



**United Nations Commission
on International Trade Law
Working Group I (MSMEs)
Twenty-third session
Vienna, 17-21 November 2014**

**Report of Working Group I (MSMEs) on the work of its
twenty-third session
(Vienna, 17-21 November 2014)**

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-3	2
II. Organization of the session	4-10	2
III. Deliberations and decisions	11	4
IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises	12-79	4
A. Best practices in business registration	12-25	4
B. Questions posed by the Working Group	26-38	7
C. Future work in the area of business registration	39-46	10
D. Issues in respect of transparency and beneficial ownership: FATF standards	47-55	11
E. Possible alternative legislative models for micro and small businesses	56-61	13
F. Legal questions surrounding the simplification of incorporation	62-79	14
V. Next sessions of the Working Group	80	20



I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.¹ At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should begin with a focus on the legal questions surrounding the simplification of incorporation.²

2. At its twenty-second session (New York, 10-14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. Based upon the issues raised in working paper A/CN.9/WG.I/WP.82, the Working Group engaged in preliminary discussion in respect of a number of broad issues relating to the development of a legal text on simplified incorporation³ as well as on what form that text might take.⁴ Business registration was also said to be of particular relevance in the future deliberations of the Working Group.⁵ In order to make further progress in fulfilling its mandate, the Working Group requested the Secretariat to prepare a document setting out best practices in respect of business registration, as well as “a template on simplified incorporation and registration containing contextual elements and experiences linked to the mandate of the Working Group, to provide the basis for drafting a possible model law, without discarding the possibility of the Working Group drafting different legal instruments, particularly, but not exclusively, as they applied to MSMEs in developing countries.”⁶ In addition, States were invited to prepare materials outlining their experience in respect of alternative approaches to the challenges of simplified incorporation and supporting MSMEs.⁷

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, relative to reducing the legal obstacles faced by MSMEs throughout their life cycle, in particular by MSMEs in developing economies. As agreed at its forty-sixth session in 2013, the Commission reiterated that such work should begin with a focus on the legal questions surrounding the simplification of incorporation.⁸

II. Organization of the session

4. Working Group I, which was composed of all States members of the Commission, held its twenty-third session in Vienna from 17-21 November 2014. The session was attended by representatives of the following States Members of the

¹ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 321.

² For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.84, paras. 5-14.

³ A/CN.9/800, paras. 22-31, 39-46 and 51-64.

⁴ *Ibid.*, paras. 32-38.

⁵ *Ibid.*, paras. 47-50.

⁶ *Ibid.*, para. 65.

⁷ *Ibid.*

⁸ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 134.

Working Group: Argentina, Brazil, Canada, China, Colombia, Croatia, Ecuador, El Salvador, France, Germany, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Namibia, Pakistan, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Burkina Faso, Chile, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Egypt, Finland, Libya, Peru, Romania and Saudi Arabia.

6. The session was attended by observers from the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: United Nations Industrial Development Organization (UNIDO), World Bank (WB);

(b) *Invited intergovernmental organizations*: Eurasian Economic Commission (EEC), International Centre for Promotion of Enterprises (ICPE);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students' Association (ELSA), Fondation pour le droit continental, Moot Alumni Association (MAA), National Law Center for Inter-American Free Trade (NLCIFT).

8. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Mr. Omer Cagri Ozdemir (Turkey)

9. In addition to the documents presented at its previous session, the Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.84);

(b) A note by the Secretariat concerning best practices in business registration (A/CN.9/WG.I/WP.85);

(c) A note by the Secretariat on the legal questions surrounding the simplification of incorporation (A/CN.9/WG.I/WP.86);

(d) A note by the Secretariat containing a draft model law on a single-member business entity (A/CN.9/WG.I/WP.86/Add.1); and

(e) The observations by the Government of Italy and the Government of France on possible alternative models for micro and small business (A/CN.9/WG.I/WP.87).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.

4. Preparation of legal standards in respect of micro, small and medium-sized enterprises (Legal issues surrounding the simplification of incorporation).
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular on the legal issues surrounding the simplification of incorporation and related matters on the basis of documents presented at its previous session and Secretariat documents A/CN.9/WG.I/WP.85, A/CN.9/WG.I/WP.86, and A/CN.9/WG.I/WP.86/Add.1, as well as the observations of the Government of Italy and the Government of France in document A/CN.9/WG.I/WP.87. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises

A. Best practices in business registration

12. The Working Group first considered the issues outlined in document A/CN.9/WG.I/WP.85 on best practices in respect of business registration, which was prepared in response to a request by the Working Group at its twenty-second session, in February 2014.⁹ The Secretariat highlighted certain aspects of the paper, which focused primarily on business registration issues in the context of MSMEs and made particular reference to two publications by the World Bank Group providing a wealth of data on business registration and MSMEs.¹⁰

13. Document A/CN.9/WG.I/WP.85 noted broad recognition amongst experts of the importance of business registration for entrepreneurs, markets and governments. Despite there being different models of organization or different levels of complexity of business registries, it was nonetheless possible to identify the following core functions: checking for the uniqueness of a business name; enrolment in a public commercial registry and registration with tax authorities.

14. Several best practices generated by the wave of reforms of business registration since the early 2000s were noted in document A/CN.9/WG.I/WP.85. They included: charging a fixed nominal registration fee, using standard registration forms and stipulating nominal (or no) paid-in minimum capital, assigning unique

⁹ A/CN.9/800, para. 49.

¹⁰ Investment Climate (World Bank Group), *Innovative Solutions for Business Entry Reforms: A Global Analysis* (July 2012), available at: www.brreg.no/internasjonalt/ISBER_Web.pdf, and *Reforming Business Registration: A Toolkit for the Practitioners* (January 2013), available at: www.wbginvestmentclimate.org/publications/loader.cfm?csModule=security/getfile&pageid=34841.

identification numbers and adopting information technology to facilitate the delivery of a range of business start-up services, minimizing judicial involvement in registration and making the use of notaries, lawyers and registration intermediaries optional, providing information on the registration process, developing single interfaces for business registration (i.e. one-stop shops) and making public the registered information.

15. As noted in A/CN.9/WG.I/WP.85, the best practices noted above usually required reform of a State's legislative or institutional framework, or of the operating procedures of the business itself. Sometimes all three areas needed to be reformed. The experience of different international organizations that were particularly active since the beginning of the last decade in providing support to State reforms in these areas was also referred to as a source for lessons learned.

16. It was highlighted in document A/CN.9/WG.I/WP.85 that a domestic legal framework that was transparent and accountable, provided flexible legal forms and general objectives clauses for business entities, provided for low or no minimum capital requirements, optional use of notaries, lawyers and registration intermediaries, a declaratory system and clarity of the law was particularly conducive to the creation of an improved business registration system.

17. As indicated in A/CN.9/WG.I/WP.85, the best practices noted could respond more to the needs of small and medium-sized enterprises than to those of micro-businesses. In addition, a recent study noted that many small-scale enterprises operating informally in developing countries remained informal despite efforts to simplify and lower the costs of business registration processes. Both issues were drawn to the attention of the Working Group for possible consideration in its discussion on further work in the area of business registration.

18. The Working Group heard a presentation¹¹ by Mr. T. Moss,¹² President of the Corporate Registers Forum (CRF) and Chief Executive and Registrar of Companies for England and Wales, on CRF activities and on business registration practices in the United Kingdom. CRF was introduced as a global forum where members could exchange experiences and information on the present and future operation of corporate business registration systems.¹³ Two examples were mentioned highlighting improvements resulting from reforms of domestic business registration systems. Lessons learned from the reforms processes were said to be, among others: leading from the top and obtaining commitment from all agencies involved; engaging in legal reform at an early stage; ensuring transparency; and reviewing and challenging thinking, processes and procedures.

19. The experience of the United Kingdom business registration system was also presented and it was stressed that the function of business registries was not only to collect information, but also to facilitate access to such information by all interested users. The system was defined as one based on a strong flexible legal framework,

¹¹ All presentations by experts invited to the twenty-third session of Working Group I may be found on the UNCITRAL website at www.uncitral.org/uncitral/en/data/whats_new/2014_11_working_group_I_presentations.html.

¹² Mr. Moss' presentation may be found on the UNCITRAL website at www.uncitral.org/pdf/english/whats_new/2014_11/WGI/Moss-Best_practice_in_business_registration.pdf.

¹³ The CRF has currently members from 50 jurisdictions representing the 5 continents.

ease of compliance, integrity and quality of information, low cost for incorporation, and easy and fast access to data, all of which aimed to ensure excellent corporate transparency. Knowledge of the customer (in particular of their corporate structure) and of the registry's user needs were also highlighted as key elements of an effective system. In particular, it was noted that it was crucial to obtain easy access to accurate information from many different national registries particularly in the case of large companies that were often structured as networks of smaller companies located in different parts of the world. Making data available to users in multiple ways (for instance, individual data, bulk data, machine to machine data) and providing low or no-cost data were other key aspects of an effective business registration system. This approach was said to assist in supporting a country's economic growth, as it responded to the need of traders and potential traders to have the most accurate information possible on business partners, suppliers and creditors.

20. The Working Group also heard a presentation by Mr. R. Dun,¹⁴ Chairman of the Board at the European Business Register (EBR) and Manager of the International Relations Business Register at the Netherlands Chamber of Commerce. EBR is an association of national business registers that functions as a one-stop shop to access company information, and covers a total of 28 countries from the European Union (EU) and other European countries outside the EU.

21. EBR was introduced as an early example of cooperation among business registers in Europe, being established in 1992 and later followed by several other initiatives, including the EU BRITE (Business Register Interoperability Throughout Europe) project (2006-2009), that provided the basis for the EU Green Paper (2009) and the EU Directive 2012/17, which aimed to establish a system for the interconnection of business registers. The Green Paper focused on two topics: access to information (particularly in the context of a network of business registers) and cooperation of business registers in cross-border procedures.

22. The role of EU Directive 2012/17 in creating an environment conducive to business registration was particularly emphasized, as companies with their place of business in EU Member States were increasingly conducting business beyond national borders. Pursuant to the Directive, EU Member States were requested to enable electronic communication between business registers and transmit information to individual users in a standardized way, by means of identical content and interoperable technologies throughout the EU. Unique identifiers ensured that information was distributed from each of the Member States' registers to the competent registers of other Member States in a standard message format.

23. The registration system of the Netherlands was also presented. The domestic legislative framework provided for mandatory registration of all relevant economic entities, including sole traders, associations, foundations, government bodies and churches. This approach was aimed at promoting legal certainty in the economy; disseminating factual data to advance economic interests of businesses and ensure registration of all companies and legal persons to enhance government efficiency.

¹⁴ Mr. Dunn's presentations may be found on the UNCITRAL website at www.uncitral.org/pdf/english/whats_new/2014_11/WGI/Dun-European_business_register.pdf and at www.uncitral.org/pdf/english/whats_new/2014_11/WGI/Dun-European_cooperation_business_registers.pdf.

The system, formerly sustained through an annual registration fee, was currently supported by government funding and information fees.

24. The Working Group further heard a presentation by Mr. V. Giannella,¹⁵ Member of the Board of the European Commerce Register's Forum (ECRF) and International Affairs Manager at Infocamere, Italy, on the results of the 2014 International Business Registers Report.¹⁶ The Report was based on a survey of 73 organizations dealing with business registration, representing four different geographic regions (Asia-Pacific; Africa and Middle East; Europe and the Americas). The Report, which is an annual survey, included a number of findings in respect of: the most popular organizational model for business registries; pre-registration activities; the use of e-systems; sources of funding and fees; and global patterns of business dynamics (terminations and incorporations).

25. Information was provided on Italy's experience with the adoption of an electronic business registration system, which completely replaced the former paper-based system. The Italian business register contained legally-required information relating to business start-up, as well as to changes occurring after registration, of all types of enterprises regardless of their legal status and the economic sector in which they operated. The interconnected character of the registry was stressed, as data from other relevant registries could be accessed. It was also highlighted that through the system, users were allowed to register with several other government agencies, such as tax authorities and social security. The new "registered electronic mail", a mandatory requirement since 2013 for all types of companies, permitted the electronic exchange of all necessary information between the Public Administration and users.

B. Questions posed by the Working Group

26. In light of the presentations given by the invited experts as outlined above, the following paragraphs summarize questions posed by the Working Group and responses received from the experts.

27. *In noting that the law should fit the culture and circumstances of a broad range of States, and in light of recently highlighted anti-corruption efforts by the G20, were business registers trying to improve verification and cross-referral of information with other authorities?* In response, it was noted that a registry must strike a careful balance between creating the conditions to ease the doing of business and to minimize the risk of money-laundering, fraud and similar behaviour. In seeking to establish this balance, some States provided for verification prior to registration; others provided for its post-registration, preferring to facilitate transparency, openness, ease of doing business and speed of access to information, while relying on the correction of any aberrant or fraudulent behaviour after the information had been posted online. In doing so, close contacts were maintained with law enforcement agencies and users of the business registry, and it was observed that, in fact, the number of corrections required was quite small in comparison with the overall number of registrations. However, it was noted that

¹⁵ Mr. Giannella's presentation may be found on the UNCITRAL website at www.uncitral.org/pdf/english/whats_new/2014_11/WGI/Giannella-ECRF_2014.pdf.

¹⁶ The Report is available at www.ecrforum.org.

both systems had advantages and disadvantages associated with them and that the quality and reliability of the information in the register was of paramount importance.

28. *How could online business registration provide for adequate authentication of the founders of the business?* It was observed that where a notary, lawyer or registration intermediary was required for business registration, the notary, lawyer or registration intermediary would communicate with the register electronically in a manner that was recognized by way of a digital certificate provided to that person. Where registration was by a sole trader and no notary, lawyer or registration intermediary was required, strong authentication was used when delivering the digital certificate of registration.

29. *Did business registers keep statistics based on different sizes of companies?* It was noted in response that such information was available, but that most companies in the United Kingdom register were small businesses, and that fewer than 5 per cent of businesses registered in the Netherlands were large. However, it was observed that the basic information requirements for all sizes of companies was the same except that larger, more complex businesses were required to file more information than smaller ones, and that the legal form of the business dictated the information obligations that had to be fulfilled.

30. *Would it be useful to business registers to have certain principles reflected in a model law or regulations, and does the provision of information assist in cross-border trade?* It was noted that any legal text in this regard should contain the essence of what constitutes a company, i.e. directors, shareholders, a statement of share capital and the location of the entity, and that such information should then be built upon for registration purposes. In any event, the goal was transparency of, and open access to, the information, regardless of whether it was for domestic or international trade.

31. *How many SMEs have gone bankrupt and what percentage of them has lasted more than one year? What is the definition of SME in the experts' domestic law? What is the comparative price of obtaining extracts from the registries?* Precise information on the number of SME bankruptcies was not immediately available, but it was observed that the more relevant figure from the perspective of registers was the number of businesses that were removed annually, and that of that number, approximately half did so voluntarily while the other half were removed for no longer meeting the requirements. In addition, over 90 per cent of SMEs were still on the register one year after their registration. Finally, various definitions of SMEs were noted, while the price of obtaining extracts of information ranged from 11 euros for a paper copy to soon-to-be free of charge.

32. *Should company law require a general objectives clause or a specific business purpose clause?* It was noted that the legal regimes on this point varied and that the requirement for a general or specific purpose clause depended on the legal type of the business being founded. In those regimes, like Italy and the Netherlands, that required a specific purpose clause, the content of the clause would be translated into information usable for additional searches and statistical classifications of types of business.

33. *Was there any specific evidence suggesting that the amount of the fee for business registration would influence the number of companies registered?* It was

observed that whether or not the amount of the business registration fee would present a barrier to registration for a business would depend on the calculation made by the business and its motivation to register. However, it was noted that the amount of the fee did play a role in that decision.

34. *It was observed that the registration requirements of companies should be differentiated depending on their size and that business registration was linked to tax liability, which should also be adjusted for size. It was further noted that the company register was but one part of the system, and that other elements affecting MSMEs needed to be considered such as the tax authority, credit rating agencies, banks and other intermediaries.* It was observed that in Finland, a new company filed its information in all relevant registers at the same time, and was provided a unique identifier for all purposes, which was then tied to publicly available information. In States, like the United Kingdom, that did not have a unified system for registration for all purposes, the primary purpose of the registry was to provide the basic information on a company, which could then be built upon by other sources. In addition, in the Netherlands, most companies were MSMEs but all companies were treated similarly, including in terms of requiring paperless registration, except in certain cases in respect of the publication and accounting requirements for the few very large companies. It was also noted that obtaining a license was also a key requirement for businesses, and particularly relevant in the context of developing countries.

35. *Were specific benefits open to women who owned MSMEs; were there limits to the number of times that a founder could close a company and open a new one; and was intellectual property linked to the business register?* In response it was observed that no specific benefits were open to women entrepreneurs; that there was no limit to the number of times that a founder could close or open a company; and that intellectual property was generally dealt with as a separate matter by another authority.

36. *Where were the rules for business registration typically found, i.e. in a State's business corporation statute or in other legislation?* The response to this question was said to vary, depending on the State, but that the relevant legislation in a number of different systems was available online at the World Bank website www.doingbusiness.org.

37. *If a sole trader were required to register, was the basis for that requirement to protect third parties or to conform with other regulations such as tax enforcement?* It was observed that in the United Kingdom, sole traders need only register with the tax authority; they would have no disclosure requirements, nor recourse to limited liability. In the Netherlands, however, sole traders were registered in the same manner as all other businesses so as to be able to identify them and locate information pertaining to them.

38. *In cases where a State's business registration system was amended to incorporate a single interface for business registration, how were companies registered under the old system migrated to the new one?* It was noted that in most cases, the reforms made to a system have been evolutionary, but that in other cases, the companies from the old system were required to register in the new system, and still other instances, the business register converted the paper files into electronic

data. In cases where there was no single interface, the business register typically worked very closely with tax and other relevant authorities.

C. Future work in the area of business registration

1. Issues to be considered

39. Further to the presentations on business registration systems by the invited experts and the discussion on registration practices in paragraphs 18 to 38 above, the Working Group continued to explore the issue of business registration, particularly: (a) whether the best practices for business registration outlined in A/CN.9/WG.I/WP.85 were sufficient to meet the needs of micro-businesses; (b) whether work by UNCITRAL could add value to the existing work in this area without duplicating the efforts and achievements of other organizations; and (c) the form such work might take.

40. The Working Group expressed its general support for the view that the best practices in business registration presented in the Secretariat's document would meet the needs of micro-businesses. Several delegations also emphasized the importance for the Working Group to address such a topic, and it was observed that business registration was in fact part of the lifecycle of MSMEs. It was further noted that although in many jurisdictions there was no need for micro-businesses (most of which are sole traders) to register, in others, mandatory registration of all businesses was required. In any event, growth of the business from that of a sole trader to a larger enterprise or corporate vehicle would likely require registration in most jurisdictions as a matter of public policy.

41. A view was expressed that it may not be necessary for the Working Group to address business registration, as several studies, toolkits and other documents were available for States wishing to embark on a reform process in this area. The Working Group should thus defer to other international organizations, such as the World Bank, which were active in providing technical assistance to States' reforms in this field and which had developed extensive experience. Another view highlighted that it was important to stress the distinction between business registration, which was largely an administrative process disciplined through secondary legislation, and registration as a means of incorporating a business, which was regulated by law in most countries.

42. It was further suggested that rather than differentiating at this stage between sole traders and more complex business forms, the Working Group may wish to take an approach focusing on the general application of principles to all businesses, with a view to later considering any necessary exceptions or tailoring of the approach to the local context. There was support for that view as representing an appropriately flexible approach.

2. Content and form of possible future work on business registration

43. The Working Group expressed its general support for the view that while A/CN.9/WG.I/WP.85 provided a good starting point for further discussion on the topic, any future legislative text on business registration should use that text to draw out the principles on which registration should be based. In addition, it was

suggested that further work on registration should ensure that a balanced approach was taken in terms of those systems where registration was a judicial process and of the relevant principles that inspired those systems. It was proposed that guiding principles on company registration could be prepared for States as well as draft articles based on those principles which States could incorporate in their domestic law.

44. The view was expressed that regardless of the type of text prepared, it should respond to the needs of developing countries for an instrument that would provide the main legislative components for business registration, but that could also be adjusted to meet the domestic context. It was noted by several delegations that a legislative guide could contain a balanced approach and ensure the necessary flexibility for legislative reform of business registration systems, accommodating the needs of developing countries, as well as the requirements of States wishing to improve their business registration system through the adoption of certain best practices, without undertaking major reforms.

45. There was general support for the view that a decision on what form a text on business registration should take could best be made after the Working Group had identified and discussed the principles supporting business registration.

46. After discussion, the Working Group agreed to continue its work on business registration, using A/CN.9/WG.I/WP.85 as a basis to more deeply explore the issues and to consider the distillation of principles. In this connection, parts IV (Best practices in business registration, paras. 18-47) and V (Reforms underpinning business registration, paras. 48-60) of A/CN.9/WG.I/WP.85 were thought to be most relevant. In addition, it was suggested that the work could also consider: (a) the advantages and limitations of different business registration models (i.e. declaratory model and the judicial based model); (b) any necessary definitions; (c) any items listed in paragraph 3 that have not already been included in the text, such as the identification of the minimum information necessary to register; and (d) the issues raised in footnote 26 of document A/CN.9/WG.I/WP.85.

D. Issues in respect of transparency and beneficial ownership: FATF standards

47. The Working Group heard a presentation by Mr. T. Goodrick,¹⁷ from the Financial Action Task Force (FATF) secretariat, on FATF's standard-setting activity to promote effective implementation of legal, regulatory and operational measures for combating money-laundering, terrorist financing and other illicit purposes.¹⁸ It was noted that such standards had been endorsed by over 190 States.

48. The presentation highlighted that while corporate vehicles played an essential role in the global economy, they could also facilitate the use of proceeds of crime if

¹⁷ Mr. Goodrick's presentation may be found on the UNCITRAL website at www.uncitral.org/pdf/english/whats_new/2014_11/WGI/Goodrick-Preventing_misuse_of_corporate_vehicles.pdf.

¹⁸ The Financial Action Task Force (FATF) is an intergovernmental body established in 1989 by the Ministers of its Member jurisdictions, currently comprising 34 jurisdiction and 2 regional organizations, representing most major financial centres in all parts of the globe. Further information is available at www.fatf-gafi.org/.

transparency was not ensured when an entity was established and/or in the entity structure and governance. Shell companies, complex structures, intermediaries and nominees were said to be examples of techniques used to obscure information on beneficial ownership of corporate vehicles. It was noted that information on legal and beneficial ownership could assist law enforcement and other competent authorities in identifying those natural persons who were responsible for the underlying activity of the entity.

49. In order to assist States in facilitating collection of such information and preventing the misuse of corporate vehicles, FATF had developed a series of recommendations which were intended to be of universal application. In particular, Recommendation 24¹⁹ required States to conduct comprehensive risk assessments of legal persons and to ensure that all companies were registered in a publicly available company registry. The basic information required was: (a) the company name; (b) proof of incorporation; (c) legal form and status; (d) the address of the registered office; (e) its basic regulating powers; and (d) a list of directors. In addition, companies were required to keep a record of their shareholders or members.

50. It was noted that the fundamental requirement of Recommendation 24 was that countries should make available adequate, accurate and timely information on the beneficial ownership of all legal persons, and that public authorities should be able to access such information in a timely manner. Beneficial owners were said to be the natural person(s) who ultimately owned or controlled the legal person either through their ownership interests, through positions held within the legal person or through other means. Further, Recommendation 24 permitted States to adopt different mechanisms to collect information according to their legal, regulatory, economic and cultural characteristics. Additional measures required of States were to ensure controls on bearer shares and nominee shareholders; to establish effective, proportionate and dissuasive sanctions for non-compliance; and to engage in international cooperation to facilitate the exchange of information, particularly through electronic business registries.

51. Other FATF standards which played an important role in preventing misuse of corporate vehicles were mentioned, including standards²⁰ requiring financial institutions, lawyers and trust and company service providers to undertake customer due diligence. Moreover, it was noted that emerging best practices were to digitize and maintain registered information in electronic form.

52. In order to assist States facing significant challenges in the implementation of the provisions of the FATF standards and to identify, design and implement appropriate measures in accordance with the requirements of the recommendations, FATF recently developed a guidance paper directed at policymakers and practitioners in national authorities.²¹

¹⁹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Part E on Transparency and Beneficial Ownership of Legal Persons and Arrangements, Recommendation 24 (www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).

²⁰ Ibid., Recommendations 10 and 22.

²¹ FATF Guidance on Transparency and Beneficial Ownership (October 2014) (www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf).

53. Other global initiatives to prevent misuse of corporate vehicles were mentioned. They included the G8 Action Plan Principles to prevent the misuse of companies and legal arrangements; the G20 work on high-level principles on beneficial ownership transparency; the World Bank/UNODC StAR Initiative; and OECD taxation initiatives such as the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes and Common Reporting Standard.

54. The FATF representative was of the view that in light of the FATF standards, the Working Group might wish to consider issues such as the collection of sufficient information by the company registry; measures to ensure that information was accurate and current; and the facilitation of timely access to information.

55. General observations and questions were made by the Working Group in respect of the issues outlined by the invited expert which better clarified certain aspects of the FATF standards. In particular, it was highlighted that as far as registration was concerned, FATF standards did not deal with issues of ex ante or ex post verification: these and measures to ensure compliance with the requirements of registration were left to the State. It was further noted that FATF standards could be applied to entities of all sizes in order to prevent criminal activities.

E. Possible alternative legislative models for micro and small businesses

56. It was recalled that at its twenty-second session (New York, 10-14 February 2014), the Working Group had invited delegations to submit information to it in respect of several domestic legislative models that had been described that provided for the segregation of business assets from personal assets without requiring the creation of an entity with legal personality.²² In response to that invitation, document A/CN.9/WG.I/WP.87 was prepared, and the Governments of Italy and France presented the content of that document to the Working Group.

57. The delegation of Italy explained that the general rule in Italy was that debtors were required to satisfy their obligations with all present and future assets. However, some derogations from this principle by sole or multiparty business entities, as well as by individuals or companies, could be found in terms of separate capital funds and business network contracts as outlined in greater detail in A/CN.9/WG.I/WP.87. In each case, public registration in respect of the segregated funds was required.

58. In response to questions raised by the Working Group, the delegation of Italy explained that it had no specific data on the use of business network contracts by MSMEs, but that as of 1 July 2014, 1,643 of such contracts had been established, involving over 8,000 entrepreneurs. However, it was added that generally speaking, such instruments were thought to be of use mainly for micro and small businesses, while separate capital funds were more commonly used by larger companies.

59. The delegation of France observed that most French entrepreneurs were sole traders and that legal techniques had been established in France to tailor flexible rules adapted to the needs of sole traders. Sole traders and individual entrepreneurs

²² A/CN.9/800, para. 46.

were entitled to segregate personal and professional assets and to have simplified tax and social security opportunities, subject to certain options. A more recent innovation had been the establishment of an individual entrepreneur with limited liability (EIRL), which continued to exist in parallel with the single person limited liability enterprise (EURL). In addition, provision was also made in France for growth from single (SASU) to multi-person (SAS) companies under a single regime.

60. In response to questions raised by the Working Group, the delegation of France confirmed that the EIRL was a fiduciary technique in which the business person split its assets but did not create a separate legal entity, but explained that the attraction for business persons to do so was not cost-related, as the cost of registration under the different regimes was quite similar. Because the segregation of assets was publicly registered, third parties could access the information and assess their risk. Intermingling of personal and professional assets was avoided through the registration requirement and enforced by way of forfeiture of one's limited liability where the segregation of the assets was not respected. Moreover, it was suggested that consideration of the issues in an evolutionary manner, from the situation of sole traders through to their growth to medium-sized enterprises might be an appropriate way for the Working Group to proceed. In addition, it was confirmed that in France, insolvency law, which could result in reorganization or liquidation, applied to all enterprises, regardless of their size.

61. Several delegations expressed interest in exploring further how the mechanisms outlined by the French and Italian delegations could be used to further the efforts of the Working Group. In addition to presenting possible options outside of the limited liability model for the growth of sole traders into multi-person business entities, it was observed that the business network contract could be considered in the development of a cooperative type approach to support MSMEs. There was support in the Working Group for the view that, due to the fact that these mechanisms relied on public registration to notify third parties of their nature, they could be considered for possible inclusion in the revised text that would be prepared focusing on the issues in A/CN.9/WG.I/WP.85.

F. Legal questions surrounding the simplification of incorporation

1. Introduction

62. The Working Group next considered issues relating to simplified business entities or simplified companies. By way of introduction, the Secretariat noted that the Working Group had received a broad mandate from the Commission to prepare legal standards aimed at creating an enabling legal environment for MSMEs, with an initial focus on the legal issues surrounding the simplification of incorporation,²³ and observed that particularly in the case of early discussions on a new topic, the Working Group may wish to exercise care to avoid interpreting that mandate too strictly so as to avoid closing off an area of discussion that might be fruitful in the overall fulfilment of the goals intended to be achieved. The Secretariat noted that the Working Group had already expanded upon its original mandate by considering in such detail information in respect of business registration, and observed that the

²³ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 321.

Commission exercised a supervisory role over the Working Group through the annual reporting system.

63. Some delegations disagreed with the characterization of the mandate of the Working Group concerning its starting point; they pointed out that the starting point for the work was simplified incorporation and registration and that mandate was derived from a proposal made by the Government of Colombia to the Commission at its forty-sixth session in 2013 to begin work on simplified business registration and incorporation.²⁴

64. In order to assist in structuring the Working Group's consideration of this complex series of issues, the Secretariat provided an overview of the relevant documentation, focusing in particular on document A/CN.9/WG.I/WP.86, which was prepared as the primary document responding to the request of the Working Group at its previous session.²⁵ Touching upon three of the broad legal principles underpinning the law of business organizations (limited liability, legal personality and freedom of contract) set out in part IV of the document, the Secretariat referred the attention of the Working Group to part V of the paper as setting out a possible framework for the Working Group to continue its analysis. The framework was intended to outline in a logical but non-exhaustive fashion the main issues that the Working Group may wish to consider in its analysis. In addition, the Secretariat clarified that in order to illustrate the aspects noted in the framework, reference was made throughout the document to two possible examples of interest to the Working Group: the Model Act on the Simplified Corporation (MASC) contained in the annex to A/CN.9/WG.I/WP.83 and the draft model law on a single-member business entity (MLSBE) contained in A/CN.9/WG.I/WP.86/Add.1.

65. Finally, it was observed by the Secretariat that, as alluded to during the previous session of the Working Group,²⁶ efforts to achieve consensus on a common private company statute by a regional economic integration organization had not been successful and had ultimately been abandoned.²⁷ The Secretariat clarified that the MLSBE in document A/CN.9/WG.I/WP.86/Add.1 was not intended as the ultimate goal for the Working Group, but was rather intended as a manageable first step in what promised to be difficult discussions, with the goal of adding more complex provisions to accommodate multiple member business entities in the same model once consensus had been achieved on a single-member model.

²⁴ The proposal of the Government of Colombia (A/CN.9/790), made at the Commission session in 2013, was co-sponsored by a number of delegations and broadly supported within the Commission.

²⁵ A/CN.9/800, para. 65.

²⁶ *Ibid.*, para. 35.

²⁷ A/CN.9/WG.I/WP.86, footnotes 9 and 11.

2. Method of proceeding with the work

66. The Working Group next considered how best it should proceed with its work. A conference room paper (CRP) was introduced that was co-sponsored by a number of delegations and expressed the view that:

(a) The factors that should guide the work at its current session were:

(i) The previous decisions and the mandate of the Working Group focused on simplified business registration and incorporation of MSMEs in developing countries and not solely on micro-enterprises;

(ii) Simplified business registration and incorporation should enable micro and small businesses to grow and to graduate from a subsistence form of doing business to a growth mode characteristic of the formal sector;

(iii) An internationally-recognized form of business registration and incorporation focusing on MSMEs would facilitate cross-border trade for MSMEs operating in regional markets;

(iv) The mandate of the Working Group required it to take into account the experience of developing countries in completing its tasks;

(b) The MASC contained in the annex to A/CN.9/WG.I/WP.83 provided a useful template for developing a legal instrument in respect of MSMEs in developing countries and:

(i) Had served as a basis for legislative reform;

(ii) Addressed the key considerations for simplified business registration and incorporation, including (i) the possibility of one or more persons incorporating; (ii) full-fledged limited liability; (iii) simple registration and incorporation requirements; (iv) contractual flexibility; (v) simple organizational structure; (vi) optional minimum capital; (vii) no purpose requirement; (viii) optional use of intermediaries; and (ix) fiscal transparency and simplified accounting; and

(c) The legal text prepared by the Working Group should include international good practices for incorporation of MSMEs from developing and developed countries, and core elements for it should be drawn from the documents before the Working Group.

67. In addition, the Working Group heard another proposal that the non-exhaustive framework of issues outlined in part V of document A/CN.9/WG.I/WP.86 would constitute an appropriate outline through which it could consider the issues relevant to the preparation of a legal text on a simplified business entity. It was also proposed that the Working Group draw from documents A/CN.9/WG.I/WP.83 and A/CN.9/WG.I/WP.86/Add.1, as well as from other models from other States. After discussion, the Working Group strongly supported that proposal as an initial step. In addition, there was strong support in the Working Group for consideration of a single legal text that could accommodate the evolution of a business entity from a single-member model to a more complex multi-member entity.

3. Framework for consideration of issues

General matters

Definition and the nature of the entity

68. The Working Group proceeded to explore the relevant issues as outlined in part V of document A/CN.9/WGI/WP.86, commencing with a consideration of general matters that might be considered for the proposed legal text. There was broad agreement in the Working Group that definitions would be useful in the final version of the proposed legal text, but that it would not be possible to consider specific terms that would need to be defined prior to having finalized the text. It was noted that although MSMEs were categorized or defined by the authorities in their local economic context, the Working Group had decided at its previous session that it was not necessary to approach the issue of simplified business entities with specific company size in mind.²⁸ The Working Group confirmed that approach, but noted that it would be useful to establish what the scope of application of the legal text would be, for example, certain enterprises might be excluded from it, such as those from certain highly regulated sectors. However, there was agreement that the text should reflect the nature of MSMEs (which could include a diverse group of types of entrepreneur) and their need for support to establish themselves and thrive. In addition, the Working Group agreed to use the terminology “simplified business entity”, which was described as a neutral term, or “simplified company” in its consideration of the issues.

69. Discussion in the Working Group next turned to the issue of the nature of the business entity, as well as how the nature of that business entity should be reflected in its name in order to provide notice to third parties. There was broad agreement in the Working Group that the entity should enjoy limited liability, and that the entity should be a “commercial” privately held entity, but not designated as “for profit”, so as to avoiding uncertainty concerning the meaning of “for profit” and to ensure a broad possible scope, which could include cooperatives and funds. It was observed that States could decide on an individual basis whether to extend the scope of the text to the non-profit sector. As far as whether or not a particular suffix should be attached to the name of the business entity to alert third parties of its nature, it was suggested that a common suffix, perhaps one that was newly created, could assist in uniformity and cross-border recognition of the entity. However, it was observed that that could be difficult to achieve in practice given different language traditions around the world, the fact that it would be important for the suffix to be recognizable in the local commerce sector, and the fact that there would be different levels of uptake of the instrument by States. Instead, it was thought that it would be preferable for the instrument to recommend that a State should use a distinguishable suffix for the business entity, but that the State could choose its own term based on domestic circumstances, provided that, for example, it indicated that the enterprise was a simplified business entity and that it enjoyed limited liability.

Purpose clause

70. The Working Group engaged in an exchange of views in respect of purpose clauses. It was observed that purpose clauses were primarily found in States that had

²⁸ A/CN.9/800, para. 24.

adopted certain common law traditions and that the intent of a specific purpose clause was a matter of agency, in that it signalled the limits of authority of the manager of the business entity: contracts entered into for purposes outside of the stated purpose might not be valid. It was also thought that purpose clauses — even general ones — could provide useful public information on the nature of the enterprise; however, it was further noted that purpose clauses could be used to anti-competitive effect. After discussion of a number of different national approaches and the increasing trend toward broad purpose clauses in States that required them, it was agreed that the purpose clause, if any, of the simplified business entity should be broad so as to provide maximum flexibility for MSMEs. It was also noted that in multiple jurisdictions, a layer of regulatory, licensing, permit and inspection regimes prescribed and regulated the business activities of MSMEs in the same way as the specific purpose clause in the articles of association.

Legal personality and limited liability

71. The Working Group recalled that it had agreed earlier in the session (see para. 69 above) that in order to assist MSMEs in their establishment and development it was key for the simplified entity established to enjoy limited liability. Moreover, the Working Group agreed that, while the concepts were linked, it was not necessary to establish legal personality in order to enjoy the benefit of limited liability, as evidenced by the domestic mechanisms outlined in document A/CN.9/WG.I/WP.87 and through presentations earlier in the session.

72. It was observed that “legal personality” could have different meanings in different States, for example, in the context of taxation, and there was some support in the Working Group for the suggestion that if the concept were to be included in the legal text on a simplified business entity, it might be best to set out its principles rather than using the actual term. The Working Group went on to consider whether it would be advisable for the simplified entity to possess legal personality even though the concept was not necessarily linked to the more imperative requirement of limited liability. Some support was expressed for the approach that legal personality was not a necessary element, that the business entity need not necessarily be a corporation, and that the proposed text should reflect a variety of possible models. In that vein, the Working Group was advised that ASEAN (the Association of Southeast Asian Nations) was striving for the goal of economic integration by 2015, and that it would be important for some States to keep all options open in the proposed text in order to maintain maximum flexibility in those discussions.

73. However, there was also support in the Working Group for the view that making provision for incorporation was a desired outcome of the work in order to provide for the full range of options for development to MSMEs from sole proprietorships to larger enterprises, and that legal personality was thus necessary. The Working Group was also made aware of the view that legal personality and the possibility of incorporation were considered to be important in some developing countries so as to provide the maximum possibility for growth for MSMEs.

74. In addition to reiterating its agreement that limited liability should be an element of the text prepared, the Working Group expressed its support for a single text that could accommodate the evolution of a business entity from a very small to a more complex multi-member entity. In terms of legal personality and the type of enterprise to focus on in the preparation of the text, the Working Group agreed that

all options considered in its discussion should remain open for future exploration. With a view to enriching its discussions, the Working Group encouraged participation from developing countries of all regions of the world in order to better respond to global needs.

Minimum capital requirement and the protection of creditors and third parties

75. The Working Group recalled its discussion in respect of minimum capital requirements at its previous session.²⁹ As at its last session, while there was no consensus on whether or not minimum capital requirements were required to offset the provision of limited liability to an enterprise, there was broad agreement in the Working Group that the modern trend was to move away from minimum capital requirements. In addition, the Working Group heard a number of examples of States that had reduced the capital requirement for enterprises of all types to zero or to a nominal amount and have had successful outcomes in terms of increased business formalization with no apparent negative impact; the view was expressed that the positive impact of reducing or abolishing the minimum capital requirement would be even greater in the case of MSMEs. The Working Group was also reminded that some States took a progressive approach to their minimum capital requirement in order to account for the difficulties that smaller enterprises might have in meeting those requirements early in their life cycle. It was suggested that this flexibility in the treatment of smaller enterprises was a reflection of their nature, in that third parties dealing with such enterprises were more likely to have direct knowledge of the enterprise and its principals, such that they were not in need of protection, but that as the enterprise grew and perhaps commenced cross-border trading, the need for the protection of third parties increased accordingly.

76. The Working Group heard that the extent to which creditors of an enterprise required protection was unclear, since voluntary creditors were usually able to protect themselves via contractual mechanisms, while involuntary creditors may not be protected by capital requirements in any event. It was also noted that minimum capital could be withdrawn from an enterprise's bank account as soon as it was established, thus not providing any real protection for third parties, while enterprises with low or no minimum capital on establishment could, in fact, have a large capital influx post-establishment. It was further observed that in those States with a minimum capital requirement, enterprises were permitted to use that capital in the operation of their business. In addition, it was suggested that in the particular context of MSMEs, providing them with limited liability to protect their personal assets was of greater importance than requiring a more than nominal minimum capital protection, which could create a potential barrier to formalization. The Working Group also heard that having no capital requirements would not necessarily have an impact on the apportionment of rights and obligations in an enterprise, since the two issues were not necessarily linked.

77. The Working Group next considered means that could be used to protect creditors and third parties other than establishing greater than nominal minimum capital requirements. While the list of such possible mechanisms set out in paragraph 32 of document A/CN.9/WG.I/WP.86 was generally noted with approval, it was observed that all of the mechanisms listed were of an ex post rather than an

²⁹ A/CN.9/800, paras. 51 to 59.

ex ante character (like minimum capital requirements) which was an important distinction in some States, and that reliance on other sectors to provide third-party protection (through, for example, banking or licensing requirements) might not be sufficient. In addition, it was suggested that while the entire list was of interest, the first three mechanisms might be of particular importance in the context of MSMEs. The Working Group also heard suggestions for possible additions to the list of mechanisms, including requirements in respect of the transparency, quality and public availability of registered information on the business entity and its managers, as well as requirements that its business name not be misleading and that its name be set out in contracts, invoices and other dealings with third parties. Further protection of third parties could be obtained via specific requirements that the founders and managers of a business entity not be bankrupt, and that they be of legal age and sound mind.

78. The Working Group agreed that the issues of minimum capital requirement and protection of third parties should be treated under the general category of protection of creditors and other third parties. Although the Working Group did not agree on what such standards for the protection of creditors and third parties should be, there was agreement that the legal text contemplated for simplified business entities should provide sufficient flexibility for a State to choose its own criteria as it saw fit. It was further agreed that the list of measures presented in paragraph 32 of document A/CN.9/WG.I/WP.86 could be expanded to include other approaches for the protection of third parties, possibly including approaches beyond commercial or company law.

79. The Working Group agreed that it would resume its deliberations on document A/CN.9/WG.I/WP.86 at its next session, beginning from paragraph 34. Delegations were invited to submit comments as official documents.

V. Next sessions of the Working Group

80. The Working Group was reminded that its twenty-fourth session would be held from 13 to 17 April 2015 in New York, and that its twenty-fifth session was tentatively scheduled to be held from 12 to 16 October 2015 in Vienna.