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# INVESTMENT & CLIMATE CHANGE:TRENDS, RISKS AND REGULATION

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# INVESTING IN CLIMATE CHANGE

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- ✘ “Climate change is a long-term trend which will affect the value of assets in the real economy and will produce long-term investment opportunities” (DB Climate Change Advisors, 2011)
- ✘ DEF:
- ✘ Mitigating change by reducing/removing GHG from atmosphere
- ✘ Adapting by responding to physical effects of climate change eg in water management or food production

# CLIMATE CHANGE INVESTMENT

MITIGATION	ADAPTATION
Cleaner Energy	Agriculture
Energy Efficiency	Water
Transport	Waste
Carbon Markets	

# CLIMATE CHANGE INVESTMENT TRENDS

- ✘ Total global investment in clean energy (USDB)
  - + Increased from \$51.7 (2004) to \$243 (2010)
  - + World primary energy consumption grew by 45 % over past 20 years
  - + Expected to grow by another 39 % over next 20 years (BP estimates)
  - + Biggest growth estimated in renewable energy
- ✘ Investment opportunities in low carbon technologies could reach US\$5 trillion by 2030

# CLIMATE CHANGE / GLOBAL WARMING

- ✘ United Nations Framework Convention on Climate Change 1992
  - + stabilisation of GH gas concentrations at levels that would prevent dangerous interference with climate systems
  - + Within time that would allow natural adaptation by ecosystems to ensure food production & sustainable economic development

# REGULATION OF GHG EMISSIONS

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- ✘ **Kyoto Protocol (into force Feb 2005)**
  - + Obligations on Industrialised Countries to reduce greenhouse gas emissions as per agreed targets between 2008 - 2012 (Annex 1 countries)
    - ✘ Average reduction of 5.2 % from 1990 levels
  - + No reduction targets for Developing (non-Annex 1) countries

# KYOTO PROTOCOL: CDM

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- ✘ Provides for “trade-off” in emission reductions (emissions trading)
  - + Emission savings to be effected where cheapest
- ✘ Article 12: Clean Development Mechanisms
  - + Allows developed (Annex 1) country to outsource obligations to reduce emissions to developing (non-Annex 1) country
  - *CDM is a tool for leveraging foreign investment for sustainable development into developing countries*
  - *Can be used to stimulate economy, create jobs & improve efficiency of energy system*
  - *Global carbon market worth more than USD\$5 billion p a*

# CLEAN DEVELOPMENT MECHANISMS (CDM)

## ✘ REQUIREMENTS:

- + Located in Non-Annex 1 Developing Country (acceded to Kyoto Protocol) that has established DNA
- + CDM must lead to long term verifiable emissions reduction
- + Must assist in achieving **sustainable development** (certified by DNA)
- + Must lead to technology transfer
- + Additionality (CDM aspect not part of business-as-usual of project)

Result in tradable CER's (Certified Emissions Reductions or Carbon Credits)

# DESIGNATED NATIONAL AUTHORITY (DNA)

- ✘ To host CDM projects, country must set up Designated National Authority (DNA)
- ✘ DNA must certify that CDM contributes to sustainable development in order to achieve carbon credits i t o Kyoto Protocol
- ✘ Country can determine own criteria for sustainable development

# SOUTH AFRICAN EXAMPLE

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- ✘ DNA division of Dept of Minerals and Energy
- ✘ SUSTAINABLE DEVELOPMENT :
- ✘ 4 Main Criteria
  - + Economic development
  - + Social development
  - + Environmental compliance
  - + General Project Acceptability (equality of distribution of project benefits)

# RISKS IN CDM INVESTMENT

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- ✘ Commodity / price
- ✘ Project completion
- ✘ Environmental compliance
- ✘ CDM compliance
- ✘ Municipal legal compliance
- ✘ Technology
- ✘ Counter-party default
- ✘ Force Majeur

# IMPLICATIONS FOR INVESTMENT AGREEMENTS

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- ✘ General: careful drafting!
- ✘ Typical IIA's:
  - + Definitions of Investment / Investor
    - ✘ Typically very wide, including all types of assets investments
  - + Fair and equitable Treatment
    - ✘ Administrative fairness
    - ✘ Complying with “legitimate expectations”

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## + National Treatment

- × Treatment no less favourable than given to national investors “in like circumstances”
- × International standard? / Calvo doctrine

## + Most-Favoured Nation Treatment

- × non-discrimination between investments from countries in “like circumstances”
- × Discrimination between Kyoto and non-Kyoto countries?

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- + Policy space / Public Welfare exceptions
    - × BEE ?
  - + Expropriation:
    - × Public purpose
    - × Compensation (“prompt, adequate & effective”)
      - \* SA: “just & equitable”
    - × Direct & Indirect expropriation::
      - \* Metalclad v \Mexico: “regulatory expropriation”,  
Measures substantially depriving investor of economic benefit of investment
      - \* Methanex v USA: non-discriminatory measures for public purpose  
& due process not expropriation & not compensable unless specific commitments given not to do so.
      - \* Azurix v Argentina: purpose weighed against impact on investor
  - + Dispute Resolution / arbitration clauses
    - × Investor – State Dispute Settlement?
    - × Local courts?
  - + Choice of law