IBA Mediation Committee
Rio de Janeiro

Dispute Boards for Complex Projects

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SENSE STUDIO

PART 1
INTRODUCTION

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THE TRADITIONAL STRUCTURE OF A DB

- DBs may comprise:
  - A single member
  - Three persons (one chair and two members)

- It is important to ensure the right mix and scope of expertise
- Easier to do this with a larger panel (but costs may be a consideration for smaller projects)
- Large, complex projects may involve many disciplines:
  - Engineering, architecture, tunneling
  - Legal
  - Quantum and finance

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IS A LARGER BOARD USEFUL?

- The Channel Tunnel – 5 members:
  - Legal
  - Engineering
  - Quantum
  - Finance
- In the event a dispute was referred a panel made up of:
  - Chair
  - And two others
- A larger panel allows the project to benefit form a wider range of experience
- Allows selection of the members best suited to a particular dispute

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IS A LARGER BOARD USEFUL?

- CERN High Luminosity Cavern project – 5 members
  - Legal (x2)
  - Architectural
  - Engineering (x2)
  - Reserves (x2, 1 legal, 1 technical)
- In the event a dispute was referred a panel made up of:
  - Chair
  - And two others
- A larger panel allows the project to benefit form a wider range of experience
- Allows selection of the members best suited to a particular dispute

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PART 2
HYBRID DISPUTE BOARDS

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THE DUAL ROLE OF A DB

- A single DB normally:
  - assists in the resolution of disputes (catalyst for dispute avoidance
  - decides disputes referred to it

- In some jurisdictions, taking on both roles might be seen to be a breach of natural justice
- London Olympics:
  - concern that dispute avoidance role amounted to mediation
  - *Glencott v Ben Barrett*
  - ODA decide to separate dispute avoidance and dispute deciding roles
  - two panels: IDAP and an adjudication panel

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CAN THE DUAL ROLE BE PROBLEMATIC?

- A single DB normally:
  - assists in the resolution of disputes (catalyst for dispute avoidance
  - decides disputes referred to it

- In some jurisdictions, taking on both roles might be seen to be a breach of natural justice
- London Olympics:
  - statutory adjudication regime
  - concern that dispute avoidance role amounted to mediation
  - *Glencott v Ben Barrett*
  - ODA decide to separate dispute avoidance and dispute deciding roles
  - two panels: IDAP and an adjudication panel

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DOES DISPUTE AVOIDANCE = MEDIATION?

- Mediation:
  - Plenary sessions (both parties)
  - Private sessions (one party plus mediator)
- Conciliation:
  - Takes place with both parties at the same time
- Dispute Board:
  - Usually takes place with both parties present
  - Some DB rules allow for private meetings
  - Is this a good idea?
  - If no private meetings is a DB dispute avoidance process one of CONCILIATION?

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HYBRID DBs

- The benefits of dispute avoidance ae well established
- How can this work with say a regime of statutory adjudication?
- Dispute avoidance function may be separated from dispute resolution function
- Transport for London Conflict Avoidance Panels:
  - Dispute avoidance procedure, panel members selected from a list
  - Dispute resolution either adjudication or arbitration, tribunal selected from a list
  - Option to resort to statutory adjudication, tribunal selected by nominating body

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HYBRID DBs - CAN THEY BE SUCCESSFUL?

- The success of a hybrid DB is dependent on parties using the dispute avoidance process first
  - Normal adjudication procedure after dispute avoidance
- Dispute avoidance process requires time
  - Statutory adjudication is normally rapid
  - 28 days in the UK, differs elsewhere
  - In some jurisdictions referral may be limited to, say, payment issues
- Under a statutory adjudication regime a party cannot be forced to use a dispute avoidance process first
- It is therefore very important that the parties understand the benefits of dispute avoidance and jointly buy into the idea

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PART 3
THE ITER DISPUTE BOARD

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ITER

- "The Way" (Latin)
- International Tokamak Experimental Reactor
  - Not designed to produce energy for the grid
- Nuclear fusion research megaproject
- The world's larges experimental Tokamak reactor

> **'We say that we will put the sun into a box. The idea is pretty. The problem is, we don't know how to make the box.'**
>
> Pierre-Gilles de Gennes, French Nobel laureate in physics

- ITER will provide the "box"
- A collaboration of 35 nations over 35 years, began 2007
- ITER Members
  - China, EU, India, Japan, Korea, Russia, USA

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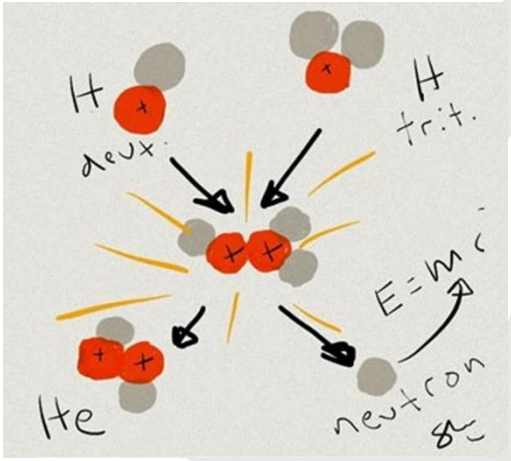
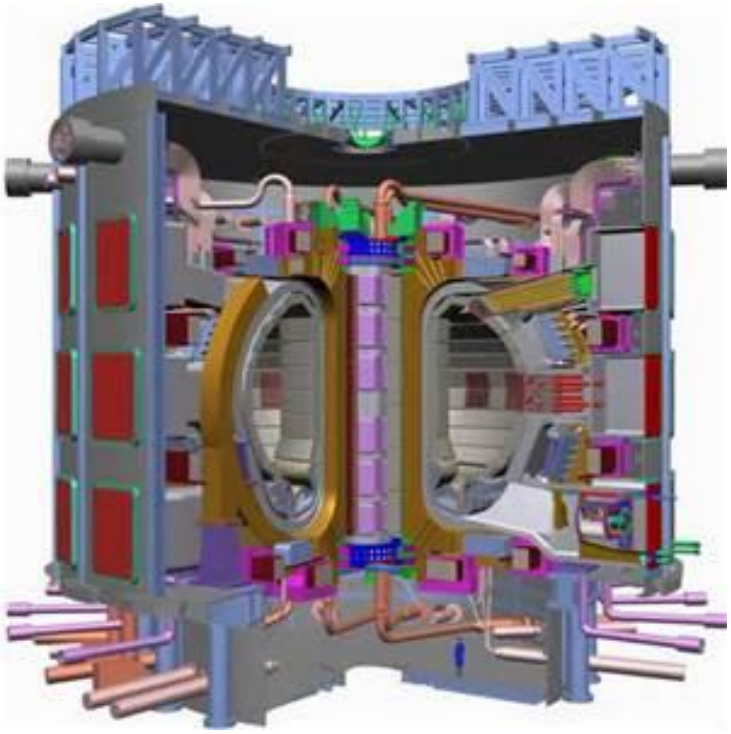
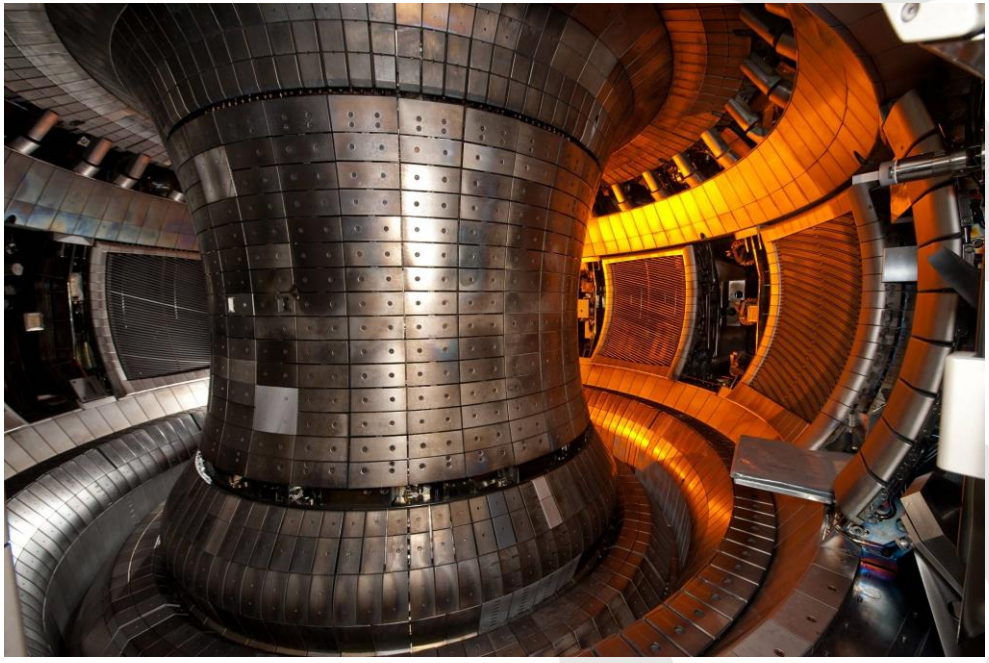
NUCLEAR FUSION

- For a city of 1m inhabitants, energy requirements:
  - 250,000t oil
  - 400,000t coal
  - 60kg fusion fuel







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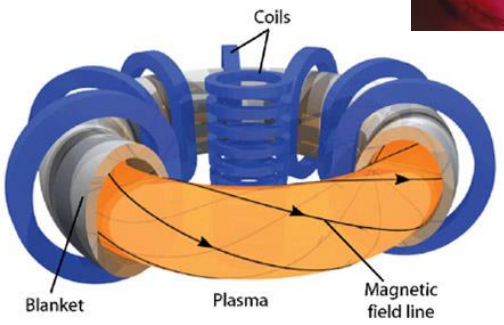
FUSION FOR ENERGY (F4E)

- The European Joint Undertaking for ITER
- An agency of the EU
- Created as a Joint Undertaking under Article 45 of the EURATOM Treaty
- Council of the European Union, 27 March 2007
- Based in Barcelona



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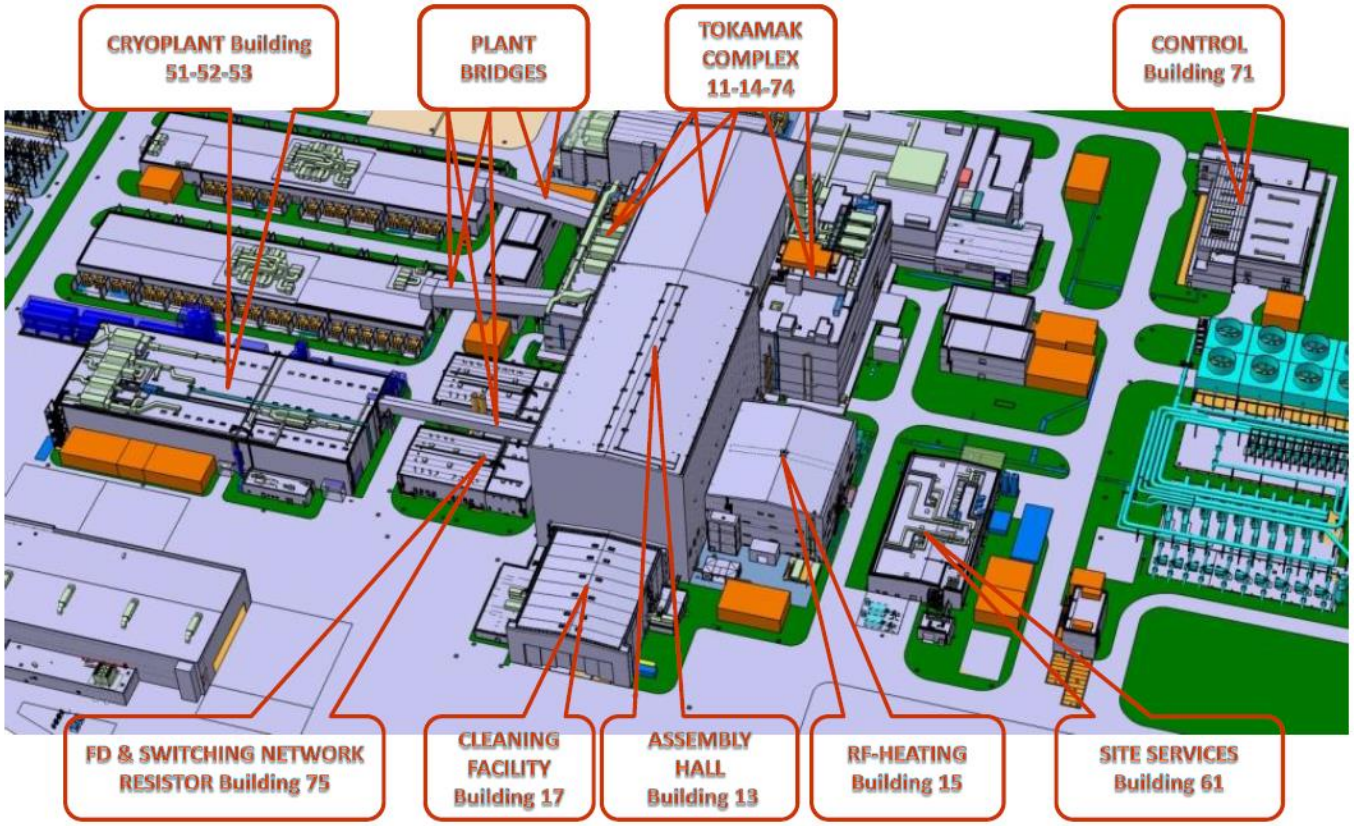
THE SITE

- Located in Cadarache, Southern France
- 180 hectare site, 42 hectare platform
- 39 buildings and technical areas



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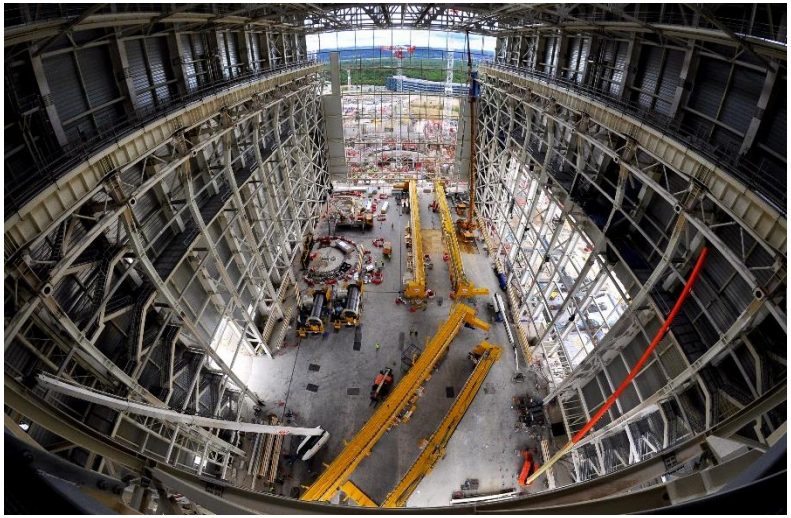
THE PROJECT

- Reinforced concrete construction
  - 250,000 m3
  - 190,000 m3 for nuclear buildings
  - Total footprint: 21,000 m2
  - Total building volume 750,000m3
- Steel framed buildings
  - 29,000 m2



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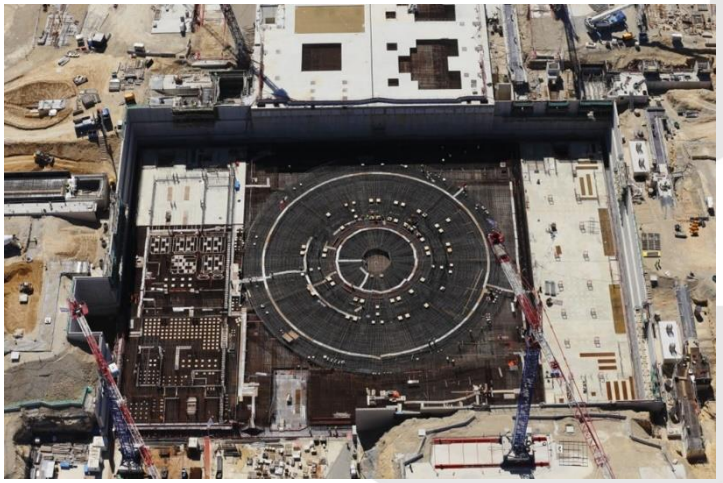
THE DISPUTE BOARD



- Convened in February 2014
- Comprises 6 members
- With exception of the chairman the member's contracts are for a period of 7 years which is the duration of the construction period
- The panel members are drawn from the UK and France but the selection process was EU-wide
- Although called an *"adjudication panel"* it is actually a dispute board and its primary function is dispute avoidance, dispute resolution only takes place for disputes that cannot be avoided

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THE DISPUTE BOARD

- Due to public procurement constraints F4E could not enter into tripartite contracts with the contractors and the adjudicators.
- Therefore, the adjudicators were employed and 'imposed' by F4E in the public procurement procedures to award the construction contracts
- The panel is made up of:
  - Lawyer (chairman)
  - Architects (x 2)
  - Nuclear Engineer
  - Dual Qualified Lawyer/Engineer
  - Nuclear Services Engineer
- The chairman and two others are selected to adjudicate a dispute

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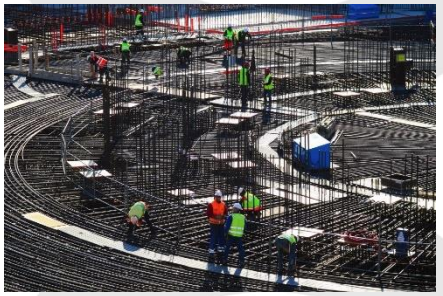
THE CONTRACTS



- Works let in packages, Construction Contracts
  - Let based either on FIDIC Red or Yellow Books
  - The anti-seismic bearings contract was let as a bespoke form
  - An architect/engineer has been employed to produce the Employer's design and project manage the various contracts
- Services Contracts
  - Architect/Engineer and H&S and Inspection Services are bespoke forms of contract
- Each Construction Contract with F4e has provisions for resolution of disputes by the DB
- Each contract has interfaces with other contracts (interface agreements).
  - Each interface agreement has provisions for resolution of disputes by the DB , different rules apply and F4E will not be a party to such adjudication.

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THE CONTRACTS

- Contracts comprise mostly consolidated Conditions of Contract with no separate Particular Conditions
- Mix between Red and Yellow Book provisions:
  - (1) Red Book with some significant design obligations
  - (2) Red Book with lump sum component
  - (3) Yellow Book with re-measureable component
  - (4) MEP contracts include obligations to produce O&M manuals the others do not
  - (5) Contracts include specific provisions for known interfaces
  - (6) Modifications deal with Contractor's Float and Concurrent Delay. The SCL Protocol does not apply.
  - (7) Specific insurance provisions for decennial insurance under French law

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THE CONTRACTUAL CHALLENGE

- Contracts let to consortia of international contractors
- Construction techniques are challenging with design and construction issues never before encountered
- Interfaces between contracts are challenging
- With complex and evolving novel technology change management is a challenge (technical evolution faster than construction)
- Change management is reflected in complex scheduling requirements
- F4E has to comply with financial regulations and procurement rules

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DISPUTE BOARD PROCEDURES

- The DB meets the parties and visit the site approximately every 4 months
- The actual requirement is a minimum of once per year and a maximum of four times
- Visits include an overview of progress and key points and meetings are held between F4E and any contractors/consortia that wish to participate
- Presentations by F4E and contractors
- Each visit includes an in depth visit to the works and walk around the works
- To date, no disputes have been referred to the DB

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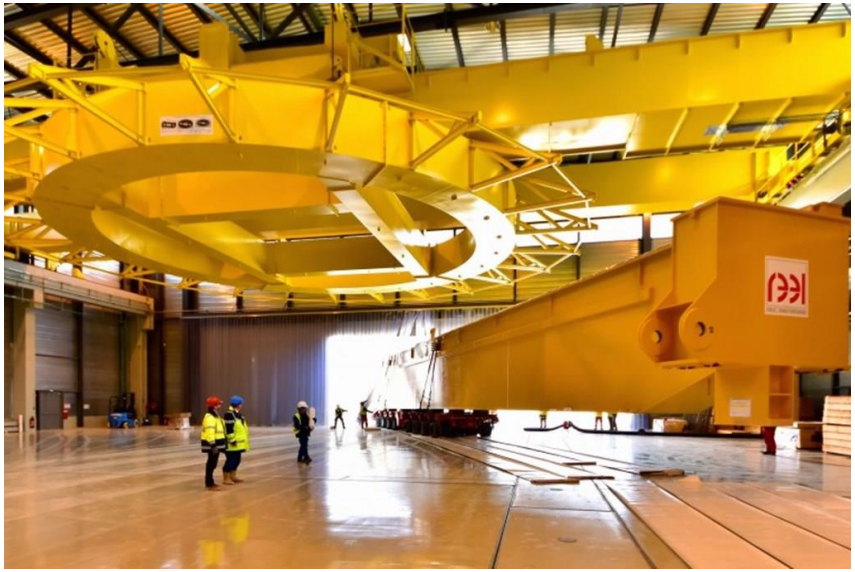
TIMETABLE FOR DISPUTE RESOLUTION

- Overall timetable for dispute resolution:
  - (1) Engineer's Determination or Other Dispute
  - (2) Referral of Dispute to Senior Representatives (There is a strict 28 day time bar for this)
  - (3) 30/45 day period for Senior Representatives to discuss
  - (4) If necessary dispute is referred to adjudication



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TIMETABLE FOR DISPUTE RESOLUTION

- The DB dispute resolution procedure is different to the normal FIDIC procedure which is:
  - (1) Notification of Dispute to Chairman
  - (2) Notification by Chairman of Adjudicator's Selected by Chairman (Parties propose only)
  - (3) Respondent's Written Submissions
  - (4) Adjudicator's Decision Issued within 25 days (meeting/hearing/visit may take place)
  - (5) Decision to include an award on costs reflecting the parties' relative success or failure in the adjudication
  - (6) Decision is Final and Binding unless brought before the European Court in Luxembourg within 45 days

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TIMETABLE FOR DISPUTE RESOLUTION

- The DB operates within the following rules:
- Any private meeting requires the other party's prior consent
- Adjudicators may rule on their own jurisdiction ('Kompetenz-Kompetenz')
- Less formality than arbitration
- Adjudicators may require production of evidence subject to legal privilege
- Adjudicators may require the attendance for questioning of one party / employee or agent
- Adjudicators may use their specialist knowledge
- Adjudicators may limit the length of submissions
- Adjudicators may reach their decision without a hearing
- Adjudicators may proceed in the absence of a party in a hearing or meeting
- Adjudicators may review and revise 'decisions' adopted by the Engineer
- Adjudicators may NOT review 'decisions' adopted by the Engineer if the decision has been taken by the Engineer following failure by a Contractor to comply with a timetable or with a procedural requirement under the relevant contract

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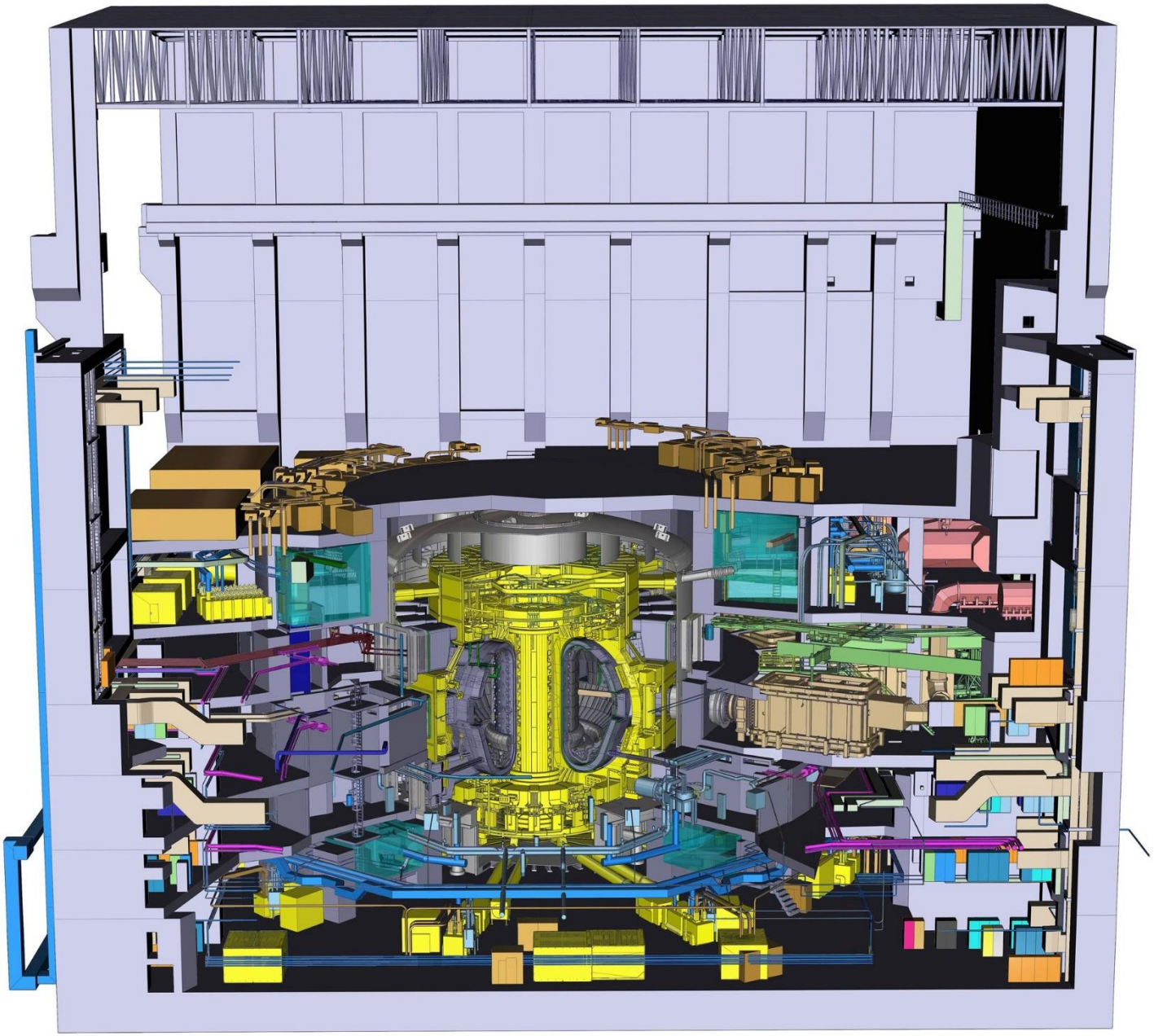
THE SUN IN A BOX



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