

International Arbitration in the Energy Sector 2023



Oddělení energetického práva

Oddělení energetického práva vzniklo v roce 2019 s cílem vytvořit podmínky pro systematický **vědecký výzkum a rozvoj úrovně poznání v oblasti energetického práva**. Jeho členové se během prvních dvou let existence oddělení zapojili do řady vědecko-výzkumných projektů a pravidelně se účastnili tuzemských i mezinárodních konferencí. Došlo též k obnovení **Symposia energetického práva**, již tradiční tuzemské konference, která unikátním způsobem propojuje akademický svět se světem praktikujících právníků působících v energetice. Zřízení Oddělení energetického práva rovněž umožnilo nabídnout studentům Masarykovy univerzity specializované kurzy rozvíjející jak poznání v oblasti energetického práva a energetiky, tak i praktické právní dovednosti.

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Arbitration: Introduction

Energy Sector: Introduction

Arbitration: Introduction

Arbitration a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments.

Arbitration is different from mediation because the neutral arbitrator has the authority to make a decision about the dispute. The decision is legally binding against both parties and can be enforced by a court.

Arbitration is not possible when there are claims relating to family law, life and health. Criminal cases or administrative cases cannot be settled via arbitration either.

Litigation (proceedings before a court)



Arbitration



Litigation

A neutral third party is appointed to resolve the dispute.

The parties to an arbitration have considerable choice in determining **how, where, by whom**, and in what language their dispute is resolved. Of particular importance to the parties is the choice of decision-maker. Unlike litigation where disputes are resolved by state appointed judges, parties to an arbitration may select their arbitrator.

Often, tribunals will comprise arbitrators of different nationalities, which adds to the neutrality of the process and the decision.

Arbitration

Arbitration is a voluntary and consensual process.

Unlike national courts, an arbitral tribunal will not have inherent jurisdiction to decide a dispute. An arbitral tribunal will only have jurisdiction if all parties to the dispute have agreed to submit their disputes to arbitration. Parties will usually provide for this by inserting an appropriately drafted arbitration clause into their agreement.

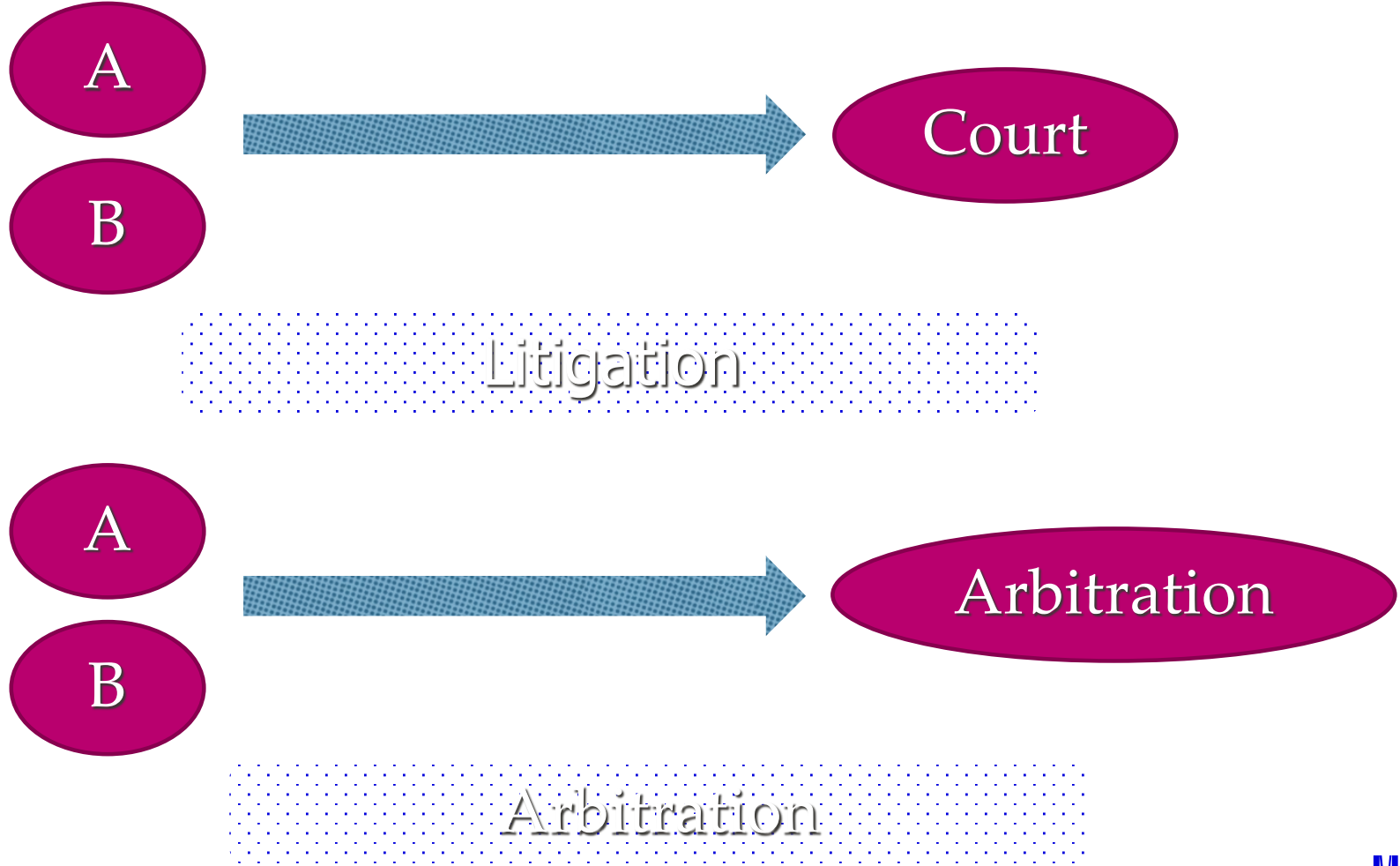
Arbitration

Arbitration is **a private method of resolving disputes between the parties** (confidential).

Arbitration is particularly advantageous for commercial parties because of the privacy and confidentiality that it can offer. Hearings generally take place in private. Parties can agree that the hearing and evidence, and any other material created or disclosed in the proceedings, be kept confidential, and that they (and the arbitrators) will not disclose any information about the arbitration. In comparison, court documents and hearings are generally public.



**Advantages: Confidentiality, Faster,
Expertise, Enforcement (?)**



A

B

Court

National law

Court

National law

Litigation (Private International law)

The Act
governing
private
international
law (91/2012)



Reasons: forum selection (chosen by the parties), governing law of the contract (chosen by the parties), confidentiality, generally faster, expertise, enforcement (New York Convention)

Public International Law (State-State arbitration or Investor-State arbitration)

Private International Law (Commercial arbitration)



International Arbitration

Public International Law:

“International law, also called public international law or law of nations, the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors.”

Objectives:

peace,

international coexistence,

international cooperation



Public International Law

Actors:

states (primary subjects)

international organizations (secondary subjects)

Individuals, including corporations
(under certain circumstances)



Public International Law

Key principle: Sovereignty

Internal sovereignty - refers to the supreme authority within a territory or the ultimate power within that territory.

External sovereignty - the principle of sovereign equality (International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed)

EXCEPTION_IUS COGENS:

States can be bound through objective legal norms they have not consented to or cannot derogate to imperative norms even if they want to. // peremptory norms accepted by the international community of states as a norm from which no derogation is permitted (prohibition of genocide)



Public International Law

Decentralised system (the UN as a central authority?)

UNGA resolutions are not legally binding.

UNSC, peace and security (legally binding resolutions).



Public International Law

Sources:

- international treaties
- customary international law derived from the practice of States
- general principles of law recognized by civilized nations



Public International Law

Customary law is not a written source of law. A rule of customary law, e.g., requiring States to grant immunity to a visiting Head of State, have two elements:

First, there must be **widespread and consistent State practice** – i.e. States must, in general, have a practice of according immunity to a visiting Head of State.

Secondly, there has to be what is called "*opinio juris*", usually translated as "a belief in legal obligation; i.e. States must accord immunity because they believe they have a legal duty to do so. As the ICJ has put it: - *'Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. ... The States concerned must feel that they are conforming to what amounts to a legal obligation.'* (North Sea Continental Shelf cases, ICJ Reps, 1969, p. 3 at 44)



Public International Law

The sovereignty of states makes any attempt to hold them accountable very challenging.

States are reluctant to subject themselves to the jurisdiction of international adjudicatory bodies.

The UN Charter obliges states to settle their disputes peacefully.

Article 33 of the UN Charter:

- **Negotiation** (two parties trying to talk things through)
- **Mediation** (a third party is involved)
- **Inquiry** – a third party is entrusted with a fact-finding task
- **Conciliation** – a third party plays even more intensive role acting almost like a tribunal, hearing evidence, reading memorials and presenting a recommendation based on the evidence. However, such recommendation is not binding.
- **Arbitration**
- **Judicial settlement (ICJ, ITLOS, WTO).**



Public International Law

JURISDICTION - CONSENT

- Due to the sovereignty of states, there is no such thing as truly compulsory jurisdiction in international law.
- **A state cannot be subject to the jurisdiction of any court without its consent to jurisdiction.**
- States can accept jurisdiction of a court/arbitral tribunal before a dispute occurs or after it occurs.

Consent to arbitration may result from a direct agreement to bring before an arbitral tribunal

- a) either future disputes arising from the investment operation (compromissory clause)**
- b) or an existing dispute.**



Public International Law

Dispute settlement methods:

- 1) Use of force (for a long time) and diplomacy.
- 2) Dispute settlement was necessary to avoid recourse to war.
- 3) From the 1870s onwards, proposals for the establishment of some system to arbitrate international disputes were becoming common.
- 4) This resulted in a formalization of international arbitration which found its culmination in the creation of the Permanent Court of Arbitration (PCA) during the first Hague Peace Conference of 1899.
- 5) International arbitration was seen, and still is seen today, as the method – *par excellence* – to avoid recourse to war and as the means to achieve respect for international law or ensure implementation of international law.
- 6) PCA was, for the first time in history something akin to a permanent international arbitral tribunal. But there was no compulsory submission of disputes to the PCA, and the PCA, despite its name, was neither a court nor a permanent tribunal.
- 7) Permanent Court of International Justice (PCIJ) is established in 1920.



Public International Law

- 1) **After the Second World War, the United Nations and its principal judicial organ, the International Court of Justice (ICJ), were created.**
- 2) **UN Charter:**
 - obligation to settle disputes in a peaceful way (Article 2 paragraph 3 of the UN Charter),**
 - prohibition on the use of force, (Article 2 paragraph 4 of the UN Charter).**

The States parties to the Statute of the Court may "at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court" (Art. 36, para. 2, of the Statute).



Public International Law

Public International law:

legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognised as international actors.

Private International law:

governs the choice of law to apply when there are conflicts in the domestic law of different countries related to private transactions. Issues addressed by Private International Law include what jurisdiction applies - choice of court, forum selection, choice of applicable law recognition or enforcement of a foreign judgment.



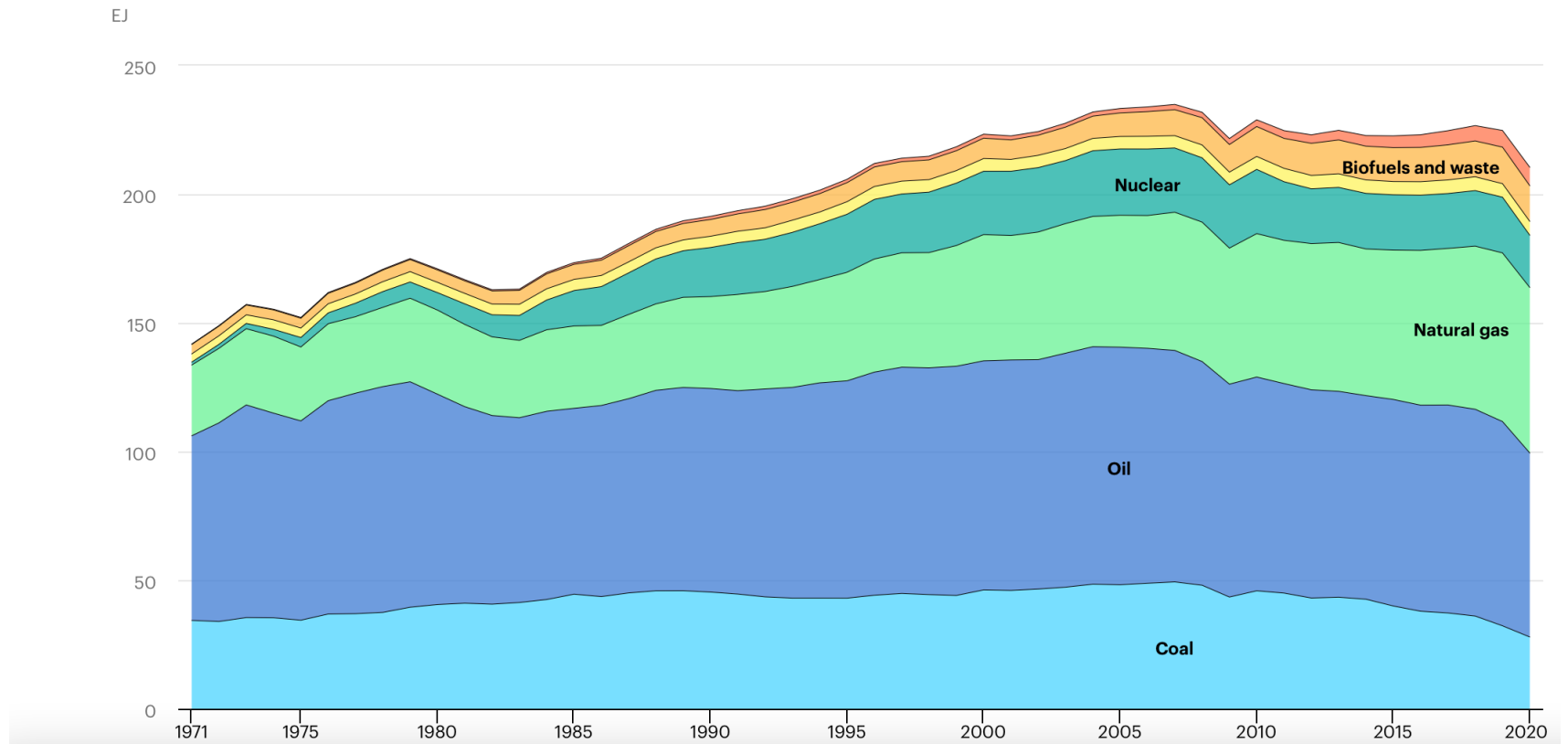
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Energy Sector



Fuels

OECD total energy supply by source, 1971-2020



Renewables

Renewables, including solar, wind, hydro, biofuels and others, are at the centre of the transition to a less carbon-intensive and more sustainable energy system.

Share of global electricity generation
2019

23.2 %

Nuclear

Nuclear power has historically been one of the largest global contributors of carbon-free electricity, however, it faces significant challenges in some countries.

Operating nuclear reactors worldwide
2021

439 REACTORS

Coal

Coal is both the largest source of electricity generation and the largest single source of CO2 emissions

Share of unabated coal-fired power generation
2020

35.2 %

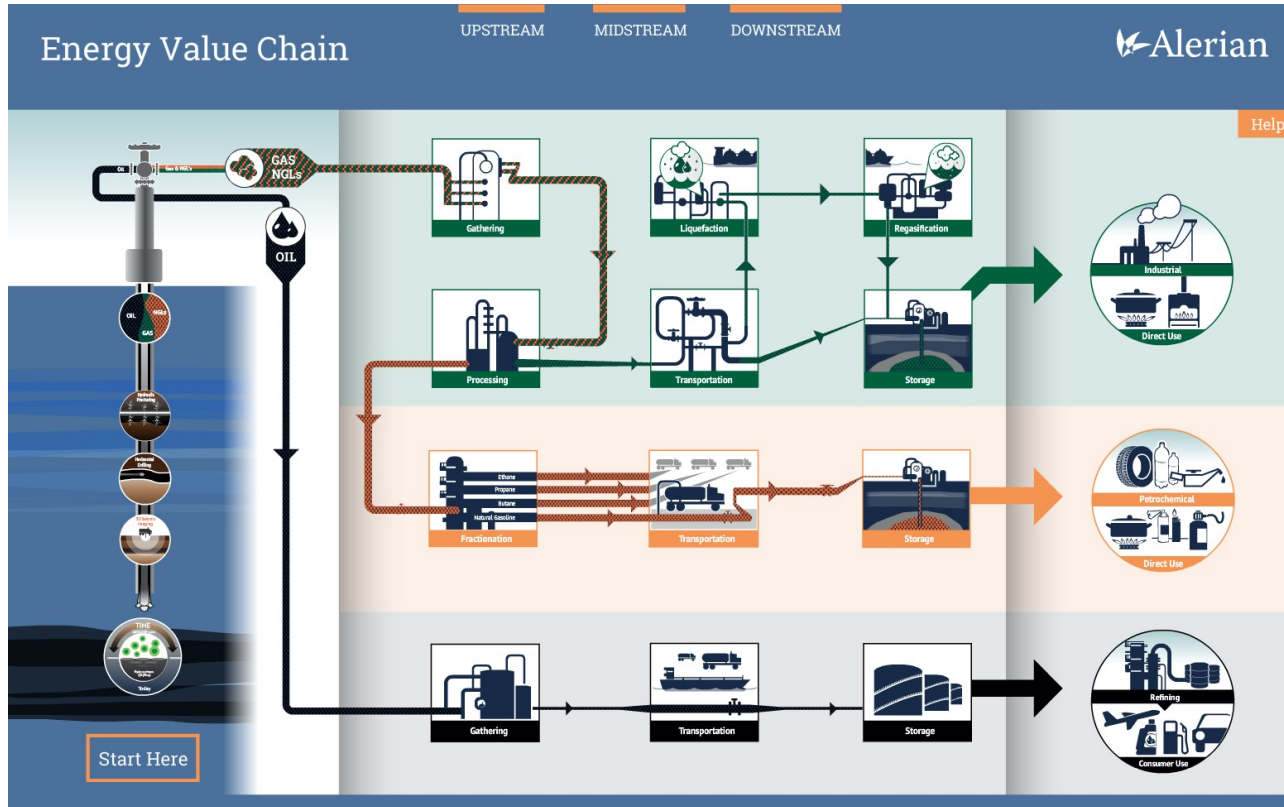
Oil

Coal is both the largest source of electricity generation and the largest single source of CO2 emissions

Gas

Natural gas is the cleanest burning and fastest growing fossil fuel, now accounting for about a quarter of global electricity generation

Energy Value Chain: Oil & Gas



Energy Value Chain: Oil & Gas

Upstream

Exploration and Production

Searching for potential underground or underwater crude oil and natural gas fields, drilling exploratory wells, and subsequently drilling and operating the wells that recover and bring the crude oil or raw natural gas to the surface.

PIONEER
NATURAL RESOURCES

ConocoPhillips

Midstream

Transportation Storage

Companies operating tanker ships, pipelines or storage facility.

KINDER MORGAN **ENBRIDGE**

Oil Service Companies

Provide products and/or services to the oil and gas industry. Usually a combination of labor, equipment, and/or other support services.

Baker Hughes 

HALLIBURTON


SAIPEM

Downstream

Refining Consumer use

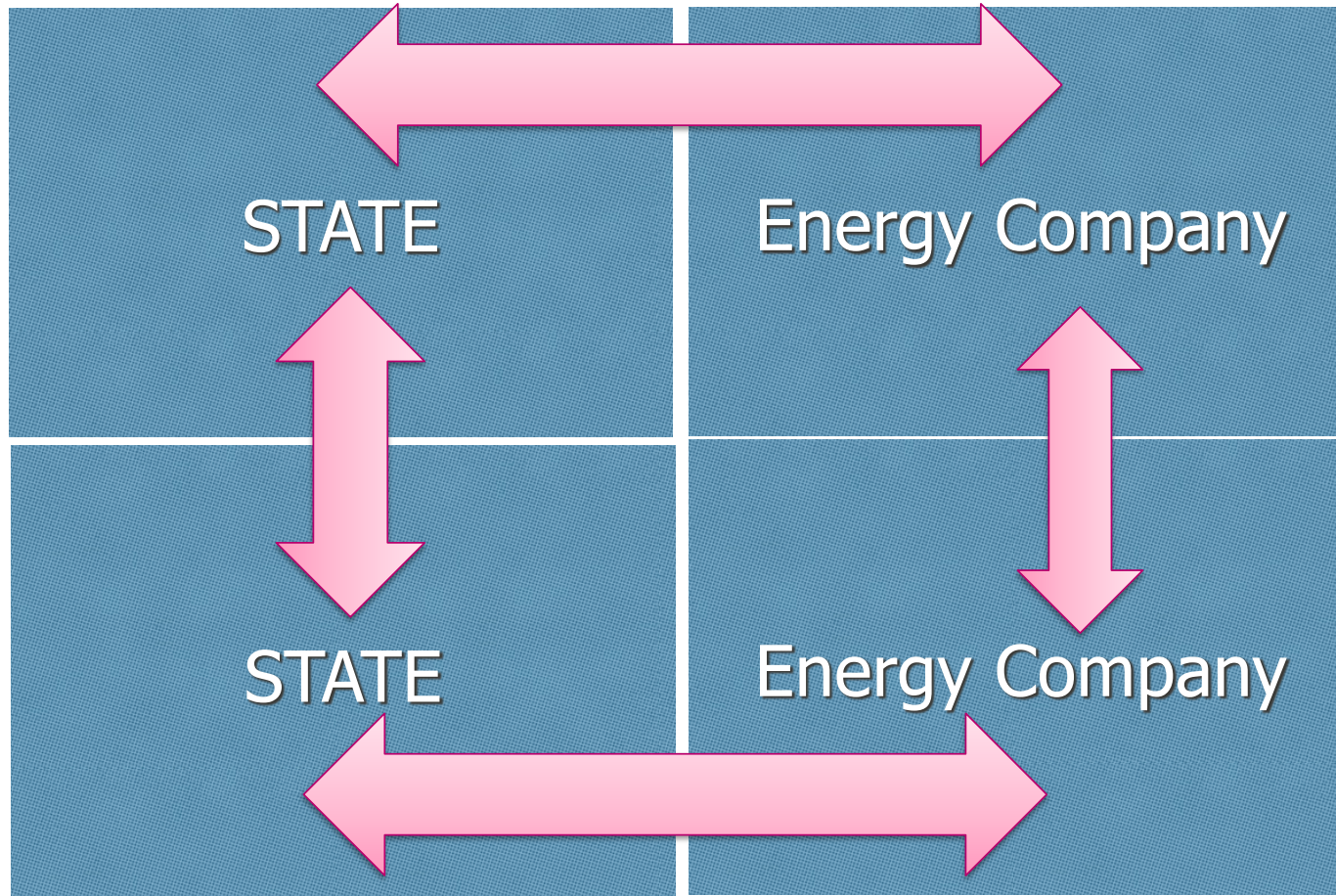

Valero

M U N I
L A W

Integrated Companies



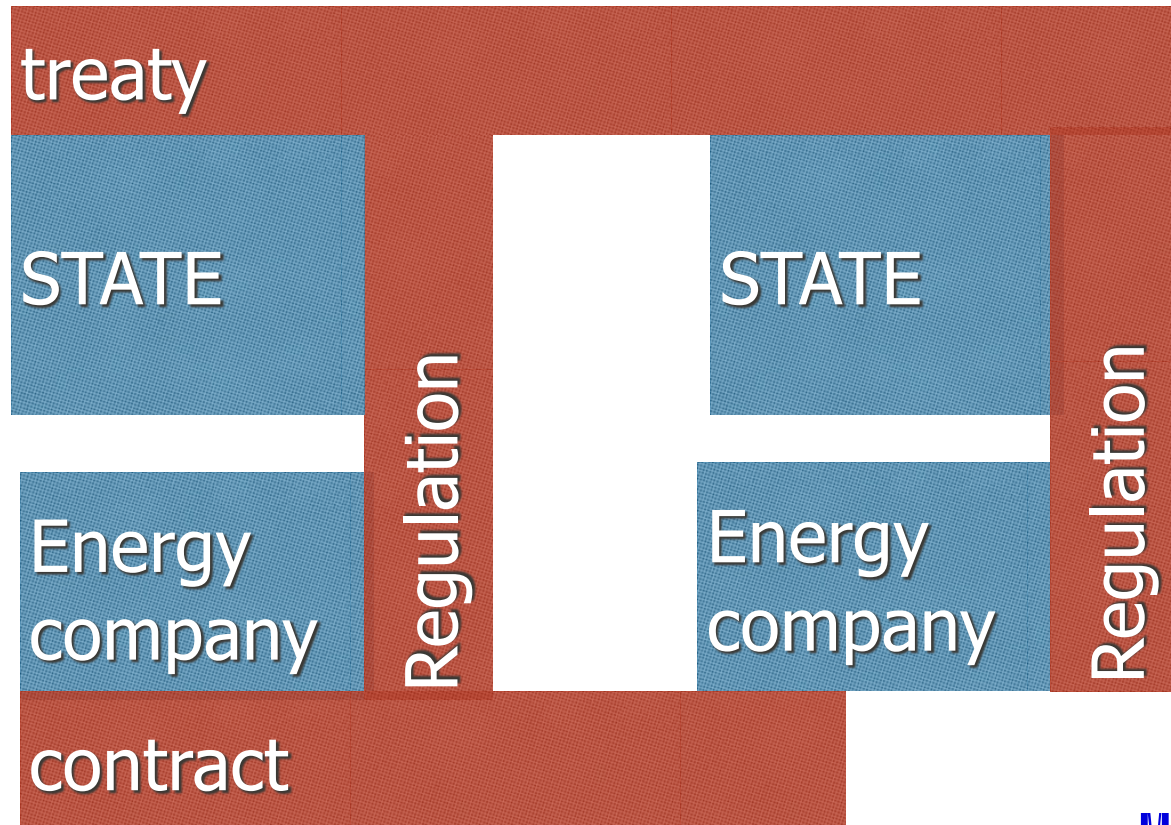
Stakeholders and legal relationships



Stakeholders and legal relationships

INTERNATIONAL LAW
dimension

NATIONAL LAW
dimension



Stakeholders and legal relationships

INTERNATIONAL LAW
dimension

Germany v. Russia



NATIONAL LAW
dimension



RWE v. Gazprom

UPSTREAM



Total Petroleum and Other Liquids Production - 2017 >

Thousand Barrels Per Day

1. United States
2. Saudi Arabia
3. Russia
4. Canada
5. China
6. Iran
7. Iraq
8. United Arab Emirates
9. Brazil
10. Kuwait
11. Mexico
12. Venezuela
13. Nigeria
14. Norway
15. Qatar



Exploration & Production

Permanent sovereignty over natural resources

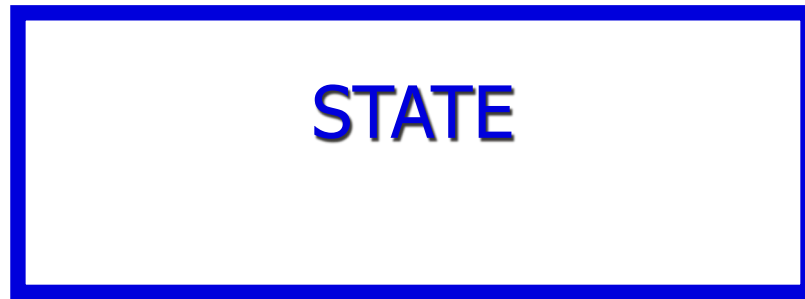
In many countries, underground natural resources, such as oil, gas or groundwater, belong to the state.

The content of ownership and the restrictions within which the individual can exercise the right of ownership is defined by each sovereign state.

Whether natural resources may be the object of a private property rights is determined by the body of domestic administrative law setting forth conditions under which natural resources may be explored and exploited (agreements, licenses, concessions, environmental regulation) as well as conditions under which the property rights are transferred to non-state actors (taxes, royalties).

Unequal distribution of natural resources

UPSTREAM: Legal Disputes

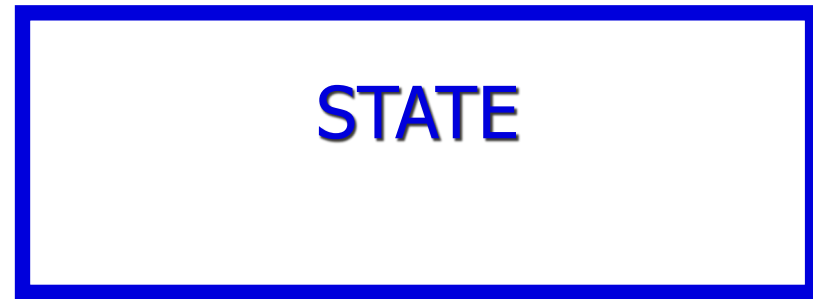
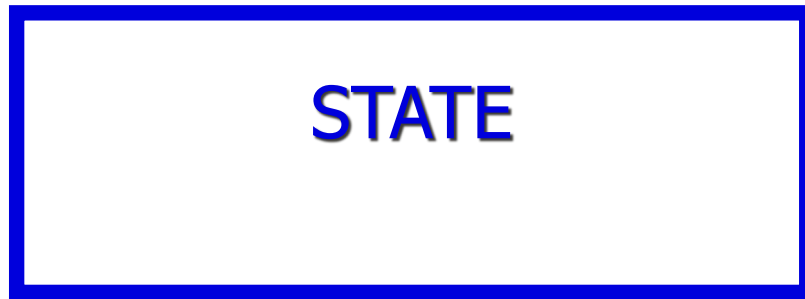


Permanent sovereignty over natural wealth and resources:

- 1) **States set forth conditions under which natural resources are to be utilized.**
- 2) States pursue public interest such as the protection of environment, economic development.

Disputes between states and energy companies

UPSTREAM: International Boundary Disputes



Permanent sovereignty over natural wealth and resources applies only in relation to a state territory (state jurisdiction).

However, boundaries, particularly maritime boundaries, are often challenged > **disputes**
between states.

MIDSTREAM AND DOWNSTREAM



STATE



ENERGY COMPANY

States set forth conditions under which energy is to be transported and traded. States pursue public interests.

TRANSIT STATES (regulation)
ENERGY MARKETS (regulation)

Transportation of oil / gas.


Sales from the producer to the wholesaler in a particular market, sales from wholesalers to the end users.

International dimension:

Cross-border transportation of oil/gas (pipelines / tankers)

Cross-border trade in energy products.

M U N I
L A W



AGENDA

- A) State – State Arbitration**
- B) Commercial Arbitration**
- C) Investor – State Arbitration**