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Proposal by the Government of Colombia**Note by the Secretariat**

At its forty-sixth session, the Commission may wish to consider item 16 of the provisional agenda (Planned and possible future work, including in the areas of arbitration and conciliation, commercial fraud, electronic commerce, insolvency law, international contract law, microfinance, online dispute resolution, public procurement and infrastructure development, including public-private partnerships, and security interests). The Commission will have before it a note by the Secretariat on the planned and possible future work of UNCITRAL (A/CN.9/774). In this connection, the Government of Colombia has submitted a proposal, the text of which is reproduced below in the form in which it was received by the Secretariat.



Annex

Proposal for the establishment of a new working group on “Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises”

I. Introduction

At its forty-fifth session, the Commission approved the proposal of the Government of Colombia for the convening of a second colloquium on microfinance, with a focus on facilitating simplified business registration and incorporation.¹

The Government of Colombia’s proposal stated that one crucial aspect of the area of microfinance, besides the granting of credit, was the creation of simplified corporate business vehicles to promote formalization and transparency for the beneficiaries of microloans. There is clear scope for UNCITRAL to deal with this area of trade law.

The Commission agreed that “the holding of such a colloquium should rank as a first priority for UNCITRAL”.² The colloquium on microfinance and related matters took place in January 2013 with the participation of experts, specialists and representatives of governments, international organizations, non-governmental organizations, the private sector and academia from all over the world.³

The main conclusion reached by the colloquium was that UNCITRAL should set up a new working group on microfinance and related matters. The Secretariat summarized the outcome of the colloquium as follows:

“...There was broad consensus among participants at the Colloquium recommending that a Working Group be established to address the legal aspects necessary for the creation of an enabling legal environment for MSMEs. It was stressed that work in establishing such an environment would be consistent with the Commission’s primary mandate to promote coordination and cooperation in the field of international trade, including regional cross-border trade.”⁴

II. The importance of micro-business and small and medium-sized enterprises in developing countries

In a developing economy, small and microenterprises are the fabric of entrepreneurship and provide a base for medium-sized and large enterprises. The creation of the latter will depend on the degree to which small and microenterprises

¹ Superintendency of Companies, *Communication No. 2012-01-17-0670*, addressed to Renaud Sorieul, Registrar of UNCITRAL, 21 June 2012.

² *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 126.

³ Organized by the UNCITRAL Secretariat; references [in the Spanish original] in English since, when this text was prepared, the official text was not available in Spanish. Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises. Note by the Secretariat, document A/CN.9/780, para. 5 (May 2013).

⁴ *Ibid.*, para. 50. [*Translator’s Note*: MSME = micro-business, small and medium-sized enterprises].

are able to integrate in a stable and sound way into a formal process of business operation.⁵

Governments must introduce public policies and focus their efforts on strengthening the business sector⁶ and, perhaps more importantly, promoting the establishment of an enabling legal environment tailored to micro-businesses and small and medium-sized enterprises.

One important consideration in the establishment of this enabling legal environment is the effect it would have on microfinance and micro-business. The Secretariat's report emphasized the importance of this issue in the following terms:

“In order to help micro, small and medium-sized enterprises to adjust to immediate uncertainty, and graduate from a subsistence form of doing business to a growth mode characteristic of the formal sector, an enabling legal environment is thus needed. Such an environment is not limited to microfinance alone; it relates to the life cycle of an enterprise — its establishment, operation and termination — and it also focuses on the supporting institutional legal framework. Nonetheless it is clearly relevant to microfinance since, ‘as a market-based approach to fighting poverty, microfinance is focused on developing entrepreneurship and expanding self-employment’.⁷ Furthermore, an enabling legal environment should not be confined only to micro-business. As definitions of micro-business and small enterprise vary substantially by region and from country to country,⁸ the same factors defining an enabling legal environment should pertain to both micro and small/medium-sized businesses.”⁹

It is thus necessary to establish a legal environment that enables entry-level formalization mechanisms, including crucial aspects such as the creation of simplified-regime corporations, access to credit, dispute resolution and simplified

⁵ [Translator's Note: reference missing in Spanish original].

⁶ Public policy agenda included in this study: *Bank Financing to Small and Medium-Sized Enterprises (SMEs) in Colombia*, Constantinos Stephanou, World Bank, Camila Rodriguez, affiliation not provided to SSRN, World Bank Policy Research Working Paper No. 4481, 1 January 2008.

⁷ A/CN.9/727.

⁸ “Lack of a clear definition is the main challenge in ensuring SME finance”, see CGAP, *Financial Access Report 2010*, p. 37, also including examples of various definitions of SMEs. A definition of SMEs and/or micro-business can be found in the European Commission Recommendation of 6 May 2003 (2003/361/EC), in *Microenterprise Results Reporting: Methodology and Statistical Annexes FY 2010 19*, USAID, available at www.usaid.gov/our_work/economicgrowth_and_trade/mlcro/MRR_FY10_Methodology_Statistical_Annexes_82211_Final.pdf. Different definitions of microcredit also exist; see, for instance, Basel Committee on Banking Supervision, *Microfinance Activities and the Core Principles for Effective Banking Supervision*, August 2010, pp. 34-35. [Translator's Note: SME = small and medium-sized enterprises; CGAP = Consultative Group to Assist the Poorest].

⁹ Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, Note by the Secretariat, A/CN.9/780, para. 12 (May 2013).

insolvency regimes, in other words a legal framework taking account of the entire economic cycle of micro-business and small and medium-sized business.¹⁰

III. Promotion of sustainable development and the rule of law

The United Nations Millennium Declaration¹¹ on development and the eradication of poverty has highlighted the potential of entrepreneurial initiative to contribute to specific sustainable development objectives.

When UNCITRAL is setting priorities in its work, it should consider the impact which the establishment of this enabling legal environment for micro-business and SMEs may have on inclusive, sustainable and equitable development and the promotion of the rule of law, as was frequently stated at the above-mentioned colloquium.

The link between creating this enabling legal environment, promoting development and strengthening the rule of law has also been recognized by the United Nations General Assembly, as confirmed by a recent Secretariat report:¹²

“The creation of an enabling legal environment also contributes to reinforcing the rule of law at country level, which, as stressed by the General Assembly in its Resolution on the Rule of Law,¹³ is conducive to the growth of a fair, stable and predictable system for generating inclusive, sustainable, and equitable development. It is worth noting that most recently the General Assembly, once again ‘recognizing the important contribution entrepreneurship can make to sustainable development’,¹⁴ has encouraged ‘governments to develop and implement policies ...that address the legal, social and regulatory barriers to equal and effective economic participation and promote entrepreneurship’. This appeal has also been extended to the international community which has been asked ‘to support the efforts of countries to promote entrepreneurship and foster the development of small and medium-sized enterprises and microenterprises’”.¹⁵

The impact on the rule of law is particularly relevant for the regulation of micro and small enterprises, given that at least half the global labour force and one third of the global economy operate in the informal sector.

¹⁰ In the same way, the World Bank states “... There is a host of advantages brought about by the depth and importance of the SME sector. That also implies that the SME sector must be taken into account when drafting legislation or designing a regulatory system for enterprises, including the crucial aspect of restructuring and liquidating distressed businesses”. José M. Garrido, in *Issues in the Treatment of the Insolvency of SMEs in Asia*, FAIR, Kuala Lumpur, 2011, p. 3.

¹¹ Available at www.un.org.

¹² Cited in: Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, Note by the Secretariat, A/CN.9/780, para. 13 (May 2013).

¹³ A/RES/67/97.

¹⁴ A/RES/67/202.

¹⁵ Ibid.

In a country like Colombia, it is not easy to determine the number of micro and small enterprises in operation, since this sector has developed largely informally.¹⁶

Informal enterprises operate outside the law and are sometimes involved in organized crime.¹⁷

The Secretariat's report points out: "...The results, however, do not vary: microbusinesses cannot enforce contracts, get formal bank loans or expand beyond a very small local network.^{18,19} In sum, they have little option 'but to trade in the informal economy'"²⁰ and the report concludes: "...the informal sector perpetuates non-compliance with the law, increasing risks for loss of tax revenue, corruption, and a poor environment for investment. It will not naturally evolve into a formal sector, which allows businesses to grow, obtain credit on normal terms, increase employment and contribute to the tax base."²¹

3.1. The informal sector in Colombia

A recent World Bank study,²² entitled *Informality: exit and exclusion* (Perry et al., 2007), explains the nature of informality in Colombia as a function of both economic "exclusion"²³ and the "exit"²⁴ into informality of enterprises in the formal sector.²⁵

¹⁶ "Existing studies have estimated the size of the informal economy in Colombia between 35 and 44 percent of GDP, a figure that has apparently grown over the past decade", Cardenas and Mejia (March 2007) and Perry (May 2007) for a view of the causes and implications of the informal sector. Cited in: *Bank Financing to Small and Medium-Sized Enterprises (SMEs) in Colombia*, Constantinos Stephanou, World Bank, Camila Rodriguez, affiliation not provided to SSRN, World Bank Policy Research Working Paper No. 4481, 1 January 2008.

¹⁷ Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, Note by the Secretariat, A/CN.9/780, para. 6 (May 2013).

¹⁸ Ibid., citing *Report of the Commission on the Legal Empowerment of the Poor, Making the Law Work for Everyone*, Vol. 1, 2008, p. 15.

¹⁹ Idem supra 15.

²⁰ Ibid. supra 16, citing the same report, p. 39.

²¹ Idem supra 15 para. 49.

²² Contained in report 42698-CO, 2010, *Informality in Colombia, Implications for Worker Welfare and Firm Productivity*, Colombia and México Country Management Unit, Human Development Department, Latin America and the Caribbean Region, World Bank, 1 March 2010, available at www.dnp.gov.co.

²³ "The concept of 'exclusion' reflects the way informality has been traditionally viewed in Latin America, namely, that informal workers and firms would generally prefer to be formal – registering with the authorities, paying taxes, having access to social security – but are prevented from doing so for reasons related to the state of the economy, the functioning of the labour market or the regulatory environment."

²⁴ "The concept of 'exit', by contrast, posits that some workers and firms are informal as a matter of choice. That is, some workers and firms, having considered the benefits and costs of formality, opt out of the formal sector. Given the benefits and costs (real or perceived) and existing opportunities and constraints, these workers and firms actually prefer informality."

²⁵ Luis Guillermo Vélez Cabrera, "Formalización Empresarial, la Base de Perdurabilidad para el Desarrollo Económico", ["Formalization of Enterprises, the Basis for Sustainability of Economic Growth"], *Revista Coyuntura Pyme de ANIF*, April 2013, Ed. 41.

According to the study, informality is a symptom of inadequate regulation which increases costs and detracts from the benefits of formalization.²⁶ It is thus imperative to consider creating an enabling legal environment for microenterprises and small and medium-sized enterprises which will put an end to exclusion and reduce the incentive for formally established enterprises to exit from the formal system.

In recent years, the Government of Colombia has implemented major reforms intended to promote development and the rule of law in various areas of commercial law, with the understanding that regulation, used as a cross-cutting policy tool, improves the conditions for access to markets and credit, reduces transaction costs and increases company competitiveness.²⁷

The reforms introduced in this area in Colombia include reforms intended to make the procedures for the registration and creation of trading companies simpler and more flexible, by means of Law 1258 of 2008 (Simplified Stock Corporation (SAS) Law); Law 1563 of 2012 on national and international arbitration, which introduces an alternative mechanism for online resolution of disputes for small claims; Law 1564 of 2012, which establishes an insolvency regime for natural persons not engaged in commercial activities, with hybrid proceedings for the discharge of insolvency; and the draft reform of the secured transactions regime which is currently before the Colombian Congress.²⁸

According to statistics from 2009-2010, these reforms promoted a rate of growth and formalization among business entities of over 25 per cent.²⁹

IV. Promotion of development and international trade

In the Commission's review of the strategic direction of UNCITRAL and in issues related to resource allocation, the need to set priorities for the Commission has become clear.³⁰ When there are competing proposals, setting priorities in UNCITRAL's work programme requires a consideration not only of its current and likely future scope and its relevance in the field of international trade and commerce,³¹ but also of the impact which this topic may have on the development of international law.³²

The colloquium emphasized not only the economic imperative to establish an enabling legal environment for enterprises, but also the effect of this environment on the development of international trade. The Secretariat's report concluded:

"...It was stressed that work in establishing such an environment would be consistent with the Commission's primary mandate to promote coordination and

²⁶ Likewise, as stated in the Secretariat report: "Excessive regulation, too many laws and too many outdated laws, will discourage transition of business to the formal sector" (A/CN.9/780, para. 49).

²⁷ Ibid. *supra* note 23.

²⁸ A/CN.9/780, paras. 16, 24, 26 and 47 (May 2013).

²⁹ Ibid. para. 16.

³⁰ A/CN.9/752/Add.1.

³¹ Ibid. para. 24.

³² A/CN.9/774, para. 22.

cooperation in the field of international trade, including regional cross-border trade. This was consistent also with the findings of the 2011 UNCITRAL Colloquium that microfinance had become a globally recognized form of cross-border finance, that it kept growing worldwide, that legal, regulatory and market gaps kept the sector from operating as well as it should and that this had created a role for international legal standard-setting.³³ Noting that cross-border recognition of these new and varied legislative issues and emerging structures was needed for MSMEs operating in regional markets in order to provide a recognizable international basis for transactions and avoid problems that can arise because of a lack of business recognition,³⁴ participants further suggested that a flexible tool, such as a legislative guide or a model law according to the topics, would contribute to harmonizing efforts in this sector and provide momentum for reforms which would further encourage micro-business participation in the economy.”³⁵

In respect of simplified business incorporation and registration, the Secretariat report cites³⁶ the International Chamber of Commerce, which maintained that: “...company law, where businesses are bound by the forms of legal entity created by the legislator, and the diversity of national forms of legal entity does indeed cause problems for SMEs”.

In addition, the World Bank found that “...economies with modern business registration ‘grow faster’,³⁷ ‘promote greater entrepreneurship and productivity’,³⁸ ‘create jobs’,³⁹ ‘boost legal certainty’⁴⁰ and ‘attract larger inflows of foreign direct investment’”.⁴¹

One fundamental consideration in the future development of international trade will be the ability of micro and small enterprises in countries with developing economies or economies in transition to access international markets, particularly through electronic commerce. The Secretariat report also concludes that:

“...Internet usage increased by nearly 3,000 per cent over the last 10 years, in the Middle East by nearly 2,250 per cent, in Latin America by over 1,200 per cent (for instance Brazil ranks fifth, Mexico twelfth and Colombia eighteenth in the world in number of individuals connected to the Internet), and in Asia by nearly 800 per cent. Globally, Internet usage has increased by 528 per cent over the last

³³ A/CN.9/727, paras. 6-7.

³⁴ In this respect, contract law differs significantly from other fields of law, such as company law, where businesses are bound by the forms of legal entity created by the legislator, and the diversity of national forms of legal entity does indeed cause problems for SMEs. See International Chamber of Commerce, *ICC Position on the European Commission Proposal for a Regulation on a Common European Sales Law*, July 2012, p. 2, available at ICC Position on the European Commission Proposal for a Regulation on a Common European Sales Law. [Translator's Note: sic].

³⁵ A/CN.9/780, para. 50.

³⁶ See quote above, note 32.

³⁷ World Bank/IFC, *Doing Business 2013, Smarter Regulations for Small and Medium-Size Enterprises*, p. 21, cited in Secretariat report A/CN.9/780, para. 10.

³⁸ Ibid.

³⁹ Ibid., note 16, p. 25, cited in Secretariat report A/CN.9/780, para. 10.

⁴⁰ Ibid., p. 21, cited in Secretariat report A/CN.9/780, para. 10.

⁴¹ Secretariat report A/CN.9/780, para. 10.

decade: approximately one third of the world's population is now connected to the Internet. That number is expected to increase to 47 per cent by 2016.”⁴²

However, for micro and small enterprises to actually access the global electronic commerce market, an enabling legal environment that promotes trust in cross-border electronic transactions and provides an enduring and continuous trading system will need to be developed.

V. Proposal for development on the initiative of a country with a developing economy or economy in transition (*a bottom-up approach*)

In order to decide judiciously on the priority to be assigned to the work of UNCITRAL in establishing an enabling legal environment for microenterprises and small and medium-sized enterprises, account must be taken of the proposals submitted by developing countries as well as those of highly developed countries. The Secretariat report explains that:

“...An improved legal infrastructure for MSMEs is needed which should rest on a global policy vision and not just isolated devices. Simply adapting traditional system laws to MSMEs will not work. Experience has shown that transposing laws from other, more highly developed, jurisdictions is similarly unhelpful, since law needs to fit the culture and circumstances of the country. It will thus be important to prepare principles that are global in nature and can be tailored by countries according to their needs. UNCITRAL has proven to be well-placed as a forum for developing such general principles and legislation that is acceptable by a wide range of countries with different legal traditions. Therefore, the Commission could play a leading role in helping to create a level playing field by promoting best practices and sharing knowledge with countries seeking guidance in this area.”⁴³

VI. Elements required for the establishment of an enabling legal environment

At its forty-fifth session in 2012, UNCITRAL decided that the colloquium on microfinance should focus on “facilitating simplified business incorporation and registration; access to credit for micro-businesses and small and medium-sized enterprises; dispute resolution applicable to microfinance transactions; and other topics related to creating an enabling legal environment for micro-businesses and small and medium-sized enterprises”.⁴⁴

In accordance with this decision, the colloquium concluded that: “...a flexible tool, such as a legislative guide or a model law according to the topics, would contribute

⁴² See Internetworld Stats: Usage and Population Statistics, available at www.internetworldstats.com, cited in Secretariat report A/CN.9/780, para. 52.

⁴³ Secretariat report A/CN.9/780, para. 49.

⁴⁴ Commission report on its 45th session, A/67/17, para. 126.

to harmonizing efforts in this sector and provide momentum for reforms which would further encourage micro-business participation in the economy.”⁴⁵

6.1. Facilitating simplified business incorporation and registration

The colloquium concluded that:

“...The starting point could be guidance that allows for simplified business start-up and operation procedures. In this regard, attention would be drawn to simplified corporate structures with easy establishment and minimal formalities, limited liability, flexible management and capitalization structure, plus ample freedom to contract. Considering the current absence of any internationally recognized standards or direction for countries wishing to adopt effective new forms, such a legal framework would significantly contribute to the formalization of thousands of enterprises that would otherwise remain in the informal sphere”.⁴⁶

The Secretariat report contains relevant information on the Colombian experience of simplified business incorporation and registration.⁴⁷

There is also a reference to a study by the Superintendency of Companies of Colombia, showing the impact of simplified and more flexible business incorporation in Colombia, which is annexed to this document.

European Commission studies⁴⁸ show that differences in company law can also hamper cross-border trade and limit international business operations: “...Currently on average only 93 per cent of the EU companies involved in the sales of goods export inside of the EU.”⁴⁹ The majority of them (62 per cent in B2B and 57 per cent

⁴⁵ Secretariat report A/CN.9/780, para. 50.

⁴⁶ F. Reyes, *Latin American Company Law — a New Policy Agenda: Reshaping the Closely-Held Entity Landscape*, 2013, p. ii, cited in Secretariat report A/CN.9/780, para. 51.

⁴⁷ “In Colombia, a major legal reform effort in the past 15 years has led to the development of a hybrid business form prioritizing flexibility, contractual freedom and limited liability: the so called *sociedad por acciones simplificada* (SAS). An SAS can be formed by one or more shareholders and can be incorporated via a relatively simple private or electronic document at minimal cost. The Simplified Stock Corporation Act (2008) relies on a system of ex post regulation in the form of enforceable standards during operation (as opposed to ex-ante regulation which creates rules to be met during establishment) to target behaviour, thus lowering costs for establishing micro-businesses. In fact, compliance with strict requirements to set up a business, e.g. minimum legal capital or public deeds of incorporation, affects all entrepreneurs. On the other hand, when standards that are enforceable ex post are used (e.g. abus de droit or equal treatment rules, that leave discretion for adjudicators to determine ex post whether violations have occurred), there is a cost only for those entrepreneurs who breach the standards. However, this approach requires effective judicial infrastructure to oversee and enforce ex-post standards. Since the SAS legislation was enacted in 2008 about 181,742 SASes (the data refers to November 2012) have been set-up, most of which, it is estimated, were pre-existing informal businesses. The SAS account for over 95 per cent of market share and, according to 2009-2010 data, they have enabled a growth in formalization of business entities of over 25 per cent”. Secretariat report A/CN.9/780, para. 16.

⁴⁸ European Commission, Brussels, 11 October 2011, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, {SEC(2011) 1165 Final}, COM(2011) 635 final, p. 10.

⁴⁹ See annex for calculations of transaction and opportunity costs (annex III). [*Translator’s Note*: annex not included in Spanish original].

in B2C) export to no more than three other MS.⁵⁰ One of the reasons for this relatively low level of cross-border trade — besides a lack of interest in export — is that some companies are hindered by [the] regulator (e.g. differences in tax regulations, contract law, administrative requirements and company law) and practical barriers (e.g. language, transportation and after-sales maintenance). Recent business surveys show that the regulatory barriers are a greater hindrance to the expansion of cross-border trade than the practical ones.”⁵¹

6.2. Other issues to be considered in the establishment of an enabling legal environment

The colloquium concluded that there are other elements essential to the establishment of an enabling legal environment which are relevant to the life cycle of the enterprise. These include dispute resolution mechanisms, electronic transfers, mobile payments, access to credit and insolvency.

6.2.1. Further issues to be considered in the establishment of an enabling legal environment

The colloquium highlighted the difficulties faced by microenterprises and small and medium-sized enterprises in obtaining access to justice and the need to set up appropriate dispute resolution systems in the area of microfinance. In report A/CN.9/756,⁵² the Secretariat described the situation relating to dispute resolution mechanisms and the problem of obtaining access to justice for the poor.

“The Commission may thus wish to consider whether it would be appropriate to undertake preparation of notes⁵³ on how a system of dispute resolution in the field of microfinance should be organized. Such notes could be designed for use by legislators and administrators in considering whether a country has established a system that effectively serves the needs of MSMEs.”⁵⁴

“Micro borrowers often lack knowledge of their rights and how to protect them.⁵⁵ Furthermore, the formal justice system tend to exclude them ‘because they cannot afford the costs related to lawyers, or paying court fees ...court procedures can be slow, and it is not uncommon for courts to have a large backlog of cases’.⁵⁶ Yet, extrajudicial third-party dispute resolution mechanisms are rarely in place, thus

⁵⁰ EB 320, p. 55 and 321, p. 56.

⁵¹ EB 320 and EB 321, the SME Panel and EBTP surveys. Similarly, a survey by Eurochambres in 2010 found that the differences in legislation were the main difficulty in cross-border trade for 36 per cent of the respondents. It was conducted among 1,330 companies in 12 EU MS and Croatia. 83 per cent of the respondents were involved in B2C transactions while 57 per cent were delivering products cross-border.

⁵² Para. 23 et seq.

⁵³ For instance, in the past the Commission prepared notes to assist arbitration practitioners during the course of arbitral proceedings, see *UNCITRAL Notes on Organizing Arbitral Proceedings* (1996).

⁵⁴ Secretariat report A/CN.9/780, para. 52.

⁵⁵ See A/CN.9/727.

⁵⁶ See A/CN.9/756, para. 24.

limiting the effectiveness of any microfinance legal framework for client protection. As a result, four billion of the world's population lack access to justice.”^{57,58}

At its forty-fourth session, the Commission⁵⁹ noted that a favourable legal and regulatory framework for microfinance included the provision of fair, efficient, transparent and inexpensive procedures for resolution of disputes arising from microfinance transactions, and that the lack of such procedures for microfinance clients was an issue to be further examined.

We thus have an opportunity to consider the issue in more detail with the aim of establishing a new working group to explore the subject in greater depth.

6.2.2. Mobile banking and e-money

Technological advances in mobile banking and e-money systems are making them increasingly important as financial services and a means of financial inclusion,⁶⁰ a fact that makes establishing adequate legal guidelines necessary.⁶¹ Key concepts must also be defined, along with a harmonized approach to the regulation of these operations that balances financial inclusion needs with the need to protect vulnerable client populations.⁶²

The colloquium concluded that: “electronic transfers (including mobile payments) offer MSMEs operating in the informal sector the opportunity to have effective access to financial services. UNCITRAL’s existing instruments on e-commerce and international credit transfers can accommodate mobile payment systems, as recognized at the Colloquium (see para. 35 of document A/CN.9/780). In order to broaden their scope, however, it was suggested that ...provision of a clear definition of key concepts such as deposit, payment and electronic money, as well as guidance on apportioning of the risks between providers and clients, would be of particular importance.”⁶³

6.2.3. Access to credit

Access to credit for small, medium-sized and microenterprises is an area of future work for UNCITRAL, as the Commission has decided.⁶⁴ The Commission likewise decided that transparency in lending is not an issue of prudential regulation, but a concept relating to clients’ rights and their protection and, as such, of relevance for commercial law.⁶⁵

⁵⁷ See *Report of the Commission on the Legal Empowerment of the Poor, Making the Law Work for Everyone*, Vol. 1, 2008, p. 13, and A/CN.9/756, para. 24.

⁵⁸ Secretariat report A/CN.9/780, para. 8.

⁵⁹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 242 and 246.

⁶⁰ See A/CN.9/756, IV. Electronic Money (E-money), p. 18 et seq.

⁶¹ Unresolved legal issues surrounding the nature of e-money were already noted in the 2011 UNCITRAL Colloquium on Microfinance, together with their potential to negatively affect low-income people. See A/CN.9/727, paras. 43-44, cited in Secretariat report A/CN.9/780, para. 9.

⁶² A/CN.9/756, para. 54.

⁶³ Secretariat report A/CN.9/780, para. 53.

⁶⁴ At its forty-fourth session (A/CN.9/727).

⁶⁵ Secretariat report A/CN.9/780, para. 36.

The colloquium concluded that “an enabling legal environment promoting access to credit for MSMEs would address commercial law matters arising in the context of secured and unsecured credit agreements. Guidance from the Commission, based on best practices, could deal with transparency in lending and enforcement in all kinds of lending transactions.”⁶⁶

6.2.4. Insolvency of microenterprises and small and medium-sized enterprises

The colloquium stressed the need to lay down rules governing insolvency of microenterprises and small and medium-sized enterprises, since the existing rules cannot be appropriately adapted to suit the scale and the needs of this sector of business, factors that mean that small enterprises may not be viable and may not recover after insolvency because they cannot reach a refinancing agreement with their creditors.

In view of the specific characteristics of micro and small enterprises, there is a need for alternative insolvency mechanisms which are more rapid and flexible and less costly, and different from those traditionally designed by large enterprises.⁶⁷

The colloquium recommended the inclusion of insolvency in UNCITRAL’s work in order to increase the viability of micro and small enterprises, stating specifically that “...the Commission may wish to address the insolvency of MSMEs with the objective to ensure fast-track procedures and business rescue options so as to develop adequate and workable alternatives to formal insolvency processes in line with both the key characteristics of an effective insolvency system and the needs of MSMEs”.^{68,69}

VII. Conclusion

As shown throughout this proposal, there is an urgent need to launch a global reflection on the importance of microfinance and related matters in order to establish an enabling legal environment for microenterprises and small and medium-sized enterprises.

In this proposal, the Government of Colombia suggests that the Commission should create a mandate for a new working group focused on the enterprise life cycle, particularly in relation to micro and small enterprises, which are the ones involved in microfinance. The working group should begin with the facilitation of simplified business incorporation and registration and other matters, such as those referred to above, related to and necessary for creating an enabling legal environment for this type of business activity.

The Government of Colombia looks forward to the discussion of this matter at the forthcoming session of the Commission.

⁶⁶ Secretariat report A/CN.9/780, para. 54.

⁶⁷ Secretariat report A/CN.9/780, paras. 54 and 55.

⁶⁸ A. Idigbe, O. Kalu, *Best Practice and Tailored Reforms in African Insolvency: Lessons from JNSOL*, December 2012, p. 2.

⁶⁹ Cited in Secretariat report A/CN.9/780, para. 55.

Appendix

In Colombia, the Superintendency of Companies has conducted a preliminary study of the combined effect on business formalization procedures of two laws: Law 1258 of 2008 (SAS Law) and Law 1429 of 2010 (First Employment Law). These two laws form part of the policy to make procedures simpler and more flexible.⁷⁰

The measurement index used in this study to assess the level of formalization is the number of unregistered microenterprises divided by the total number of microenterprises.

The Superintendency compared the number of active businesses between April 2010 and January 2013, using information from the Single Business Registry (*Registro Unico Empresarial* – RUE) to observe the potential combined effect of the two laws, beginning in 2010 when they were both in force for the first time.

* Table 1

The simplified stock corporation (*sociedad por acciones simplificada* – SAS) was the only type of business which saw an increase in registration of new businesses, while other forms of incorporation declined.

* Table 2

In a more detailed study by size of the enterprise, designed to reveal the origins of the 192,602 SAS businesses apparently active in January 2013, we see that there are 132,873 businesses registered as completely new SAS businesses, i.e. they were not SAS businesses in 2010 and did not originate in an existing business structure, and that they are concentrated in the sphere of micro and small enterprises (92 per cent of all new SAS businesses). The effect of the increase in the number of businesses registering under this more flexible procedure is just one example of the potential impact on formalization exerted by regulatory frameworks more appropriate to the real situation of microenterprises and small and medium-sized enterprises.

⁷⁰ Luis Guillermo Vélez Cabrera, “Formalización Empresarial, la Base de Perdurabilidad para el Desarrollo Económico”, [“Formalization of Enterprises, the Basis for Sustainability of Economic Growth”], *Revista Coyuntura Pyme de ANIF*, April 2013, Ed. 41.

Table 1*
Active businesses, end April 2010 and end January 2013

	Associative work enterprises	Single-person enterprises	Other enterprises	Agrarian transformation enterprises	Corporations	Collectives	Limited partnerships	Foreign companies	Limited companies	Simplified stock corporations (SAS)	All companies
End January 2013	12 574	55 182	8 030	31	41 724	289	27 249	2 564	320 760	192 602	661 005
End April 2010	22 120	103 474	4 795	117	74 629	864	44 619	3 236	616 117	54 508	924 569
Difference 2013 vs. 2010	(9 546)	(48 292)	3 235	(86)	(32 905)	(575)	(17 370)	(762)	(295 357)	138 094	(263 564)

* Data taken from the Single Business Registry.

Table 2*
SAS enterprises in 2013 and their origins

Originating from SAS in 2013	Enterprise size				Total
	Large enterprise	Medium-sized enterprise	Microenterprise	Small enterprise	
Originating from another type of enterprise	904	3 386	15 803	10 127	30 220
Already formed as SAS in 2010	337	1 442	22 365	5 365	29 509
New enterprise created as SAS	266	1 161	122 655	8 791	132 878
Total	1 507	5 989	160 823	24 283	192 602

* Data taken from the Single Business Registry.