

AI Appeals Board Decision

Case No. AI3613

Three documents of the Task Force on Private Foreign Investment of the Joint Development Committee of the World Bank and International Monetary Fund

(Decision dated December 3, 2015)

Decision of the AI Appeals Board

1. The AI Appeals Board (“AIB”) admits the application in its entirety, reverses the AI Committee (AIC)’s decision, and orders disclosure of the requested documents, for the following reasons:

Background

2. On January 9, 2015, the Bank received a public access request (the request) for three documents related to the Task Force on Private Foreign Investment of the Joint Development Committee of the Bank and the IMF: (a) M. Narasimham, “Performance Criteria Stipulated by Host Countries” DC/TF/PFI/80-1 (January 8, 1980); (b) C. Fred Bergsten, “Host Country Policies: Performance Requirements” DC/TF/PFI/80-3 (January 25, 1980); and (c) David Robertson, “Investment Incentives in Home and Host Countries” DC/TF/PFI/80-5 (January 25, 1980) (hereinafter referred to as the “documents”).
3. On January 15, 2015, the Bank denied access to the documents based on the “Information Provided by Member Countries or Third Parties in Confidence” exception contained within section the Bank’s Policy on Access to Information (the AI Policy).
4. On January 16, 2015, the Bank received an appeal challenging the denial. The appeal asserted both a “violation of policy” and a “public interest” case for disclosure.
5. On January 20, 2015, the Secretariat to the Access to Information Committee (AIC), (to whom the appeal against the original denial was to be heard), sought the Bank’s Corporate Secretariat (SEC) assistance in contacting the secretariat for the Development Committee. The SEC let it be known that it supported the disclosure of the Documents “provided the IMF gives its written concurrence to the disclosure.”
6. Thereafter, a number of exchanges of correspondence between the Bank and the IMF ensued. It is fair to say the Bank was persistent in seeking a formal response from the IMF, which was initially not forthcoming. Finally, on April 3, 2015, the IMF Legal Department replied stated that “we are not in a position at this time to consent to the disclosure of Development Committee (DC) documents since, as is well known to your colleagues, we do not yet have a policy on such disclosure.”

7. On May 7, 2015, the AIC considered the appeal and found that the original application of the “Information Provided by Member Countries or Third Parties in Confidence” exception was erroneous, but that the appeal was not properly before the AIC in any case. The AIC dismissed the appeal on the basis that the AIC did not have authority to consider the appeal because pursuant to the AI Policy interpretation dated February 27, 2014 (“Application of the Access to Information Policy to the Records of the Board of Governors”), the declassification and disclosure process set out in the AI Policy cannot be applied to the nonpublic records of the Board of Governors (BoG).
8. On May 29, 2015, the AIC’s decision on appeal was transmitted to the requester who duly appealed to the AIB on the basis of three grounds: one, that the request falls within the scope of the AI Policy and, hence, within the jurisdiction of the AIC (contrary to its finding), including a contestation of the AIC’s finding that the documents are records of the BoG; two, that non-disclosure would be an improper or unreasonable restriction; three, that the public interest over-ride should have been exercised in any case to permit disclosure.
9. In determining this case, we interviewed World Bank staff of the SEC, ECR and Legal, which was of great assistance to us.

The Issues:

10. Our responsibility is to apply the AI Policy within the bounds of our jurisdiction, which is confined to appeals that assert that the Bank has violated its own policy. The issues that we must consider and determine in this case are the following:
 - What is the access to information policy rule that applies to this request and, specifically does the July 2015 policy adopted regarding the BoG records apply retroactively?
 - Is there any exemption that applies that should properly preclude disclosure of the documents?
 - Is IMF approval required for the disclosure of the documents requested?
11. The AI Policy was revised on July 1, 2015. The revised AI Policy is silent on the subject of retroactivity. For the present appeal, it is necessary for us to determine this issue. Under the Operating Procedures of the Access to Information Appeals Board:

In fulfilling its mandate the AI Appeals Board must read and apply the Policy as it is written - using the ordinary meaning of the words, absent an express interpretation to the contrary issued by the AIC or the Board – *or as the Policy has been amended by the Board* – or interpreted by issuance of an express interpretation by the AIC or the Board, when relevant. (emphasis added).
12. An ‘ordinary’ principle of interpretation would say that if the rule-making body had intended the revisions to not apply retroactively, then it would have said so expressly in the revised provisions. A purposive interpretative approach encourages us to adopt an interpretation in favour of disclosure – the underlying policy principle that guides the AI Policy. Whether we

were to adopt an ordinary or a purposive approach to statutory interpretation, our conclusion would be the same: the relevant provisions apply retroactively.

13. Accordingly, our view is that in considering whether the AI policy was violated, we must apply the revised AI policy provisions. The AIB mandate and the relevant operating procedures for the AIB, requires application of the policy that is currently in existence. Hence, the appeal is properly before us and the July 1, 2015 policy applies.
14. The appellant contests whether the documents are BoG documents. The documents were prepared for the purpose of a task force of the Development Committee. The Development Committee is a joint ministerial committee of the Boards of Governors of the Bank and the IMF. Accordingly, we find that the documents are clearly documents or records of the BoG.
15. Section III.B.3 of the AI Policy states that “Board of Governors Documents and Records relating to or arising from meetings held jointly with the IMF may be made publicly available if and when the IMF provides its written approval to disclose”. However, the provision then proceeds to state that certain documents that are “routinely available from the Bank are posted on the Bank’s external website:...(e) ...reports, papers, notes and other documents prepared by Bank staff for the meetings of the Development Committee”.
16. We understand that it is now routine practice for all Development Committee documents, including background documents, to be published ahead of the Development Committee bi-annual meetings. The three documents requested by the appellant are reports or papers prepared for the Development Committee.
17. Accordingly, the documents fall outside of the requirement contained in the first part of Section III.B.3, namely, that BoG “Documents and Records relating to or arising from meetings held jointly with the IMF may be made publicly available if and when the IMF provides its written approval to disclose.”
18. No other exemption can properly apply to the documents. In this, we agree with the AIC’s finding that the Bank had “no objection to disclosing the Documents” (paragraph 7(b) of the AIC decision).

AI Appeals Board Findings:

19. The revised AI Policy applies.
20. The requested documents are documents or records of the Board of Governors.
21. Under the AI Policy the documents are subject to routine disclosure. The written approval of the IMF for disclosure of the documents is not required.
22. The requested documents should be disclosed to the appellant.
23. The AI Appeals Board’s decision is final.