

MULTINATION DEVELOPMENT BANKS AND DISPUTE RESOLUTION

CASE STUDY AFRICAN DEVELOPMENT BANK

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MDBs and DRBF

Importance and Role of MDBs (Why)

- ▣ Setting Policy Trends in Borrowing Countries
- ▣ Co-financing (**they work together**)
- ▣ Harmonization (**Produce common stands**)
- ▣ Sharing information (**Emulate each other**)
- ▣ Capacity Building (**Talk the Same Language**)

(Important vector of policy changes)

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In Summary:

MDBs have high level of Leverage in Influencing Policies Development and Resource Mobilization in Borrowing Countries.
AfDB covers 53 Borrowing Countries

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Procurement Statistics in AfDB (million USD) Awarded Civil Works Contracts

	2006	2007	2008 (March)
Volume:	600	970	70
Percentage:	78 %	73 %	03 %
Number:	507	417	19

The majority carried out through International
Competitive Bidding

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2008 Indicative Lending Program (million USD)

Infrastructure	3,820
Multi- Sector	1,415
Financial	515
Social	495
Mining	410
Agriculture	220
Environment	150
Total	7,025

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Dispute Resolution Clause in AfDB Rules

The conditions of contract shall include ... the forum for the settlement of disputes. **International commercial arbitration has practical advantages over other methods for the settlement of disputes.** Therefore, the Bank recommends that Borrowers use this type of arbitration in contracts for the procurement of goods and works. In case of works contracts, supply and installation contracts, and turnkey contracts, the dispute settlement provision **shall also include** mechanisms such as **dispute review boards or adjudicators, which are designed to permit a speedier dispute settlement.**

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Dispute Resolution Clause in Harmonized MPDs

Clause 20.2 Appointment of the Dispute Board

“Disputes shall be referred to a DB for decision in accordance with sub-clause [Obtaining Dispute Board’s decision]. The Parties shall appoint a DB by the date stated in the Contract Data”.

Explicit Use of DBs

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Current Practice

- MDBs prefer amicable solutions to avoid Disputes Resolution mechanisms
- Litigation may negatively affect contract award
- Contractors prefer to be in the good books of MDBs thus (avoid disputes)

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Perceived Trend

- ✓ The newly harmonized Master Procurement Document (MDP) is more explicit about using DB (MPD not in full use-require adaptation)
- ✓ Procurement Rules stipulate DB as an addition (optional)
- ✓ Recently it is noted that thinking about the use of DB has increased

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Forum for setting the Harmonization Agenda
(including the Use of DB)

- ▣ FIDIC
- ▣ CICA
- ▣ OECD/DAC
- ▣ Annual Meeting of Heads of Procurement
(HoP)

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Status of Use of Dispute Resolution in AfDB

By Sounding of Operations Staff (not scientific)

□ Questions On Frequency of Use of DB:

- ✓ Never
- ✓ Rarely
- ✓ Often
- ✓ State Number of Cases where DB Used
- ✓ Random review of some AfDB contracts

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Results of Questionnaire

1. Level of Knowledge (**Low**)
2. Level of Use of Dispute Resolution (**Very Low**)
3. 2 Cases reported which required DBs
4. General Perception (**Positive**)
5. Use of DB is Part of MDBs Rules and Master Procurement Document

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What was learned after explaining DB's Role:

- ❖ Project Managers appreciated DBs approach
- ❖ Willingness to try DB mechanism
- ❖ Project Managers valued DB for:
 - **Lower Cost and their Predictability**
 - **Simplicity and user-friendly**
 - **Manageability and Time Control**

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Recommendations:

A. General

- ❑ DRBF to evaluate level of Use of DB in contracts financed by donors and national governments
- ❑ Share and capitalize on DB success stories
- ❑ Elucidate on (Success in implementing DB recommendations and their legal Implication)

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Recommendations:

A. General (cont.):

- ❑ Elaborate on Cases With and without DRBs {cost, time, management ... etc}
- ❑ Increase Use of Local Expertise (Nationals) in Africa **to lower costs**
- ❑ Seize momentum of conducive conditions within MDBs **(Ready to be exploited)**

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Recommendations:

B. MDBs

- ❑ DRBF to initiate formal dialogue with MDBs (possibly at the margin of the HoP Annual Meetings with FIDIC and CICA)
- ❑ Making information and data available to MDBs staff (paper form and web-based)
- ❑ Conduct training-sensitization meetings (e.g. AfDB one-day seminar-March 2008)

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Recommendations:

c. Borrowers

- Introduce Borrowers to DRBs through Sensitization, Training and Capacity Building
- Lobby to Include the Use of DRBs in the National Procurement and Contracting Codes

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Way Forward: Implementing Harmonized MPDs

1. Sensitize Implementers and build capacity
2. DRBF can provide a network of adjudicators from Africa and elsewhere
3. Provide information on time requirements, cost, etc of DBs for Local and International contracts
4. DRBF should play a proactive role to facilitate the use of DB using the new MPD
5. Liaise with FIDIC and CICA to enhance use of DB