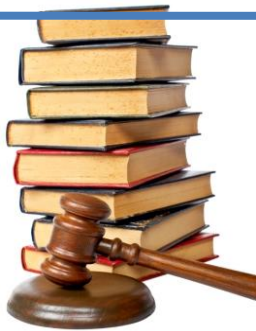




African Development Bank

Legal Aspects of Financing Infrastructure Projects (MDB perspective)

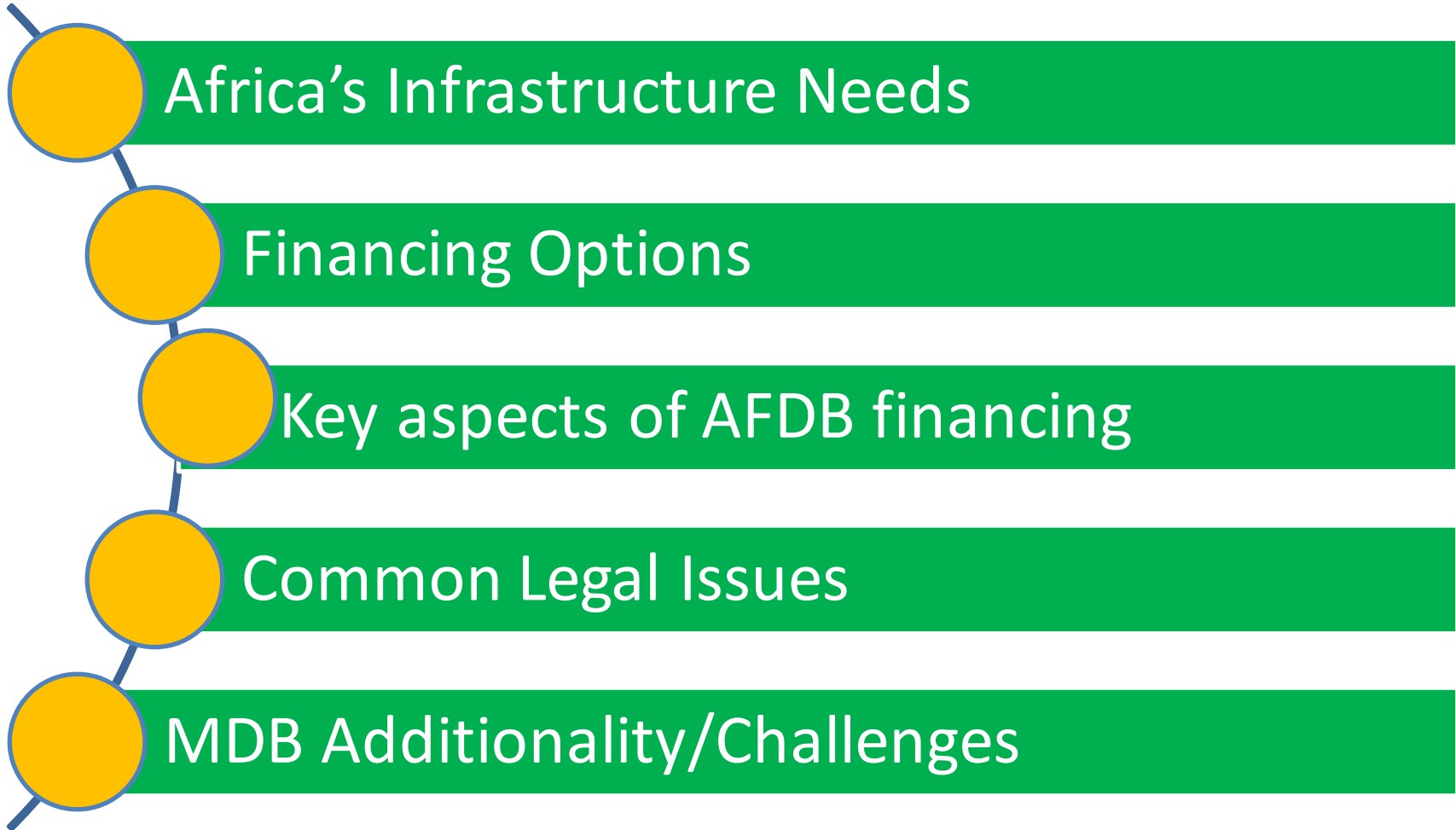


Kigali, Rwanda
February 14, 2011



Presentation by: ANNEMARIE MECCA PRINCIPAL LEGAL COUNSEL

OUTLINE



INFRASTRUCTURE STATISTICS

Infrastructure

- USD 93 billion p.a. until 2020
- Less than 40% have access to electricity
- 1/3 of the rural population has access to roads
- ICT -Internet density is just above 80 persons per thousand

Agriculture

- 5% of agriculture is under irrigation

Water & Sanitation

- 34% of the population have access to improved sanitation
- 65% have access to clean water

MULTILATERAL DEVELOPMENT BANKS

Agence Francaise de Développement (AFD)

Canadian International Development Agency (CIDA)

Department for International Development (DFID)

CDC

Finnish Fund for Industrial Cooperation Ltd

Netherlands Development Finance Company (FMO)

Danish International Investment Funds

Norwegian Investment Fund for Developing Countries (NORFUND)

Societe de Promotion et de Participation pour la Cooperation (PROPARCO)

Industrial Development Corporation

World Bank Group (IDA, IBRD & IFC)

MULTILATERAL DEVELOPMENT BANKS

- African Development Bank

- Asian Development Bank

- East African Development Bank

- 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



BANK'S COMMITMENT

2008-2012 Medium Term Strategy, infrastructure financing accounts for more than half of Bank operations.

USD6 billion in 2009 (52% of the Bank's portfolio) out of total operations worth USD12.6 billion was invested in infrastructure .

Energy sub-sector received the largest share of 57%.

The overall approval for infrastructure in 2009 represents an increase of 177.3% compared to 2008.

AfDB INITIATIVES



**Program for
Infrastructure
Development
in Africa (PIDA)**

NEPAD-IPPF

**EU-Africa
Infrastructure
Trust Fund**

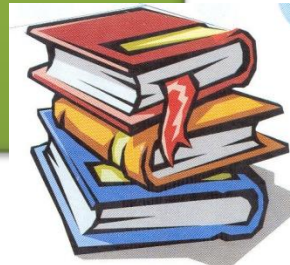
**Infrastructure
Consortium
for Africa (ICA)**

FINANCING OPTIONS

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

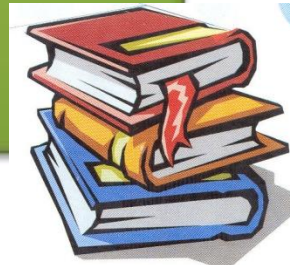
Financing Documents

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



Project Documents

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



KEY ASPECTS OF MDB(AFDB) FINANCING

Borrower Restrictions

Procurement rules

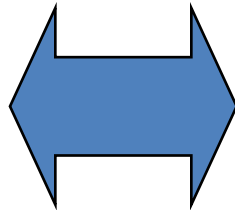
Environmental & social Issues

Immunities & privileges

Negative Pledge

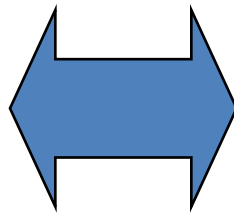
Application of internal policies

**BORROWER
RESTRICTIONS**



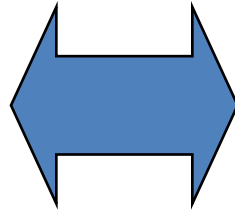
- Incorporated in member country
- Government's no-objection
- Necessary consents/approvals
- Waive immunities
- Submission to courts and/or arbitration

Procurement Rules



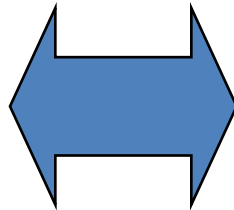
- Financing subject to MDB procurement rules and regulations
- Afdb Rule of Origin (Bank financed transactions)
- Goods and services produced in member countries
- Bidding Processes
- Procurement Methods
- MDB Cross-debarment of firms*

**Environmental
& Social
considerations**



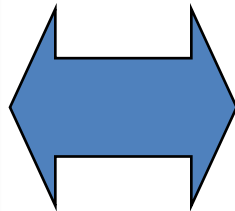
- **E&S Social impacts**
- **E & S Risk mitigation plan**
- **Resettlement and/or compensation?**
- **Reputational risk**
- **Independent Review**
- **Event of Default/CP**

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

- 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

OTHER IMPORTANT ASPECTS

Anti-corruption Provisions

AML/CFT Requirements

Additionality Assessments

Reporting Requirements

Supervision missions

Project Risk Assessment

- 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

Project Risks & Mitigants

- 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

Common Legal Issues

- 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

Common Legal Issues

- Governing law
- Security packages
- Process and relationship management

Governing Law

- 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

Dispute Resolution

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

Advantages of Arbitration

- **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

Security packages


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

Common Security

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

PROCESS MANAGEMENT

Lawyer ensure that each of the parties understands issues in question



Parties in different parts of the world



Logistics of complex negotiations

MDB Advantages/Additionality

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

Challenges

- Perceived as Slow and bureaucratic process
- Requirement for familiarity with MDB policies

Questions?
Comments?

THANK YOU!