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Item No. 4 on the Agenda: Draft amendments to the UNIDROIT Regulations on financial matters

(memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Proposals for amendments to chapter of the UNIDROIT Regulations dealing with the financial management of the Institute: comments by Mr Henry Gabriel and Hans-Georg Bollweg.</i>
<i>Action to be taken</i>	<i>Opinion to be transmitted to the General Assembly at its 71st session.</i>
<i>Related documents</i>	

1. On 3 and 10 September 2012, the Secretariat received letters from Mr Henry Gabriel and Mr Hans-Georg Bollweg, members of the UNIDROIT Governing Council, containing the following proposals:

Mr Henry Gabriel

"I have had an opportunity to review the proposal by the Federal Republic of Germany to modify the UNIDROIT financial regulations. I think the German initiative is both useful and appropriate.

I understand the Governing Council will be asked to approve these possible amendments, and therefore I thought it would be useful to make a couple of comments and suggestions to the proposal.

Because the financial regulations directly affect the work of the General Assembly and the Finance Committee, I have taken the liberty to consult with both the United States Mission to the International Organizations in Rome and the United States Department of State Office of the Legal Advisor Section on Private International Law as these two governmental bodies work directly with the General Assembly and the Finance

Committee. Both the United States Mission and the Office of Legal Advisor are in accord with my comments, but I make them in my individual capacity as a member of the Governing Council.

I note that none of the proposals require amendments to the Charter. I think this is essential to the success of the German proposal.

My specific comments are the following:

Proposed article 26(3): The Secretary-General shall make all necessary arrangements in order that member Governments may have at their disposal all elements necessary to form an opinion at least two weeks before the session of the General Assembly at which the budget is to be adopted and the amount of the member Governments' financial contributions is to be set.

Unless there are very significant reasons not so do so, distribution to member states should be not less than one month prior to consideration by the General Assembly. Since the Finance Committee meets early in the fall with a follow-on meeting or more as necessary, that deadline should be workable. Given the suggestion that the General Assembly may take a more active role in the future, this additional time would allow member state governments the opportunity for meaningful review.

Proposed article 26(4): The General Assembly shall, by consensus, adopt the budget and set the amount of the member Governments' financial contributions based on the draft submitted by the Secretary-General.

The phrase "by consensus" should be deleted. There has been controversy over the term recently at UNCITRAL, and this controversy should not be transported to UNIDROIT. Moreover, a literal interpretation of "consensus" would suggest that any member state could veto a decision of the body by a single vote. This result is surely not intended or desirable. The term should be avoided.

Proposed article 31: The Secretary-General shall choose the bank(s) where the funds of UNIDROIT are to be deposited. He shall be authorised to invest such funds as are not necessary for the immediate running needs of UNIDROIT, on the condition that he take due care in making investments and in selecting establishments in which he has no vested interest. The Secretary-General shall account for the results of any such investments.

All references in this article and in other articles (see e.g. articles 32, 35, 37) to "he" should be non-gender specific.

To give some flexibility as to where the Institute funds can be kept, "or other regulated financial institution" should be added after the word "bank".

The term "account for" should be changed to "detailed", "itemized", "explained" or some similar wording to prevent the interpretation that the Secretary-General has more than a fiduciary duty and instead has an obligation to guarantee the funds.

Proposed article 32(b): prescribe that all payments be made upon the presentation a special form, accompanied by supporting documents where necessary, indicating the

name and address of the proposed recipient of payment, the amount payable, the object of the expenditure, the relevant item of the budget, and proof that the services or products have actually been provided and have not previously been paid for;

The term "proof" should be replaced by "certify" or some similar word. The term "proof" could suggest a technical legal standard that is clearly not intended.

Article 33: 1. The Secretary-General, on the advice of the Treasurer, shall approve all proposals for expenditure where appropriate and sign an order for payment.

2. The Treasurer shall execute orders for payment signed by the Secretary-General and obtain receipts for payment.

Articles 33 and 35 provide specific duties for the Treasurer. There should be some provision in the regulations to provide for another designee for any period for which there is no appointed treasurer or to provide that the President can designate an alternative with the concurrence of the Secretary General.

Article 33 appears to be inconsistent with proposed article 32 (c). Article 32(c) provides for designated staff to perform functions designated for the treasurer in article 33. A clause in such as "as provided for in the UNIDROIT regulations" instead of "in the name of UNIDROIT" may solve this inconsistency.

Proposed article 37(2): *The auditor must have all necessary titles and qualifications required for the carrying out of his duties, which shall consist of the annual auditing of the accounts and ensuring that the provisions of the Regulations are abided by.*

The requirement of "necessary... qualifications" should be sufficient. "Titles" should be removed. The requirement of titles could cause problems, as professional titles and their requirements differ greatly. "

Mr Hans-Georg Bollweg

"On behalf of the German Government and in my own capacity as Member of the UNIDROIT Governing Council I would like to submit our view to the comments made by our distinguished colleague Mr Henry Gabriel:

I am grateful for the comments made by Henry Gabriel in reply of the current German proposal to create financial regulations for UNIDROIT. We understand that these comments were made to achieve the best result possible. We indeed acknowledge this very much.

I endorse nearly all these comments. Where new language was proposed by Henry Gabriel, it should be implemented in the current draft financial regulations. Where no new language was provided by him I suggest that we should kindly task the drafting of amendments to the UNIDROIT Secretariat.

However, there is only one remaining point which needs further consideration. This relates to proposed article 26(4), which currently reads:

The General Assembly shall, by consensus, adopt the budget and set the amount of the member Governments' financial contributions based on the draft submitted by the Secretary-General.

Henry Gabriel suggested to delete the phrase "by consensus" as it is not defined and could lead to a veto situation where one member state only could block the decision on UNIDROIT's budget.

Regarding fundamental budgetary decisions the consensus principle is anchored in almost every international organization. This principle means that in the absence of any contradictory vote the budget is adopted. As long as a consensus cannot be achieved, budgetary negotiations must continue. Consequently, a consensus ensures that no member state can be overruled by the votes of a majority of other members and it avoids at the same time to have "winners" and "losers" when it comes to adoption of the budget by virtue of voting, which also could lead to disadvantages. In practice, the consensus principle has not created any negative effect even in large international organizations. Of course, there exists a risk of a veto situation, as Henry Gabriel correctly pointed out.

To properly address a possible case of budgetary blockage, which is clearly not what we all want to experience in UNIDROIT, I suggest to add a new paragraph 5 in Article 26 of the draft financial regulations while retaining the phrase "by consensus" in Article 26, para 4. This new Article should read as follows:

Article 26 (5): If, at the beginning of a financial year, the budget has not yet been approved by the General Assembly, extraordinary meetings of the Finance Committee shall be held in order to reach an urgent decision. In the meantime, UNIDROIT is authorized to incur obligations under provisional budget allotments established by the Secretary General and make payments until 31 March of the current financial year up to the level of 25 per cent of the agreed previous year's budget. The authorization to incur obligations shall be renewed by the Secretary General every quarter as necessary.

Other international organizations, like OSCE, have this Article in their financial regulations. It allows UNIDROIT to continue operations on the basis of the previous budget in the unlikely case of a periodical absence of a budgetary consensus."