

MEMORANDUM

To : Dominique Hempel  
From : Edmond Tavernier  
Date : March 28, 2003  
Re : **The Global Fund / Board's Decision Making between Meetings**

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As per your kind instructions of March 25, 2003, we reviewed the Section 9.2, in pages 13/52 of the Report of the Third Board Meeting in light with the bylaws of the Global Fund to Fight Aids, Tuberculosis and Malaria (respectively the "Bylaws" and the "Global Fund" or the "Foundation").

As we understand, the said section proposes to introduce a new paragraph 3.2 in the Board Operating Procedure ("**New Article 3.2 BOP**"). The wording of New Article 3.2 BOP would be: "*The Board Chair/Vice Chair are empowered to make decisions on matters within their discretion between Board meetings. These decisions will be presented to the Board at its next meeting. [...]*"

**I. OUR CONCLUSIONS**

1. We are of the opinion that New Article 3.2 BOP is not in contradiction with the Bylaws provided that such a decision making process is used on an exceptional basis, for unforeseen situations which require a prompt reaction on the Foundation's part, and in situations where it would not be possible to obtain an immediate reaction through a normal vote of the entire Board, including a vote by way of circulating decisions.
2. However, in order to avoid situations where the authority of the Chair or the Vice Chair in relation to a specific decision based on New Article 3.2 BOP could possibly be questioned, we are of the opinion and strongly recommend that the power of decision referred to in this Section be expressly set forth in the Bylaws as well as the definition of what should be regarded as being within the Chair and Vice Chair's "discretion" mentioned in the same Section.



### 3. DISCUSSION

4. Article 13 (1) Bylaws reads as follows:

*"The Foundation Board shall be the supreme governing body of the Foundation. It shall possess the highest and most extensive authority concerning the administration of the Foundation. The Foundation Board shall provide the bylaws and internal guidelines and procedures necessary for the administration and management of the Foundation."*

5. Article 13 (3) Bylaws states:

*"The Foundation Board may delegate to the Secretariat or to any committee it may deem appropriate part of its powers for management purposes of the current business in conformity with the internal guidelines and procedures."*

6. Article 13 (5) Bylaws reads as follows:

*"The Foundation Board shall designate persons having the authority to commit the Foundation and determine the type of signing authority."*

7. On the basis of article 13 (1) Bylaws and in its capacity of supreme governing body, we believe that the Board is entitled to adopt decisions such as the decision to enact New Article 3.2 BOP and this both in terms of form and substance. According to article 13 (5) Bylaws, the Board is also entitled to appoint persons having the authority to commit the Foundation. In our opinion, this article 13 (5) could be regarded as an additional authority for New Article 3.2 BOP whenever Chair and Vice Chair's actions which would be performed on this basis would result in decisions committing the Foundation. However, with regard to the rather strict voting procedures set forth in the Bylaws and considering the possibility for the Board to take decisions by way of circulating decision (art. 15 Bylaws), the authority of the Chair and the Vice Chair as provided for by New Article 3.2 BOP should be exceptional and only dedicated to unforeseen situations which demand an immediate reaction on the Foundation's part.

8. Article 13 (3) Bylaws deals with delegation of Board's powers but refers to the Secretariat and committees exclusively with no mention of either the Chair or the Vice Chair. One could therefore argue that article 13 (3) Bylaws prohibits delegation to any other persons than those specified therein and requires that any decision binding the Foundation be taken by the Board in its entirety unless said decision is taken within the scope of a delegation in the meaning of the said article 13 (3). We believe that this argument would be in contradiction with the extensive power entrusted to the Board by article 13 (1) Bylaws and with the power to designate the



persons who have the authority to bind the Foundation as provided for by article 13 (5) Bylaws. We further understand that New Article 3.2 BOP is not to be regarded as a delegation of power as such since it merely indicates that a decision taken by the Chair or the Vice Chair pursuant to this Section is to be regarded as a decision of the Board itself.

9. In any case, in order to avoid any discussions about the authority of the decisions which might be taken by the Chair or the Vice Chair on the basis of New Article 3.2 BOP, we would recommend that this power of decision be expressly referred to in the Bylaws, namely in article 12.
10. In order to avoid possible contradictory decisions, New Article 3.2 BOP should be amended so as to entrust either the Chair only, or the Chair and the Vice Chair acting together, with such power of decision.
11. We would also like to emphasize that New Article 3.2 BOP does not define precisely what falls within the Chair or Vice Chair's "discretion". Therefore, specific decisions taken by the Chair or the Vice Chair are exposed to be challenged on the basis that the said decisions were not within such discretion. We would therefore recommend that this "discretion" be precisely defined in the Bylaws. In that respect, we would recommend that the Bylaws set forth exhaustively the cases where such decisions are allowed. We realize, however, that such catalogue is very difficult to establish. The discretion could at least be defined as being limited to the day-to-day business of the Foundation.
12. In light of the foregoing, article 12 Bylaws could include a new paragraph 2 which would read:

*"The Chair and the Vice Chair acting together are empowered to take on behalf of the Board any decision which they deem necessary in relation to the day-to-day business of the Foundation. They shall report on each of such decisions at the very next Board meeting."*

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We hope that the foregoing will be of assistance. Should you need further information or like to discuss the matter, please do not hesitate to contact us.

Best regards.

TAVERNIER TSCHANZ