

Arbitration and the Nuclear Sector

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Sources of law relevant to nuclear disputes

- There may often be more than one source of law applicable to a nuclear project:
 - Domestic Law
 - EU Law (including Euratom)
 - Public International Law (including under treaties such as the Energy Charter Treaty)
- There may be some areas where laws overlap or conflict
- There may be both domestic and supra-national law in relation to among others:
 - Environmental regulations
 - Nuclear safety regulations

Examples of “conflicts” of laws

- Hungary
 - EU blocked €12 billion deal NPP with Russia over importation of nuclear fuel
- Micula
 - Investment treaty obligation conflicting with EU law
 - EU intervenes to stop Romania paying damages awarded under the treaty arbitration over concerns about state aid
- Electrabel
 - Some guidance on how to navigate conflicts

Why do disputes arise?

- The nuclear power business involves large, complex, capital-intensive projects that have long lifespans
- Disputes borne out of nuclear projects may include
 - Disputes arising from project financing
 - Large suite of contracts
 - Construction disputes surrounding the erection of the nuclear power plant (and perhaps its eventual decommissioning and deconstruction)
 - Energy supply and transit disputes surrounding, for example, supply, import or export agreements

How are disputes resolved?

- In a 2013 survey when asked ‘which is the most preferred dispute resolution mechanism in your industry’:
 - 56% in the energy sector most preferred arbitration
 - 68% in the construction sector most preferred arbitration
- When asked if Arbitration was suited to their industry:
 - 78% in the energy sector agreed
 - 84% in the construction sector agreed

Why Arbitration?

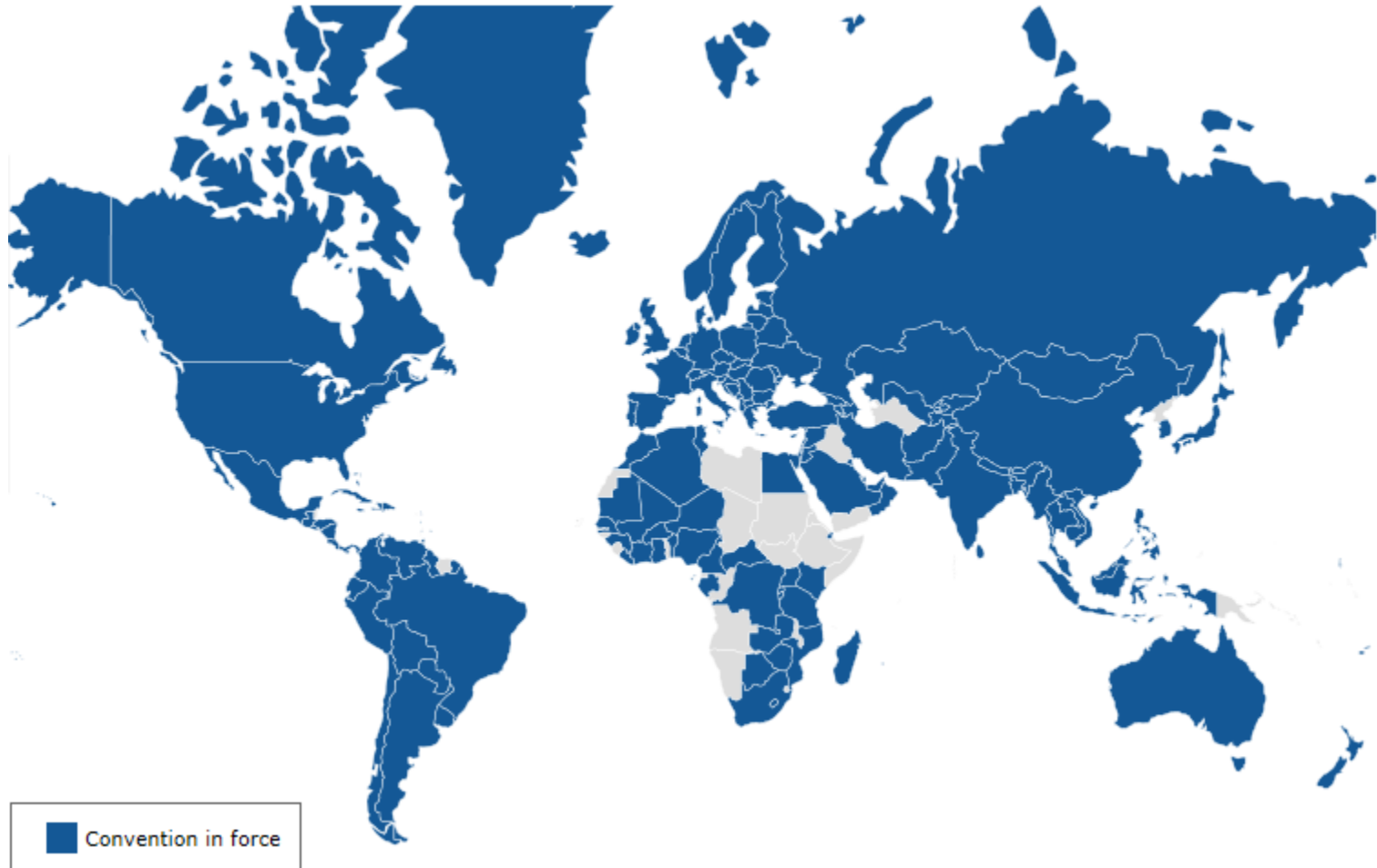
- The most important benefits of arbitration are:
 - Expertise of the decision maker
 - Neutrality
 - Confidentiality
 - Enforceability
 - Flexibility of procedure

- These features of international arbitration are particularly well suited to the kind of disputes seen in the nuclear sector

Specific benefits

- Neutrality
 - Avoid referring dispute to the country of one of the parties ('home court advantage')
 - Avoids risks associated with litigation, particularly in jurisdictions with a high level of political risk
- Enforceability
 - Arbitral awards can be enforced under the New York Convention
 - 154 States have signed up
 - Limited grounds for resisting enforcement

Parties to the New York Convention (2015)

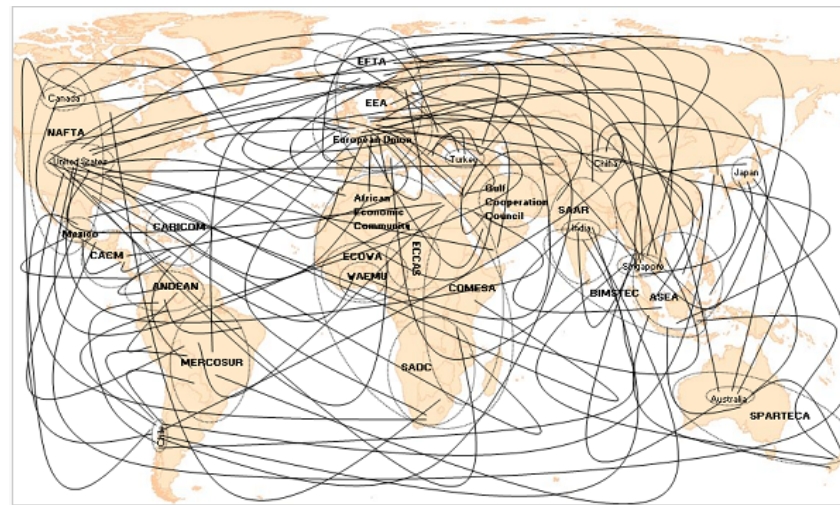


Arbitration in Bulgaria

- KRIB Court of Arbitration
 - Established November 2014
- Main arbitration institutions
 - Bulgarian Chamber of Commerce and Industry (BCCI)
 - Bulgarian Industrial Association (BIA)
- In 2014 more than 40,000 new arbitration proceedings were commenced
- More than 15 Arbitration centres in Bulgaria

What Are Investment Treaties?

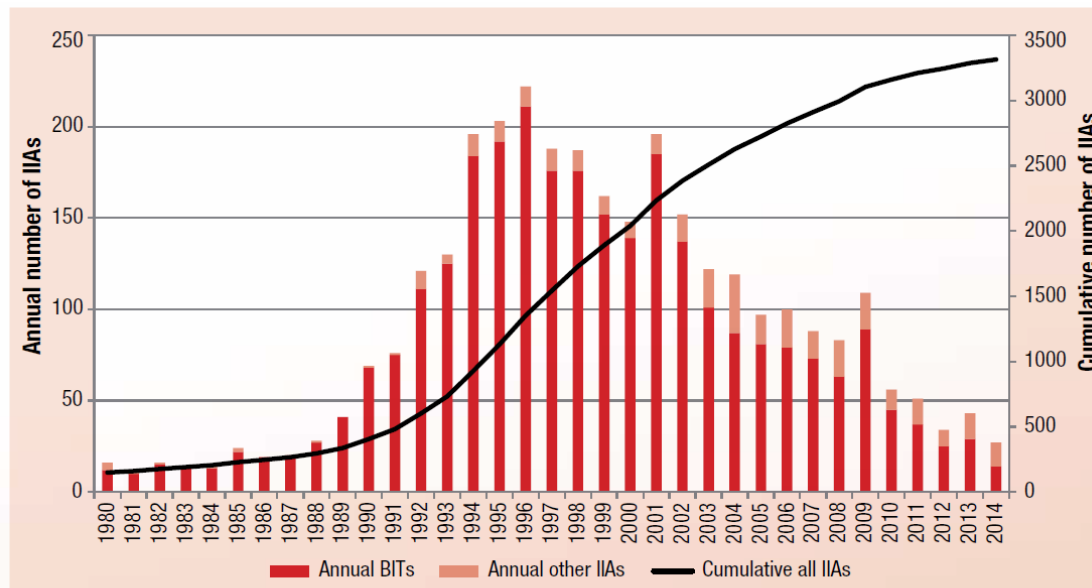
- Agreements between States regarding treatment of each other's investors
 - Bilateral Investment Treaties (“BITs”) between two States
 - Multilateral Investment Treaties with investment chapters (e.g. Energy Charter Treaty (“ECT”))
 - Other International Investment Agreements (“IIAs”) with differing levels of protections for investors (e.g. Free Trade Agreements)



"Spaghetti bowl" of IIAs. Source: UNCTAD

Established Investment Treaties

- First BIT: Germany-Pakistan, 1959
- Huge numbers of BITs entered into in the 1990s
- More than 2,900 BITs and over 300 IIAs today



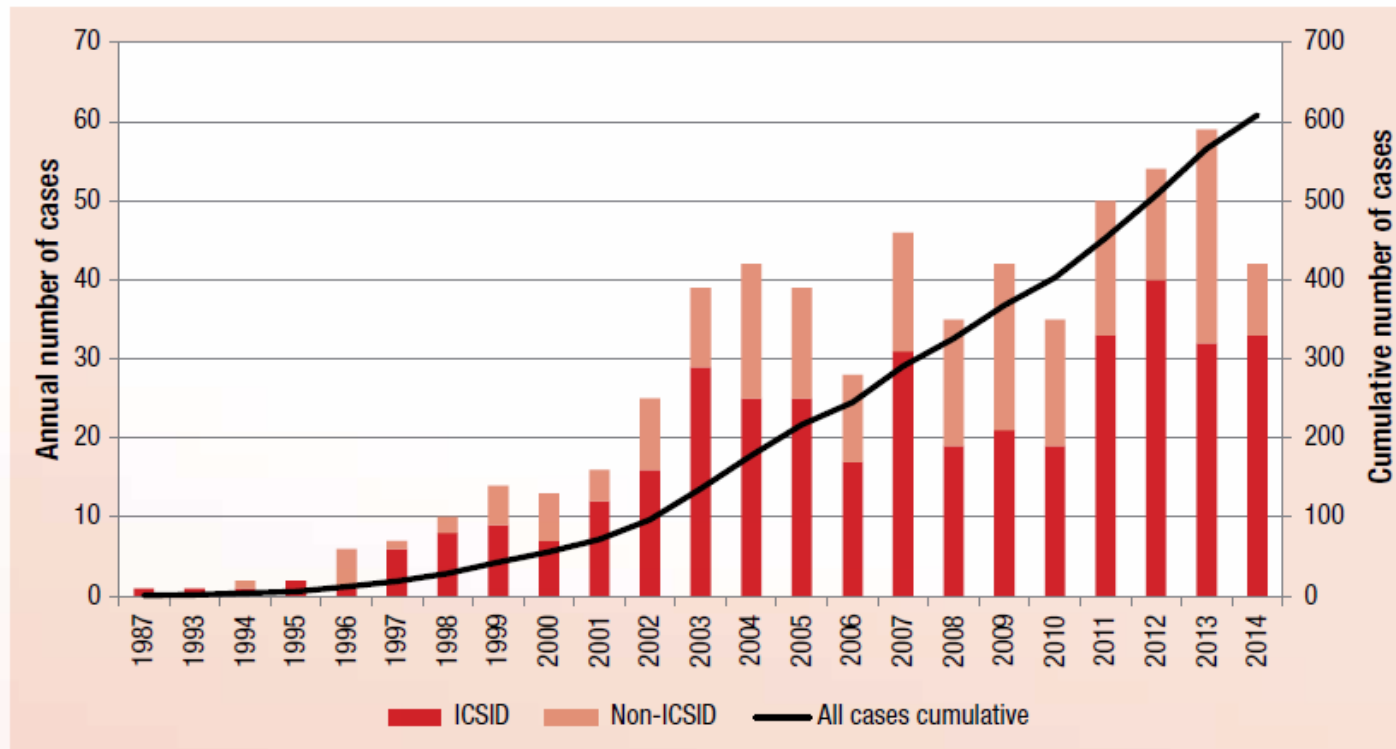
Source: UNCTAD, IIA database.
Note: Preliminary data for 2014.

What Are Investment Treaties For?

- Intended to promote and protect foreign direct investment
- Two principal ways in which they do this:
 - Create substantive rights for foreign investors in relation to investments made in the Host State
 - Offer foreign investors direct recourse to international arbitration:
 - neutral forum as opposed to the local courts of the Host State
 - depoliticisation of investment disputes (particularly important in emerging markets or where significant political risk for investors)
 - direct recourse against the Host State without having to rely on the investor's Home State stepping in on the investor's behalf
 - application of public international law (by itself, or as a correcting influence on the Host State's law)

Investor-State Dispute Settlement

Known Investor-State Dispute Settlement cases 1987-2014



Source: UNCTAD, ISDS database.
Note: Preliminary data for 2014.

Two-Way Flow of Benefits

□ Benefits for Governments

- Indirectly facilitates FDI by promulgating the rule of law
- Increases investor confidence and incentivise investment
- Appreciates that foreign capital is often required to exploit a State's natural energy resources

□ Benefits for Investors

- Mitigates political and legal risks
- Gives greater control over dispute in a neutral forum for settlement
- Enforceability of award

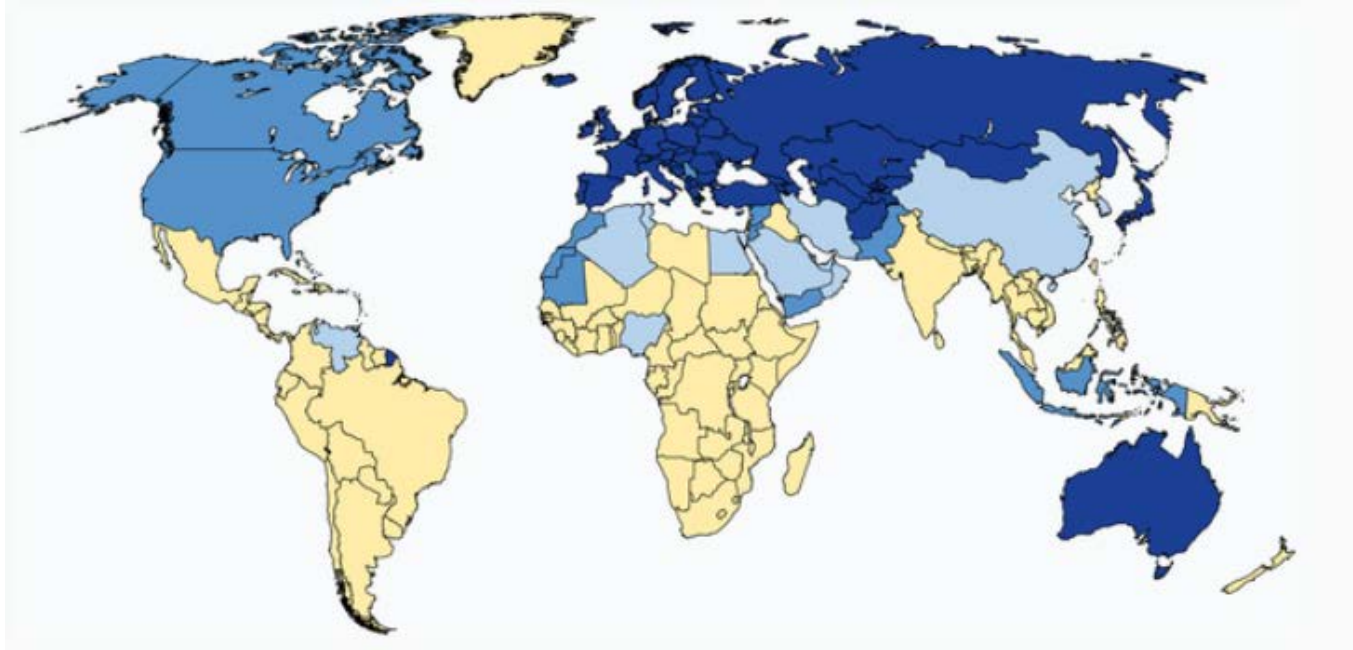
Why are Investment Treaties Important in the Energy Sector?

- Energy investments are typically high risk, long term and capital intensive
- Many large scale projects are transnational and/or feature the involvement of States or State entities
- The energy sector can be subject to high levels of regulation and policy making, particularly in times of fluctuating market and political conditions

The Energy Charter Treaty (ECT)

- *“The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thus minimising the risks associated with energy-related investments and trade” (emphasis added)
(Source: Introduction to the ECT)*
- The four pillars: trade, transit, investment protection, energy efficiency
- Investor-state arbitration under the ECT
 - Investment promotion and protection (Part III): contains the common substantive provisions found under BITs
 - The investor-state dispute settlement mechanism (Article 26)
 - State-State dispute mechanism (Article 27)

Energy Charter Treaty Constituency*



- Energy Charter Treaty Signatory States (1994)
- Observer States to the Energy Charter Conference (signatories to the 1991 Energy Charter)
- Observer States to the Energy Charter Conference by Invitation (non-signatories to the 1991 Energy Charter)

* As of 3 November 2014

Scope of Investment Protection

- Not just about oil and gas
- All types of energy materials and products, inclusive of electricity and energy-related equipment
- The ECT confers rights to engage in Economic Activity in the Energy Sector.
 - *“Economic Activity in the Energy Sector” means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products ... or concerning the distribution of heat to multiple premises.”* (emphasis added)

Questions?

Thank you

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