 192–95 and accompanying text.

214. *See Bridas II*, 447 F.3d at 415 (authorizing enforcement of the arbitral award in favor of Bridas for $495 million).

215. *See, e.g.*, Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco III*), 499 F. Supp. 2d 452, 460 (S.D.N.Y. 2007) (struggling to find what the law commands under the circumstances and deciding that the "the law is unsettled").

216. *See id.* at 459 (describing that "the laws differ when the party estopped is a government entity, as is the case with PetroEcuador").

217. *See id.* at 468–69 (concluding that "an Ecuadorian court would not find the JOA binding on CEPE in 1974"). In other words, Ecuadorian law would not bind Ecuador or PetroEcuador to the arbitration agreement in the original JOA when neither was a signatory to that agreement.

218. *See supra* note 57 and accompanying text (indicating that the law of the agreement is a possibility under the New York Convention as a choice of law at the pre-enforcement stage).

219. Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco I*), 376 F. Supp. 2d 334, 339 (S.D.N.Y. 2005).

220. *See supra* note 74 and accompanying text (citing the preference in U.S. courts to apply federal common law to cases dealing with international commercial arbitrations).

domestic law and binding international law.[221] While it could be argued that the New York Convention put Ecuador on notice that U.S. law could apply, the *ChevronTexaco* court, in effect, recognized the failure of this methodology to yield justice and grant respect to a foreign sovereign.[222] The weakness of *ChevronTexaco* is that it is limited in its scope. The court turned to Ecuadorian law "because estoppel, particularly when sought against a governmental entity or the government itself, can only lie where there is reasonable reliance."[223] The holding is limited to turning to the law of the government in question only when reliance on that government's own law is a relevant factor in the analysis. Based on the court's reasoning, however, the law of the government in question *is* the law upon which that government relies—and not just in cases of estoppel. Thus, *ChevronTexaco* points in the right direction, but does not go far enough in establishing a new standard.

2. *The Law Otherwise Applicable: Foreign Law*

When foreign law is the law otherwise applicable to determining arbitrability,[224] courts have the option of applying another legal framework. This choice of law was not considered in either *Bridas* or *ChevronTexaco*.[225] As noted earlier, U.S. courts are reluctant to apply foreign law when addressing international arbitration.[226] Applying foreign law potentially offers a better solution to the TPN problem than federal common law, but falls short of the

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221. The same deference was accorded to U.S. businesses in *Sarhank Group v. Oracle Corp.* *See* Sarhank Group v. Oracle Corp., 404 F.3d 657, 662–63 (2d Cir. 2005) ("An American [TPN] cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law."). This argument seems appealing to the TPN government, but the holding of *Sarhank* also illustrates "a parochial preference for local law, applied to protect local businesses." BORN, *supra* note 5, at 1220. For the sovereign context, however, the deference to the government's law is not parochial, but rather a demonstration of international comity.

222. *Supra* note 205 and accompanying text.

223. Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco III*), 499 F. Supp. 2d 452, 458 (S.D.N.Y. 2007).

224. *See supra* note 62 and accompanying text (pointing out that this could be the law of any number of legal systems, but that the relevant analysis calls for looking at the implications of applying foreign law to the TPN issue).

225. While this law was not applied in either case, it could have been. *See* Bridas S.A.P.I.C. v. Gov't of Turkm. (*Bridas I*), 345 F.3d 347, 352 (5th Cir. 2003) (citing England as the law that was to govern the agreement); Republic of Ecuador v. ChevronTexaco Corp. (*ChevronTexaco I*), 376 F. Supp. 2d 334, 339 (S.D.N.Y. 2005) (citing New York as the law, "except for those matters which are necessarily governed by [Ecuadorian law]").

226. *Supra* note 71 and accompanying text.

benefits of applying the law of the government in question. To the extent that a court finds a third party equitably bound to the agreement under the law of contract, the terms of that contract arguably arise as the de facto choice of the TPN.[227] This conclusion would be more in keeping with the goal of party autonomy and consent in international arbitration.[228] However, strictly speaking, this choice of law represents a choice made by parties other than the TPN. Nevertheless, in cases like *Bridas* and *ChevronTexaco*, in which the government can be bound through a state-owned company, the government arguably exercises sufficient control over the state-owned enterprise to influence peripherally the enterprise's contracts.[229] Thus, justice would not bar binding the government to the law selected in the agreement executed by the state-owned company. However, the fact that state-owned enterprises are created to provide separation from the government undermines this conclusion.[230] Further, because the foreign law chosen could be any number of laws, the choice to apply foreign law would neither promote the interests of the TPN government, nor appeal to the domestic court adjudicating.[231]

3. Internationally Neutral Standards

In contrast to the approaches of federal common law and foreign law, internationally neutral standards have a certain inherent appeal in the international arbitration context, particularly for those cases that implicate a foreign government.[232] France, for instance, has decided that "international arbitration agreements are 'autonomous' from national legal systems and subject to international law."[233] Internationally neutral standards can be

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227. *See* REDFERN ET AL., *supra* note 75, at 175 ("Party consent is a prerequisite for arbitration.").

228. *Id.*

229. At the very least the government has the power to limit what laws can be assigned to govern agreements entered into by its state-owned entities.

230. *See* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 624 (1983) (explaining that a general characteristic of a state-owned enterprise is that "[t]he instrumentality is run as a distinct economic enterprise"); *see also supra* notes 97–98 and accompanying text (describing state-owned enterprises).

231. *Supra* note 62 and accompanying text. The availability of numerous choices leads to unpredictability.

232. *See* BORN, *supra* note 5, at 1212–13 ("In international relations . . . it is preferable to apply rules adapted to the conditions of the international market." (citing *Award in ICC Case No. 8385*, *in* COLLECTION OF ICC ARBITRAL AWARDS 1996–2000 474, 476 (J. Arnaldez et al. eds., 2003))).

233. *Id.* at 1214.

understood to include both general principles of law and the notion of *lex mercatoria*.[234] Internationally neutral standards would "provide . . . the benefit that the same law would be applied to the [TPN] issue by arbitrators and courts alike."[235] This advantage, however, ignores the fact that internationally neutral standards are somewhat amorphous, and thus their application could prove inconsistent and yield unpredictable results.[236] As *Bridas* and *ChevronTexaco* illustrate, the consequences of unpredictability can prove dire to a country's development objectives and impinge on its sovereignty.

At least for the context of the TPN government, referring to the state's own laws provides greater clarity and a more inclusive set of theories. Because governments are still bound by binding international law, internationally neutral standards still serve as a baseline for addressing the issue of whether to bind a TPN government.[237] However, because such law is inclusive in the laws of the state,[238] defining the standard as the law of the government in question not only adopts the benefits of internationally neutral standards, but also provides a framework for TPN theories not necessarily contemplated at the international level.

D. Capacity and Authority as a Check on the New Standard

While applying the law of the government in question to the issue of whether to compel a TPN government to arbitration proves superior to federal common law, other foreign law, and even internationally neutral standards, the standard is problematic if it can be abused. The ability of a government to manipulate its domestic laws to avoid liability raises a possible risk to the new

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234. *See id.* at 2231–32 (referring to general principles of law as those "principles of law common to leading legal systems" and *lex mercatoria* as law "tailored to commercial transactions").

235. Smit, *supra* note 1, at 331.

236. *See* BORN, *supra* note 5, at 2231–32 (describing the controversies and difficulties of both general principles of law and *lex mercatoria*). For the case of *lex mercatoria*, its role as an "international commercial common law" makes it "fraught with missteps." *Id.* at 2236; *see also* CHUKWUMERIJE, *supra* note 6, at 165 (arguing that "international law and general principles are inadequate standards for regulating complex commercial relations: They are incomprehensive and rarely easily ascertainable"). Thus, international law standing alone would be equally unappealing and inadequate for deciding whether to bind a TPN government.

237. *See* BORN, *supra* note 5, at 1219 (conceding that "national laws in the context of [TPN] issues should be subject to international limitations").

238. To the extent that an internationally neutral standard has risen to the level of being customary international law or a general principle of law, states are bound by it. *See* U.N. Charter art. 7, par. 1, art. 36, par. 3, art. 38 (listing customary international law and general principles of law as sources of binding international law).

standard. Overly narrow third-party liability laws could permit governments to manipulate a U.S. or international legal framework that deferred to their laws for determining TPN liability. Similarly, passage of legislation excluding the government or government entity from TPN compulsion could undermine the goals of the new standard proposed in Part IV.A. While these concerns are not without merit, potential negative effects felt by foreign investors affected by such laws would result in a chilling effect on foreign investment.[239] Aside from leaving the risk to the market place, these laws could also be disregarded under the notions of capacity and authority that currently limit the ability of governments to manipulate explicit consent to international arbitration agreements.[240]

A party agreeing to an arbitration agreement must have the capacity to do so.[241] Accordingly, the New York Convention permits refusing to enforce an award based on incapacity of a party.[242] Often states will have internal requirements, based on authority, to establish governmental capacity to enter binding arbitration agreements.[243] Nevertheless, "[i]t is plainly unsatisfactory for a state or state agency to be entitled to rely on its own law to defeat an agreement that it has freely entered into."[244] Both arbitral tribunals and national

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239. *See* SKAGEN, *supra* note 103, at 9 (explaining that the post-*Bridas* effect has "tarnished the Turkmen government's reputation as a joint venture (JV) partner and helped keep other companies away"). Even though Bridas made a successful recovery, Turkmenistan still faced negative consequences in terms of its foreign investment reputation.

240. *See* CHUKWUMERIJE, *supra* note 6, at 52 (explaining that capacity and authority to enter into an arbitration agreement are essential, but that a state cannot consent to arbitration and then claim incapacity based on domestic law).

241. *See* REDEFERN ET AL., *supra* note 75, at 172 ("Parties to a contract must have legal capacity to enter into that contract, otherwise it is invalid. The position is no different if the contract in question happens to be an arbitration agreement.").

242. *See* New York Convention, *supra* note 3, art. V § 1(a) (permitting refusal of enforcement of an arbitral award based on some incapacity of the party under the law applicable to them). Similarly, Article II § 3 could also be used to refuse recognition of an agreement because of incapacity. *Id.* art. II § 3. *But see* CHUKWUMERIJE, *supra* note 6 at 39 (describing that the choice-of-law issue raised under this provision's language "applicable to them" is "incomplete and misleading" because it could mean "the residence of the parties, their domicile or their nationality").

243. *See* REDFERN ET AL., *supra* note 75, at 174 (declaring that some national laws partially or completely ban the ability of the state or a state agency from entering into international arbitration agreements, or otherwise mandate a set of perquisites); *see also* CHUKWUMERIJE, *supra* note 6, at 48 (explaining that authority is particularly relevant in the context of states because as nonnatural persons they require a "duly authorized official" to bind them).

244. REDFERN ET AL., *supra* note 75, at 174; *see also* CHUKWUMERIJE, *supra* note 6, at 45 ("International public policy would thus dictate that a State cannot rely on its national law to challenge its capacity to arbitrate, because to hold otherwise will be a breach of good faith and the principle of *pacta sunt servanda*.").

courts have reiterated this conclusion.[245] As a result, the bar on incapacity claims by states and state-owned entities "has crystallized in a rule of 'common law of arbitration.'"[246]

The law dealing with the capacity and authority of states and state agencies to enter into arbitration agreements is built around cases where the state was an actual signatory.[247] However, extending the rules to cases where the state is a TPN requires only that the TPN government be likewise barred from denying capacity as a TPN when domestic law would otherwise compel a TPN. By extending the current law of capacity and authority, the new standard remains protected from abuse.

As evidenced by *Bridas* and *ChevronTexaco*, applying federal common law to the issue of a TPN government can yield results that unfairly undercut the sovereignty of the state in question. Additionally, governments face a heightened risk under U.S. arbitration law's exclusion of the Act of State protection.[248] As a result, U.S. courts require a new standard to address TPN governments faced with arbitration. Applying the law of the government in question offers a fair solution and proves superior to applying otherwise applicable foreign law or internationally neutral standards. Furthermore, the fairness of the new standard remains protected through international legal understandings of capacity and authority and remains checked by foreign investment market forces. As this Note concludes, at the same time that the new standard preserves sovereignty, it also promotes greater interdependence of international legal and economic systems.

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245. *See* BORN, *supra* note 5, at 630 ("[I]nternational conventions, national arbitration legislation and international arbitral awards all . . . [hold] that a state may not invoke its own law to deny its capacity to have made an agreement to arbitrate."); *see also* CHUKWUMERIJE, *supra* note 6, at 47, 51 (explaining that International Centre for the Settlement of Investment Disputes Convention signatories "are estopped from pleading incapacity to arbitrate" and that article 46 of the Vienna Convention injects a good-faith requirement that would undercut a state's ability to object to arbitration into which it freely entered).

246. *See* CHUKWUMERIJE, *supra* note 6, at 52 (supporting this conclusion because of "the need for trust and reliability in the commercial world"); *see also* BORN, *supra* note 5, at 632–35 (offering further support of this common law theory by citing supporting authorities from "U.S., English, French, Italian, Greek, Egyptian, Moroccan and Tunisian courts" and that numerous "international arbitral tribunals have reached similar results").

247. *See* CHUKWUMERIJE, *supra* note 6, at 38–52 (providing a discussion of cases and materials on capacity and authority which are premised on a state signing an arbitration agreement and then reneging).

248. *Supra* notes 50–51 and accompanying text.

V. Conclusion

Arbitration remains an increasingly common international dispute resolution forum and one that is particularly appealing to foreign investors in developing nations.[249] Arbitration attempts to resolve the historical conflicts encountered by either adjudicating in the host country or the country of the investor.[250] The neutrality of arbitration promotes investment; investment presumably promotes development.[251] Development, in turn, brings clean water, electricity, and funds for education and healthcare to more people around the world.[252] The recent decisions by U.S. courts in *Bridas* and *ChevronTexaco* potentially undermine the productive and beneficial use of arbitration to facilitate international investment and commercial transactions. With respect to TPN governments, U.S. courts' reliance on substantive federal common law to resolve the TPN issue potentially inhibits the ability of other nations to act as they see fit for their nation and with respect to their natural resources. Additionally, the decisions of *Bridas* and *ChevronTexaco* highlight the divergent, and therefore unpredictable, application of federal common law. National courts that undercut the benefits of international arbitration ultimately diminish the value of a dispute settlement mechanism that promotes development. If states become uncomfortable with the ability of foreign courts to subvert their perceptions about arbitration, then investors that seek the assurances of arbitration will be less likely to continue investing.

The issue is not merely one that developing countries face, however. While developed countries may have more elaborate theories of third-party corporate liability,[253] that does not undermine the benefits of fairness and deference to sovereignty that bolster the new standard advocated in this Note. The distinction relates to the fact that governments are distinct enough from

249. *Supra* note 28 and accompanying text; *see also* BORN, *supra* note 5, at 68 (citing the increased use of international commercial arbitration and noting that arbitration is "perceived as the most effective . . . means for resolving international commercial disputes").

250. *See* CHUKWUMERIJE, *supra* note 6, at 52 (explaining that "[w]here parties to an international commercial dispute are from different countries, they may be reluctant to submit their dispute to the national courts of one of the parties" and that this is especially true when "the dispute involves a State party").

251. *See* William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 702 (1989) (defending the "the role of arbitration in the process of global wealth creation").

252. *Supra* note 93 and accompanying text.

253. *Supra* Part IV.B. Developed countries often have both consensual and nonconsensual third-party liability theories. *Supra* note 35 and accompanying text.

private actors to merit a different standard from what is currently applied to the TPN problem in U.S. courts.

Adoption by U.S. courts, and hopefully by other national courts and arbitral tribunals, of deference to the law of the TPN government that faces compulsion to arbitration will yield positive results for all parties. First, this new standard will promote continued use of arbitration to resolve international commercial and investment disputes because foreign governments will remain amenable to the neutrality and fairness of the process. Second, and because of the first, this will promote continued foreign investment. Third, and finally, this new standard will promote the rule of law—both at the national and international levels.

At the national level, governments will be provoked into adhering to their own domestic frameworks because jurisdiction that implicates liabilities will stem from their domestic third-party liability laws. Similarly, to promote investment, states may be drawn to adopt additional third-party liability theories that are standardized in other legal systems. This method of adoption of extraterritorial legal theories will be built on domestic consensus and not external imposition. At the international level, the new standard will reinforce general principles of international law and increase respect for the international legal order. At the same time, the adoption of standardized third-party liability theories by an increasing number of states will result in codification of new international law. Thus, a synergistic interplay will result as the legal frameworks at the national and international levels continue to drive the evolution of international law. By adopting the new standard to address the governmental TPN problem, U.S. courts will lead the way to autonomous, predictable, and fair international dispute resolution by arbitration and ensure that the public mechanics that safeguard the arbitration system continue to mesh with the sovereignty of individual states.