



M E M O R A N D U M

To : Dominique Hempel
From : Edmond Tavernier
Date : March 25, 2003
Re : **The Liability of the Foundation and the personal liability of its bodies members**

As per your kind instructions, we endeavored to state below the scope and extent of the potential liability of The Global Fund to Fight Aids Tuberculosis and Malaria vis-à-vis third persons by reason of its legal nature as a foundation under Swiss law.

We also summarized below the conditions under which, according to Swiss law, a member of a body of this foundation might be held personally liable vis-à-vis third parties by reason of actions taken in such capacity on behalf of the said foundation.

This memorandum is based upon the laws of Switzerland exclusively. We have based our examinations on the provisions of Swiss law as currently applied by Swiss courts and as, in our judgment, necessary or appropriate for the purpose of this memorandum.

We do not purport to be qualified to pass upon, and we express no opinion herein as to, the laws of any jurisdiction other than those of Switzerland.

Due to the composition of its bodies and activities, specific situations which might involve a representative of the above-mentioned foundation are likely to encompass aspects of international law. Therefore, the issue of the applicable law and the competent jurisdiction will have to be analyzed on a case-by-case basis. For the purpose of the present memorandum, however, we have assumed that Swiss substantive law is applicable.



I. FACTS

1. The Global Fund to Fight Aids Tuberculosis and Malaria ("**The Global Fund**" or the "**Foundation**") is a Geneva-based foundation which was incorporated pursuant to a public deed dated January 22, 2002 and registered in the Geneva Trade Register on January 24, 2002.
2. According to article 2 of its bylaws, the purpose of the Foundation is *'to attract, manage and disburse resources through a new public-private foundation that will make a sustainable and significant contribution to the reduction of infections, illness and death, thereby mitigating the impact caused by HIV/AIDS, tuberculosis and malaria in countries in need, and contributing to poverty reduction as part of the Millenium Development Goals established by the United Nations.'*
3. The Global Fund is under the supervisory authority of the Federal Department for Internal Affairs in Berne (the "**Supervisory Authority**") which confirmed its authority by decision dated January 30, 2002.
4. During its meeting of January 28-29, 2002, the board of the Foundation (the "**Board**") adopted a set of revised bylaws which were approved by the Supervisory Authority in its decision of May 14, 2002 (the "**Bylaws**").
5. The Board is also governed by a set of operating procedures which were adopted at this same meeting of January 29, 2002 (the "**Board Operating Procedures**").
6. According to the Bylaws, the bodies of the Foundation are: (i) the Partnership Forum, (ii) the Board, (iii) the Secretariat, (iv) the Technical Review Panel and (iv) the Auditing Body; the latter still needs to be appointed (the "**Bodies**").
7. The Board consists of eighteen voting members and five nonvoting members (collectively, the "**Board Members**" and individually the "**Board Member**").
8. The voting members consist of seven representatives from developing countries, seven representatives from donors and four representatives from civil society/private sector.
9. The nonvoting members consist of (i) one representative of a non-governmental organization ("**NGO**") who is a person living with HIV/AIDS or from a community living with tuberculosis or malaria, (ii) one representative from the World Health Organization (the "**WHO**"), (iii) one representative from the United Nations Program on HIV/AIDS, (iv) one representative from the World Bank (hereinafter also referred to as the "**Trustee**") and (v) a Swiss citizen living in Switzerland.



10. Each above-mentioned membership group selects its member to serve on the Board for a two-year period. Each member actually serves as representative of his constituency. The Board Members select a chair and a vice chair (the "**Chair**" and the "**Vice Chair**").
11. The Chair and the Vice Chair of the Board as well as the executive director of the Secretariat have been registered with the Trade Register of Geneva and have the authority to bind The Global Fund by their sole signature. Pursuant to requirements of the Supervisory Authority, an individual who is to be a Swiss citizen domiciled in Switzerland has to have the same signatory authority.
12. The Secretariat is responsible for managing the day-to-day operations of the Foundation. The head of the Secretariat is the executive director (the "**Executive Director**"). As of today, the members of the Secretariat are formally WHO's employees.
13. According to article 17 of the Board Operating Procedures, the Chair is expected to work closely with the Executive Director to carry out the day-to-day business of the Board.
14. On May 24, 2002, the Foundation entered with the WHO into a service agreement according to which WHO is to provide the Foundation with services of an administrative nature (the "**Administrative Agreement**"). According to article 2.4 of the Administrative Agreement, the WHO has agreed to make no distinction between WHO staff assigned to the Secretariat and other WHO staff. We understand that, pursuant to this article 2.4, WHO has made sure that members of the Secretariat enjoy the same immunity of jurisdiction as that provided to WHO staff.
15. Besides, all the funds to be dedicated by the Foundation to specific projects are held in trust by the World Bank in accordance with the terms and conditions of a certain trust agreement dated May 23, 2002 entered into by and between the Foundation and the World Bank (the "**Trust Agreement**").
16. On the basis of the conversations we had with you, we understand that, as a rule, the Foundation acts according to the following scheme :
 - In response to a Call for Proposals for The Global Fund, Country Coordinating Mechanisms ("**CCM**"), which are organized with the participation of public and private organizations involved in fighting the three diseases in the affected countries, and/or other entities, prepare proposals related to specific projects and submit them for review and approval for funding by the Foundation.
 - Proposals are submitted to the Secretariat of The Global Fund ("**Secretariat**") according to The Global Fund Guidelines for Proposals (the "**Guidelines**") as



published and regularly adapted by the Secretariat. The Secretariat forwards eligible proposals to the Technical Review Panel for review.

- The Technical Review Panel then submits its recommendations to the Board.
- Should the Board accept to fund any given proposal, then a grant agreement is to be concluded between the Foundation, acting through the Secretariat, and the organism which, according to the accepted proposal, is designated to receive the funds (the "**Principal Recipient**"). The parties to the grant agreement are currently, on the one hand, the Principal Recipient and, on the other hand, The Global Fund. The Principal Recipient is free to delegate the implementation of the accepted proposal to sub-recipients (the "**Sub-Recipient**"). In case of such a delegation, the Principal Recipient is solely responsible for the Sub-Recipients.
- The WHO, acting "in support of" the Global Fund, entrusts specific entities, the "**Local Fund Agents**" with the task of assessing the financial management and systems of the Local Fund Agent and assisting the agent in preparing the implementation of the proposal. For this purpose, the WHO, acting "in support of" the Global Fund, enters into a general mandate agreement with each of the Local Fund Agents (the "**LFA Framework Contract**"); in relation to a specific project, the WHO, still acting "in support of" the Global Fund, delivers a specific work order to the relevant Local Fund Agent (the "**Work Order**"). Both the general mandate agreement and the specific work order are governed by Swiss law whenever the Local Fund Agent is an entity of private law and not a state body. The parties to these contracts are The Global Fund and the WHO, on the one hand, and the Local Fund Agent, on the other hand.
- At its fourth Board Meeting, The Global Fund Board decided that a so-called Internal Appeal Mechanism should be introduced in order to provide applicants with the right to have their application reconsidered, this right of reconsideration being the sole recourse available. The Internal Appeal Mechanism will enter into force upon the adoption of its Rules by the Chair and Vice Chair and by the publication of these Rules on the Internet site of The Global Fund. The Internal Appeal Procedure encompasses (i) an assessment and recommendation by the so-called Appeal Panel and (ii) a final decision by the Board.
- Grants are granted on a discretionary basis and subject to availability of the funds for the proposal concerned.



II. THE QUESTIONS

17. Based on the facts as briefly summarized above you have asked us to examine the following questions:
1. Whether The Global Fund is liable toward third parties to the same extent as any other foundation of Swiss private law ? In particular, whether the Foundation's assets are subject to enforcement's right of creditors ?
 2. Under which conditions a member of a specific body of the Foundation might be personally held liable vis-à-vis third persons for actions taken when acting in such capacity as member of one of the Foundation's bodies ?
 3. Whether the immunity which certain of the Board members and the members of the Secretariat enjoy (pursuant to their position within the administration of their country or organization and, for the members of the Secretariat, pursuant to their position of WHO staff members) provide them with some kind of protection against claims made by third parties with regard to their personal liability as referred to at question 2 above ?
18. At this stage, you have asked us to limit our examination to the aforesaid questions 1 and 2. We understand that the question 3 above is to be addressed by the Swiss federal administration.

III. OUR CONCLUSIONS

19. The Global Fund is liable towards third parties to the same extent as any other Swiss private foundation.
20. As a legal entity duly registered with the Trade Register, The Global Fund is subject to bankruptcy proceedings.
21. However, we are of the opinion that the money held in trust pursuant to the Trust Agreement would not be affected by possible bankruptcy proceedings involving the Foundation. Bankruptcy proceedings involving the Foundation would only affect The Global Fund's claim arising from the Trust Agreement and pertaining to the use of these funds.
22. An individual member of one of the Foundation's bodies as set forth in the Bylaws would incur a personal liability for torts only if it were established that such individual, acting purposely or by negligence, infringed personally a provision of law or violated an absolute



right of a third person, and doing so, caused damages. The mere fact of being a member of one of the Foundation's bodies is therefore not sufficient in itself to trigger the personal liability of a member vis-à-vis any third persons who might have suffered a prejudice in relation to The Global Fund's activities. In any event, with regard to the above-mentioned question 3, one should analyze whether the immunity which, as we understand, certain members of the Board and the members of the Secretariat enjoy, could successfully be opposed to a personal liability claim for actions taken by these persons when acting as Board Members or as members of the Secretariat.

IV. DISCUSSION

1. Extent of the liability of The Global Fund vis-à-vis third persons

1.1. The Foundation is engaged by the acts of its bodies

23. The Global Fund was incorporated as a Swiss foundation within the meaning of article 80 *et seq* of the Swiss Civil Code ("CC"). Except for specific cases which are of no relevance in the case of The Global Fund, a foundation exists as a legal entity upon its registration in the trade register (see Hans Michael RIEMER, Die Stiftungen, Systematischer Teil, Berner Kommentar, A.3, T.III, ad art. 81 p. 450 ch. 105; Harold GRÜNINGER, Schweizerisches Zivilgesetzbuch I, Basler Kommentar, Art. 1-359 ZGB, ad art. 81 p. 510 par. 25).
24. According to article 55 (2) CC, and as with any other Swiss legal entity, a foundation is bound by the acts of its bodies. Such bodies are not only those defined in the Bylaws, but include whoever *de facto* is in charge of effectively running the entity and participates in a decisive manner to the entity's decision-making process (see GRÜNINGER, *op. cit.* ad art. 54/55 p. 377 par. 12 *et seq.*; RIEMER, Allgemeine Bestimmungen, Systematischer Teil und Kommentar zu Art. 52-59 ZGB, in Berner Kommentar, B.I, A.3, T.I (hereinafter "RIEMER art. 52-59"), p. 144 par. 28). A body will bind a foundation whenever it acts in such capacity, as opposed to actions taken in the capacity of a private person (RIEMER, art. 52-59, p. 148 ch. 35).
25. According to article 39 (12) of the Federal Statute on Debt Collection and Bankruptcy, a foundation is subject to bankruptcy proceedings (see GRÜNINGER, *op. cit.* ad art. 81 p. 510 par. 25). A foundation, however, does not fall within the scope of bankruptcy proceedings if such foundation is not obliged to be registered in the trade register by virtue of article 55 (2) CC (see Pierre-Robert GILLIÉRON, Commentaire de la loi fédérale sur la poursuite pour dettes et la faillite, articles 1-88, 1999, ad art. 39 p. 707 par. 52). These exceptions are exhaustively set forth in article 55 par. 2 CC. They refer to the so-called family foundations and church foundations (see art. 55 (2) CC).



26. In the instant matter, The Global Fund exists since its registration in the Trade Register of Geneva, i.e. January 24, 2002.
27. Since that date, The Global Fund is by operation of law bound by the acts carried out by any of its bodies. The bodies set forth in the Bylaws are certainly empowered to engage The Global Fund by their acts. Although not defined in the Bylaws as being a body of The Global Fund, an individual or an entity may bind this foundation by its actions whenever such individual or entity is *de facto* in charge of effectively running The Global Fund and participates in a decisive manner to its decision-making process. Persons registered in the Trade Register as having the authority to engage The Global Fund by their sole signature (mainly the Chair, the Vice Chair and the Executive Director) are bodies of the Foundations. According to the information at our disposal, we have not been in a position to identify further individuals or entity which might be regarded as a body of The Global Fund.
28. One could argue that the Global Fund should not be bound by actions of members of the Secretariat to the extent that said members are WHO's employees, in particular for any action taken in the context of the LFA Framework Contracts or any Work Order related thereto since it is only the WHO which is party to the said agreements. Such an argument would aim at attributing the actions of the Secretariat members to the WHO with the purpose of enjoying the immunities attached to this organization. We believe that this argument would not prevail.
29. Indeed, with regard to the definition of a foundation's body which is based on an assessment of the actual involvement of the body in the decision-making process rather than on formal criteria (see above, par. 24), a person does not need to be a formal employee of a foundation in order to be regarded as a body of such a foundation. In other words, their capacity as WHO's employees does not prevent members of the Secretariat from being regarded as a representative of the Global Fund and thereby to have their actions, which are connected to their capacity of representative, attributed to this foundation.
30. Regarding in particular the LFA Framework Contracts and the Work Orders, this attribution is unlikely to be excluded by the fact that the only party to these agreements is the WHO. In this respect, it should be pointed out that these agreements are established and performed for the sole purpose of carrying out projects proposed exclusively to, and selected solely by the Global Fund. They are furthermore signed by the Executive Director of the Global Fund and the programs related to the Work Orders are funded on the basis of an exclusive decision of this foundation.
31. It is rather dubious therefore that the Global Fund could successfully argue that it should not be liable for actions taken by any member of the Secretariat, either generally or in relation to the LFA Framework contracts or any work order related thereto, on the ground that this member is actually an employee of the WHO.



1.2. All of the Foundation's assets are subject to enforcement of rights of creditors

32. Since it is neither a church foundation nor a family foundation in the sense of article 55 par. 2 CC, The Global Fund would be subject to bankruptcy proceedings, should it become unable to meet its liabilities. It should be noted that any unpaid creditor may initiate usual enforcement proceedings under Swiss law, which ultimately would result in the adjudication of bankruptcy for legal entities which, as The Global Fund, are registered in the trade register. All assets of The Global Fund would be subject to bankruptcy.
33. As regards the funds held in trust by the World Bank for the benefit of The Global Fund, their possible inclusion in hypothetical bankruptcy proceedings should first be analysed in light of the terms and conditions of the Trust Agreement.
34. As a caveat, we should point out that our opinion about the funds held in trust is subject to review by an US lawyer. Indeed, we note that the Trust Agreement does not specify any applicable law. According to leading commentators from the viewpoint of Swiss conflicts law, in the absence of a choice of law, the law of the country where the trustee has its domicile should be the applicable law (FLORENCE GUILLAUME, *Incompatibilité du trust avec le droit Suisse ? Un mythe s'effrite*, in SZIER 2000 p. 1/27 and 29). This was the position taken by our Supreme Court in a decision published in ATF 96 II 79 (JdT 1971 I 329/337; RALPH SCHLOSSER, MARCO VILLA, *Les contrats de service, répertoire des arrêts du tribunal fédéral*, CEDIDAC 25 p. 905 N° 1565). Indeed, the Court held that, in the case at issue, the agreements establishing the trust had their closest connections with the country where the trustee was incorporated.
35. In the instant case, because of the status of the World Bank and considering the activities of the World Bank as trustee in the United State, we believe that US law may be regarded as the law applicable to the trust. As a consequence, a US lawyer would be in a position to express an opinion as to the legal nature of The Global Fund's rights over the assets held in trust.
36. On the basis of the Trust Agreement, however, and subject to review by US counsel, we are of the opinion that The Global Fund is not the owner of the funds held in trust by the World Bank, but that it merely has a claim against the World Bank that the funds be paid out according to The Global Fund's instructions. Therefore, in our opinion, the assets held in trust would not fall within the scope of the bankruptcy. Unlike the said assets, we believe that the claim of The Global Fund arising from the Trust Agreement and being part of The Global Fund's assets should be included in the bankruptcy proceedings. As Swiss lawyers, however, we are in no position to define the nature of that claim and the rights attached thereto; only US counsel could be in a position to make such an analysis.



2. Personal liability of members of The Global Fund's bodies or of The Global Fund's officers vis-à-vis third persons

2.1. The legal basis

37. Swiss foundations are specifically ruled by articles 80 *et seq.* CC. This set of provisions does not include specific rules as to the liability of the member of the bodies of a foundation vis-à-vis third persons. General provisions of article 55 (3) CC are therefore applicable (GRÜNINGER *op. cit.* p. 520 par. 17; RIEMER, *op. cit.* ad art. 83, p. 492 par. 23).

38. Article 55 CC states:

*"La volonté d'une personne morale s'exprime par ses organes.
Ceux-ci obligent la personne morale par leurs actes juridiques et par tous autres faits.
Les fautes commises engagent, au surplus, la responsabilité personnelle de leurs auteurs."*

In free translation:

*"The intent of a legal entity is expressed by its bodies.
These bodies bind the legal entity by their juridical acts as well as any other facts.
Besides, faults generate the personal liability of those having committed such faults."*

39. In other words, the foundation is bound by the acts of its representatives, which are defined in light of their participation in the decision-making process of the foundation (see above par. 24 and art. 55 (2) CC). Besides, whoever is regarded as a representative of the foundation is also liable personally for the damage which is caused by such representative (see art. 55 (3) CC).

40. Indeed, article 55 (3) CC encompasses any kind of liability which an individual may have vis-à-vis third persons, and not only the liability resulting from a fault as the wording of article 55 CC seems to imply (see RIEMER, art. 52-59, ad art. 54/55 p. 162 par. 64-65). While in specific cases provided for by law (such as, for instance, the motor vehicle owner's liability for damage caused by his car) a person may see its liability triggered even in absence of fault, liability in tort represents the main area where article 55 (3) CC is applied. The present memorandum will then focus exclusively on this liability.



2.2. Liability for torts

41. Torts liability is defined in article 41 of Swiss Code of Obligation ("CO"). Torts liability pertains to liability for damage caused in absence of any contractual relationship. Article 41 CO states:

*"Celui qui cause, d'une manière illicite, un dommage à autrui, soit intentionnellement, soit par négligence ou imprudence, est tenu de le réparer.
Celui qui cause intentionnellement un dommage à autrui par des faits contraires aux mœurs est également tenu de le réparer."*

In free translation :

*"Whoever unlawfully causes damage to another, whether wilfully or negligently, shall be liable for damages.
Equally liable for damages is any person who wilfully causes damage to another in violation of bonos mores."*

42. Article 41 CO requires therefore (i) an unlawful act, (ii) a damage, (iii) caused by the unlawful act, and (iv) a fault (see ENGEL, *Traité des obligations en droit Suisse*, 2ème éd., p. 447).
43. An unlawful act: An act is deemed unlawful either if it violates an absolute right of the aggrieved party or if it causes a prejudice by infringing a provision of law which aims to protect such party against this prejudice (see The Supreme Court in ATF 122 III 176 = JdT 1998 II 140/156; ENGEL, *op. cit.* p. 452). An absolute right is a right which can be asserted vis-à-vis anyone (such as, for instance, property rights or one's life) as opposed to relative rights which can be asserted only in the context of a specific relationship, such as for instance the relationship between creditor and debtor of a claim (Heinz REY, *Außervertragliches Haftpflichtrecht*, 2. Auflage, p. 150 par. 683-685). For instance, should the representative of a company deceive a third person when entering into an agreement, such deceit would then be regarded as unlawful (see The Supreme Court in ATF 122 III 176/192 = JdT 1998 II 140/156 and 158; François CHAUDET, *Droit Suisse des affaires*, Bâle 2000, p. 152).
44. A damage is a reduction of one party's assets to which one did not consent (see ENGEL, *op. cit.* p. 472). The damage must be certain, i.e. it must be established or, albeit future, must be almost certain to occur (see ENGEL *op. cit.* p. 473, REY, *op. cit.* p. 44 par. 202).
45. Causation: Under Swiss law, tort liability requires a particular connection of causation between the damage and the unlawful act, i.e. a so-called adequate causation (*la causalité adéquate*). Pursuant to this theory, an action is considered as being the adequate cause of a particular prejudice only if everyday experience shows that such an



action normally leads to such prejudice (ENGEL, op. cit. p. 485-488; REY, op. cit. p. 117 *et seq.*). The theory of adequate causation entrusts the judge with substantial discretion. Causation is deemed interrupted, and thereby the wrongdoer exonerated, whenever independent causes or events which (such as the acts committed by third persons or the Acts of God) show the wrongdoer's action as no longer being a significant cause of the damage (REY, op. cit. p. 124 par. 551-554).

46. A fault: A fault is defined as a lack of due diligence, which means that the wrongdoer knew or should have known that he was acting against the law and that he could have acted in conformity with the law (ENGEL, op. cit. p. 461). One has to distinguish between intent and negligence. Whenever the author is aware of the harmful result of his behaviour and accepts it or is indifferent to such result, there is intent (REY, op. cit. p. 184-185 par. 835 *et seq.*). Negligence means that the wrongdoer did not act with the care that was appropriate according to the circumstances. Whether a conduct was negligent or not, is a matter to be established by courts in light of an objective standard, i.e. the standard of the hypothetical conduct which would have been adopted by a reasonable person placed in similar circumstances (REY, op. cit. p. 185-186 par. 843 *et seq.*). In practice, the courts have large power of appreciation to decide on the fault in a particular case.

2.3. Statute of limitations and joint liability

47. According to leading commentators, the statute of limitations applicable to personal liability claims for damages against foundation's representatives are time-barred according to article 60 CO and not in accordance with the five-year status applicable to claims against members of company's board of directors (see RIEMER, op. cit. ad art. 83 p. 497 par. 28). According to article 60 CO, claims for torts are time-barred after one year from the date when the aggrieved person acquired sufficient knowledge of the damage and of the identity of the person(s) liable but, in any event, after ten years from the date when the act causing the damage occurred. Should the action qualify as a criminal offence, that is submitted to a longer statute of limitations, then the latter would apply.
48. Should several representatives cause a damage together in such a way that their faults appear to be common, those representatives would then be held jointly liable (see RIEMER, art. 52-59 ZGB, ad art. 54/55 p. 162 par. 66). There would be such common fault whenever each of the defendants knew the dangerous situation they created together and if they knew, or should have known, of the participation of the others (see ENGEL, op. cit. p. 563).

2.4. The situation of the individual members of The Global Fund's bodies

49. We are not in a position to identify in an abstract manner all the consequences of the Swiss rules on personal liability for the individual members of The Global Fund's bodies. Based on the foregoing, however, we would like to briefly state the following points:



- Since the Board, the Secretariat and the Technical Review Panel are not separate legal entities, they cannot as such be held liable under article 55 (3) CC.
- Since article 55 (3) CC does not add a specific ground for personal liability vis-à-vis a third party, which would arise from the very capacity of being a representative of a foundation, the members of The Global Fund's statutory bodies do not assume additional personal liability vis-à-vis a third party by the sole fact of having this capacity.
- The conditions for the personal liability are not different from one body to another. In other words, members of the Board might have their personal liability triggered under the same conditions as those pertaining to members of the Secretariat or the Technical Review Panel. However, for those among the Board Members and for the Secretariat members who, as we understand, enjoy some kind of immunity, it should be analysed with regard to question 3, as referred to above in paragraph 17, whether these persons can successfully oppose this immunity to legal proceedings which would be initiated on the basis of their personal liability for actions taken when acting in such capacity as Board Members or members of the Secretariat.
- Article 41 CO requires a violation by the representative of a specific legal rule or a particular absolute right. Therefore, a hypothetical violation by the Foundation of an agreement such as, for instance, a grant agreement, or the disregard by the Board of its guidelines or of its Board Operating Procedures, would not as such be sufficient to trigger the representative's personal liability. On the contrary, one would have to prove that the representative in question, by his own doing, negligently or intentionally, violated a specific provision of the law or infringed an absolute right, and thereby caused a damage to the aggrieved party. Similarly, as a further example, the representative in question would not be held liable for the wrongdoing of a Principal Recipient, unless the said representative behaved intentionally or by negligence in such a manner as to be regarded as having taken part in the Principal Recipient's wrongful act.

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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.

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