Aidspan
Independent observer of the Global Fund

The Elephant and the Mouse

by Bernard Rivers

I was recently invited by a university in the UK to serve as a visiting fellow for most of this year while conducting research on the Global Fund. I have to raise my own funding for this project, so the only advantage of the fellowship is that it provides a label to hang round my neck. But that's exactly what I wanted, so I accepted with thanks.

Subsequently, however, the university asked me to sign a "standard" legal agreement specifying that all results from my work over the next three years will be owned by the university, and that I need the university's permission before I submit for publication anything arising from the project.

When I protested, it was explained that this is the agreement that the university always uses in such situations, and that the wording cannot be modified. The university attempted to reassure me by adding that the wording "is subject to interpretation" – which, as I understand it, meant that the university would not enforce the more unreasonable terms.

The agreement made me feel as though the university is an elephant and I am a mouse, with the elephant giving itself the right to stomp on the mouse – and then saying, "But don't worry, we won't actually do that."

I relate this anecdote because I think that the Global Fund has often treated its principal recipients (PRs) very similarly. The Global Fund is the elephant; the PR is the mouse.

For each PR, this elephant–mouse imbalance starts as soon as the PR's first grant agreement is "negotiated." This has never been a negotiation between equals; it has essentially been a case of the Secretariat saying "sign it or don't become a PR."

The standard Global Fund grant agreement has been in place for ten years. The most elephant-like clause is Article 27, which says

"The Global Fund may require the Principal Recipient to immediately refund to the Global Fund any disbursement of the Grant funds [if] there has been a breach by the Principal Recipient of any provision of this Agreement."

This means that the PR can be required to reimburse any or all of the grant funds it has received if it is in breach in any way of any provision of the agreement. This clause is fine if the PR is proven to have engaged in fraud. But the clause, as written, can also be applied in the case of much lesser offences.

I can hear the Fund protesting, "But don't worry, we won't actually do that."

But, at the urging of the Office of the Inspector General (OIG), the Fund has done exactly that, many times. Arising from its audits and investigations over the years, the OIG has used Article 27 as its basis for recommending to the Secretariat that 33 PRs be required to reimburse to the Global Fund a total of $92 million. Of this, $38 million had to be reimbursed because the PRs had incurred expenditures for which supporting documentation was either missing or inadequate, even though the actual expenditures may have been perfectly appropriate. (See the table available here.) Sometimes, the documentation was deemed "inadequate" simply because it consisted of photocopies rather than originals.

Until 2012, the Secretariat consistently, and without public complaint, accepted the OIG's recommendation that the Fund seek such reimbursements from the PRs.

When documentation confirming the expenditure was missing or imperfect, the key question that the OIG should have asked was, "Was the activity actually carried out? Were benefits derived?" It seems to me that when the answer was Yes, the PRs should have been reprimanded for the missing or poor documentation, but they should not have been required to reimburse the funds, as they were – at least until 2012. (Of course, any reimbursed money was then used by the Global Fund for other grants; but that was not much consolation to the countries that had to make the reimbursements.)

In its most recent reports, the OIG has not said how much money should be reimbursed; instead, it has proposed that the Secretariat look into the matter and make its own decision. But this does not change the determinations made by the OIG in the 33 earlier cases.

It would help if there were a process whereby PRs facing what they felt to be unreasonable demands by the OIG for reimbursement could ask an independent mediator to review the case and propose a reasonable solution. The Global Fund Board decided in November 2011 that the Fund should establish a Voluntary Dispute Resolution Process to resolve OIG-related disputes. But nearly 18 months later, the process is still not in place. (There is a separate arbitration process that can be used. But it is hugely expensive for the PR, because the grant agreement says that the arbitration process must take place in Switzerland.)

Two events late last year suggested that the Fund may be moving towards less elephant-like behaviour. First, three years after the OIG determined that a PR in the Philippines should reimburse $1.8 million to the Fund and that the PR's grant agreements should be terminated, the Global Fund reversed this determination and welcomed the PR back into the fold. No reason was given publicly, but Global Fund sources say that the Fund had concluded that it could not prove that the money being claimed had indeed

been spent on unauthorised activities as the OIG had said. And second, the Fund fired the head of the OIG for performance that was “unsatisfactory.”

Where does this leave the countries that have not yet refunded the money demanded by the OIG? And, for that matter, where does it leave the countries that have refunded the money but might now wish they had not?

In July 2012, the Secretariat set up a Recoveries Committee to look into the 33 cases where the OIG has determined that PRs must reimburse specific amounts of money to the Global Fund. At first, this committee played a rather passive role, working on the assumption that each of the OIG’s determinations was valid unless the PR in question approached it with information that led the committee to conclude otherwise. But Seth Faison, the Fund’s Communications Director, said on 6 March 2013 that Mark Dybul, the new Executive Director, recently directed the Recoveries Committee to work “in a more accelerated way.” Mr Faison added that the Committee is now “engaging with each” of the 33 PRs, seeking “to come to solutions that properly reflect both sides of the story”; that the Voluntary Dispute Resolution Process will be put in place; and that the OIG welcomes this new approach.

Mr Faison also said that with the launch on 28 February 2013 of the new funding model, there is now “a cooperative approach and dialogue” in the relationship between the Global Fund and PRs.

Let’s hope so. But the Global Fund is still going to have a very hard time retroactively imposing consistent and fair standards as to which of the 33 PRs should make reimbursements – when the OIG’s own standards were, until 2012, rarely consistent and sometimes unfair.

Furthermore, the Global Fund still needs to revise its hundreds of grant agreements with PRs so that they are less imbalanced. Unless this is done, there is a danger that the Fund will still sometimes behave like an elephant, and the mice will continue to live in fear.

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