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Report of Working Group I (MSMEs) on the work of its twenty-fourth session (New York, 13-17 April 2015)

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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 incorporation[3] 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]

4. At its twenty-third session (Vienna, 17-21 November 2014), Working Group I continued its work in accordance with the mandate received from the Commission. Following a discussion of the issues raised in working paper A/CN.9/WG.I/WP.85 in respect of best practices in business registration, and presentations by representatives of the Corporate Registers Forum, the European Business Register and the European Commerce Register's Forum, the Working Group agreed to

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[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.88, paras. 5-15.

[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.

continue its work on business registration by further exploring the relevant key principles. To that end, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of working paper A/CN.9/WG.I/WP.85 for discussion at a future session. In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group heard a presentation by the secretariat of the Financial Action Task Force (FATF) on its standard-setting activity to combat money-laundering, terrorist financing and other illicit activity, as well as presentations by States of the information contained in working paper A/CN.9/WG.I/WP.87 on possible alternative legislative models to assist MSMEs. The Working Group next explored the legal questions surrounding the simplification of incorporation by considering the issues outlined in the framework set out in working paper A/CN.9/WG.I/WP.86, and agreed that it would resume its deliberations at its twenty-fourth session beginning with paragraph 34 of that document.

II. Organization of the session

5. Working Group I, which was composed of all States members of the Commission, held its twenty-fourth session in New York from 13-17 April 2015. The session was attended by representatives of the following States Members of the Working Group: Armenia, Brazil, Cameroon, Canada, China, Colombia, Croatia, Ecuador, France, Germany, India, Indonesia, Italy, Japan, Kenya, Malaysia, Mexico, Namibia, Panama, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, United States of America, and Zambia.

6. The session was attended by observers from the following States: Finland, Libya, the Netherlands, Peru and Romania.

7. The session was attended by the following non-member States having received a standing invitation to participate as observer in the sessions and the work of the General Assembly: the Holy See.

8. The session was also attended by observers from the European Union.

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

(a) *Organizations of the United Nations system*: World Bank (WB); World Intellectual Property Organization (WIPO);

(b) *Invited intergovernmental organizations*: Organization of American States (OAS);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), American Society of International Law (ASIL), Commercial Finance Association (CFA), Fondation pour le droit continental, Moot Alumni Association (MAA), National Law Center for Inter-American Free Trade (NLCIFT), The European Law Students' Association (ELSA) and The Law Association for Asia and the Pacific (LAWASIA).

10. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Ms. Jennifer Ng'ang'a (Kenya)

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

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.88);

(b) A note by the Secretariat containing a draft model law on a simplified business entity (A/CN.9/WG.I/WP.89); and

(c) Observations by the Government of the Federal Republic of Germany (A/CN.9/WG.I/WP.90).

12. 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.
7. Adoption of the report.

III. Deliberations and decisions

13. 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 sessions and on Secretariat document A/CN.9/WG.I/WP.89, as well as the observations of the Government of the Federal Republic of Germany in document A/CN.9/WG.I/WP.90. 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 (Legal issues surrounding the simplification of incorporation)

14. Prior to recommencing deliberations in the Working Group, it was recalled that the work of Working Group I on MSMEs was of particular relevance in light of the United Nations Post-2015 Development Agenda, since the outcome of such work could be expected to have a major impact on developing countries, whose economic strength depended on MSMEs. It was further observed that an outdated commercial

law framework could be an impediment to sustainable development and could make it difficult for States to efficiently mobilize their resources.

15. In keeping with that intervention, it was observed that the focus of the Working Group's efforts should be to support microenterprises in order to foster their establishment and sustainable growth. In that vein, Working Paper A/CN.9/WG.I/WP.90 had been prepared, containing a number of suggested theses that could guide the Working Group in its future efforts. These seven guidelines were summarized as: building bridges to bridge the gaps between different legal traditions; honouring what already existed in terms of company law; focusing on the "think small first" principle to develop the work; finding legal and regulatory tools to establish businesses simply, at a minimal cost and in a trustworthy manner; leveraging important aspects of business registration and limited liability; making information accessible across borders; and focusing on an innovative path that could lead to a legislative guide or toolkit with optional model provisions.

16. Support was expressed in the Working Group for the guidelines suggested in Working Paper A/CN.9/WG.I/WP.90 as a means of developing the work in an appropriate context. However, the Working Group recalled that it had explored the issue of what form its work in respect of the legal issues surrounding the simplification of incorporation should take at previous sessions (see A/CN.9/800, paras. 34 to 38), but that it had not yet made a decision in this regard. Support was expressed for both a legislative guide or toolkit approach and for a model law; the Working Group agreed that both approaches had merits and that it was not necessary to make a decision on the form of the text until its discussions had progressed further.

17. The Secretariat drew the attention of the Working Group to Working Paper A/CN.9/WG.I/WP.89, which contained a draft model law on a simplified business entity as well as commentary on those provisions. The Secretariat explained that it had prepared the document in order to assist the Working Group in its further discussion of Working Paper A/CN.9/WG.I/WP.86 by illustrating how the principles under discussion could appear in a text, should the Working Group decide to prepare a model law. It was explained that the draft model law in Working Paper A/CN.9/WG.I/WP.89 incorporated the decisions made by the Working Group at its twenty-third session (Vienna, 17-21 November 2014), and could be modified to include additional decisions made by the Working Group at the current session.

18. The Working Group recalled the progress of its work at the previous session (see A/CN.9/825), and some additional comments were made in respect of issues that had been discussed at that session. In particular, it was observed that the name of an enterprise need not be unique, provided that businesses with the same name were sufficiently distinguishable, and that requiring a unique name for registration could result in unnecessary delays in registration. A suggestion was also made that care should be taken in identifying the nature of the business entity, as it could have tax ramifications depending on the relevant State. The Working Group then resumed its consideration of the issues presented in Working Paper A/CN.9/WG.I/WP.86, commencing with paragraph 34, as agreed at the conclusion of its twenty-third session.

A. Formation of the business entity

Number of members

19. The Working Group considered the number of members that should be required for formation of a simplified business entity. The Working Group recalled that it had agreed at its previous session (see A/CN.9/825, para. 67) that efforts should be made to agree on 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. It was observed at the current session that such an approach could have a number of advantages, including reducing transaction costs for single member businesses wishing to grow, and that any text prepared should be structured so as to permit smaller entities to access the rules relevant to them easily, and to disregard more complex rules meant for multi-member business entities. In keeping with its earlier decision, there was general agreement in the Working Group that single and multiple member entities should be accommodated in the same text, and that there should be no maximum number of members required, leaving such a decision to the policy of the relevant State.

20. Reference was also made to the discussion in the previous session of the Working Group in respect of Working Paper A/CN.9/WG.I/WP.87, which described possible alternative legislative models for micro and small businesses that provided for the segregation of business assets from personal assets without requiring the creation of an entity with legal personality (see A/CN.9/825, paras. 56 to 61 and 74). It was observed that that approach could permit small entrepreneurs to access the advantages of limited liability, even in a multi-member format, without requiring them to incorporate, and could thus be a simpler option for many of them. The Working Group was reminded that it had tentatively agreed at its last session to include a discussion of such options in its further work, including business registration, since those mechanisms generally relied upon public registration to notify third parties of their nature.

Business registration

21. It was observed that the Working Group at its last session had agreed to continue its work on business registration, and had requested the Secretariat to explore in-depth the issues and to distil the principles found in parts IV (Best practices in business registration, paras. 18-47) and V (Reforms underpinning business registration, paras. 48-60) of Working Paper A/CN.9/WG.I/WP.85 (see A/CN.9/825). While aspects of business registration were considered relevant to the exploration of the legal issues surrounding the simplification of incorporation, further consideration of the issues in respect of business registration could be expected to take place at the next session of the Working Group. Rather than pre-empt that discussion, particularly in respect of some of the more complex issues set out in paragraphs 35 and 36 of Working Paper A/CN.9/WG.I/WP.86, the Working Group agreed to delay its consideration of those issues until the broader discussion on business registration had taken place, bearing in mind that there should be consistency in the approach taken.

22. It was observed that the Working Group should note that electronic registration referred to in paragraph 36 consisted of two aspects: online access to the business

registry system and the creation of the electronic record of registration. A concern was raised that that reference should be deleted as it did not take into account the fact that not all States had the necessary infrastructure for electronic business registration. However, there was support in the Working Group for the view that paragraph 36 was appropriately balanced in that it did not suggest that electronic registration should be compulsory, but rather suggested that any registration system would have to accommodate both paper-based and electronic means. Moreover, inclusion of electronic registration that might not yet be attainable for every State was nonetheless in line with the forward-looking nature of creating an enabling legal environment for MSMEs and of the work of UNCITRAL generally. It was further emphasized that electronic registration afforded many advantages, including transparency, deterrence against corruption and money-laundering, efficiency and convenience.

Information required in the formation document

23. The Working Group next considered paragraph 37 of Working Paper A/CN.9/WG.I/WP.86 concerning which information should be required in the formation document to be submitted to authorities for the valid formation of the entity, and which information could be submitted at the option of the founding members. It was observed that the key issue in this regard was to provide for transparency, since such information would be the only information that would be publicly available. It was suggested that such information should include not only the name of the entity, the location of the entity and the names and residence of the founding members and of each member of the board of management, but that the formation document should also require disclosure of those authorized to represent the business entity and to legally bind it. There was some support for that view. Others suggested that in order to avoid bureaucratic hurdles that could discourage formalization, information required in the formation document and subjected to transparency should be the minimum necessary to identify the entity and to permit its operation; additional non-essential information could be located in the operating documents rather than the public registry. There was also support for that view in the Working Group.

24. The view was also expressed that the names of all shareholders of the entity should also be included in the formation document, or otherwise be publicly available. Concern was expressed that this information might not be available at the time of formation of the business entity, and that such a requirement could create a burden for smaller closely held businesses. In addition, it was observed that some States would prefer not to disclose that information, and that it should be a policy choice that should be left to the implementing State. Caution was urged that the more onerous transparency requirements for publicly traded companies should not be extended to privately held ones, particularly to those micro and very small entities that were intended to benefit from the efforts of the Working Group.

25. A view was also expressed that the most important purpose of the information required of an entity concerned its creditworthiness and that information on the assets of the entity was vital for that purpose. It was observed that such an asset-based registry could be linked to the business registry in order to assist micro and small businesses, but that such asset information was separate from the information that should be required in the formation document.

26. The Working Group was urged to focus on the theme of "think small first" in its consideration of what information should be required in the formation document. There was support for the suggestion that the focus of the discussion should be on what information should be required of the very smallest entity in order for it to operate successfully, bearing in mind that many such micro and small informal businesses were already operating successfully, including in cross-border trade. It was suggested that three aspects of particular importance in terms of transparency for such an entity were the identity of the entity, the identity of its founding members, and information on how that entity was controlled by its members.

27. The Working Group concluded its consideration of what information should be required in the formation document of a simplified business entity in order to achieve the valid formation of the entity, and which information should be optional. Although it did not reach agreement on those matters, the Working Group was of the view that the broad expression of views was useful and that it could return to consider some of those issues after other aspects of Working Paper A/CN.9/WG.I/WP.86 and other documents were considered.

B. Possible reconsideration of working methods

28. Following its consideration of the issues above in respect of the number of members required for the formation of the business entity, certain aspects of business registration, and information that should be required in the formation document, the Working Group assessed whether it might be advisable to adjust its working methods. In particular, the Working Group considered whether it should continue discussing the framework of issues set out in Working Paper A/CN.9/WG.I/WP.86, or whether it would be of greater assistance to the Working Group to instead consider those issues as illustrated in the draft model law on a simplified business entity contained in Working Paper A/CN.9/WG.I/WP.89 and by A/CN.9/WG.I/WG.83. A view was expressed that considering the latter would be more appropriate at the current session, since Working Paper A/CN.9/WG.I/WP.89 contained provisions that were more specific in nature and therefore might better assist the Working Group in structuring its discussion of those issues. However, there was support in the Working Group for the position that at that point in the deliberations there remained several conceptual issues in Working Paper A/CN.9/WG.I/WP.86 that had yet to be discussed and determined, and that decisions on such issues were considered important in providing guidance on future discussions, including on A/CN.9/WG.I/WP.89. It was also said that Working Paper A/CN.9/WG.I/WP.86 contained many policy considerations that, although complex, were nonetheless likely to resurface in later discussions were they not considered at an early stage. The Working Group decided to continue with its deliberations on Working Paper A/CN.9/WG.I/WP.86.

C. Relations of members to each other and to the business entity

Contributions and liability to make contributions

29. The Working Group recalled that it had at previous sessions considered the issue of the advisability of a minimum capital requirement for simplified business

entities (see A/CN.9/800, paras. 51 to 59 and A/CN.9/825, paras. 75 to 78), and that while it did not wish to reiterate that discussion, there were certain aspects of it that could be said to touch upon the issue of contributions to the business entity by the founding members. In particular, it was observed that in order for the business entity to operate, it would have to have some sort of contributions from founding members. In response, it was noted that a business entity did not necessarily have to possess assets at its formation, since assets would be generated through the operations of the entity. In addition, it was noted that contributions of members could take many forms, including current or future agreements to contribute cash, tangible or intangible property, services, skills or labour. It was noted that a mandatory minimum amount of contribution, a requirement in respect of when the contribution must be made and strict rules on the form of the contribution could present obstacles to micro and small enterprises. In addition, it was further clarified that the purpose of including rules on contributions was to permit founding members of an entity to agree among themselves on what they would contribute to the business, but that such rules should not be mandatory; there was support in the Working Group for that view.

30. In response to the question of how the obligation to contribute could be enforced outside of the contractual relationship between the members, it was observed that some States had provisions in their company law that penalized a failure to contribute in the promised form and at the promised time by depriving the member of their right to participate as a member of the entity. A concern was expressed that the regimes described might not provide sufficient protection to third parties when no contributions were necessary at the formation of the business entity. In addition, the view was expressed in the Working Group that the value of contributions should be assessed in order to determine what distributions could properly be made; however, this approach was cautioned against as a possible incursion into matters best left regulated by insolvency rules.

Distributions to members and liability for improper distributions

31. The Working Group next considered the issue of what rules might be established to effect distributions to members, and whether restrictions should be placed on distributions to members of the business entity in order to ensure that the entity could continue to operate following the distribution. Approaches to control improper distributions were said to include the insolvency test and the balance sheet test (both of which were illustrated in article 9(3) of draft model law on a simplified business entity in document A/CN.9/WG.I/WP.89), which some were of the view might be too complex for micro and small enterprises, as well as the requirement that a business entity keep a certain minimum amount of money as a reserve fund that could not be properly distributed to members. It was noted by one State that although it had abolished the minimum capital requirement for the establishment of a business entity, it nonetheless maintained legal capital as the standard of distribution.

32. The Working Group also considered how liability for improper distribution should be imposed. It was noted that article 11 of the draft model law on a simplified business entity in document A/CN.9/WG.I/WP.89 established the liability of a member for having received improper distributions. In addition, it was thought that there should be a specific rule beyond a general liability provision in order to

establish the liability of managers in the case of improper distributions. A suggestion was also made that provisions could be included to establish a default regime for the situation where members fail to agree on how to share distributions, profits and losses.

D. Adjustment of working methods

33. Prior to the commencement of its discussion on the next section of Working Paper A/CN.9/WG.I/WP.86 concerning shares, voting rights, rights to information, and shareholder agreements and meetings, it was observed that those considerations might be too complex to be applied to the MSME context. The Working Group was reminded of the importance of fostering MSMEs, particularly in developing economies, and that to do so it would be best to keep the formalization process as simple as possible. It was emphasized that the "think small first" paradigm was an important guiding principle, but that it should not directly translate into a one-size-fits-all approach, given the wide range of legal traditions and market conditions that existed in various economies around the world.

34. In light of those observations, the Working Group reconsidered how best to accommodate the very simple rules needed by single member entities in a legal instrument along with more complex provisions for multi-member enterprises. A suggestion was made that the Working Group could continue to deliberate on the assumption that the legal text would contain two types of provisions: a set of common provisions that was applicable to both single and multi-member entities and another set of more complex provisions that was applicable only to multi-member entities. Articles 1 through 6 in the draft model law in Working Paper A/CN.9/WG.I/WP.89 were suggested as common provisions that could be applicable to both single and multi-member enterprises. It was further suggested that in light of those considerations, Working Paper A/CN.9/WG.I/WP.89 might be a better document on which to continue deliberations, bearing in mind that simple rules might also suffice for multi-member entities, depending upon the complexity of the business.

35. After discussion, it was decided by the Working Group that it should continue its work by considering the first six articles of the draft model law and commentary thereon contained in Working Paper A/CN.9/WG.I/WP.89, without prejudice to the final form of the legislative text, which had not yet been decided.

E. Articles 1 to 6 of A/CN.9/WG.I/WP.89

Article 1. Nature

36. A concern was raised that the term "commercial" might not be broad enough to include the full range of MSME activities that ought to be covered by the text; for example, in some legal traditions, the term might not include activities in the agricultural or handicraft sector. It was observed that that shortcoming could be remedied through mention in the commentary of those additional sectors that were intended to be included. An additional suggestion was that the term "commercial" could be replaced with the word "business", as the latter was said to be more inclusive. The Working Group was in agreement with those suggestions.

37. Questions were also raised regarding whether the phrase “including the ownership of property” was necessary and whether it was in the appropriate provision in the text. By way of explanation, it was noted that the phrase was intended to address certain jurisdictions in which the ownership of property was not considered to be a commercial activity. Since the Working Group had decided to refer to “business activity” instead of “commercial activity”, it agreed that the phrase could be deleted and the concept moved to the commentary in respect of article 2, as necessary.

38. A recommendation was also made that, although the Working Group had previously agreed to use the term “simplified business entity” as a neutral term, or “simplified company” (see A/CN.9/825, para. 68), the phrase “simplified company” should be used throughout the text instead of “simplified business entity”. It was stated that, as a practical matter, the term “company” was more familiar to the business world, especially in developing countries. Concerns were expressed with this proposal, in that the term “company” was said to carry with it certain connotations depending upon the legal tradition of the State, and it was suggested that the term “business entity” might be a more neutral choice. It was observed that regardless of which term was chosen in the text, the State implementing the provisions would choose an appropriate term in its enactment of that text. It was further suggested that square brackets could be inserted around the phrase “simplified business entity” where it appeared in the text; although there was support for the use of the term “simplified business entity”, it was agreed that it could be placed in square brackets pending agreement by the Working Group on it or another term.

39. In response to questions raised in respect of the intended meaning of the terms “operating document” (which appeared in paragraph 9) and “formation document” in the draft text, it was explained that in order to avoid confusion with existing legal concepts and legal traditions, UNCITRAL instruments often sought neutral terminology to be used instead. As explained in paragraph 12 of Working Paper A/CN.9/WG.I/WP.89, an “operating document” was intended to be the document or electronic record that governed the affairs of the simplified business entity, and would include articles of association, bylaws and other similar instruments, while the “formation document” was the instrument necessary to create the simplified business entity, the contents of which would be submitted to the business register and would be made public. It was noted that the legal regime in some States did not have two separate documents that corresponded to the two described, but rather a single instrument. In that connection, it was agreed that the important feature to be preserved in the draft text was not necessarily that two separate instruments were required, but rather was in respect of the contents of the instruments and which aspects of the information contained in them would be required to be made public. It was observed that that discussion could be pursued in greater detail when the Working Group considered article 6 on the contents of the formation document.

40. It was also suggested that a phrase to the effect of “unless otherwise provided by law” be added to the end of article 1. Although this issue was not taken up by the Working Group at the current session, the delegation proposing it reserved the right to return to this point in future discussions.

41. A concern was raised that the current title of article 1 of the draft text, “nature”, did not appropriately reflect the content of the article. Various suggestions

for its replacement were made, including, inter alia, “scope”, “sphere of application”, “definition”, “goal” and “purpose”. A view was expressed that “goal” or “purpose” might not be appropriate, as draft article 1 did not purport to aspire to a specific goal or purpose. After deliberation, the Working Group agreed to replace “nature” with “scope” as a preliminary title of article 1, subject to any developments that might arise as a result of future discussions on the draft legal text.

Article 2. Legal personality

42. It was suggested that the current text of draft article 2 did not sufficiently reflect the desired capacity of the simplified business entity, and that additional powers should be added along the lines of its ability to own tangible and intangible assets and to acquire rights and assume obligations. There was support in the Working Group for that proposal, and for the suggestion that ideas along these lines should be collected for future consideration by the Working Group. A list of potential additional powers to be added to the provision was also suggested, based on existing legislative models, but the Working Group was reminded that while it was desirable to have a comprehensive approach, that goal should be balanced with the need for simplicity.

43. The Working Group was reminded that, as noted above in paragraph 36, it had previously considered the inclusion under a possible MSME scheme of entrepreneurs and individuals operating in the agriculture and handicraft spheres, and doubts were raised that the current draft text could accommodate their inclusion. It was also recalled that the Working Group had at its last session received information in respect of certain domestic legislative models applicable to micro and small businesses that provided for the segregation of business assets without requiring the creation of an entity with legal personality yet nonetheless offered limited liability protection (Working Paper A/CN.9/WG.I/WP.87). It was suggested that the Working Group had agreed to focus on limited liability, but that there was as yet no such agreement in respect of legal personality. However, caution was also expressed that attempting to include such a broad array of possible businesses in the draft text could result in confusion on the part of third parties interacting with the business entity, and that it might be clearer to limit the draft text to separate legal entities. Moreover, it was recalled that the Working Group could agree to include in explanatory materials a description of those successful regimes that permitted entities with limited liability but no legal personality, and it was agreed to take note of those issues more generally in the commentary or accompanying materials. It was also stated that the first sentence of paragraph 11 of the draft text in A/CN.9/WG.I/WP.89 might require clarification, in that the defining characteristic of legal personality was the capacity to exercise certain rights rather than the segregation of personal and business assets.

44. In addition, delegations were urged to inform the Working Group of any statistics and information they had in respect of the success of various alternative legal forms. In that regard, it was noted that it would also be instructive for the Working Group to receive information in respect of the extent to which alternative regimes enjoyed the support of banking practice in the States in which they were employed.

45. Although it was suggested that the first sentence of article 2 could be deleted in light of the earlier discussion on legal personality, there was strong support for its

retention in the draft text. It was observed that the sentence set out clearly the delineation between the artificial business entity and the natural entity, and that to remove it would be to deprive the draft text of a concept of fundamental importance. In light of those considerations, the Working Group agreed to retain the first sentence of draft article 2.

46. A related suggestion was made to add the words "and capacity" to the title of article 2 of the draft text, so that it would read "legal personality and capacity" in order to better reflect the content of the draft provision. Following deliberation, the Working Group agreed to retain the current title, "legal personality", as the title of draft article 2.

47. In response to a question whether rules in respect of when the legal capacity of a simplified business entity began and ended should be included in draft article 2, it was observed that article 5 of the draft text established the formation requirements for the simplified business entity, and that it would come into existence upon registration, and cease to exist when it was struck from the register. A concern was expressed that draft article 5 might not be sufficient for that purpose.

48. A suggestion was made to replace the term "shareholder" with "member" in article 2 of the draft text, as the former could have a restrictive meaning whereas the latter was more system-neutral and inclusive. That suggestion gained widespread support and the Working Group decided to use "member" in lieu of "shareholder" throughout the text, as well as to bear in mind that the text should take care to include both single and multi-member entities.

49. A proposal was also made that the draft text could be clarified through the deletion of the phrase "and the power to do all things necessary or convenient to carry on its activities" from the end of draft article 2. That proposal was not taken up by the Working Group.

50. In response to the recurring discussion of potential tax repercussions in specific States associated with the use of the concept of legal personality, it was observed that the Working Group should refrain from drafting the text around the tax laws of any State. It was said that, while cognizant of the need to remove as many legal obstacles as possible, an overemphasis on tax-related issues ought to be avoided as the Working Group was endeavouring to develop a system-neutral legal instrument. In response, it was suggested that corporate double taxation was a concern for some States and that although tax issues need not be directly addressed in the draft text, potential obstacles of this type ought to be identified in the commentary.

Article 3. Limited liability

51. The Working Group next considered draft article 3 on limited liability and the commentary associated with it. In preliminary discussions, it was observed that the concluding sentence of paragraph 14 did not appear to present a balanced view, and that it should be adjusted accordingly. It was also suggested that draft article 3 could be amended to establish separate rules for a single member entity and for a multi-member entity, but that proposal was not taken up by the Working Group.

52. Some support was expressed for article 3 as drafted, although it was observed that an operating document might consist of an oral agreement, and that "operating

agreement" might be a more suitable phrase in the text. However, a number of delegations expressed concerns over the opening phrase of the draft provision, "except as provided by the operating document". It was observed that the draft provision as a whole appeared to cover two different types of liability: the "external liability" that was an obligation of the simplified business entity to creditors or other third parties, and for which a member could not be personally liable, and the "internal liability", consisting of debts as between members of the simplified business entity, and which could be covered by a members' agreement. The draft provision appeared to mix the two types of liability, and it was noted that these two types of liability could be separated out in a future draft for additional clarity. Since the operating document was not necessarily intended to be disclosed to the public, the opening phrase of the draft article was thought to be particularly problematic in light of the effect it could have on unsuspecting third parties. The Working Group agreed that the opening phrase of draft article 3 should be reformulated as a separate provision.

53. The Working Group heard various initial proposals for text that could be substituted for draft article 3. One such proposal was: "members of the simplified business entity shall not be held liable for any obligation of the simplified business entity, with the exception of piercing the corporate veil." Another proposal was: "a member of this simplified business entity is not liable except for its contribution to the entity," with a note in the commentary that the member would nonetheless remain liable for certain actions, such as tortious ones or personal guarantees.

54. In order to assist the Working Group in further focusing the discussion, several observations were made. The Working Group was encouraged in its consideration of a text on a simplified business entity to bear in mind who its target audience was; in effect, was it aimed at microsized business or was it to establish a more uniform legal form for a business entity that was more of the small or medium size? Other questions raised were whether in the developing country context, the goal was to reform and simplify outdated company law regimes or to provide a separate and innovative approach based on the collective domestic experience of delegations, but specifically tailored to MSMEs. There was broad agreement in the Working Group that the goal of the work should be the latter. In that vein, it was further clarified that the text should enable MSMEs to access the formal economy as quickly and affordably as possible, and to provide benefits for informal MSMEs making the transition to a formal entity by providing them with limited liability and legal personality. It was also observed that the optimal solution might be to draw ideas from corporate law reform to create a legal text that was capable of standing on its own and was not dependent on existing company law, however it was also suggested that it might be advantageous to link to existing company law in order to generate confidence in the legal underpinnings of the business entity by stakeholders such as banks. The Working Group agreed in general with that articulation of its goals, but specified that while it recognized that a more formal business form with legal personality was most suited for treatment in the text being discussed, it did not wish to discard the possibility of providing additional advice for States in the context of micro and small entities, particularly in terms of solutions where legal personality was not required, such as those explored previously in Working Paper A/CN.9/WG.I/WP/87.

55. There was broad agreement in the Working Group that it would be useful to consider draft article 3 in light of three main issues. The first aspect of the provision was to establish that the liability of members of the simplified business entity to third parties was limited such that an obligation of the entity did not transfer to its members. The second matter to be treated in the draft provision was to establish the obligation, if any, of the member of the simplified business entity to contribute to the capital of the entity. Thirdly, the draft article could address the relationship among the members of the simplified business entity concerning liability.

56. It was suggested that a fourth matter could be added to the above analysis, in that the Working Group could also consider in the provision on limited liability the situations in which the corporate veil would be pierced and limited liability for members of the simplified business entity would be lost. However, there was general agreement in the Working Group that rules on piercing the corporate veil were quite detailed and could vary widely from State to State, such that it might not be productive to attempt to establish such standards in the draft text, outside of noting the potential importance of such a remedy in the commentary and leaving establishment of standards on it to enacting States. It was also observed that piercing the corporate veil was one of several approaches that the Working Group had identified previously as a means of ensuring third party protection in cases where there was an abuse of limited liability, including those listed in footnote 17 of Working Paper A/CN.9/WG.I/WP.89.

57. It was proposed that text for draft article 3 along the lines of the following text might appropriately deal with the four issues outlined in the previous two paragraphs:

(a) A member is not solely by reason of being a member liable to any person, directly or indirectly for any act or obligation of the simplified business entity;

(b) A member is liable to contribute to assets of the simplified business entity as provided by the operating document, or as required by law;

(c) A member may be liable to the simplified business entity or to other members in respect of the acts or obligations of the simplified business entity if provided by the operating or other document.

58. By way of additional clarification of the suggested text in the paragraph above, it was noted that delegates had made it clear through their interventions that rules in respect of piercing the corporate veil tended to have a very specific domestic context, and thus were not susceptible to a generalized treatment in the text. However, by inclusion of the phrase “as required by law” in subparagraph (b), those domestic solutions could nonetheless be included to qualify the provision.

59. An alternative drafting suggestion for draft article 3 was made along the lines of the following:

(a) The members of the entity are not personally liable for the debts of the entity, provided there is no abuse;

(b) The members of the entity will be liable for the losses of the entity only to the extent of their contributions to the entity;

(c) The members of the entity will be liable for the losses of the entity in proportion to the amount of their contribution, unless there is an agreement that says otherwise.

60. Although some concern was expressed that issues relating to the contributions of members should be dealt with elsewhere in the draft text, such as in conjunction with draft article 12, there was general agreement that the suggested approaches provided an acceptable basis on which to pursue future discussion.

Article 4. Name of entity

61. There was broad support for the current wording of draft article 4, paragraph 1, which made it mandatory for a simplified business entity to contain a phrase or an abbreviation that distinguished it from other business entities and signalled its status as a simplified business entity with limited liability. The Working Group accordingly agreed to retain that text.

62. A suggestion was made to require simplified business entities to include a reference to their limited liability (i.e. the phrase or abbreviation mentioned in article 4, paragraph 1) in their correspondence with third parties (e.g. contracts, invoices, negotiable instruments or orders for goods and services). It was said that this measure reflected an important policy objective of enhancing legal certainty and protecting third parties who wished to enter into business with simplified business entities from abuse of limited liability as it would put them on notice of the simplified business entity's status. In addition, failure to fulfil the requirement would not require a specific sanction except for being denied the benefit of limited liability. However, some delegations were of the view that although such a requirement could assist legal certainty, it need not be mandatory and that it could create an additional burden on simplified business entities by increasing their cost of compliance and verification, thus potentially hindering efficiency. After discussion, the Working Group agreed to include those considerations in the commentary to article 4 in order to leave the details of any regulation to enacting States. Specifically, the commentary would explain the need to protect third parties from potential abuse of limited liability by putting them on notice that they were dealing with an entity possessing that status, while exercising caution so as not to burden simplified business entities, particularly those in developing countries, with additional administrative costs. It was agreed by the Working Group that it might have to revisit this issue when it discussed protection of third parties at a future session.

63. With regard to draft article 4, paragraph 2, it was stressed that requiring a simplified business entity to have a unique name in order to register was of fundamental importance so as to protect other businesses as well as the registering entity itself. In response, the Working Group was cautioned against developing provisions that dealt with matters that were traditionally governed by domestic law, as was said in this case (i.e. that most States had their own rules that dealt with dual, confusing or prohibited names in business registration). The Working Group heard from several delegations on various approaches of different legal systems in handling the issue of distinguishability between names of entities. The Working Group was also advised of recent technological developments that enabled registration of similar or prohibited names of business entities without duplication or confusion, and of the possibility of using a unique identifier as another means of

avoiding duplication. After deliberation, the Working Group agreed to include the substance of paragraph 2 in the commentary and to leave the specific method of attaining distinguishability of names for enacting States to decide.

Article 5. Formation of a simplified business entity

64. It was suggested that in order to preserve the simplicity of the proposed text in light of its intended audience, draft article 5, paragraph 1, should only permit natural and not legal persons to form a simplified business entity. That suggestion was not taken up.

65. Concerns were raised in the Working Group that the draft text as currently prepared was not satisfactory in terms of providing that a simplified business entity was formed at the time of execution and delivery of the formation document, and that the appropriate moment of formation was instead at the time of its registration. There was broad agreement in the Working Group that the preferred time of formation was at the moment of issuance of the certificate of registration of the simplified business entity. In response to concerns that the text should take care to ensure that unnecessary delays in the issuance of the certificate of registration or arbitrary rejections of registrations were avoided, and the Working Group agreed that the commentary in the text should recommend that the business registry could only reject applications for failing to fulfil specific formal requirements.

66. In addition, the Working Group found the draft text in draft article 5, paragraph 2, permitting a simplified business entity to be formed up to 90 days after the date of delivery of the formation document to be unnecessary and overly complex for the purposes of the current text. It was agreed that text permitting such future formation be deleted.

67. A concern was also expressed that paragraph 21 of the commentary in respect of the advantages of permitting creation of the simplified business entity without the intervention of intermediaries was not balanced in that the text failed to address the advantages that could be gained from the involvement of intermediaries, and a request was made to adjust the text accordingly in order to make it more neutral. An additional suggestion was that mention should be made in the commentary that while issuance of the business registration certificate might signal the formation of the simplified business entity, no business would be permitted to begin operations without the necessary licenses, but the view was also expressed that licenses were not related to the legal formation of the simplified business entity, and that a discussion of licensing issues might be misplaced in this draft provision.

Article 6. Formation document

68. The Working Group recalled its previous discussion in respect of the distinction between a formation document and an operating document, and its agreement that the important feature to be preserved was not the form of those documents but rather what information in them was to be publicly disclosed (see para. 39 above).

69. The Working Group was in general agreement with the statement that the actual process by which a simplified business entity was formed was determined by cultural, political and historical factors that varied from State to State, as did the level of formality required for formation. However, it was agreed that the key issue

to determine once formation occurred, was what minimum information in respect of the simplified business entity was required to be included in this draft provision in order to protect third parties doing business with it. In addition, the Working Group also agreed that the rules in this regard should be as simple as possible in order to encourage compliance, particularly in developing economies.

70. While there was some support for the text of article 6, paragraph 1, as drafted, several proposals were made in respect of information that should be mandatorily included in the registration process and that should be publicly disclosed. It was suggested that the names of members of the simplified business entity should be included; while there was support for that approach, there was also support for the suggestion that it might be too cumbersome to require MSMEs to comply with this requirement since the membership could be quite fluid. In light of that, it was suggested that only the names of the founding members needed to be included at the time of formation. Another suggestion was that the individual contributions of the members should be disclosed, while a more workable alternative was thought to be that the total capital of the simplified business entity should be disclosed, even in the absence of a minimum capital requirement.

71. It was also proposed that information subject to disclosure should include the identity of those authorized to represent and legally bind the simplified business entity, including their appointment and period of office, as well as whether they were entitled to act individually or jointly. Another suggestion was that the management structure of the simplified business entity, assuming it had a formal one, should be publicly available. There was some support for both suggestions.

72. Various additional proposals were made for information that should be required to be publicly disclosed by the simplified business entity upon its registration, including the following:

(a) The purpose clause of the simplified business entity;

(b) Accounting documents; and

(c) Documents related to the constitution of the entity.

73. There was broad agreement in the Working Group that publicly disclosed information should be kept as current as possible, but there were different suggestions in respect of how that might be accomplished. Suggestions included requiring immediate filing of amendments of the required information, requiring annual updates or updates within specified time periods, and periodic solicitation for updates from the registry, possibly by way of mobile or other communication technology. Concerns were expressed that requiring regular updates of information could unduly burden micro and small businesses. It was suggested that, until updated, the registered information could be considered to be legally binding as against third parties.

74. With regard to paragraph 2 of draft article 6, it was suggested that the provision be kept as simple as possible. One suggestion was to adopt text permitting members of simplified business entities to include in the formation document any additional information they deemed appropriate.

75. The Working Group agreed that their deliberations in respect of draft article 6 should be included in the commentary to the text for further consideration at a future session.

F. Possible structure for a unified legal text on an enabling legal environment for micro, small and medium-sized enterprises

76. The Working Group heard a proposal from several delegations on a possible structure for discussions going forward, outlined below. It was said that the purpose of this proposal was to simplify the discussion and that the list of twelve articles in Part B, paragraph 4, which contained articles that the Working Group had been considering at its current session, might be more relevant to the context of micro and small-sized business entities. It was added that in formulating this structure, caution was exercised to accommodate the wide range of views already expressed by the Working Group and also of the variance in economic and legal systems that existed around the world.

Guidance on the promotion of micro, small and medium-sized enterprises

A. Introduction

B. Toolkit

1. Analysing economic background and existing legislation in the country

   (a) State of play

   (b) How does it affect MSMEs?

   (c) Evaluation: Need for change?

2. “Think small first” approach (including the “drafting principles” of A/CN.9/WG.I/WP.90)

   (a) Microstructures

      (i) Single member entities

      (ii) Alternative models: business network contracts (A/CN.9/WG.I/WP.87)

      (iii) Mini company

3. Registration: Simple, cheap and trusted (A/CN.9/WG.I/WP.85)

   (a) Electronic means

   (b) Low cost

   (c) Quality of information (“making limited liability work”) v. declaratory systems

   (d) Making information available across borders

4. Twelve model provisions for a simplified business entity (A/CN.9/WG.I/WP.86, A/CN.9/WG.I/WP.89)

Art. 1 Nature and name

Art. 2 Legal personality

Art. 3 Limited liability

Art. 4 Governance structures

Art. 5 Registration and proof of existence

Art. 6 (1) Single-member

(2) Multiple-member

(3) Shares and distributions

Art. 7 Fiduciary duties

Art. 8 (1) Lifting the corporate veil

(2) Liability of shareholders as against the company

Art. 9 Accounting and financial statements

Art. 10 Simplified restructuring

Art. 11 Dissolution and winding-up

Art. 12 Conflict resolution

5. The legal context surrounding successful MSMEs: taxation, employment, banking and access to credit, insolvency

77. In response, it was said that while the intention behind the proposal — that of rationalizing and simplifying the discussion in the context of MSMEs — was useful in shaping the discussion at hand and for future reflection as the discussions in the Working Group evolved, the suggested structure and content of the proposal might not be compatible with the working method that had already been agreed in terms of the continued discussion of Working Paper A/CN.9/WG.I/WP.89. In particular, it was said that paragraph 1 of Part B and paragraph 5 of Part B (which concerned topics such as taxation and employment) would likely be considered beyond the mandate of UNCITRAL. After deliberation, the Working Group agreed to continue its work on the basis of Working Paper A/CN.9/WG.I/WP.89, bearing in mind the general principles outlined in the proposal going forward, including the "think small first" approach, and to prioritize those aspects of the draft text in A/CN.9/WG.I/WP.89 that were the most relevant for simplified business entities. The Working Group also agreed that it would discuss the alternative models introduced in A/CN.9/WG.I/WP.87 at a later stage in its deliberations.

V. Next session of the Working Group

78. The Working Group was reminded that its twenty-fifth session was tentatively scheduled to be held from 19 to 23 October 2015 in Vienna.