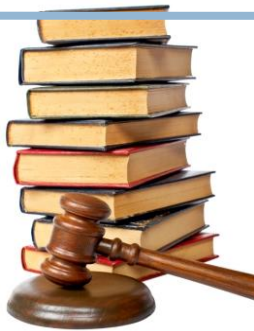


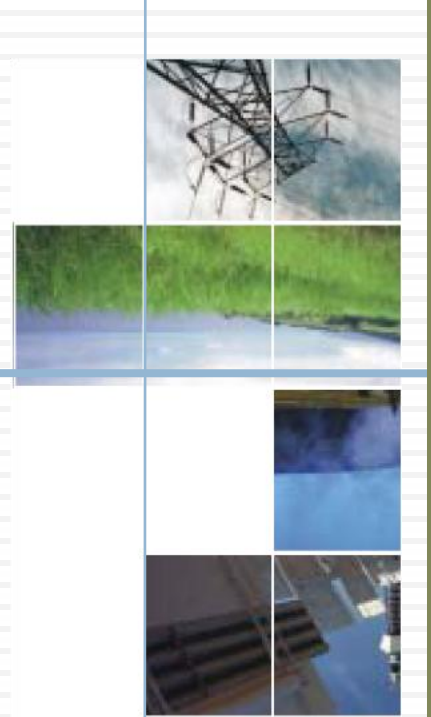


African Development Bank

# Key Aspects of Financing Infrastructure Projects (AfDB Perspective)



Cape Town, South Africa  
May 24-27, 2011



Presentation by: ANNEMARIE MECCA PRINCIPAL LEGAL COUNSEL

# Outline



2

Introduction

Financing Options

Key aspects of AFDB financing

Common Legal Issues

MDB Additionality/Challenges



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# Multilateral Development Banks

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- African Development Bank
- Asian Development Bank
- East African Development Bank
- World Bank Group ( IDA, IBRD & IFC)
- Banque Ouest Africaine de Développement (BOAD)
- Development Bank of Southern Africa
- Canadian International Development Agency (CIDA)
- Department for International Development (DFID)
- CDC
- DEG
- European Investment Bank
- KFW
- Netherlands Development Finance Company (FMO)



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# Financing Options

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- Sovereign Loans
- Non-sovereign loans
- Mezzanine/subordinated loans
- Equity Investment
- A/B Loan syndication

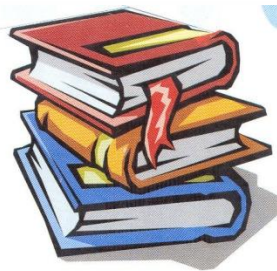


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# Financing Documents

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- Mandate Letter and Term Sheet
- Common terms agreements, loan agreements
- Inter-creditor Agreement
- Security documentation (Accounts Agreements)
- Equity Support documentation



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# Project Documents

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- Concession agreement
- construction contracts( O&M, EPC)
- Off take Agreements( PPAs etc)
- supply contracts



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# Key Aspects

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Borrower Restrictions

Procurement rules

Environmental & social Issues

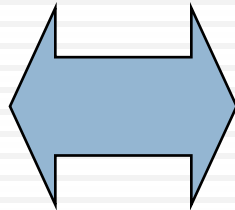
Immunities & privileges

Negative Pledge

Application of internal policies



## **BORROWER RESTRICTIONS**

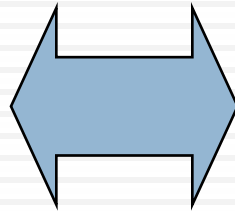


- Incorporated in member country
- Government's no-objection
- Necessary consents/approvals
- Waive immunities
- Submission to courts and/or arbitration

## Procurement Rules

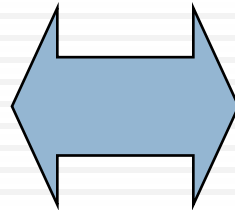
- **Financing subject to MDB procurement rules and regulations**
- **Afdb Rule of Origin (Bank financed transactions)**
- **Goods and services produced in member countries**
- **Bidding Processes**
- **Procurement Methods**
- **MDB Cross-debarment of firms\***

**Environmental  
& Social  
considerations**



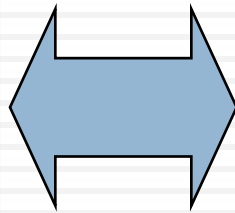
- E&S Social impacts
- E & S Risk mitigation plan
- Resettlement and/or compensation?
- Reputational risk
- Independent Review
- Event of Default/CP

## Immunities and privileges



- Immunity from every form of legal process except when borrowing
- Properties and assets of the Bank are immune from attachment or execution before delivery of final judgment
- Property and assets immune from search, confiscation and archives inviolable
- Tax exemption
- Dispute resolution mechanisms \*

## Preferred Creditor Status



- **Bank property and assets exempt from restrictions, regulation and moratoria**
- **MDBs enjoy preferential access to foreign exchange in the event of crisis**
- **PCS crucial in A/B loans and helps in mobilization of resources**
- **Applies to MDB only**
- **Source of comfort? Advantage?**

# Negative Pledge Clauses

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- ❑ No collateral to other lenders (crucial in unsecured deals)
- ❑ Any security granted must rank parri passu or MDB ranks senior
- ❑ Limits external borrowing
- ❑ Waived under certain circumstances



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# Other Important Aspects

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Anti-corruption Provisions

AML/CFT Requirements

Additionality Assessments

Reporting Requirements

Supervision missions



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# Project Risk Assessment

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- ❑ Bank lawyers conducts due diligence to :
  - ❑ Identify potential & fundamental risks
  - ❑ determine the allocation of those risks as between parties;
  - ❑ enable the parties to assess the “bankability” of the project as a whole
- ❑ Lawyer liaises with Advisors- technical, market, environmental, insurance , legal, financial modelers



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# Project Risks & Mitigants

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- Completion risk
- Off take/revenue risk
- Operating risk
- Resource risk
- Currency risk
- Political risk (expropriation, civil wars, currency restrictions, breach of contract)
- Feasibility studies
- Insurances
- Contracts e.g. fixed price construction contracts, completion guarantees, completion bonus, drawdown control
- Exchange control approvals
- Role of MDBs
- Participation of local entities



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# Common Legal Issues

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- ❑ Governing law
- ❑ Security packages
- ❑ Process and relationship management



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# Governing Law

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- ❑ Choice of law to govern the contracts
  - ❑ Local Law
  - ❑ English law? New York Law? French Law?
  - ❑ lex situs
  - ❑ Statutory requirements
  
- ❑ Enforceability of contracts under that law



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# Dispute Resolution

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- ❑ Arbitration
- ❑ Court Jurisdiction at Lenders' option
- ❑ Borrower required to waive immunities
- ❑ AFDB submits to arbitration jurisdiction to preserve its privileges and immunities



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# Advantages of Arbitration

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- ❑ **Speed and privacy**
- ❑ specially qualified arbitrator vs generalist judge
- ❑ arbitral forum in a neutral foreign venue viewed as providing certainty of an efficient and reasonable result
- ❑ Enforceability in home jurisdiction



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# Other Legal Issues

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- ❑ Complex relationships among the parties over a long period of time
- ❑ Ever–shifting market standards
- ❑ absence of agreed form project documentation
- ❑ extremely varied nature of project finance transactions
- ❑ Requirement for familiarity with varied disciplines of law and a range of financial instruments



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# Security packages

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- ❑ Security governed by local law
- ❑ Perfection and enforceability of security
- ❑ Filing / registration costs



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# Common Security

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- ❑ Assignment of concession agreement
- ❑ Mortgages or charges(land, equipment, SPV shares)
- ❑ Assignment of insurances
- ❑ Charge over accounts
- ❑ Direct agreements (step-in rights)



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# Process Management

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Lawyer ensure that each of the parties understands issues in question

Parties in different parts of the world

Logistics of complex negotiations



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# MDB Advantages/Additionality

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- ❑ Catalytic role in attracting additional financing
- ❑ Confidence to other lenders/investors
- ❑ Best practice and standardization
- ❑ Political Risk Mitigation?



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# Challenges

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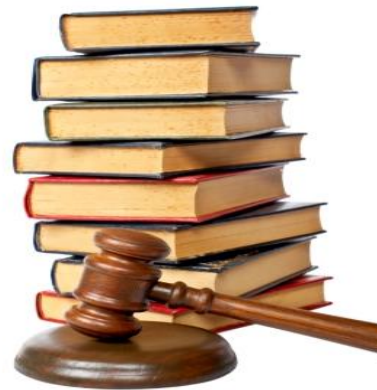


- ❑ Perceived as Slow
- ❑ Rigid
- ❑ bureaucratic
- ❑ Requirement for familiarity with MDB policies



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# QUESTIONS? COMMENTS?





# THANK YOU!



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