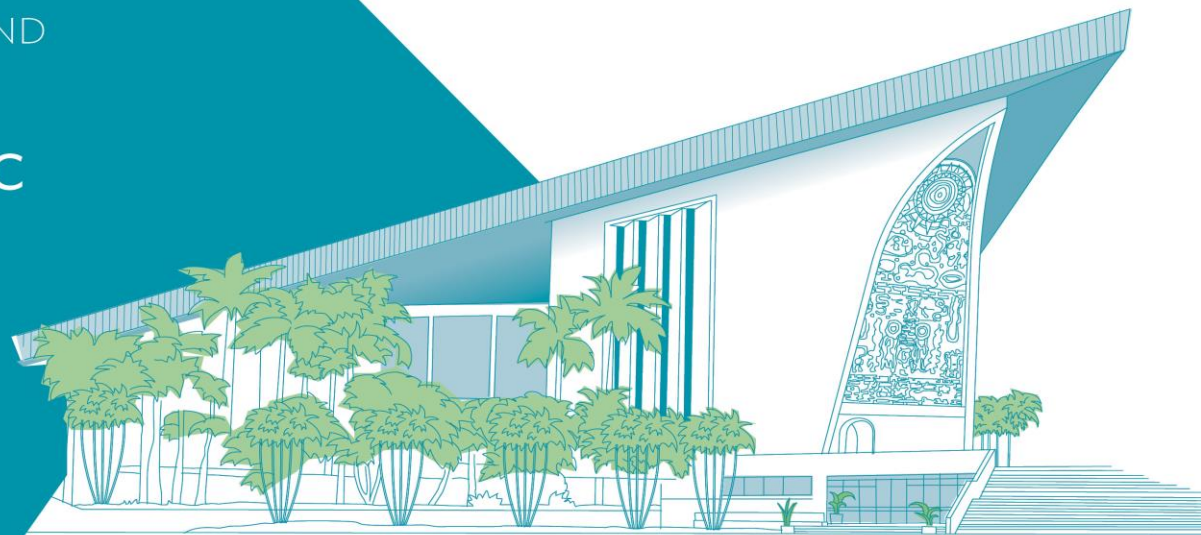




INTERNATIONAL MEDIATION AND
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RENEWABLE ENERGY DISPUTES

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Trial and Global Disputes Practice

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What is renewable energy?

Renewable energy is **produced** by harnessing **replaceable natural resources**.

What is renewable energy?

- Renewable energy includes, among others:
 - **Solar** (E.g., 1,000 MW Kurnool Ultra Mega Solar Park, India; ADB-funded 7.4 MW Rangamati Solar Project; Bangladesh)
 - **Wind** (E.g., 150 MW Burgos Wind Farm, Philippines; ADB-funded 100 MW Mannar Island Wind Farm, Sri Lanka)



What is renewable energy?

- Renewable energy includes, among others:
 - **Hydropower** (E.g., 22,500 MW Three Gorges Dam, China; ADB-funded 290 MW Nam Ngiep 1 Hydroelectric Power Project, Laos)
 - **Geothermal** (E.g., 227 MW Wayang Windu Geothermal Power Plant, Indonesia; ADB-funded 90 MW Rantau Dedap Geothermal Project, Indonesia)





Renewable energy as a state interest.

- Renewable energy is **powered by natural resources** over which States (sometimes even multiple States) exercise dominion (e.g., Mekong River, which traverses China, Myanmar, Laos, Cambodia, and Thailand).
- Governments are embracing renewable energy as they seek to **diversify their energy mix** to include renewable energy as a **reliable and cost-efficient energy source**.
 - ❖ **Rising demand for energy in the Asia Pacific** accounts for over half of global energy consumption.
 - ❖ According to the IEA, renewables is the **fastest growing power source in the electricity sector**, providing almost 30% of power demand in 2023, up from 24% in 2017.
- **Multilateral institutions** such as the ADB **are providing support** (e.g., ADB's Clean Energy Program, World Bank's Strategic Climate Fund).



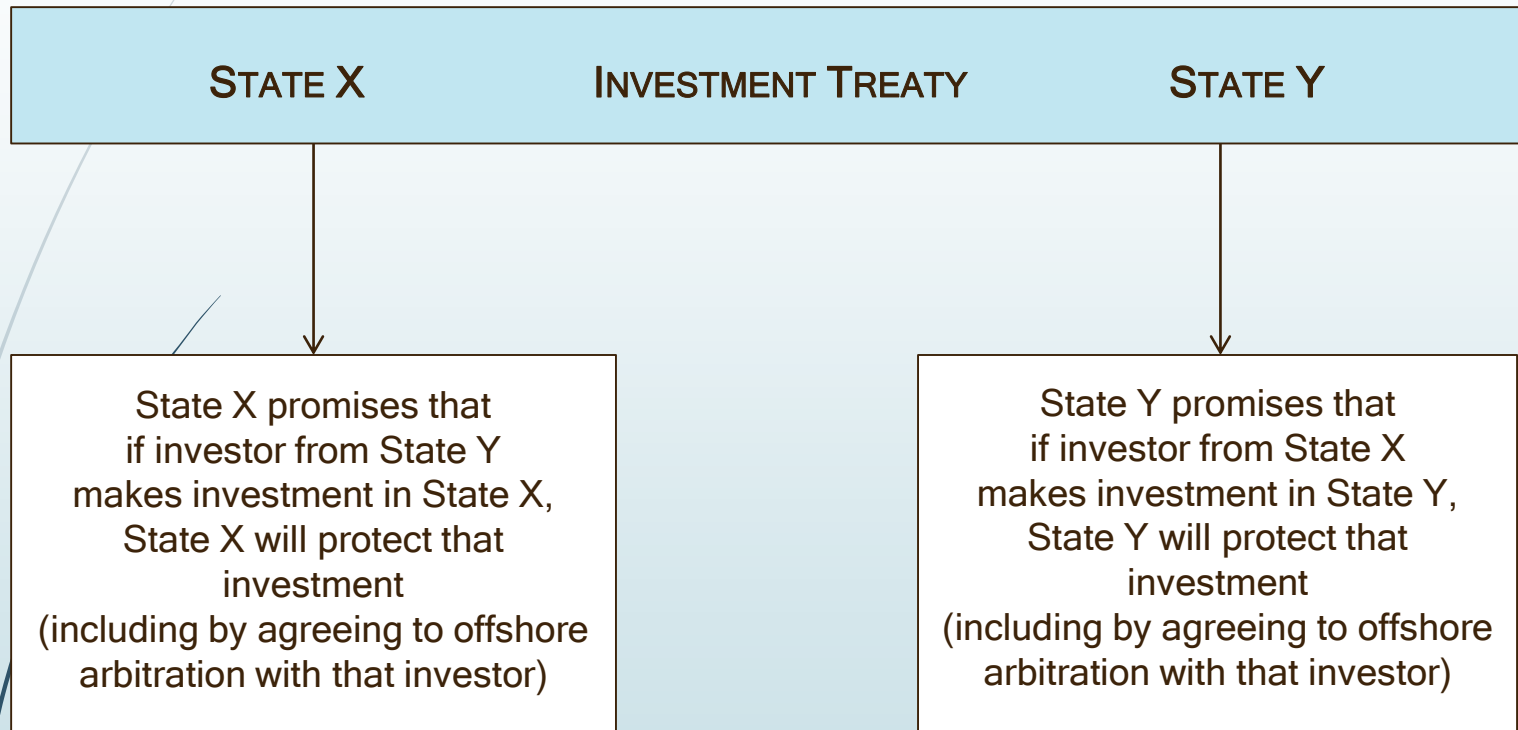
Renewable energy as a state interest.

- Renewable energy projects **can be covered by international treaties**. (E.g., Grand Inga Treaty between Congo and South Africa, Itaipu Treaty between Brazil and Paraguay).
- ***Pakistan v. India***: Dispute over construction of **hydropower projects on the Kishenganga River**; arbitration under the Indus Waters Treaty of 1960.

Renewable energy as a state interest.

- Renewable energy projects **can also be covered by bilateral or multilateral investment treaties**, which afford **protections to investors** (e.g. Energy Charter Treaty, ASEAN Comprehensive Investment Agreement)
- **Practitioners' Tips:**
 - ✓ Check whether any international treaty or bilateral investment treaty applies to the project.
 - ✓ Consider whether interest in renewable energy project can be structured to maximize investment treaty protection.

Investment Treaty Protection



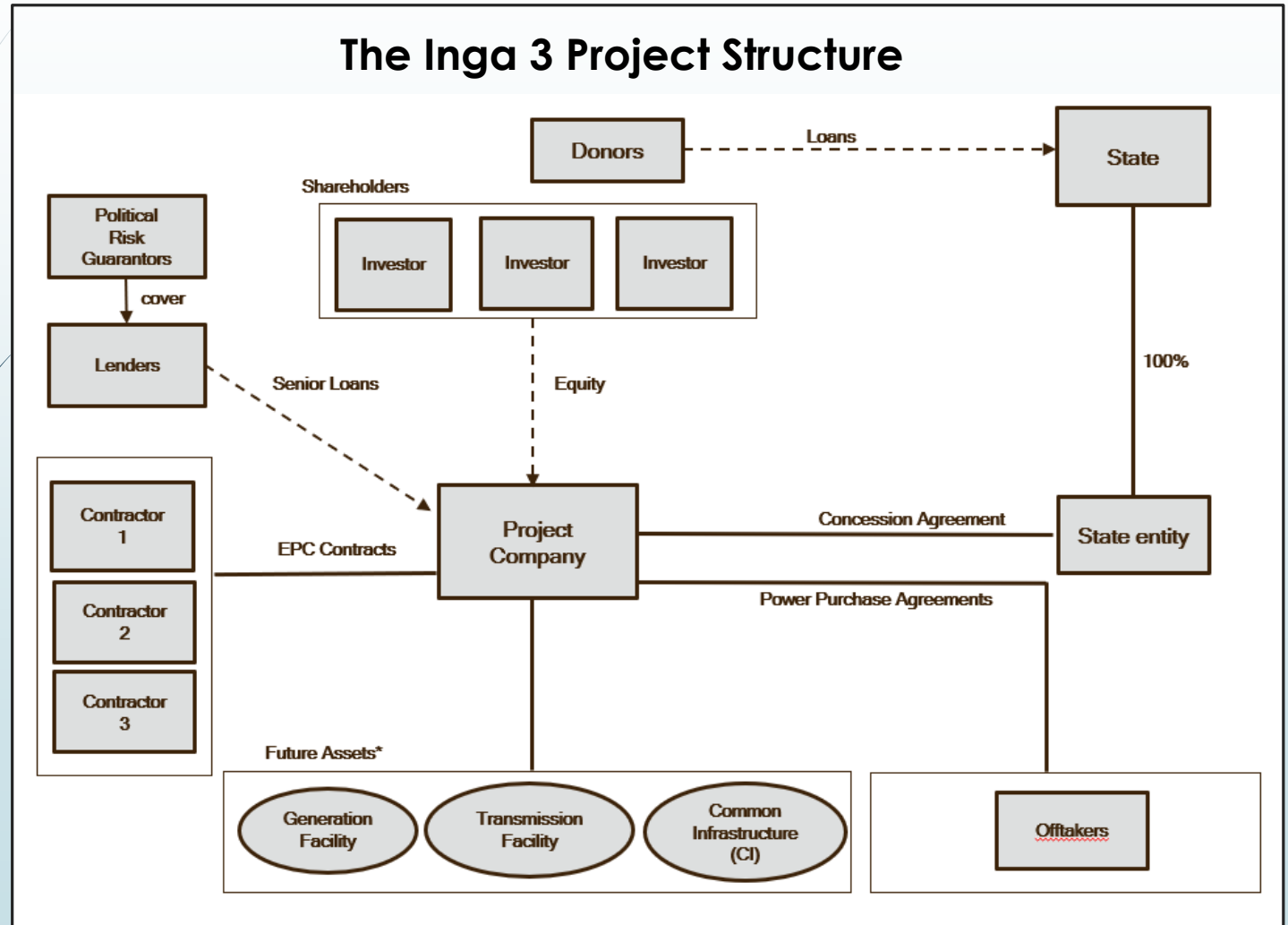
Renewable energy projects as complex and large-scale projects.

The Grand Inga Hydropower Project, Democratic Republic of Congo

- Unprecedented scale and complexity; seeks to harness the hydropower potential of the Congo River.
- Planned 41,000 MW capacity will dwarf the 22,500 MW capacity of China's Three Gorges Dam.
- Entails 7 phases, with the 4,800 MW Inga 3 as the first phase.
- 2,500 MW from Inga 3 will be sold cross-border to South Africa.
- Includes 8,000 km of transmission lines (likely) through Zambia and Zimbabwe.



Renewable energy projects as complex and large-scale projects.



Renewable energy projects as complex and large-scale projects.

- Involves **multiple stakeholders**, which can include **State-owned or affiliated entities, contractors and subcontractors, offtakers, lenders**, and also **local communities**.
- Relationships with different stakeholders, **from multiple jurisdictions** governed by **separate contracts**, with **different counterparties**, and which can include **different choice of law or dispute resolution provisions**.
- Renewable energy projects are **ripe ground for disputes**.

Renewable energy projects as complex and large-scale projects – prone to political risk.

- Political forces or events that occur in a host State or arising from the international environment that can disrupt a project company's completion or operations.
- Includes, inter alia :
 - ❖ political violence such as war or civil disturbance
 - ❖ expropriation
 - ❖ changes in a host State's laws
 - ❖ unjustified delays in governmental action
 - ❖ currency restrictions
 - ❖ limitations on the movement of goods/people



Renewable
energy
projects as
ripe ground
for disputes
with different
stakeholders.

Disputes with States and State-owned or affiliated entities

- Can be under concession agreements, letters of guarantee, or letters of support.
- E.g., **Kingangop Wind Park v. Kenya**: Project stalled because of protests from local communities; claimant damages under a letter of support from the Kenyan government, in which government undertook to indemnify for losses if construction was prevented by “political events.”
- **Practitioners’ Tip:**
 - ✓ Proper State parties covered by arbitration clause. (E.g., **Centrotherm Photovoltaic AG Kinetic German v. Sonelgaz et al.**; claims dismissed against two State parties which did not sign the agreement)
 - ✓ Seek broad scopes for any indemnification or force majeure provisions.
 - ✓ Check availability of investment treaty protections. Parallel treaty and contract arbitrations permissible.



Practitioners' Tips – Risk Mitigation for Concession Agreements

KEY POLITICAL RISKS	RISK MITIGATION DEVICE
Change in Law Risk <ul style="list-style-type: none">• Tax Increases• Other Cost Increases• Lost Revenue	Stabilization Clause / Indemnification
Other Revenue Risks <ul style="list-style-type: none">• FOREX Conversion• FOREX Availability• Offshore Remittance	Government guarantee

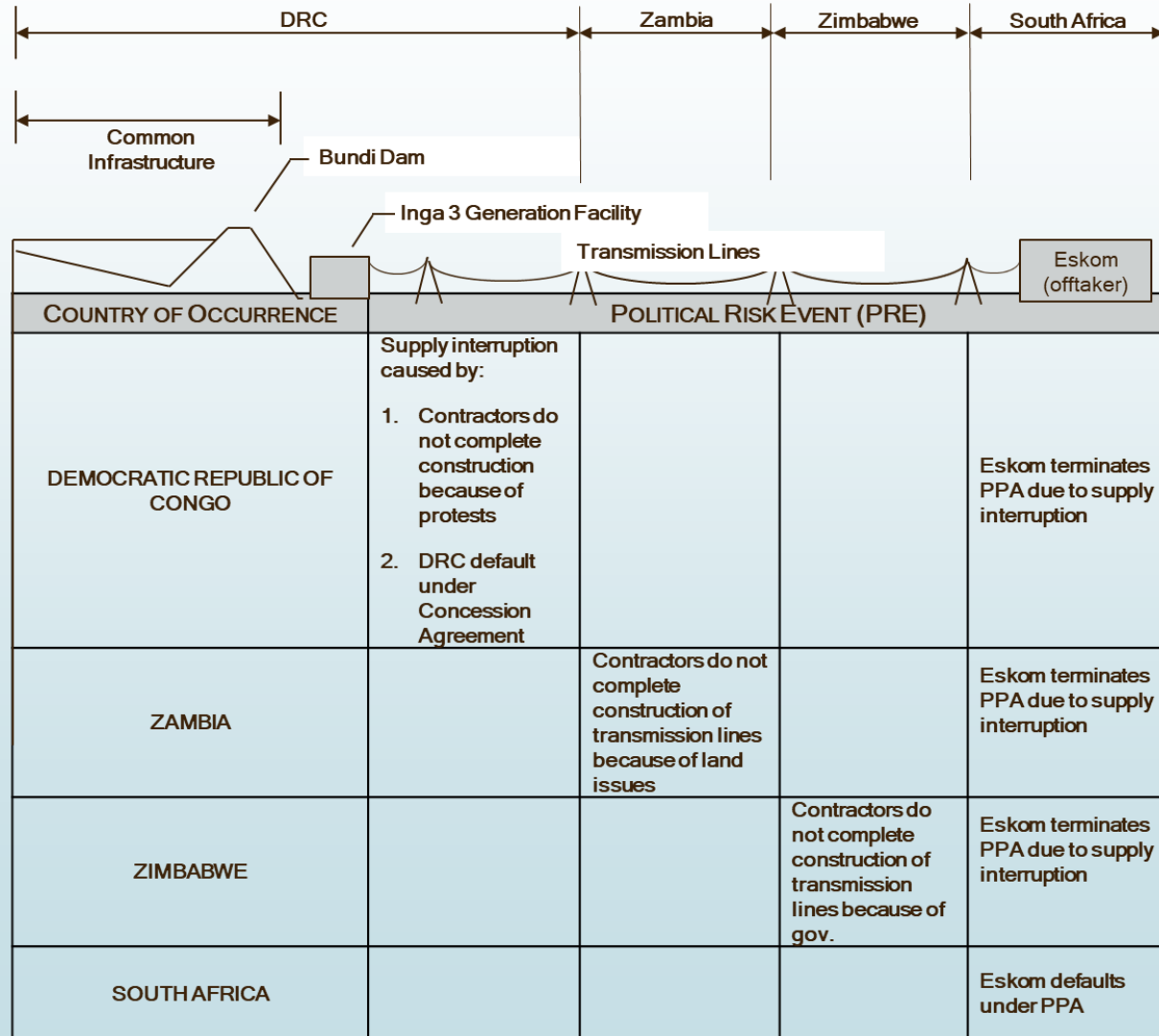
Renewable
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Construction disputes

- Can be under interconnected web of downstream and upstream contracts, including EPC and sub-contracts for the supply of component parts.
- E.g., ***PV Crystallox Solar v. Neo SolarPower Corp.***: Dispute over supply of solar wafers; buyer stopped purchases under long term supply contract after cost of silicon plunged.
- **Practitioners' Tip:**
 - ✓ A delay or default in one contract can delay or undermine performance in another.
 - ✓ Back-to-back protections.

The Cascading Effects of Construction Delays

Multi-Country Political Risk in the Inga Project



Renewable energy projects as ripe ground for disputes with different stakeholders.

Offtake disputes

- Offtakers are the ultimate destination. Disputes, defaults, or delays upstream in the value chain can lead to an offtake dispute.
- These types of disputes can also arise if:
 - ❖ purchaser is unable to purchase power for whatever reason
 - ❖ construction delays commercial operations
 - ❖ or government incentives are withdrawn and make a power project economically unviable.
- E.g., **EFT Group v. Hidroelectrica**: Dispute arose when Hidroelectrica cancelled power supply contracts after becoming insolvent and public criticism that deals were at below-market process.
- **Practitioners' Tip:**
 - ✓ Back-to-back protections.
 - ✓ Broad force majeure provisions
 - ✓ Liquidated damages with damages caps.

Practitioners' Tips – Risk Mitigation for Offtake Agreements

KEY POLITICAL RISKS	RISK MITIGATION DEVICE
Development Risk <ul style="list-style-type: none">• Permits and Authorizations• Land Acquisition• Financing• Construction• Delay Liability	Force Majeure Harmonization / Construction Contract Pass - Through Deemed COD
Change in Law Risk <ul style="list-style-type: none">• Tax Increases• Other Cost Increases• Lost Revenue• Enforceability	Indemnification
Generation Risk <ul style="list-style-type: none">• Political Force Majeure Affecting Generator	Force Majeure Provision / Liquidated Damages with Liability Caps

Renewable Energy - Trends

- Increase in renewable energy projects and renewable energy investments.
- Complex, large-scale, and multi-party nature of renewable energy projects.
- Commercial and investment treaty disputes.

Conclusion – Practitioners’ Tips

- Arbitration as a means of dispute resolution lends itself well to the complex, multi-party nature of renewable energy disputes.
- Ensure that arbitration clauses cover all appropriate parties across the entire renewable energy value chain.
- Ensure that arbitration clauses are clear and unambiguous. Do not assume that arbitration extends to or are incorporated by related agreements.
- Consider whether there are international law protections available.

Thank you.

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Trial and Global Disputes – International
Arbitration