

The Basic Law and Legal Personality of ADB

Presentation by
Arthur M. Mitchell, General Counsel
18 September 2006

The logo for the Asian Development Bank (ADB), consisting of the letters "ADB" in a white serif font on a dark blue square background.

ADB

Basic Law of ADB

Constituent treaty (constitution): Agreement Establishing the Asian Development Bank, i.e., the "Charter"

Other relevant documents:

- By-Laws
- Rules of Procedure of the Board of Governors/Board of Directors
- Headquarters Agreement between the ADB and the Philippine Government
- Host country agreements in countries where ADB Resident Missions and Representative Offices are located

ADB's Purpose

“The purpose of the Bank shall be to foster economic growth and co-operation in the region of Asia and the Far East (hereinafter referred to as the “region”), and to contribute to the acceleration of the process of economic development of the developing member countries in the region, collectively and individually.”

(Charter, Article I)

International Personality

Public international organizations can be regarded as possessing legal personality
(International Court of Justice [ICJ]).

“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”

(ICJ in its *Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*)

- Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, 1986
 - Provides legal framework for exercise of treaty-making power of international organizations
 - Follows closely the Vienna Convention of Law of Treaties between States, 1969 – in force
 - Not yet in force

Structure of ADB with reference to the Charter

Board of Governors, Board of Directors, and Management

- **Board of Governors – Article 28**

All powers of ADB invested in this Board, which can delegate any or all its powers to the Board of Directors except certain ones such as

- admitting new members
- approving the annual report
- electing the President & members of the Board of Directors

Structure of ADB with reference to the Charter

- **Board of Directors – Article 31**
 - Responsible for the direction of the general operations of ADB
 - Makes decisions on lending operations of ADB, e.g., loans and other investments; approves ADB's administrative budget; approves ADB policies

- **Management** – Articles 34 and 35
 - President and Vice-Presidents
 - President is appointed by the Board of Governors
 - Vice-Presidents are appointed by the Board of Directors on the recommendation of the President
 - President as legal representative of ADB underscores “executive” functions
 - President is also chair of the Board of Directors
 - As chief of staff of ADB, the President conducts, under the direction of the Board of Directors, the current business of ADB; responsible for organization and engagement of ADB staff

Operational Principles & Limitations

Important legal principles in ADB operations include

- ADB finances with the consent of the member country – Article 14 (iii)
- Need for study and written report before a loan is granted – Article 14 (iv)
- ADB acts as “lender of last resort” – Article 14 (v)
- Subject to exceptions, ADB must ensure that its investment proceeds from its ordinary operations or special operations are used for procurement in member countries – Article 14 (ix)

- Loans must be used to meet expenditures for the project as they are actually incurred – Article 14 (x)
- ADB must ensure that loan proceeds are used for purpose for which loan is granted and with due attention to considerations of economy and efficiency – Article 14 (xi)
- ADB must be guided by “sound banking principles” in its operations – Article 14 (xiv)
- ADB decisions on lending activities must be based only on economic considerations with noninterference in the political affairs of any member – Article 36 (2)

Immunities, Exemptions and Privileges (1)

- **Immunity from judicial proceedings (Article 50, Charter)**

ADB is immune from legal process except for borrowings, guaranteeing obligations, or buying and selling or underwriting sale of securities.

- **Immunity of assets (Article 51)**
- **Immunity of archives (Article 52)**

Immunities, Exemptions and Privileges (2)

- Freedom of assets from restrictions (Article 53)
- Privilege for communications (Article 54)
- Exemption from taxation (Article 56)
- Immunities and privileges of ADB personnel (Article 55)

Dispute Resolution

- **Lending operations for borrowers**, e.g., ADB's Special Operations Loan Regulations dated 1 January 2006, and Ordinary Operations Loan Regulations dated 1 July 2001
 - Arbitration provided
 - Law to be applied by the Arbitral Tribunal shall be public international law
- **Borrowings**, e.g., public offering of bond issue, typically application of law of the country where bonds are issued; and submission to local court jurisdiction

Law and Policy Reform

- Working with the Regional Departments to assess and assist on law and policy reform. Importance of the “rule of law” in the success and sustainability of development projects.
- OGC focus areas: Access to justice, WTO-related legal issues, anti-money laundering, competition law, pro-poor regulatory reform, and insolvency and secured transactions
- Requests for ADB assistance through the CSP/CSPU process
- LPR materials
 - 3 toolkits (3 CDs)
 - LPR Brochure
 - 2005 LPR Bulletin focusing on access to justice

Legal and judicial reform is important not only for legal development but also for development in other spheres such as economic development, political development and so on, and these in turn are also constitutive parts of development as a whole.

- Amartya Sen

ADB

For More Information

Arthur M. Mitchell:
Tel. No. (632) 632-4890

ADB