



B-327672

September 20, 2016

Congressional Committees

Subject: *Millennium Challenge Corporation—Availability of Appropriations for Compacts*

As directed in the Consolidated Appropriations Act, 2016¹ (Act), GAO is issuing this legal opinion concerning the availability of the Millennium Challenge Corporation's (MCC) appropriations for compacts with certain countries.

MCC receives appropriations to provide assistance to low income countries through compacts. The identification of countries that are eligible to receive assistance and the development of compacts with those countries follows a statutorily prescribed process, which may span several fiscal years. For these compacts, MCC obligates its appropriations at the time a compact enters into force—that is, near the end of the statutorily prescribed process. By law, however, identification of a country as a candidate country for purposes of eligibility necessarily occurs several years earlier at the beginning of this process, when MCC applies income status requirements that have been imposed upon enactment of MCC's appropriations for that fiscal year. We were asked about the continued purpose availability of appropriations for obligations for compacts with countries that experience a subsequent improvement in income status that would have rendered them ineligible for a compact at the beginning of the statutory process.

Because of the complex, somewhat lengthy statutory process for development of a compact with a country, we conclude that the country's income status at the beginning of the process determines the availability of MCC's appropriations for that country's compact. Although MCC receives no-year appropriations, the statutory scheme requires MCC to determine whether a country qualifies as a candidate country on a fiscal year basis. In addition, annual appropriations acts have imposed additional requirements on the process for compact selection and development.

Consistent with our practice for legal opinions, we contacted MCC to obtain additional factual information and its legal views on this matter. GAO, *Procedures*

¹ Pub. L. No. 114-113, div. K, title III, 129 Stat. 2242, 2723 (Dec. 18, 2015).

and Practices for Legal Decisions and Opinions, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP. MCC provided us with information and its legal views. Letter from Vice President, General Counsel and Corporate Secretary (Acting), MCC, to Managing Associate General Counsel, GAO (Mar. 3, 2016) (MCC Letter).

BACKGROUND

MCC's mission is to "provide United States assistance for global development . . . and to provide such assistance in a manner that promotes economic growth and the elimination of extreme poverty and strengthens good governance, economic freedom, and investments in people." 22 U.S.C. § 7701. One way in which MCC provides assistance to countries selected by its Board of Directors is through an MCC compact. MCC Letter, at 2.

Compacts are multi-year agreements for assistance authorized by the Millennium Challenge Act (MCA), 22 U.S.C. §§ 7701–7718. These compacts are international agreements designed to reduce poverty through economic growth achieved through shared, defined development objectives. MCC Letter, at 2. MCC compacts have ranged in size from \$65 to \$698 million and invest in a variety of sectors including infrastructure, agriculture and irrigation, land, education, health, financial services, and rule of law. *Id.* Each compact MCC enters into specifies the roles, responsibilities, and respective commitments of MCC and the partner country. *Id.*, at 2–3.

Process for MCC Compacts

MCC selects countries for these compacts pursuant to a specific statutory process and according to criteria set forth in the MCA and annual appropriations acts. The selection process consists of three main steps: (1) MCC identifies candidate countries; (2) MCC then determines whether candidate countries are eligible countries; and (3) MCC selects among eligible countries to enter into a compact. MCC Letter, at 3, 7. After selection, compact negotiations between MCC and the selected country may take place over the course of several fiscal years.

Step 1 – Identification of Candidate Countries

The MCA sets forth the criteria that a country must meet in order to qualify as a "candidate country." 22 U.S.C. § 7705. A country may not be identified as a candidate country unless it qualifies as either a low income country (LIC) or a lower middle income country (LMIC). Candidate countries include LICs or LMICs that meet certain conditions. MCC Letter, at 4. One condition involves the country's per

capita income.² *Id.* Section 606(b)(1) provides that, in addition to LICs “a country shall be a candidate country for purposes of eligibility for [FY] 2006 or a subsequent fiscal year if the country—(A) is classified as a [LMIC] in the then most recent edition of the World Development Report for Reconstruction and Development published by the International Bank for Reconstruction and Development and has an income greater than the historical ceiling for International Development Association eligibility for the fiscal year involved.” 22 U.S.C. § 7705(b). These countries are LMICs.³

Step 2 – Determination of Eligible Countries

From the candidate countries MCC has identified, MCC then determines which of these candidate countries meet the criteria to be an eligible country for a compact. The MCA requires MCC to determine eligible countries “for a fiscal year.” 22 U.S.C. § 7706; MCC Letter, at 4. The MCA directs MCC’s Board to make this determination based “to the maximum extent possible, upon objective and quantifiable indicators of a country’s demonstrated commitment to . . . [specific] criteria . . . , and shall, where appropriate, take into account and assess the role of women and girls.” 22 U.S.C. § 7706(a). The MCA specifies that a candidate country should be considered to be an eligible country for purposes of this section for the fiscal year if MCC’s Board determines that the country has demonstrated a commitment to just and democratic governance; economic freedom; and investments in the people of such country, particularly women and children.⁴ 22 U.S.C. § 7706(b). Indeed, the MCA provides

² The MCA provides that this determination is based in part on data from the International Bank for Reconstruction and Development. 22 U.S.C. § 7705(a). Congress sometimes amends the criteria in the annual appropriations act. *See, e.g.*, Pub. L. No. 114-113, 129 Stat. at 2723 (providing that notwithstanding 22 U.S.C. § 7705, a country shall be defined as a candidate country if, among other things, its per capita income is equal to or below certain annual thresholds set by the World Bank).

³ The income thresholds have sometimes been modified by the annual appropriations acts. *See, e.g.*, Pub. L. No. 114-113, 129 Stat. at 2723 (“Provided further, That notwithstanding section 606(b)(1) of the MCA . . . a country shall be a candidate country for purposes of eligibility for assistance for the fiscal year if the country has a per capita income equal to or below the World Bank’s lower middle income country threshold for the fiscal year and is not among the 75 lowest per capita income countries as identified by the World Bank; and the country meets the requirements of section 606(a)(1)(B) of the MCA”).

⁴ At least 90 days prior to the Board’s determination of eligible countries for the fiscal year, MCC must prepare and submit to the appropriate congressional committees a report containing a list of all candidate countries and publish the information in the Federal Register. 22 U.S.C. § 7707(a). MCC must also prepare and submit to the appropriate congressional committees a report on the eligibility criteria and methodology for the fiscal year at least 60 days prior to determining eligibility and
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that “[t]he criteria and methodology submitted by the Board to Congress and published in the Federal Register . . . with respect to a fiscal year shall remain fixed for purposes of eligibility determinations for such year.” 22 U.S.C. § 7706(d). The Board is, as appropriate, to review and modify the eligibility criteria and methodology in subsequent years. 22 U.S.C. § 7706(e).

Step 3 – Selection of Countries for a Compact

From these eligible countries, MCC then selects countries for a compact pursuant to section 607 of the MCA, 22 U.S.C. § 7706(c). Section 607(c) of the MCA provides:

“At the time the Board determines eligible countries under this section for a fiscal year, the Board shall select those eligible countries with respect to which the United States will initially seek to enter into a Millennium Challenge Compact pursuant to section 609 In selecting eligible countries . . . , the Board shall consider the following factors: (A) The extent to which the country clearly meets or exceeds the eligibility criteria[;] (B) The opportunity to reduce poverty and generate economic growth in the country[; and] (C) The availability of amounts to carry out this title.”

Development of Compacts with Selected Countries

Once the three steps above are complete and MCC has selected a country for a compact, MCC begins to develop the compact.⁵ MCC explains that once it selects a country for compact assistance, it may take multiple fiscal years to complete the development process and sign a compact. MCC Letter, at 6–7. MCC has prepared guidance that sets the target time for compact development at 27 months. *Id.*, at 7 n.25. MCC notes that the compact development process includes but is not limited to preliminary analysis, project development, and appraisal. *Id.*, at 6.

MCC records an obligation not at the time it signs a compact, but at the time that the compact enters into force.⁶ “Entry into force” is a term of art in international law.

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then notify the appropriate committees in the same manner no later than 5 days after the Board determines eligible countries. 22 U.S.C. §§ 7707(b), (d).

⁵ MCC must consult with the committees not later than 15 days prior to the start of negotiations of a compact. 22 U.S.C. § 7709(a); see, e.g., Pub. L. No. 114-113, 129 Stat. at 2722–23.

⁶ Recording an obligation at the time the compact enters into force is consistent with the requirements of the recording statute, because until that time, there is no firm, unconditional commitment on the part of the United States to provide assistance
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Here, entry into force does not occur automatically upon signature of the compact by the parties. *Id.*, at 7. MCC explains that it follows the Vienna Convention on the Law of Treaties regarding what constitutes entry into force, which provides that “[a] treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.”⁷ MCC Letter, at 8; Vienna Convention on the Law of Treaties art. 24, *opened for signature* May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331. MCC includes language in the compact specifying that the compact will enter into force on the date that MCC notifies the partner country that the conditions precedent to entry into force (as specified in the compact) have been met to MCC’s satisfaction.⁸ MCC Letter, at 8 n.35.

DISCUSSION

This opinion addresses a particular purpose question regarding the availability of MCC’s appropriations, that is, whether MCC’s appropriations are available for a compact with a country whose income status improves after it has been selected for a compact but before the compact enters into force. Congress enacts appropriations to MCC to provide assistance, through compacts, to LICs and LMICs. Sometimes, by the time MCC obligates its appropriation for a compact, the compact country’s income status has improved and it is no longer a LIC or LMIC.

This issue arises because of the unique statutory scheme governing the compact selection and development process. The identification of countries that are eligible to receive assistance and the development of compacts with those countries may span several fiscal years. For these compacts, MCC obligates its appropriations at the time a compact enters into force—that is, near the end of the statutorily prescribed process. By law, however, identification of a country as a candidate country for purposes of eligibility necessarily occurs several years earlier at the

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funds to a selected country. 31 U.S.C. § 1501(a)(5)(B); see 50 Comp. Gen. 857 (1971).

⁷ Although the United States signed the Vienna Convention on the Law of Treaties on April 24, 1970, the U.S. Senate has not given its advice and consent to the treaty. The United States, however, considers many of the provisions to constitute customary international law on the law of treaties. See <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Sept. 16, 2016).

⁸ When the compact enters into force, the implementation period begins. The MCA provides that the duration of a compact shall not exceed five years. 22 U.S.C. § 7708(j). The MCA and appropriations acts impose notification requirements on MCC related to the end of the compact development process. See 22 U.S.C. § 7709(b); MCC Letter, at 7; see, e.g., Pub. L. No. 114-113, 129 Stat. at 2722–23.

beginning of this process, when MCC applies income status requirements that have been imposed upon enactment of MCC's appropriations for that fiscal year.

As discussed below, we conclude that MCC's appropriations, including no-year funds appropriated in a prior year, are available for obligation upon entry into force notwithstanding a change in income status. In our view, because of the nature of the statutory process and the length of time needed to satisfy this process, the availability of MCC's funds for the purposes relating to a country's income status is measured at the beginning of the process, at the time the country is identified as a candidate country, rather than upon entry into force.

Effect of a Change in Income Status

Typically, the appropriation for MCC enacts an amount "[f]or necessary expenses to carry out the provisions of the Millennium Challenge Act of 2003."⁹ We must therefore turn to the provisions of the MCA to determine the purposes for which MCC's appropriations must be used.

When interpreting the MCA, we begin by looking at the language of the statute itself. See B-325630, Sept. 30, 2014. Under section 605 of the MCA, MCC may provide assistance to a country that enters into an MCC compact "in the form of grants, cooperative agreements, or contracts to or with eligible entities," defined as "(1) the national government of *the eligible country*; (2) regional or local governmental units of the country; or (3) a nongovernmental organization or private entity." 22 U.S.C. §§ 7704(b), (c) (emphasis added). The MCA then sets forth a detailed process for determining eligible countries, the first step of which is determining whether countries meet the criteria to be designated as a candidate country for a fiscal year. 22 U.S.C. § 7705 ("A country shall be a candidate country for purposes of eligibility for assistance for fiscal year 2005 or a subsequent fiscal year if...").

The notion of a "fiscal year" in the MCA is significant here. The peculiar statutory language of the MCA sets forth a detailed process through which MCC is to select countries for compacts, and repeatedly provides that the determination and selection of countries is for a "fiscal year." Congress may impose additional and varied requirements on the no-year money appropriated in any fiscal year. Development of the compact with a selected country may take several years, but the time of identification as a candidate country determines the availability of funds upon entry into force, even though entry into force may occur several years later. The statutes here compel this unique result.

⁹ See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. at 2722; Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. J, title III, 128 Stat. 2130, 2590 (Dec. 16, 2014); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. K, title III, 128 Stat. 5, 481 (Jan. 17, 2014).

There is no requirement in the MCA that MCC reevaluate its candidacy decision for a fiscal year at each stage of the compact development and negotiation process. Revisiting a country's candidacy status at each stage of the process would undercut the statutory scheme. A contextual reading of the MCA as a whole indicates that Congress envisioned this to be an iterative process that spans more than one fiscal year.

Availability of No-Year Funds for MCC Compacts

It appears that MCC, in its response to us, may have viewed the no-year character of its funds as paramount to the issue presented.¹⁰ At issue in this opinion, however, is not the time availability of MCC's appropriations. Rather, it is, as addressed above, the purpose availability at the point of obligation (that is, when a compact enters into force) when a selected country's income status has improved.

With regard to the use of no-year funds appropriated to MCC in prior years, we note that these funds are not subject to the *bona fide* needs rule and are available for any need, whether past, present or future. B-326945, Sept. 28, 2015. Therefore, MCC can use any available no-year funds for compacts with countries that were properly selected for compacts pursuant to the terms of the MCA. Thus, any currently available funds (whether appropriated in the fiscal year the compact enters into force or before) would be available for a compact with a country that enters into force in that fiscal year, subject to any restrictions upon the availability of the no-year funds for a given fiscal year. B-326945.

CONCLUSION

MCC's currently available appropriations, including no-year funds appropriated in a prior year, are available for the purpose of obligation for a compact, upon entry into force, with a country that was properly identified as a candidate country, determined to be an eligible country, and selected for a compact for a fiscal year pursuant to the MCA. This conclusion applies even where the country may have experienced a subsequent change in income status, before the compact enters into force, to an income status that, otherwise, would not be entitled to assistance. MCC is not required to reevaluate the candidacy decision and redetermine whether the country would meet the criteria for a candidate country in place at the time the compact enters into force.

¹⁰ A no-year appropriation is an appropriation that is available for an unlimited period of time. These funds are available until expended and available for the needs of any fiscal year. B-326945, Sept. 28, 2015. MCC indicated that it tracks funds in order to comply with any restrictions or limitations that may apply to no-year funds appropriated in a given fiscal year. MCC Letter, at 12.

If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853 or Julie Matta, Assistant General Counsel, at (202) 512-4023.

A handwritten signature in cursive script, appearing to read "Thomas H. Amstutz".

for

Susan A. Poling
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List of Congressional Committees

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