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FACING THE FUTURE OF OIL IN U.S. COURTS: A RECOMMENDATION FOR CHANGING THE *BREMEN* DOCTRINE ON ENFORCEABILITY OF FORUM SELECTION CLAUSES

Mark D. Mutschink*

I. INTRODUCTION

WHEN Exxon Mobil faced the nationalization of its oil-field projects in Venezuela in 2007, it refused Venezuela's offer of compensation and instituted international commercial arbitration.¹ The war of words that followed clearly depicted Venezuela's view toward any perceived infringement on its sovereign hydrocarbon rights. Members of Venezuela's government called Exxon officials "bandits and thieves . . . trying to steal our future"² and Exxon's arbitration demand and other court actions "judicial terrorism" and "economic hostage-taking."³ In fact, Exxon can be considered fortunate to have been able to negotiate for an arbitration clause in its contract with Petroleos de Venezuela, S.A. (PDVSA), the Venezuelan national oil company (NOC).⁴ The arbitration clause put Exxon and PDVSA in a neutral forum and gave Exxon a chance to fight on a level playing field.⁵ This legal battle reveals some key issues and raises some important concerns surrounding the dealings between private U.S. companies and NOCs around the world. For example, NOCs have the ability to wield both their private economic power and state power, such as the power to simply nationalize a private company's assets within their country.⁶ Additionally, NOCs seem increasingly hostile to resolving any disagreements outside their

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1. Sara Miller Llana, *Exxon Fights Chavez' Venezuela for Compensation in Courts*, CHRISTIAN SCI. MONITOR, Feb. 11, 2008, at 4.

2. David Ivanovich & John Otis, *Judge Grants Exxon Mobil Asset Request*, HOUS. CHRON., Feb. 14, 2008, at B1.

3. Loren Steffy, *Chavez Drama Worth Nada*, HOUS. CHRON., Feb. 15, 2008, at B1.

4. Steven Mufson, *Chavez's Oil Threats Slick but Not Solid: Halting Exports Would Hurt Venezuela More Than U.S.*, WASH. POST, Feb. 13, 2008, at D1.

5. See *id.*

6. See Ivanovich & Otis, *supra* note 2.

own legal systems.⁷ Finally, considering NOCs' importance in the world-wide energy sector, there should be serious concern that NOCs have the power to directly impact the U.S. energy supply on a scale that could affect national security and the economy.⁸

This article addresses the U.S. courts' doctrine regarding enforceability of forum selection clauses and recommends a change to that doctrine when one of the parties to the contract is a NOC. Section II lays out the current landscape of energy policy, production, and consumption in the United States and describes the features and actions of several NOCs around the world. Section III addresses how NOCs are treated under the Foreign Sovereign Immunities Act of 1976 (FSIA).⁹ Section IV describes the current doctrine of forum selection clause enforcement in the U.S. court system, and Section V offers a recommendation for changing that doctrine when one party to a forum selection clause is a NOC.

II. THE CURRENT LANDSCAPE OF ENERGY POLICY AND REALITY IN THE UNITED STATES AND THE ROLE OF NATIONAL OIL COMPANIES

It seems impossible to open the newspaper or log in to your homepage without seeing a headline concerning some aspect of energy. The sheer number of news, scholarly, and legal articles underlines the importance of all things energy in the modern world. Search *oil* under Google News and you get thousands of hits.¹⁰ A detailed inquiry into such a huge and diverse subject matter is neither practical nor necessary for this comment. However, describing the current state of U.S. energy policy, production, and consumption and the role foreign NOCs play in U.S. energy supply and demand is necessary to understand the timeliness and importance of this comment's proposals. The following description begins with a quick look at U.S. energy policy and the rhetoric surrounding energy security. Next, the section discusses U.S. energy production and consumption, including what forecasters predict about the future of U.S. energy supply and demand. The discussion ends with a description of NOCs: what they are, why they are important, and what actions they have recently taken.

A. ENERGY SECURITY IN THE UNITED STATES

The federal and state governments of the United States consistently offer energy security as a justification or explanation for their choices and

7. See Steffy, *supra* note 3.

8. Wajid Rasheed, *The Oil Curtain and the Evolution of National Oil Companies*, J. PETROLEUM TECH., Feb. 2009, at 36, 36.

9. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–11 (2006).

10. *Google News*, GOOGLE, <http://www.google.com/news> (last visited Aug. 4, 2010).

policies with energy projects,¹¹ legislation,¹² and administrative action.¹³ However, these officials, legislators, and agencies frequently fail to adequately define the concept of energy security.¹⁴ The National Conference of State Legislatures provides one definition: “Energy security refers to a resilient energy system . . . [It is] capable of withstanding threats through a combination of active, direct security measures . . . and passive or more indirect measures—such as redundancy, duplication of critical equipment, diversity in fuel, other sources of energy, and reliance on less vulnerable infrastructure.”¹⁵ Within the limits of this discussion, *energy security* is used as a shorthand reference to securing supplies of conventional energy sources, development of alternative energy sources, and efforts to improve energy efficiency. Two important justifications for promoting energy security are (1) promoting national security and (2) promoting economic growth and stability.¹⁶

1. Energy Security and National Security

United States officials now frequently recognize that ensuring energy security is a vital part of ensuring national security.¹⁷ Then-Senator Barack Obama gave a speech in 2006 equating energy security with national security.¹⁸ And, in a recent proclamation, President Obama said: “Well funded energy research and development will not only help protect our environment and support our communities, but it will also address concerns of global competitiveness and national security.”¹⁹ The Department of Energy (DOE) raises the issues of both U.S. national security and U.S. economic security when it talks about the supply and demand of energy sources.²⁰ Finally, the Department of Defense (DOD) also recognizes the link between energy security and national security.²¹ For exam-

11. See, e.g., Alexandra Zavis, *Army Green Isn't Just Fatigues*, L.A. TIMES, Apr. 26, 2009, at A1 (characterizing Department of Defense as “testing ground . . . for green initiatives”).

12. See, e.g., Energy Independence and Security Act of 2007, 42 U.S.C. §§ 17001–17386 (Supp. I 2009). Subchapter II of the Act is entitled “Energy Security Through Increased Production of Biofuels,” but energy security is not defined. See *id.*

13. See, e.g., Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,117 (Oct. 5, 2009) (requiring federal agencies to reduce emissions of GHG’s justified in part by improving energy security).

14. See Energy Independence and Security Act of 2007, Subchapter II (offering no definition of energy security); Zavis, *supra* note 11 (same); see also Exec. Order No. 13,514, *supra* note 13, at 52,117.

15. MATTHEW H. BROWN, CHRISTIE REWEY & TROY GAGLIANO, NAT’L CONFERENCE OF STATE LEGISLATURES, ENERGY SECURITY 7 (2003).

16. James A. Duffield, Irene M. Xiarchos & Steve A. Halbrook, *Ethanol Policy: Past, Present, and Future*, 53 S.D. L. REV. 425, 441 (2008).

17. See Senator Barack Obama, Remarks before the Governor’s Ethanol Coalition: Energy Security is National Security (Feb. 28, 2006), available at http://www.barackobama.com/2006/02/28/energy_security_is_national_se.php.

18. See *id.*

19. Proclamation No. 8431, 74 Fed. Reg. 51,735, 51,735 (Oct. 2, 2009).

20. *Energy Sources*, U.S. DEP’T OF ENERGY, <http://www.energy.gov/energysources/index.htm> (last visited Aug. 4, 2010).

21. U.S. DEP’T OF DEF., NATIONAL DEFENSE STRATEGY 5 (June 2008).

ple, the 2008 National Defense Strategy acknowledges that energy demands will affect national security issues in the future.²² The DOD foresees that even with investment in alternative energy sources, U.S. dependence on oil will continue to increase in the coming years.²³ To satisfy demand, the United States will probably have to seek sources of supply in more unstable areas of the world.²⁴

Recognizing the critical link between energy security and national security, the U.S. military began taking steps to improve its energy efficiency and to develop alternative energy sources.²⁵ For example, the U.S. Army's training center at Fort Irwin in California is a proving ground for alternative energy projects that could save both money and lives in the field.²⁶ The Fort takes advantage of plug-in cars, solar- and wind-powered computers, and foam-insulated tents to be more energy efficient.²⁷ In another project, the Defense Advanced Research Projects Agency is helping to fund research into algae-grown biofuel with the goal of producing a reliable, alternative source of jet fuel.²⁸ These two examples illustrate the U.S. military's commitment to improving energy efficiency and developing alternative fuel sources, both of which will lead to increased energy security and national security.²⁹

2. *Energy Security and Economic Growth and Stability*

In addition to affecting national security, energy-security measures can affect the growth and stability of the U.S. economy.³⁰ President Obama recognized that the future of the U.S. economy is linked to continued innovation in the science and technology of clean energy.³¹ One legislative effort to promote innovation and investment in clean energy is the American Recovery and Reinvestment Act of 2009 (Recovery Act).³² The Recovery Act provides for the investment of \$80 billion for clean energy development.³³ This investment lays "the foundation for a clean energy economy that will create a new generation of jobs, reduce depen-

22. *Id.*

23. *Id.* at 16; see also *infra* Part II.B (discussing projected U.S. energy consumption statistics).

24. See U.S. DEP'T OF DEF., *supra* note 21, at 16.

25. Zavis, *supra* note 11.

26. *Id.*

27. *Id.*

28. Ed Timms, *Algae Could Become Reliable Jet Fuel Source*, DALLAS MORNING NEWS, June 7, 2009, at A4.

29. See *id.*; Zavis, *supra* note 11.

30. Press Release, U.S. Dep't of Energy, President Obama Announces Over \$467 Million in Recovery Act Funding for Geothermal and Solar Energy Projects (May 27, 2009).

31. *Id.* Developing clean-energy projects potentially impacts energy security by improving energy efficiency and creating alternative energy sources in the short term and reducing dependence on oil in the long term. See *supra* Part II.A.

32. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (codified as amended in scattered sections of 26 U.S.C.).

33. Memorandum from Vice President Joe Biden to President Barack Obama, Progress Report: The Transformation to a Clean Energy Economy 1 (Dec. 15, 2009).

dence on oil and enhance national security.”³⁴ Vice President Biden estimates that the total investment value, including appropriations, federal loans, and tax incentives could be up to \$150 billion for clean energy projects. Additionally, the investment could create over 850,000 new jobs in renewable energy and smart-grid projects.³⁵ Most importantly, variations in oil prices should not directly affect any of these jobs.³⁶ The hope is that this investment will help transform the U.S. energy system and lead to less dependence on foreign oil.³⁷ While the Recovery Act is a sizable investment in clean energy, its long-term impact is questionable especially considering that the United States spends over \$500 billion each year to meet its energy demands.³⁸

The Recovery Act’s investment in clean energy reflects the growing realization that energy security is an important issue in our economic stability. The supply and price of oil can seriously affect the U.S. economy in both the short and long term, a fact that hit home recently.³⁹ In 2008 and 2009, both U.S. and worldwide airlines were forced to cut back on their capacity to stay afloat as oil prices hit \$150 per barrel.⁴⁰ The increased price also affected the DOD, which saw its energy bill increase from \$13 billion in 2007 to \$20 billion in 2008.⁴¹ Although developing alternative fuel sources and improving energy efficiency are both important steps toward achieving the goal of ending U.S. dependence on foreign oil and becoming the world’s leader in clean energy,⁴² the following section demonstrates why continuing to secure U.S. supplies of oil abroad remains of paramount importance.

B. U.S. ENERGY CONSUMPTION AND PRODUCTION STATISTICS

The reality of U.S. energy consumption statistics and projections makes it clear that this country depends on imported oil to meet demand and will continue to depend on imported oil for years to come.⁴³ The Energy Information Administration (EIA) within the DOE compiled these statistics and forecasts, so the numbers are “policy-independent.”⁴⁴ The most recent production and consumption statistics demonstrate the scope of U.S. dependence upon foreign sources of oil. In 2008, total liquid-

34. *Id.*

35. *Id.* at 2, 4.

36. *See id.*

37. *Id.* at 1.

38. *Energy Sources*, *supra* note 20.

39. See Terry Maxon, *In Turbulent Times, Big Airlines Shrink*, DALLAS MORNING NEWS, Jan. 19, 2010, at D1.

40. *Id.*

41. Zavis, *supra* note 11.

42. Press Release, U.S. Dep’t of Energy, *supra* note 30.

43. See U.S. ENERGY INFO. ADMIN., U.S. DEP’T OF ENERGY, ANNUAL ENERGY OUTLOOK 2010 146–47, available at <http://www.eia.doe.gov/oiaf/aeo/pdf/appa.pdf>.

44. *Prices & Trends*, U.S. DEP’T OF ENERGY, <http://www.energy.gov/pricestrends/index.htm>.

fuel⁴⁵ consumption averaged over 19 million barrels per day, while domestic production was slightly more than 8 million barrels per day.⁴⁶ To meet its demand for liquid fuels, the United States imported almost 10 million barrels of crude oil per day from foreign sources, which totaled over two-thirds of the U.S. daily supply.⁴⁷

Tracking the source of U.S. oil imports reveals a supply-diversification strategy, most likely as a method of securing supply against disruptions. The United States imported oil from over eighty countries in significant amounts in 2008.⁴⁸ However, Canada, Saudi Arabia, Mexico, Venezuela, and Nigeria combined to supply over 67% of those crude-oil imports,⁴⁹ revealing a potential weakness in this diversification strategy. Also important, a vast majority of U.S. crude oil imports are from countries in which NOCs control the production and sale of oil.⁵⁰ In fact, NOCs of the world control 88% of the world's proven oil reserves.⁵¹ Not only do NOCs control reserves, they also account for the majority of the world's oil production.⁵² That means privately controlled oil companies produce the minority of the world's supply.⁵³ Moreover, the largest international oil companies (IOCs) produced only 8% of the total oil in 2007.⁵⁴ It is clear from this data that NOCs of the world presently wield incredible economic power, and that power is likely to increase in the coming years because of continued growth in worldwide demand.⁵⁵

Although the United States is investing in developing alternative fuel sources, improving energy efficiency, and reducing dependence on oil, the effects of these efforts will not end dependence on imported oil in the

45. Liquid fuel supplies include crude oil, refined hydrocarbons, ethanol, and biodiesel among others, while the liquid fuels actually consumed are usually refined hydrocarbons. See U.S. ENERGY INFO. ADMIN., *supra* note 43, at 129.

46. *Id.* at 146–47 (noting that conventional domestic production equaled 7.68 million barrels per day, and unconventional production equaled 0.66 million barrels per day for a total of 8.34 million barrels per day of liquid fuels).

47. *Id.* at 129 (stating gross imports of crude oil equaled 9.78 million barrels per day in 2008).

48. U.S. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, U.S. IMPORTS BY COUNTRY OF ORIGIN, *available at* http://tonto.eia.doe.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbbldpd_a.htm (June 29, 2009) (showing eighty-three countries supplied at least one thousand barrels of crude oil per day to the United States in 2008).

49. *Id.* Their respective contributions were: Canada, 20%; Saudi Arabia, 15.4%; Mexico, 12.1%; Venezuela, 10.6%; and Nigeria, 9.4%. See *id.*

50. *Id.*; THE WORLD BANK GROUP, A CITIZEN'S GUIDE TO NATIONAL OIL COMPANIES 14 (2008). Adding the imports from countries with NOCs and dividing by total imports reveals nearly 70% of imports come from countries with NOCs.

51. U.S. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ENERGY IN BRIEF: WHO ARE THE MAJOR PLAYERS SUPPLYING THE WORLD OIL MARKET? (Jan. 28, 2009), *available at* http://tonto.eia.doe.gov/energy_in_brief/world_oil_market.cfm.

52. *Id.* (noting that, in 2007, NOCs accounted for 52% of world oil production).

53. See *id.*

54. *Id.* (setting forth combined production of Exxon Mobil, BP, and Royal Dutch Shell).

55. ANNUAL ENERGY OUTLOOK 2010, *supra* note 43, at 147 (noting that total consumption of liquid fuels projected to increase by over twenty-five million barrels per day by 2035).

near future.⁵⁶ The EIA predicts that U.S. consumption of liquid fuels will remain relatively stable over the next twenty-five years.⁵⁷ However, because of increased domestic biofuel production, improved efficiency standards, and increased domestic oil production, the projected percentage of imported liquid fuels in 2035 drops to 45% of the total liquid-fuel consumption.⁵⁸ This percentage represents a reduction in U.S. dependence on imported oil but also highlights the fact that the United States will still be “dependent” on foreign sources of oil and petroleum products for 45% of its needs.⁵⁹ In the next twenty-five years and beyond, U.S. energy security will continue to rely upon foreign sources of oil despite improvements in clean energy, alternative fuels, and energy efficiency.⁶⁰ This continued dependence on imported oil underscores the importance of NOCs to U.S. energy security.

C. AN OVERVIEW OF NATIONAL OIL COMPANIES AND THEIR IMPORTANCE TO ENERGY SECURITY

1. *What is a National Oil Company?*

National oil companies are generally state-controlled corporations operating to develop the state’s mineral resources—petroleum.⁶¹ As noted in Section II.B, NOCs control 88% of the world’s proven petroleum reserves.⁶² Generally, NOCs develop and produce the state’s oil resources while cooperating to some extent with the overall goals and strategies of the government.⁶³ NOCs differ significantly from IOCs that must answer to their investors and must operate efficiently and quickly to maximize profits.⁶⁴ Another key difference between NOCs and IOCs is that because NOCs control most world oil reserves, IOCs will most likely have to buy their interests in oil fields from NOCs to gain access to potential fields.⁶⁵

Although NOCs are generally created as corporate entities able to enter into contracts in their own names, their operational independence can differ significantly.⁶⁶ For example, *Petróleo Brasileiro S.A. (Petrobras)*, the Brazilian NOC, is a mixed-stock corporation created under

56. *See id.* at 129 (estimating that the United States will still import over eight million barrels of crude oil per day in 2035).

57. *Id.* (noting that U.S. liquid fuel consumption was 20.65 million barrels per day in 2007 and is estimated to be 22.06 million barrels per day in 2035).

58. U.S. ENERGY INFO. ADMIN., U.S. DEP’T OF ENERGY, ANNUAL ENERGY OUTLOOK 2010: EARLY RELEASE OVERVIEW 8 (Dec. 2009) available at <http://www.eia.doe.gov/oiaf/aeo/pdf/overview.pdf>.

59. *See id.*

60. *See id.*

61. ROBERT PIROG, CRS REPORT FOR CONGRESS: THE ROLE OF NATIONAL OIL COMPANIES IN THE INTERNATIONAL OIL MARKET i (2007).

62. *See supra* text accompanying note 51.

63. ENERGY IN BRIEF: WHO ARE THE MAJOR PLAYERS SUPPLYING THE WORLD OIL MARKET?, *supra* note 51, at 1.

64. *Id.*

65. *See id.*

66. *Id.*

Brazilian public law and must be majority-owned by the Brazilian government.⁶⁷ Petrobras is one of the more autonomous NOCs in the world, with significant control over its strategy and operations.⁶⁸ However, other NOCs act more as extensions of their governments, supporting government strategies and programs and not necessarily pursuing market-oriented goals.⁶⁹ This group of NOCs includes Saudi Aramco, Pemex, and PDVSA—the NOCs of Saudi Arabia, Mexico, and Venezuela, respectively.⁷⁰ Remember that these three countries are the second, third, and fourth largest sources of U.S. oil imports.⁷¹ Even though these companies act more in line with the state's strategies and goals, they are still separate legal entities created under the laws of their respective countries.⁷² Recognizing the unique characteristics of NOCs and their importance to the international oil and energy markets is critical to developing a logically consistent approach to dealing with them in the U.S. legal system. In addition to these characteristics, the rise of resource nationalism should be considered when crafting legal rules applicable to NOCs.

2. *National Oil Companies and the Rise (Again) of Resource Nationalism*

National oil companies are the historical products and the modern agents of resource nationalism among the oil producing nations of the world.⁷³ Professor Paul Stevens's recent article gives a very good historical breakdown of the cyclical nature of resource nationalism and the many factors driving the cycle.⁷⁴ Professor Stevens's definition of resource nationalism has "two components—limiting the operations of private international oil companies (IOCs) and asserting a greater national control over natural resource development."⁷⁵ This definition is useful because it is very easy to identify which NOC actions fall within the bounds of resource nationalism. Whether resource nationalism is a motivating factor behind the acts of NOCs is important to this discussion because acts of resource nationalism are more akin to state action than private action.⁷⁶

67. Petrobras By-Laws, ch.1, art. 1, PETROBRAS, <http://www.petrobras.com.br/en/about-us/corporate-strategy/downloads/pdf/petrobras-by-laws.pdf> (last visited Aug. 8, 2010).

68. ENERGY IN BRIEF: WHO ARE THE MAJOR PLAYERS SUPPLYING THE WORLD OIL MARKET?, *supra* note 51.

69. *Id.*

70. *Id.*

71. U.S. IMPORTS BY COUNTRY OF ORIGIN, *supra* note 48.

72. *Corporate Management*, SAUDI ARAMCO, <http://www.saudiaramco.com> (last visited Aug. 8, 2010); *Corporate Governance*, PEMEX, <http://www.ri.pemex.com/index.cfm> (last visited Aug. 8, 2010); *About PDVSA*, PDVSA, <http://www.pdvs.com> (last visited Aug. 8, 2010).

73. See Paul Stevens, *National Oil Companies and International Oil Companies in the Middle East: Under the Shadow of Government and the Resource Nationalism Cycle*, 1 J. OF WORLD ENERGY L. & BUS., 5, 12–14 (2008).

74. See generally *id.*

75. *Id.* at 5.

76. See *supra* text accompanying note 72.

Recent history shows that resource nationalism is alive and well in many parts of the oil producing world.⁷⁷ In 2007, when oil prices were high and climbing,⁷⁸ PDVSA and Venezuela nationalized the oil fields of many western oil companies.⁷⁹ During this time period, Venezuela used oil income to increase spending on domestic social programs and weapons purchases.⁸⁰ Also during this time, Iran was able to push back against United Nations economic sanctions, and Russia stopped exports of natural gas to the Ukraine to send a political message.⁸¹ All of these acts include elements of sovereign power and policy funded by the respective countries' NOCs.⁸²

There are several examples of recent NOC acts that have the characteristics of state action, such as nationalization of IOC oil fields, which can be construed as resource nationalism at work.⁸³ One of the most infamous of these examples occurred in 2007 when PDVSA took majority stakes in oil projects in the Orinoco Basin.⁸⁴ Two IOCs, including Exxon, refused to accept the new contracts and instead demanded arbitration under their contracts with PDVSA.⁸⁵ Exxon also aggressively pursued attachment of PDVSA assets abroad and succeeded in freezing billions of dollars of PDVSA's assets in the U.S., Dutch, and British courts.⁸⁶ Exxon's tactic was understood as both a move to pressure PDVSA into better terms over the Orinoco Basin project and a signal to other NOCs that Exxon would aggressively fight resource nationalism anywhere.⁸⁷ However, in a limited victory for PDVSA, the British injunction freezing up to \$12 billion was overturned on appeal while the U.S. and Dutch injunctions appear to remain intact.⁸⁸ As of the time of this comment, the case remains docketed for arbitration in the International Centre for Settlement of Investment Disputes.⁸⁹ PDVSA's action fits the definition of resource nationalism nicely⁹⁰ because it limited the involvement of the world's largest IOC and asserted greater control over the oil reserves in

77. See, e.g., *Venezuela Ends Oil Negotiations*, N.Y. TIMES, Jan. 15, 2007, at C2.

78. Steve Geisi, *Triple-digit Oil Prices Expected After 2007*, MARKETWATCH (Dec. 17, 2007, 2:05 PM), <http://www.marketwatch.com/story/after-2007-records-oil-expected-to-turn-back-toward-100>.

79. Simon Romero et al., *Chavez Reopens Oil Bids to West as Prices Plunge*, N.Y. TIMES, Jan. 15, 2009, at A1.

80. See Simon Romero et al., *3 Oil Countries Face a Reckoning*, N.Y. TIMES, Oct. 21, 2008, at A1.

81. See *id.*

82. *Id.*

83. See, e.g., Llana, *supra* note 1.

84. *Id.*

85. *Id.*

86. See Chris Kraul, *Venezuela Oil Giant Tries End Run*, L.A. TIMES, Feb. 12, 2008, at C3.

87. Llana, *supra* note 1.

88. Julia Werdigier, *Court Orders Freeing of Some Venezuelan Assets*, N.Y. TIMES, Mar. 19, 2008, at C6.

89. *Mobil Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 (pending).

90. Stevens, *supra* note 73, at 5.

the Orinoco River Basin.⁹¹

A more recent act in Venezuela demonstrates that resource nationalism is not just a concern of the mega IOCs anymore.⁹² Petrosucre, a subsidiary of PDVSA, fell behind on payments due under a drilling contract with Ensko International Inc., a drilling service company.⁹³ Ensko suspended drilling operations on its ENSCO 69 drilling rig in January 2009 because of Petrosucre's failure to make payment on past-due invoices of up to \$35.5 million.⁹⁴ However, Petrosucre continued to operate ENSCO 69 with its own crews.⁹⁵ In May 2009, Ensko terminated the drilling contract with Petrosucre, but Petrosucre stated it would continue to operate the ENSCO 69 drilling rig.⁹⁶ Ensko followed up by announcing that it did not foresee the return of ENSCO 69, had filed an insurance claim, and was "evaluating legal remedies against Petrosucre for contractual and other damages related to the rig's seizure."⁹⁷ It appears that the two sides eventually came to a settlement, with PDVSA agreeing to pay Ensko \$50 million, although it is unclear whether Ensko has regained control of ENSCO 69.⁹⁸ Interestingly, Ensko's most recent list of its drilling rig assets does not include the ENSCO 69 rig.⁹⁹

PDVSA also took over operations of private natural-gas-compression plants in early June 2009.¹⁰⁰ The involved companies sued PDVSA in a New York state court to enjoin the NOC from drawing on lines of credit set up for the original joint venture.¹⁰¹ The status of the case is unclear at this time. All told, PDVSA nationalized the assets of more than seventy oilfield services companies between January and August 2009.¹⁰²

However, the cyclical nature of resource nationalism is becoming more evident, as the recent decrease in global oil prices has placed many of the oil producing countries and their NOCs in a "reverse oil shock."¹⁰³ As a result, many of these countries' NOCs are inviting IOCs, as well as other

91. Llana, *supra* note 1, at 1.

92. *See, e.g.*, Press Release, Ensko Int'l, Inc., Ensko International Reports on Status of Operations in Venezuela (Jan. 28, 2009), available at <http://www.enscous.com/newsroom/press-releases> [hereinafter Press Release, Ensko Int'l Reports].

93. Press Release, Ensko Int'l, Inc., Ensko International Terminates Contract for ENSCO 69 in Venezuela (June 8, 2009), available at <http://www.enscous.com/newsroom/press-releases> [hereinafter Press Release, Ensko Int'l Terminates Contract].

94. Press Release, Ensko Int'l Reports, *supra* note 92.

95. Press Release, Ensko Int'l Terminates Contract, *supra* note 93.

96. *Id.*

97. *Ensko Sees Rig Return Unlikely*, BUS. NEWS AM., July 17, 2009, http://www.bnaamericas.com/news/oilandgas/Ensko_sees_rig_return_unlikely.

98. *PDVSA, Ensko Settle for US\$50mn - Report*, BUS. NEWS AM., Dec. 14, 2009, http://www.bnaamericas.com/news/oilandgas/PDVSA,_Ensko_settle_for_us_50mn_-_report.

99. ENSCO, <http://www.enscous.com> (follow "Rig Fleet" hyperlink; then select "North and South America" under "Filter by Region") (last visited Sept. 30, 2010).

100. Associated Press, *Venezuela Plant Takeovers Affect Tulsa Company*, THE OKLAHOMAN, June 5, 2009, at B2.

101. *Around the Region*, HOUS. CHRON., Aug. 26, 2009, at B7.

102. Chris Kraul, *Snags Delaying 'Oil City'*, L.A. TIMES, Aug. 14, 2009, at B1.

103. Romero et al., *supra* note 80.

NOCs, to negotiate for oil-field leases once again.¹⁰⁴ For example, Russia's NOCs recently signed a multi-billion dollar investment deal with China.¹⁰⁵ Libyan officials are courting foreign investors, including western oil companies, but at the same time they will not rule out the possibility of nationalizing energy interests in the country.¹⁰⁶ Even Venezuela and PDVSA are interested in getting IOCs to invest in a new oil-field project in Soledad.¹⁰⁷

To successfully negotiate with NOCs, IOCs and the more recently targeted oilfield services companies need clearly articulated legal rules affecting NOCs. They need clarity on the legal standing of NOCs in U.S. courts. They also need clarity on whether forum selection clauses are enforceable. This can be, and should be, a very important negotiating point since "dealing with a sovereign foreign government in its own state-controlled judicial system can be trying, to say the least."¹⁰⁸ The lack of a clear legal framework for NOCs in the U.S. legal system may be one reason IOCs tried to renegotiate the project terms in Venezuela's Soledad bidding to include international arbitration.¹⁰⁹ However, it may be especially difficult to win an arbitration clause in negotiations, given NOCs' state and economic power¹¹⁰ combined with reticence to resolve disputes outside their own legal systems.¹¹¹ One suggestion for improving the U.S. legal system's treatment of state-owned companies is to amend the FSIA.¹¹² However, this comment focuses on the current version of the FSIA and recommends a change to the law of forum selection clauses as an alternative that is easily adoptable through the common law.

III. NOCs AND THE FOREIGN SOVEREIGN IMMUNITY ACT

The FSIA¹¹³ applies to virtually every suit brought against a NOC in U.S. courts because NOCs are almost certainly "foreign states" under the statute.¹¹⁴ Therefore, any private company seeking to sue a NOC in the United States must overcome the FSIA's protections to proceed to the merits of its claim.¹¹⁵ This section outlines the application of the FSIA to NOCs and the basic reasoning behind the statute as it applies to NOCs.

104. See, e.g., Kristen Hays, *Not So High and Mighty: Low Oil Prices Have Some Calling on Foreign Companies*, HOUS. CHRON., Apr. 19, 2009, at B1.

105. *Id.*

106. Lynn Cook, *Libya Calls \$100 Oil Fair Price: Envoy Won't Rule Out Nationalization*, HOUS. CHRON., Jan. 28, 2009, at B1.

107. See Kraul, *supra* note 102.

108. Eric Fox, *Venezuela Still a Problem for Energy Sector*, INVESTOPEDIA (May 4, 2009, 2:20 PM), <http://stocks.investopedia.com>.

109. See Kraul, *supra* note 102.

110. Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. TRANSNAT'L L. & POL'Y. 1, 18 (2008).

111. Alexia Burnet & Juan Agustin Lentini, *Arbitration of International Oil, Gas, and Energy Disputes in Latin America*, 27 Nw. J. INT'L L. & BUS. 591, 592 (2007).

112. See Riblett, *supra* note 110, at 1-4.

113. 28 U.S.C. §§ 1602-11 (2006).

114. § 1603(a)-(b); Riblett, *supra* note 110, at 3.

115. Riblett, *supra* note 110, at 7.

The FSIA is really a jurisdictional statute and does not create any new cause of action.¹¹⁶ It operates by conferring immunity to the jurisdiction of U.S. courts on all foreign sovereigns.¹¹⁷ Therefore, to determine whether jurisdiction over a NOC would exist, two questions must be answered in the affirmative: (1) is a NOC a "foreign state" under the FSIA, and (2) does an exception to immunity apply?¹¹⁸

A. NOCs ARE "FOREIGN STATES" UNDER THE FSIA

NOCs are almost certainly considered foreign states for purposes of the FSIA because they meet the definition of an agency or instrumentality of a foreign state. The FSIA's definition of a foreign state is found in § 1603(a)–(b):

For purposes of [the FSIA]—(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.¹¹⁹

NOCs are probably not political subdivisions of the state because that definition is understood to include governmental units, like state, provincial, and city governments.¹²⁰ Therefore, for the FSIA to apply, NOCs must probably assert that they are an agency or instrumentality of a foreign state.¹²¹ Under this definition, most NOCs will probably satisfy the first and third prongs quite easily, with the only potential difficulty arising under the second prong.¹²²

Most NOCs should satisfy the first requirement because they are organized as corporations or some other legal equivalent.¹²³ Saudi Aramco, Pemex, PDVSA, and Petrobras are all organized as corporations.¹²⁴ The third requirement is also usually easily met because these corporations are almost always formed under the laws of their respective

116. § 1604; *see also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989); Riblett, *supra* note 110, at 6.

117. § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.")

118. Riblett, *supra* note 110, at 7.

119. § 1603(a)–(b).

120. Riblett, *supra* note 110, at 9.

121. § 1604; Riblett, *supra* note 110, at 8–11.

122. Riblett, *supra* note 110, at 10.

123. *Id.*

124. *See supra* notes 68–70, 72 and accompanying text.

nations.¹²⁵ However, if a NOC owned a subsidiary formed under the laws of the United States or another third country, that subsidiary would not be considered a foreign state under the FSIA.¹²⁶

The key to whether a NOC would be an agency or instrumentality is if it meets the second requirement, which requires it to be “an organ of a foreign state or a political subdivision thereof, or [to have] a majority of [its] shares or other ownership interest . . . owned by a foreign state or political subdivision thereof.”¹²⁷ There are two prongs within the second requirement—the ownership prong and the organ prong—either is sufficient to satisfy the requirement.¹²⁸

1. NOCs Should Satisfy the Ownership Prong

The ownership prong has been characterized as “more straightforward” than the organ-of-the-state prong.¹²⁹ It is clear that many of the world’s NOCs satisfy the second requirement under the ownership prong. As noted above, it is relatively easy to find out if a NOC is majority-owned by the state simply by looking on its website and at its enabling statutes.¹³⁰ The only difficulty with making the determination of whether a NOC is majority-owned by the state is when transparency is very low, which has been a concern about a NOCs for many industry observers.¹³¹ However, another interesting issue is whether a subsidiary of a NOC can be classified as an agency or instrumentality under the ownership prong.

The United States Supreme Court addressed this issue in 2003 and held that “[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation’s shares.”¹³² In *Dole Food Co. v. Patrickson*, a group of farm workers from Latin America sued Dole Food Company and alleged that they were injured by exposure to a chemical pesticide.¹³³ Two Israeli companies were impleaded and subsequently moved for dismissal under the immunity provisions of the FSIA by claiming to be instrumentalities of Israel.¹³⁴ The two Israeli companies were denied instrumentality status because they were separated from the State of Israel by one or more corporate tiers.¹³⁵ The Court relied heavily on the unambiguous text of the FSIA to

125. See *supra* notes 68–70, 72 and accompanying text.

126. R. Doak Bishop, Sashe D. Dimitroff & Craig S. Miles, *Strategic Options Available When Catastrophe Strikes the Major International Energy Project*, 36 TEX. INT’L L.J. 635, 677 (2001).

127. 28 U.S.C. § 1603(b)(2) (2006).

128. *Id.*

129. Riblett, *supra* note 110, at 10.

130. See, e.g., Petrobras By-Laws, *supra* note 67.

131. Patrick Heller, *Commentary: To Succeed, an Iraqi National Oil Company Needs an Iraqi Oil Law*, REVENUE WATCH INST. (Sept. 4, 2009) <http://www.revenuewatch.org/news/090409b.php>; see also EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://eiti.org> (last visited Sept. 30, 2010).

132. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003).

133. *Id.* at 471.

134. *Id.* at 471–72.

135. *Id.* at 473.

come to its conclusion.¹³⁶ However, the Court ignored one aspect of the ownership prong when it announced “[a] corporation is an instrumentality of a foreign state under the FSIA *only if* the foreign state itself owns a majority of the corporation’s shares.”¹³⁷ The statutory text also allows for agency or instrumentality status if the entity is majority-owned by a political subdivision of the state.¹³⁸ So, it appears that the Court left open a small window for defendants to argue that they are an agency or instrumentality because they are directly majority-owned by a political subdivision of a foreign state.¹³⁹ In fact, at least one U.S. district court has expressed this in a case under the FSIA.¹⁴⁰ Even if a NOC or its subsidiary cannot satisfy the ownership prong, it may still qualify for immunity under the organ prong.¹⁴¹

2. NOCs Should Satisfy the Organ of the State Prong

NOCs should also satisfy the organ prong of the agency or instrumentality test in most cases, as should many of their subsidiaries.¹⁴² The tests for whether an entity qualifies for immunity as an organ of the state are found in federal common law because the FSIA does not define the term.¹⁴³ There is no definitive test for determining agency or instrumentality status under the organ prong; rather, a balancing of factors is appropriate.¹⁴⁴ Two balancing tests—one with five factors and the other with seven—have gained widespread use.¹⁴⁵ The five-factor balancing test used in the Second and Fifth Circuits consists of:

- (1) whether the foreign state created the entity for a national purpose;
- (2) whether the foreign state actively supervises the entity;
- (3) whether the foreign state requires the hiring of public employees and pays their salaries;
- (4) whether the entity holds exclusive rights to some right in the [foreign] country; and
- (5) how the entity is treated under foreign state law.¹⁴⁶

136. *Id.* at 473, 476 (quoting 28 U.S.C. § 1603(b)(2) (2006) (stating “[t]he text of the FSIA gives no indication that Congress intended . . . to depart from the general rules regarding corporate formalities”).

137. *Id.* at 477 (emphasis added).

138. 28 U.S.C. § 1603(b)(2).

139. *See Vivas v. Boeing Co.*, No. 06-C-3566, 2007 U.S. Dist. LEXIS 61625, at *23 (N.D. Ill. Aug. 21, 2007).

140. *Id.* (finding that instrumentality status of an entity majority-owned by a political subdivision was unaffected by *Dole*).

141. Riblett, *supra* note 110, at 11.

142. *See id.*

143. Organ of the state is not defined in the definitions section of the FSIA. *See* 28 U.S.C. § 1603; *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 206 (3d Cir. 2003); Michael A. Granne, *Defining “Organ of a Foreign State” Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. DAVIS L. REV. 1, 3 (2008).

144. Granne, *supra* note 143, at 20.

145. *Id.* at 22.

146. *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846–47 (5th Cir. 2000); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 791 (S.D.N.Y. 2005).

The Third Circuit created the seven-factor test by dividing the first factor into two separate inquiries and adding ownership structure as another factor to consider.¹⁴⁷ The seven factors are:

(1) the circumstances surrounding the entity's creation; (2) the purpose of its activities; (3) the degree of supervision by the government; (4) the level of government financial support; (5) the entity's employment policies, particularly regarding whether the foreign state requires the hiring of public employees and pays their salaries; and (6) the entity's obligations and privileges under the foreign state's laws [And] (7) the ownership structure of the entity.¹⁴⁸

Regardless of which balancing test a court chooses to apply, it is highly probable that any NOC sued in a U.S. court would qualify as an organ of the state because of the creation, structure, ownership, and activities of most NOCs.¹⁴⁹ The courts that have considered whether NOCs are agencies or instrumentalities under the FSIA have either assumed that they were or have found them to be so under the balancing test.¹⁵⁰ Once a NOC establishes that it is an agency or instrumentality under one of the two prongs, the plaintiff has the burden to show that an exception to sovereign immunity applies.¹⁵¹

B. THE COMMERCIAL ACTIVITY EXCEPTION TO IMMUNITY

Once a defendant NOC establishes that it is entitled to sovereign immunity under the FSIA, the burden shifts to the plaintiff to identify an exception to immunity granted in §§ 1605–1607 of the statute.¹⁵² There are several exceptions listed in the statute¹⁵³ with commercial activity the most commonly used.¹⁵⁴ The commercial activity exception to sovereign immunity applies where:

147. *USX Corp.*, 345 F.3d at 209; Granne, *supra* note 143, at 22–23.

148. *USX Corp.*, 345 F.3d at 209. This test has also been used by a district court in the Tenth Circuit. *RSM Prod. Corp. v. Petroleos de Venez. Societa Anonima*, 338 F. Supp. 2d 1208, 1215 (D. Colo. 2004).

149. *See supra* Part II.C.

150. *See, e.g., Kelly*, 213 F.3d at 846–49 (finding a subsidiary of Syria's NOC was an organ of the state); *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) (holding one of Pemex's subsidiaries was an organ of the state); *Stena Rederi AB v. Comision de Contratos del Comité Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 386 n.7 (5th Cir. 1991) (deciding without analyzing that Pemex was an agency or instrumentality of Mexico); *RSM Prod. Corp.*, 338 F. Supp. 2d at 1212 (finding that a wholly owned subsidiary of PDVSA is an organ of the state after plaintiff stipulated that PDVSA was an agency or instrumentality of the state).

151. *Kelly*, 213 F.3d at 847.

152. *Id.*

153. 28 U.S.C. § 1604 (2006). These include “waiver, commercial activity, expropriation . . . , the determination of rights in property present in the United States, and certain torts occurring within U.S. territory.” Karen Halverson, *Is a Foreign State a “Person”? Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 115, 121 (2001) (footnotes omitted).

154. Riblett, *supra* note 110, at 32.

the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.¹⁵⁵

The FSIA defines commercial activity as “either a regular course of commercial conduct or a particular commercial transaction or act.”¹⁵⁶ Courts must reference the nature, not the purpose, of the activity when deciding whether it is commercial.¹⁵⁷ Even if the activity is engaged in for a sovereign purpose, such as buying military supplies, the commercial nature of the transaction is controlling.¹⁵⁸ So, where a foreign sovereign acts as a private player in the market rather than as a regulator, it will not be granted immunity.¹⁵⁹ This argument may be helpful to IOCs and service companies when trying to sue NOCs. This is because although the NOC’s enabling statute may state that the purpose of the NOC is to develop the nation’s hydrocarbons “for the public welfare and social interest,” if the activity involved is simply a service contract to drill a well at a particular site, then that activity is probably more like the actions in which a private landowner could engage.¹⁶⁰

Even if the plaintiff can establish that the complained-of activity is commercial in nature, the commercial activity exception contains a jurisdictional nexus that requires the conduct to either have occurred in the United States or have a direct effect within the United States.¹⁶¹ This jurisdictional nexus appears to be very similar to minimum contacts analyses in U.S. state and federal courts.¹⁶² This means that a plaintiff will have a burdensome task proving the facts needed to establish jurisdiction over the NOC under this exception and that the NOC has a distinct advantage over plaintiffs because of the blanket immunity provided to it.¹⁶³ Although this burden seems harsh, it is consistent with the FSIA’s purpose of making it difficult to sue foreign governments in U.S. courts.¹⁶⁴

So, the FSIA will almost always apply to a NOC that raises it as a defense because NOCs are almost certainly going to qualify as foreign states under the statute. This shifts the burden to the plaintiff to show that one of the exceptions to immunity applies, and that burden is heavy.¹⁶⁵ In fact, NOCs enjoy substantial protections from suit under the

155. 28 U.S.C. § 1605(a)(2).

156. 28 U.S.C. § 1603(d).

157. § 1603(d).

158. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614–15 (1992).

159. *Id.* at 614.

160. *RSM Prod. Corp. v. Petroleos de Venez. Societa Anonima*, 338 F. Supp. 2d 1208, 1215 (D. Colo. 2004).

161. Halverson, *supra* note 153, at 157; Riblett, *supra* note 110, at 33.

162. Halverson, *supra* note 153, at 122.

163. See Riblett, *supra* note 110, at 33.

164. *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003).

165. *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir. 2000).

FSIA, and that fact must temper the enforcement of forum selection clauses found in their contracts with private companies.¹⁶⁶

IV. ENFORCEMENT OF FORUM SELECTION CLAUSES UNDER THE *BREMEN* STANDARD

A. A BRIEF HISTORY OF FORUM SELECTION CLAUSE ENFORCEMENT IN THE UNITED STATES

Forum selection clauses are considered to be “nearly ubiquitous in modern business relationships of all kinds.”¹⁶⁷ A recent empirical study of ninety-six international business transactions found forum selection clauses were present in over four times as many contracts as arbitration clauses.¹⁶⁸ Forum selection clauses probably obtain their popularity because of the many benefits businesses believe they provide. These benefits include the ability to select a desirable forum for dispute resolution *ex ante*, which increases predictability throughout the parties’ contractual relationship.¹⁶⁹ Additionally, these clauses can be seen as a way to reduce the costs of dispute resolution because of their almost universal enforcement in U.S. courts.¹⁷⁰ Beyond predictability, forum selection clauses allow parties to assuage fears of bias by selecting a neutral jurisdiction in which to resolve any disputes.¹⁷¹ However, there are some issues surrounding the use of forum selection clauses by NOCs that raise the question of whether, and how, these clauses should be enforced. These issues will be discussed in detail in Section V.

As previously mentioned, the near universal enforceability of forum selection clauses in U.S. courts may be one factor in their popularity.¹⁷² But at one point, U.S. courts disfavored these clauses.¹⁷³ The most cited reason for disfavoring forum selection clauses was that it was against public policy for private parties to be able to oust a court of its jurisdiction.¹⁷⁴ However, the Supreme Court rejected this justification in *Bremen*,¹⁷⁵ and ever since that decision, forum selection clauses have been almost univer-

166. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003); Riblett, *supra* note 110, at 29–35.

167. William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 1 (2006).

168. Ya-Wei Li, Note, *Dispute Resolution Clauses in International Contracts: An Empirical Study*, 39 CORNELL INT’L L.J. 789, 799 (2006).

169. Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT’L L.J. 51, 52 (1992); Jason Webb Yackee, *Choice of Law Considerations in the Validity and Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT’L L. & FOREIGN AFF. 43, 45 (2004).

170. Solimine, *supra* note 169, at 52 (noting that because of the uniform enforceability of forum selection clauses, it is less likely that a complainant will file suit in a forum not agreed upon).

171. *Id.*

172. Yackee, *supra* note 169, at 48.

173. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972); *see also* Solimine, *supra* note 169, at 53–54.

174. Solimine, *supra* note 169, at 54; Woodward, *supra* note 167, at 15.

175. *Bremen*, 407 U.S. at 12 (describing the idea of ouster as a “vestigial legal fiction”).

sally upheld.¹⁷⁶

B. A REVIEW OF THE SUPREME COURT'S OPINION IN *BREMEN* AND
SUBSEQUENT DECISIONS AFFECTING FORUM SELECTION
CLAUSE ENFORCEABILITY

The pivotal event concerning the enforcement of forum selection clauses in the United States was the Supreme Court's decision in *Bremen*.¹⁷⁷ The case generated copious commentary¹⁷⁸ and description but none with an eye for the problems raised when a NOC attempts to enforce a forum selection clause. Therefore, a description of the case with a view towards the unique characteristics of NOCs is helpful.

Bremen was a suit in admiralty, which the complainant Zapata filed in Florida.¹⁷⁹ Zapata solicited bids from several companies for the towage of its self-elevated drilling rig from the Gulf of Mexico to the Adriatic Sea.¹⁸⁰ Unterweser, a German corporation, submitted the winning bid, and the final contract included a provision that stated "[a]ny dispute arising must be treated before the London Court of Justice."¹⁸¹ The final contract was the result of negotiations between the two parties where several terms were altered, but the forum selection clause remained untouched.¹⁸² During towing, heavy storms damaged the drilling rig, and Unterweser's deep-sea tug, *Bremen*, towed the rig to Tampa Bay under Zapata's instructions.¹⁸³ Then Zapata filed suit in the United States District Court for the Middle District of Florida, disregarding its promise to litigate in London.¹⁸⁴

Unterweser's attempt to enforce the forum selection clause in the district court failed, and Unterweser eventually appealed to the Court of Appeals for the Fifth Circuit.¹⁸⁵ The Fifth Circuit held that the district court did not abuse its discretion in refusing to enforce the forum selection clause because London was not a more convenient forum than Tampa Bay, and litigation in London could bar recovery because of other exculpatory clauses in the contract.¹⁸⁶ Unterweser fared much better in the Supreme Court.¹⁸⁷ There, Chief Justice Burger delivered the opinion of the Court with only Justice White concurring and Justice Douglas dis-

176. Yackee, *supra* note 169, at 48.

177. See *M/S Bremen*, 407 U.S. at 1; see also Phoebe Kornfeld, *The Enforceability of Forum-Selection Clauses After Stewart Organization, Inc. v. Ricoh Corporation*, 6 ALASKA L. REV. 175, 177 (1989); Woodward, *supra* note 167, at 15.

178. Checking citing references on Westlaw reveals that *Bremen* has been cited in 1,182 journal articles (last visited July 26, 2010).

179. *Bremen*, 407 U.S. at 3-4.

180. *Id.* at 2.

181. *Id.*

182. *Id.* at 3.

183. *Id.*

184. *Id.* at 3-4.

185. *Id.* at 4-8.

186. *Id.* at 7-8.

187. *Id.* at 8.

senting.¹⁸⁸ The Court held that the forum selection clause should control unless there was “a strong showing that it should be set aside” and remanded the case to the district court to give Zapata a chance to “show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”¹⁸⁹ In fact, the Court’s instruction was that forum selection clauses “are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”¹⁹⁰

Some of the reasoning behind the opinion is especially vital to considering how forum selection clauses should be treated when a NOC is involved. First, Chief Justice Burger appeared to strongly consider the state of the market and the rise of international trade as factors weighing in favor of holding that forum selection clauses should be prima facie valid.¹⁹¹ He started by taking notice of the expansion of overseas commercial activities of U.S. companies, and he noted that a policy disfavoring forum selection clauses smacked of parochialism.¹⁹² Parochial attitudes toward solving problems only in American courts would hinder “[t]he expansion of American business and industry” and “would be a heavy hand indeed on the future development of international commercial dealings by Americans.”¹⁹³ Finally, Chief Justice Burger referred again to “present-day commercial realities” to support his conclusions.¹⁹⁴ This strong and repeated recognition of the realities of international trade should weigh heavily on any legal rules affecting NOCs because of their critical role in worldwide and U.S. energy markets.

Another justification for holding forum selection clauses valid was that they reduce potential uncertainty and inconvenience, giving effect to the parties’ choices and thus supporting freedom to contract and party autonomy.¹⁹⁵ However, it seems that Chief Justice Burger made several assumptions about the underlying contract in *Bremen* in his reasoning about these factors. First, although there was some evidence of this, the Chief Justice assumed that the contract at issue in this case was “a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power.”¹⁹⁶ Additionally, the Chief Justice assumed that the forum selection clause was in fact bargained-for and that its inclusion was reflected in the price of the contract.¹⁹⁷ These assumptions and the fact that *Bremen* was a case in admiralty, gave rise to many questions about the enforceability of forum selection clauses in

188. *Id.* at 2, 20.

189. *Id.* at 15.

190. *Id.* at 10.

191. *Id.* at 8.

192. *Id.* at 8–9.

193. *Id.* at 9.

194. *Id.* at 15.

195. *Id.* at 11–13.

196. *Id.* at 12–13.

197. *Id.* at 14.

other scenarios; some of which have been addressed by other courts, and some of which remain unanswered.

The Supreme Court implicitly extended the doctrine of enforceability beyond admiralty just two years later.¹⁹⁸ Since then, federal courts have consistently enforced forum selection clauses.¹⁹⁹ Although U.S. federal courts seem to uniformly apply *Bremen* in federal question and diversity cases, commentators question whether the *Bremen* doctrine should be applied in purely domestic situations.²⁰⁰ Another interesting question is whether, given the fact that the FSIA supplies the sole basis for subject matter and personal jurisdiction over foreign states (and their NOCs), the *Bremen* doctrine should apply in cases where the party seeking to enforce the forum selection clause is a NOC.

C. THE CURRENT FRAMEWORK OF ENFORCEMENT

When a party challenges a forum selection clause, the proper approach is to consider the clause to be prima facie valid, with the burden on the challenging party to prove that enforcement of the clause would be unreasonable under the circumstances.²⁰¹ That burden is heavy.²⁰² Unreasonableness can be shown if any of the following factors are met:

(1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement “will for all practical purposes be deprived of his day in court” because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.²⁰³

These four factors are supposedly not an exclusive list, but they appear to be the only valid grounds that courts consider when a forum selection clause is challenged.²⁰⁴

To successfully argue that fraud or overreaching invalidates the challenged forum selection clause, the challenger must show that the fraud or overreaching was specifically used to procure the clause and not the overall contract.²⁰⁵ “Overreaching is that which results from an inequality of

198. *Haynsworth v. The Corp.*, 121 F.3d 956, 962 (5th Cir. 1997) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518–21 (1974)).

199. *See, e.g.*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537–39 (1995); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590–95 (1991); *Haynsworth*, 121 F.3d at 962–63; *Maxen Capital, LLC v. Sutherland*, No. H-08-3590, 2009 U.S. Dist. LEXIS 29308, at *20–23 (S.D. Tex. Apr. 3, 2009).

200. *See* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 315–16 (1988).

201. *Bremen*, 407 U.S. at 10; *see also Haynsworth*, 121 F.3d at 963.

202. *Bremen*, 407 U.S. at 15, 17.

203. *Haynsworth*, 121 F.3d at 963 (citing *Carnival Cruise Lines, Inc.*, 499 U.S. at 595).

204. *See Carnival Cruise Lines, Inc.*, 499 U.S. at 594 (dismissing the Ninth Circuit’s independent justification for holding a forum selection clause unenforceable).

205. *See Haynsworth*, 121 F.3d at 963 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974)).

bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties.”²⁰⁶ Where the two parties are sophisticated businesses or individuals courts will be less likely to find overreaching.²⁰⁷ This skepticism as to overreaching can be traced to *Bremen*.²⁰⁸ However, when one of the two parties is a NOC, this factor may swing in favor of the party challenging enforcement because the NOC has something the other party does not—state power. Courts should take the element of state power into account when deciding whether a NOC and private party came to a truly negotiated agreement.

U.S. courts are skeptical of parties arguing that being forced to litigate in a foreign forum under the forum selection clause would deprive the party of its day in court because of grave inconvenience or unfairness. This skepticism was born in *Bremen*, where the Supreme Court held that if the forum selection clause is part of a “freely negotiated private international commercial agreement,” then any inconvenience arising from litigating a dispute in the chosen forum was clearly foreseeable and, therefore, agreeable to the party challenging enforcement.²⁰⁹ Challengers to forum selection clauses have tried arguing that a lack of comparable remedies in the contract forum would deprive the party of its day in court.²¹⁰ In *Interamerican Trade*, the plaintiffs argued that litigation in Brazil would deprive them of their day in court because of the lack of a jury trial, slowness of litigation in Brazil, unavailability of trial by depositions, and the requirement of a \$2.2 million security deposit.²¹¹ The court rejected these arguments because all of these issues were foreseeable at the time of contracting, and although the Brazilian court might be inconvenient, it would not be unjust.²¹² Similarly, the lack of remedies comparable to those under the U.S. securities laws was not enough to hold a forum selection clause unenforceable.²¹³

The third factor for finding a forum selection clause unenforceable—“the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy”—seems to be analyzed in conjunction with the second factor.²¹⁴ As noted in the previous cases, the deprivation of a remedy has often been analyzed as a factor in whether the chosen forum is gravely

206. *Maxen Capital, LLC v. Sutherland*, No. H-08-3590, 2009 U.S. Dist. LEXIS 29308, at *22 (S.D. Tex. Apr. 3, 2009) (quoting *Haynsworth*, 121 F.3d at 965 n.17).

207. *See id.*

208. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972) (stating the evidence disputes the notion of overreaching, and that “for all we know” the novelty of the transaction was a factor in *Unterweser* refusing to take financial responsibility for the risks involved).

209. *Id.* at 16–18.

210. *Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, 973 F.2d 487, 489 (6th Cir. 1992); *Alt. Delivery Solutions, Inc. v. R.R. Donnelley & Sons Co.*, No. SA-05-CA-0172-XR, 2005 U.S. Dist. LEXIS 15949, at *45–47 (W.D. Tex. July 8, 2005).

211. *Interamerican Trade Corp.*, 973 F.2d at 489.

212. *Id.* at 489–90.

213. *Haynsworth v. The Corp.*, 121 F.3d 956, 967 (5th Cir. 1997).

214. *Id.* at 963.

inconvenient or unfair.²¹⁵ However, a very recent case out of the Northern District of West Virginia analyzed the third factor independently of the second factor and came to the conclusion that to be successful, a challenge must show “more than a less favorable outcome in the foreign court.”²¹⁶ In *Sheldon*, the plaintiff signed an agreement specifying German courts of the European Court of Justice as the exclusive forum for litigating any claims regarding the contract between the plaintiff and defendants.²¹⁷ The court found that although the plaintiff’s remedies might be less favorable in a German court, the German Civil Code did provide an opportunity to seek damages under both breach of contract and tort theories.²¹⁸ That actual damages were limited, punitive damages were unavailable, contingent fee arrangements were only available in limited circumstances, and a jury trial was unavailable was not enough to meet the unreasonableness standard.²¹⁹

The final factor of the unreasonableness test has also been difficult for challengers to satisfy. First, it appears that the public policy must be declared *ex ante*, although it is not clear whether the declaration must occur prior to the time of contract or prior to the time of suit.²²⁰ Second, a public policy argument may be effective where the policy declares that the particular claim pursued must only be brought within the courts of the forum in which suit is brought.²²¹ It seems that these two requirements combine to form a very high hurdle, especially when combined with *Bremen*’s caution against taking the “parochial [view] that all disputes must be resolved under our laws and in our courts.”²²² In fact, not even the strong public policy announced in U.S. securities laws was enough to satisfy the public policy factor of the unreasonableness test.²²³

V. RESOLVING THE ISSUES OF FORUM SELECTION CLAUSE ENFORCEABILITY WHERE ONE PARTY IS A NOC

So, forum selection clauses are favored in U.S. courts, and challengers must overcome a very heavy burden to successfully defeat such a

215. See, e.g., *Interamerican Trade Corp.*, 973 F.2d at 489–90; see also *Maxen Capital, LLC v. Sutherland*, No. H-08-3590, 2009 U.S. Dist. LEXIS 29308, at *20–22 (S.D. Tex. Apr. 3, 2009).

216. *Sheldon v. Hart*, No. 5:09-CV-51, 2010 WL 114007, at *7 (N.D. W. Va. Jan. 8, 2010).

217. *Id.* at *1–2.

218. *Id.* at *7.

219. *Id.*; see also *Gita Sports Ltd. v. SG Sensortechnik GmbH & Co.*, 560 F. Supp. 2d 432, 440 (W.D.N.C. 2008).

220. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (stating the clause is “unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision” (emphasis added)).

221. *Woods v. Christensen Shipyards, Ltd.*, No. 04-61432-CIV, 2005 WL 5654643, at *10 (S.D. Fla. Sep. 23, 2005) (stating “that there is a distinction between public policy” regarding venue and “substantive protections” and that the public policy *Bremen* speaks of refers to public policy regarding venue).

222. *Bremen*, 407 U.S. at 9.

223. *Haynsworth v. The Corp.*, 121 F.3d 956, 965–67 (5th Cir. 1997).

clause.²²⁴ However, given some of the previously discussed aspects of NOCs, the current reality of U.S. oil dependence, and the predicted future of the U.S. demand for oil, should the analysis change? The answer is a resounding yes. The arguments for making a change in the doctrine are based on NOCs' structure and function, their use of economic and state power, and the realities of the international energy markets.²²⁵ First, however, there is a preliminary question that must be resolved. Should *Bremen*'s doctrine of forum-selection-clause enforceability be extended to situations where one party is a NOC, or should a different test apply?

A. BREMEN SHOULD EXTEND TO SITUATIONS INVOLVING NOCs

The enforceability of forum selection clauses where one party is a NOC should be governed under the *Bremen* standard. Recall that *Bremen* was a case in admiralty and that it was later extended to other types of cases.²²⁶ The question remains whether the unreasonableness test should apply to a case arising under the FSIA because, although the FSIA is a federal statute, it is only jurisdictional. Whether a federal question is raised is debatable. So far, commentators question the extension of the unreasonableness test to areas outside federal admiralty cases,²²⁷ but courts almost uniformly accept it.²²⁸

The FSIA allows a NOC to waive the protections of the FSIA and consent to subject matter jurisdiction where that jurisdiction would otherwise be lacking.²²⁹ The inclusion of waiver as a possible exception to jurisdictional immunity indicates Congress' willingness to allow a foreign state to consent to jurisdiction in U.S. courts.²³⁰ In this situation, the foreign state would be sued in a U.S. court, but any concerns for comity²³¹ and avoiding parochialism are moot because of the foreign state's consent. Moreover, the realities of the marketplace in which NOCs operate today show that forum selection clauses remain popular and at least theoretically effective in reducing the costs and uncertainty in contracting.²³² The most likely method by which a NOC will waive jurisdictional immunity is the forum selection clause; therefore, forum selection clauses are able to operate consistently within the framework of the FSIA.

224. *Bremen*, 407 U.S. at 15, 17.

225. See *supra* Part II.C (describing how NOCs get power by controlling reserves); *supra* Part II.B (discussing the relationship between American and foreign oil producers).

226. See *supra* notes 198–200 and accompanying text.

227. Mullenix, *supra* note 200, at 306; Yackee, *supra* note 169, at 64–66.

228. See, e.g., *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537–38 (1995); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590–95 (1991); *Haynsworth*, 121 F.3d at 962–63; see also *Maxen Capital, LLC v. Sutherland*, No. H-08-3590, 2009 U.S. Dist. LEXIS 29308, at *20–22 (S.D. Tex. Apr. 3, 2009); Yackee, *supra* note 169, at 48.

229. 28 U.S.C. § 1605(a)(1) (2006).

230. See *id.*

231. See Granne, *supra* note 143, at 6.

232. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8–9 (1972); *supra* notes 167–71 and accompanying text.

However, the fact that the FSIA is the sole basis for jurisdiction over a foreign state may caution against allowing parties to choose which court will hear their complaints.²³³ This is because public policy announced in the FSIA allows foreign states the entitlement to a presumption of immunity from suit in U.S. courts.²³⁴ This public policy should be considered when deciding whether NOCs can contract out of U.S. jurisdiction. However, because NOCs are almost certainly foreign states under the FSIA, which grants significant protections from suit in the United States, it would be illogical for a NOC to waive its protections. If the *Bremen* doctrine were not applied in suits under the FSIA, it would be easy to imagine a situation where a NOC, which chose not to include a forum selection clause in its contract, could choose to waive its sovereign immunity to gain access to U.S. courts for offense. But on the flip side of the coin, the U.S. company would be at a disadvantage because it could not force the NOC into U.S. courts because of FSIA immunity, even when the company may have no potential remedies in other jurisdictions.²³⁵ This situation supports the argument that forum selection clauses should be enforceable under the *Bremen* standard to provide some protection to the private companies that deal with NOCs. How that enforcement takes shape is discussed next.

B. SEVERAL FACTORS SUPPORT ALTERING THE *BREMEN* STANDARD
FOR ENFORCING FORUM SELECTION CLAUSES WHERE ONE
PARTY IS A NOC

The *Bremen* standard should apply to suits involving NOCs, but the test should be altered because of NOCs' status as foreign states under the FSIA and their combined economic and state power. Applying the *Bremen* standard for enforcement of forum selection clauses without any changes ignores the fact that NOCs are qualitatively different from private enterprises. First, although NOCs are often organized as corporate entities separate from their state's government, they often take action more readily identified with sovereign power.²³⁶ Additionally, NOCs control the vast majority of the world's proven oil and gas reserves, and this will give NOCs increasing economic and strategic power as time goes on.²³⁷ Finally, in addition to acting like sovereigns in some of their dealings, current U.S. law treats NOCs as sovereigns under the FSIA.²³⁸

233. Halverson, *supra* note 153, at 119; Granne, *supra* note 143, at 3.

234. See 28 U.S.C. § 1602 (2006).

235. In fact, it seems that at least once in recent history a subsidiary of a NOC attempted to challenge a forum selection clause naming its home country as the exclusive forum, seeking the benefit of suing in the U.S. *Braspetro Oil Servs. Co. v. Modec (USA), Inc.*, 240 F. App'x 612, 613-15 (5th Cir. 2007). This attempt was foiled by the enforcement of the forum selection clause. *Id.* at 618.

236. See *supra* Part II.C (outlining NOCs' roles in acts of resource nationalism).

237. See *supra* Part II.C (describing NOCs' economic power in terms of their control of world reserves); *supra* Part II.B (describing America's predicted continuing dependence on foreign oil over the next twenty-five years).

238. See *supra* Part III.

These qualities of NOCs affect the *Bremen* doctrine in two ways: (1) the transactions at issue definitely lack the flavor of a “private international agreement”²³⁹ and (2) NOCs and private companies have a clear difference in their respective power.

Chief Justice Burger repeatedly emphasized that the forum selection clause at issue in *Bremen* was part of a “private international agreement.”²⁴⁰ When a NOC is involved, the transaction begins to lose some of its private character. For example, when a NOC and an IOC agree to a contract for the development of an oil field, but the NOC later decides to nationalize the project, the private character of the transaction is destroyed.²⁴¹ No private company could simply appropriate equipment, supplies, and interests in real property like NOCs have routinely done around the world.²⁴² Additionally, the private nature of contracting with a NOC for development of an oil field, or for a drilling services contract, is questionable because of NOCs’ status in U.S. courts. The majority of the world’s NOCs are most likely going to be considered foreign states under the FSIA and will, therefore, have very strong protections against suit in the United States.²⁴³ Changing the *Bremen* doctrine to allow for additional scrutiny of a forum selection clause will not reduce NOCs’ power and legal right to accomplish their national goals, but it would result in a more fair bargaining process for private companies dealing with NOCs.

The second reason for changing the application of the *Bremen* doctrine when a NOC is involved in the dispute is that there is a key difference in bargaining power between the NOC and a private company. This difference in power is due in part to the special status of NOCs under their own countries’ laws and the FSIA.²⁴⁴ In their home states, many NOCs enjoy “special status in the hydrocarbon domain”²⁴⁵ as the sole entity allowed to develop the country’s hydrocarbon resources.²⁴⁶ Another source of the difference in bargaining power between NOCs and private companies stems from NOCs’ control over one of the most precious commodities on earth—oil. Although efforts to develop green technology and alternative energy sources are increasing, the world and America’s dependence on oil is not going away any time soon.²⁴⁷ This difference in bargaining power, especially NOC state power, necessitates the following changes to the *Bremen* doctrine.

239. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 16 (1972).

240. *Id.* at 12–14.

241. See *supra* notes 84–88 and accompanying text (Exxon Mobil in Venezuela).

242. See *id.*; see also *supra* notes 93–99 and accompanying text (Petrosucr operates ENSCO 69).

243. See *supra* Part III; Riblett, *supra* note 110, at 3.

244. See Riblett, *supra* note 110, at 3.

245. *Id.*

246. See, e.g., *About PDVSA*, *supra* note 72.

247. See *supra* Part II.B.

C. PLACING A BURDEN OF PRODUCTION ON NOCs WOULD PROTECT PRIVATE COMPANIES WHILE STAYING TRUE TO THE REASONING OF *BREMEN*

The simplest and least costly way to increase the protections for private companies dealing with NOCs is to change the *Bremen* doctrine by requiring NOCs to produce some evidence that the forum selection clause at issue was freely negotiated.²⁴⁸ Adding a burden of production to the party seeking enforcement of the forum selection clause addresses the potential problems that accompany dealing with a NOC without disregarding Chief Justice Burger's reasoning in *Bremen*.²⁴⁹ Once the NOC satisfies the burden of production, the process of enforcement continues at the original starting point of the *Bremen* doctrine: the forum selection clause is considered prima facie valid, and the burden is on the challenging party to show that enforcement would be unreasonable under the circumstances.²⁵⁰ Chief Justice Burger reasoned that placing the burden of persuasion on the party challenging enforcement of the clause supported the concepts of party autonomy and freedom of contract and accounted for realities of international trade.²⁵¹ Additionally, this structure for analyzing the enforceability of forum selection clauses avoided the pitfall of parochialism.²⁵² Thus, the proposed burden of production (1) supports the concepts of party autonomy and freedom of contract, accounting for the widespread use of forum selection clauses and (2) avoids claims of parochialism.²⁵³

First, the burden of production is not onerous and will not negatively impact the use of forum selection clauses in international contracts. This is because all that should be required to satisfy the burden of production is some evidence of bargaining for the forum selection clause.²⁵⁴ For example, in *Bremen*, the German company submitted an affidavit stating "that it specified English courts 'in an effort to meet Zapata Off-Shore Company half way.'"²⁵⁵ This affidavit is the kind of evidence that should be required to satisfy the proposed burden of production. However, under this burden of production, more detail should be required to show that the forum selection clause was freely negotiated. With supporting documentation, such as the preliminary drafts of the contracts, Unterweser's affidavit would have been enough to satisfy the burden of production, and *Bremen* would have the same outcome. Additionally, the burden may be satisfied by submitting transcripts of negotiations, deposi-

248. This burden of production should be placed on the party seeking to enforce the forum selection clause. However, since it will most often be the NOC, the discussion assumes a NOC will be the party seeking to enforce the clause.

249. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972).

250. See *id.* at 10.

251. See Mullenix, *supra* note 200, at 307-13; see also *supra* Part IV.B.

252. See *supra* Part IV.B.

253. See *id.* See generally *Bremen*, 407 U.S. at 12-13 (discussing the benefits of party autonomy and freedom to contract regarding forum selection).

254. See *Bremen*, 407 U.S. at 13-14.

255. *Id.* at 14 n.14 (citing the circuit court's dissent and quoting from the affidavit).

tion testimony, live testimony, or documentary evidence, such as a sequence of contracts demonstrating a give and take involving the forum selection clause.²⁵⁶

Because the burden is not onerous, this small change should not discourage parties from including forum selection clauses as a method of improving certainty in their contractual relationship.²⁵⁷ This comports with Chief Justice Burger's frequent references to the realities of international trade.²⁵⁸ This change should not negatively affect the popularity of forum selection clauses in international commercial contracts.²⁵⁹ In fact, forum selection clauses that have the support of negotiation documentation between the parties should be even more unassailable in court and should cut down on litigation challenging those clauses, thus reducing potential costs of litigation.

Second, placing the burden of production on the NOC provides private companies protection from abuses of state power while avoiding the specter of parochialism. This increased protection for private companies arises from the predicted effects of the proposed burden of production. First, NOCs would most likely create a record of their negotiations over the forum selection clauses to protect themselves. The important secondary effect of this behavior is that the private companies will be made fully aware of the import of the forum selection clause and will have engaged in some level of discussion about the clause during negotiations. Another tertiary effect of this behavior is that NOCs will have better protection should a private company later challenge the forum selection clause. This behavior models what the Chief Justice assumed was present in *Bremen*.²⁶⁰ This behavior also goes toward assuring that the forum selection clause is really a freely-negotiated term even when the NOC insists that the forum selection clause is non-negotiable.²⁶¹ The taint of parochialism is easily avoided not only because the burden on the NOC is so small but also because the doctrine should give effect to the parties' choice of forum in most cases. Therefore, the concepts of party autonomy and freedom of contract remain supported by the *Bremen* doctrine.²⁶² Finally, if NOCs around the world find the proposed changes objectionable and decide to avoid forum selection clauses, NOCs would most likely increase their use of international commercial arbitration. If so, private companies would still have improved protection when dealing with NOCs, and there would be a few less cases crowding the U.S. courts. The secondary, but very important, effect of increased use of interna-

256. *See id.* at 14 n.15.

257. *See id.* at 13-14, 14 n.15.

258. *Id.* at 8-9, 15; *see supra* notes 181-83 and accompanying text.

259. *See Li, supra* note 168, at 799.

260. *Bremen*, 407 U.S. at 14 (stating "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations").

261. This is similar to the assumption in *Bremen* that the contract price took the tower's reluctance to accept financial responsibility for the risks of the towing job. *Id.* at 16.

262. *See id.* at 11.

tional arbitration would be more widespread enforceability of judgments.²⁶³

In the absence of making any changes to the *Bremen* standard for enforcing forum selection clauses, courts considering these clauses when a NOC is involved should closely examine many of the same factors discussed in this comment under the existing framework. The most important factors to consider are the inherent differences in bargaining power between the private company and NOC that can lead to overreaching and the lack of a private international agreement because of the NOC's status as a "foreign state" under the FSIA.²⁶⁴ Finally, Congress needs to give a clear statement of U.S. energy policy for the future. Given the predicted energy consumption for the near future, this is an area where a clearly articulated public policy is necessary to engender consistency and predictability in business dealings with NOCs.

VI. CONCLUSION

Forum selection clauses are a part of everyday business-life in international commerce, and they owe their popularity to many factors. These clauses help to create predictability in contractual relationships and reduce dispute-resolution costs. They are expressions of the venerated concepts of freedom of contract and party autonomy. However, the current treatment of these clauses in a battle between private companies and NOCs often leave the private players at a significant disadvantage. Without some change to the existing doctrine, private oil companies, drilling companies, transport companies, and others in the petroleum industry often lack negotiating power up front and legal power on the back end in their dealings with the world's NOCs. In this environment, there is no clear legal check against NOC power within U.S. courts, and victims of nationalization and resource nationalism are often left without domestic legal recourse.

By placing an initial burden of production on a NOC attempting to enforce a forum selection clause, these problems disappear without creating new ones. This small change should not discourage the use of forum selection clauses but should instead encourage real discussion of dispute resolution procedures and enhance the "private" nature of the negotiations. This in turn will help to remove the potential use of state power from the relationship between NOCs and private companies. Finally, this change does not raise the problems associated with parochialism because most forum selection clauses made under this doctrine will continue to enjoy enforcement.

There is no reason to disregard this proposed change, and there is no need to rely on the Supreme Court to take the first step. The fact that NOCs are already considered to be foreign states under current U.S. law

263. See Li, *supra* note 168, at 795-96.

264. See *supra* Part II.C; Riblett, *supra* note 110, at 3.

supports the argument that their commercial dealings are not perfectly private in nature. However, there is no need to abandon the current framework for enforcement entirely. Instead, the current framework can be slightly changed without having to overrule it. This change not only will help provide private U.S. companies with bargaining power at the negotiating table *ex ante* but also will help protect them from the worst abuses of resource nationalism by NOCs.

