



INTERNATIONAL MEDIATION AND
ARBITRATION CONFERENCE

2nd South Pacific International Arbitration Conference

25–26 March 2019
Stanley Hotel, Port Moresby
Papua New Guinea



RENEWABLE ENERGY DISPUTES

William B. Panlilio
King & Spalding

Trial and Global Disputes Practice

26 March 2019

This is not an ADB material. The views expressed in this document are the views of the author/s and/or their organizations and do not necessarily reflect the views or policies of the Asian Development Bank, or its Board of Governors, or the governments they represent. ADB does not guarantee the accuracy and/or completeness of the material's contents, and accepts no responsibility for any direct or indirect consequence of their use or reliance, whether wholly or partially. Please feel free to contact the authors directly should you have queries.



What is renewable energy?

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

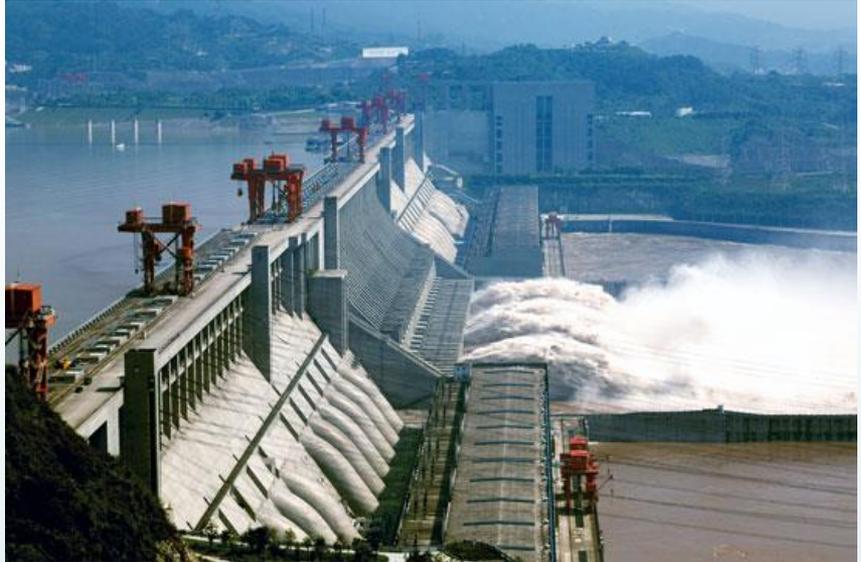
What is renewable energy?

- 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).



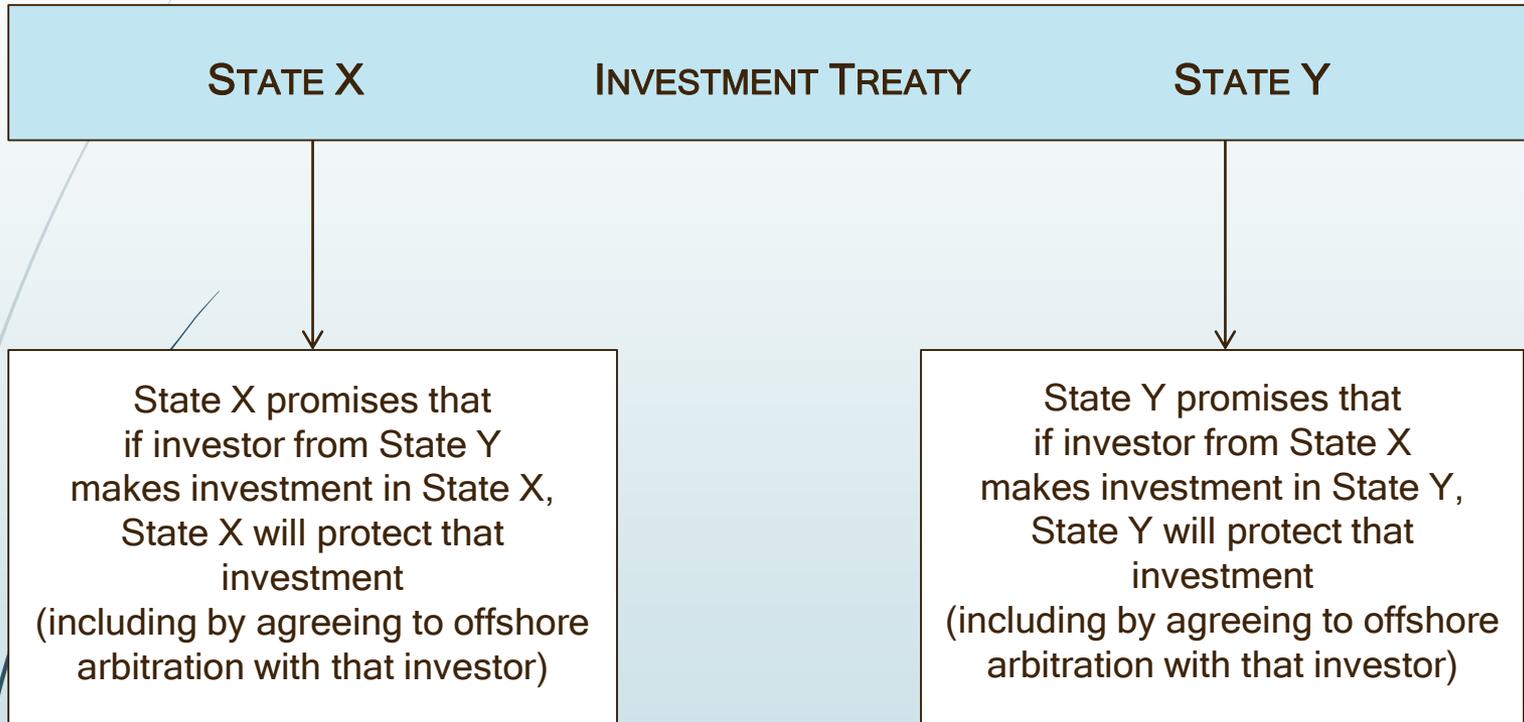
Renewable energy as a state interest.

- 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



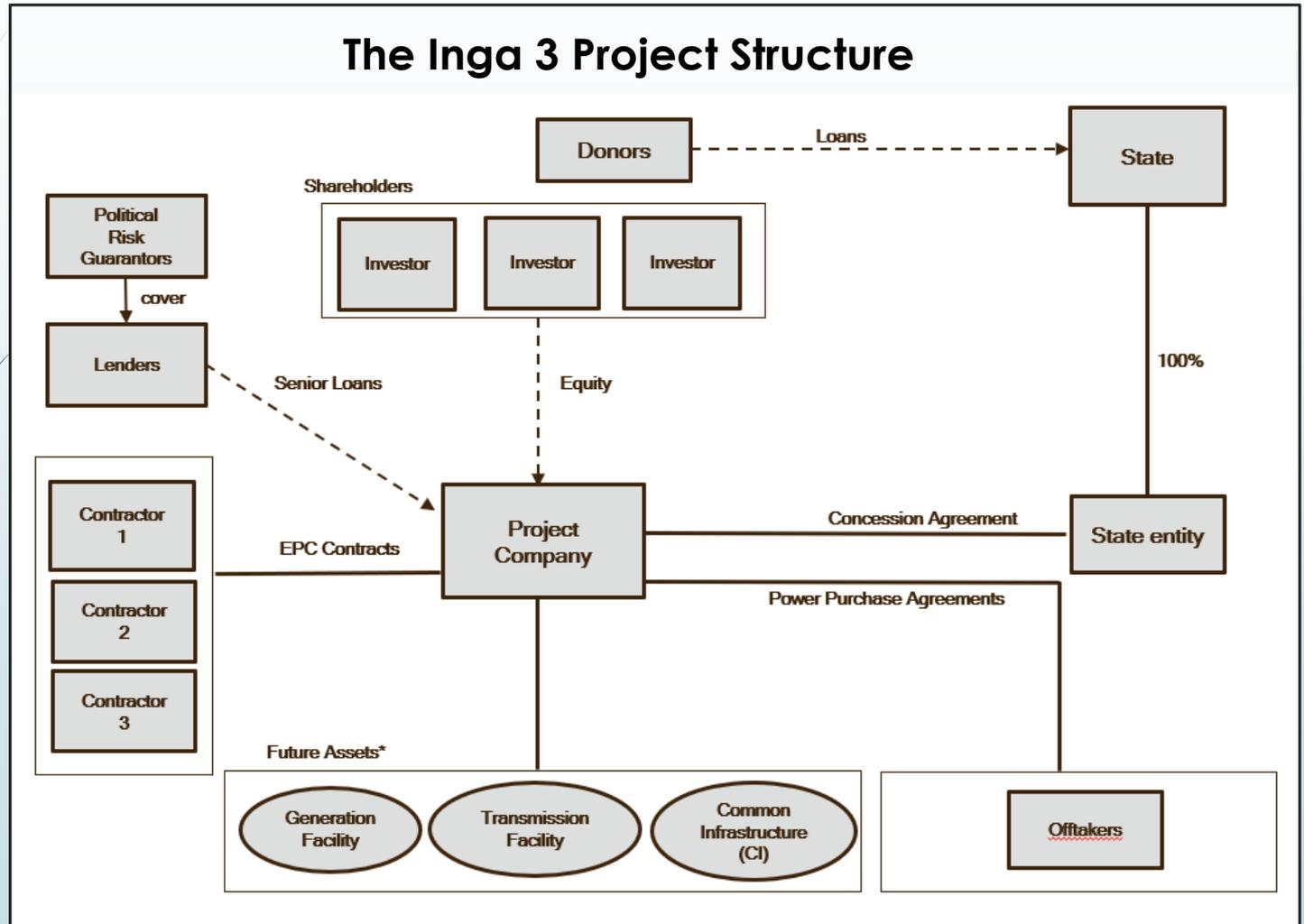
Renewable energy projects as complex and large-scale projects.

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.

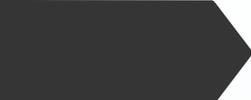
- Political forces or events that occur in a host State or arising from the international environment that can disrupt a project company's completion or operations.
- Includes, inter alia :
 - ❖ political violence such as war or civil disturbance
 - ❖ expropriation
 - ❖ changes in a host State's laws
 - ❖ 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

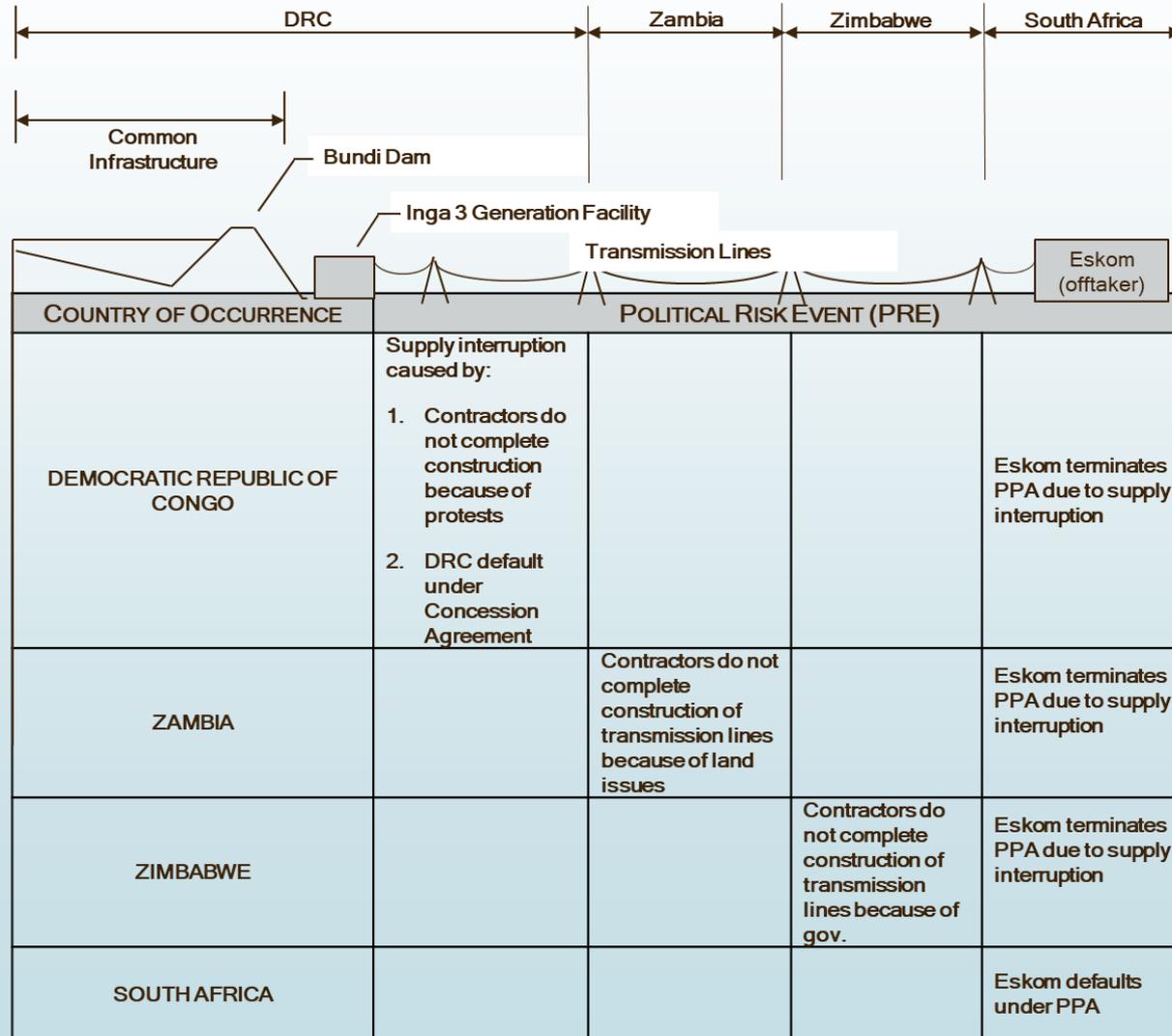
Renewable energy projects as ripe ground for disputes with different stakeholders.

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.

William B. Panlilio (wpanlilio@kslaw.com)

King & Spalding

Trial and Global Disputes – International
Arbitration