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Report of Working Group I (MSMEs) on the work of its twenty-seventh session (Vienna, 3-7 October 2016)

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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 to 14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. 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 and business registration was said to be of particular relevance in the future deliberations of the Working Group.⁵

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, as set out above in paragraph 1.⁶

4. At its twenty-third session (Vienna, 17 to 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, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of that working paper for discussion at a future session. In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group considered 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.

5. At its twenty-fourth session (New York, 13 to 17 April 2015), the Working Group continued its discussion of the legal questions surrounding the simplification of incorporation. After initial consideration of the issues as set out in Working Paper A/CN.9/WG.I/WP.86, the Working Group decided 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. Further to a proposal from several delegations, the Working Group agreed to continue its discussion of the issues included in A/CN.9/WG.I/WP.89, bearing in mind the general principles outlined in the proposal, 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

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.97, paras. 5-20.

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

⁴ *Ibid.*, paras. 32-38.

⁵ *Ibid.*, paras. 47-50.

⁶ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 134.

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.

6. At its forty-eighth session, in 2015, the Commission noted the progress made by the Working Group in the analysis of the legal issues surrounding the simplification of incorporation and to good practices in business registration, both of which aimed at reducing the legal obstacles encountered by MSMEs throughout their life cycle. After discussion, the Commission reaffirmed the mandate of the Working Group under the terms of reference established by the Commission at its forty-sixth session in 2013 and confirmed at its forty-seventh session in 2014.⁷ In its discussion in respect of the future legislative activity, the Commission also agreed that document A/CN.9/WG.I/WP.83 should be included among the documents under consideration by Working Group I for the simplification of incorporation.⁸

7. At its twenty-fifth session (Vienna, 19 to 23 October 2015), the Working Group continued its preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, exploring the legal issues surrounding the simplification of incorporation and on good practices in business registration. In terms of the later, following presentation by the Secretariat of documents A/CN.9/WG.I/WP.93, Add.1 and Add.2 on key principles of business registration and subsequent consideration by the Working Group of A/CN.9/WG.I/WP.93, it was decided that a document along the lines of a concise legislative guide on key principles in business registration should be prepared, without prejudice to the final form that the materials might take. To that end, the Secretariat was requested to prepare a set of draft recommendations to be considered by the Working Group when it resumed its consideration of Working Papers A/CN.9/WG.I/WP.93, Add.1 and Add.2 at its next session.⁹ In respect of the legal issues surrounding the simplification of incorporation, the Working Group resumed its consideration of the draft model law on a simplified business entity as contained in working paper A/CN.9/WG.I/WP.89, starting with Chapter VI on organization of the simplified business entity, and continuing on with Chapter VIII on dissolution and winding up, Chapter VII on restructuring, and draft article 35 on financial statements (contained in Chapter IX on miscellaneous matters).¹⁰ The Working Group agreed to continue discussion of the draft text in Working Paper A/CN.9/WG.I/WP.89 at its twenty-sixth session, commencing with Chapter III on shares and capital, and continuing with Chapter V on shareholders' meetings.

8. At its twenty-sixth session (New York, 4 to 8 April 2016), Working Group I continued its consideration of the legal issues surrounding the simplification of incorporation and on key principles in business registration. In respect of the former, the Working Group resumed its deliberations on the basis of working paper A/CN.9/WG.I/WP.89. Following its discussion of the issues in Chapters III and V,¹¹

⁷ *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 220 and 225; *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 134; and *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 321.

⁸ *Ibid.*, *Seventieth session, Supplement No. 17 (A/70/17)*, para. 340.

⁹ See Report of Working Group I (MSMEs) on the work of its twenty-fifth session, A/CN.9/860, para. 73.

¹⁰ *Ibid.*, paras. 76 to 96.

¹¹ Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, paras. 22 to 47.

the Working Group decided that the text being prepared on a simplified business entity should be in the form of a legislative guide, and requested the Secretariat to prepare for discussion at a future session a draft legislative guide that reflected its policy discussions to date (see A/CN.9/WG.I/WP.99 and Add.1).¹² In respect of key principles in business registration, the Working Group considered recommendations 1 to 10 of the draft commentary (A/CN.9/WG.I/WP.93, Add.1 and Add.2) and recommendations (A/CN.9/WG.I/WP.96 and Add.1) for a legislative guide, and requested the Secretariat to combine those two sets of documents into a single draft legislative guide for discussion at a future session.¹³ In addition, the Working Group also considered the general architecture of its work on MSMEs, and agreed that its MSME work should be accompanied by an introductory document along the lines of A/CN.9/WG.I/WP.92, which would form a part of the final text and would provide an overarching framework for current and future work on MSMEs.¹⁴ The Working Group also decided at its twenty-sixth session¹⁵ that it would devote the deliberations at its twenty-seventh session to a draft legislative guide on a simplified business entity, and at its twenty-eighth session (New York, 1 to 9 May 2017) to a consideration of a draft legislative guide reflecting key principles and good practices in business registration.

9. At its forty-ninth session (New York, 27 June to 15 July 2016), the Commission commended the Working Group for its progress in the preparation of legal standards in respect of the legal issues surrounding the simplification of incorporation and to key principles in business registration, both of which aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle. The Commission also noted the decision of the Working Group to prepare a legislative guide on each of those topics and States were encouraged to ensure that their delegations included experts on business registration so as to facilitate its work.¹⁶

II. Organization of the session

10. Working Group I, which was composed of all States Members of the Commission, held its twenty-seventh session in Vienna from 3 to 7 October 2016. The session was attended by representatives of the following States Members of the Working Group: Argentina, Brazil, Canada, China, Colombia, Czechia, El Salvador, France, Germany, India, Indonesia, Italy, Japan, Kuwait, Mexico, Pakistan, Panama, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

11. The session was attended by observers from the following States: Croatia, Cyprus, Dominican Republic, Luxembourg, Netherlands, Niger, Republic of Moldova, Saudi Arabia, Slovakia, Tunisia and United Arab Emirates.

¹² Ibid., paras. 48 to 50.

¹³ Ibid., paras. 51 to 85 and 90.

¹⁴ Ibid., paras. 86 to 87.

¹⁵ Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, para. 90.

¹⁶ *Official Records of the General Assembly, Seventy-first session, Supplement No. 17 (A/71/17)*, under preparation.

12. The session was also attended by observers from the European Union.
13. The session was also attended by observers from the following international organizations:
 - (a) *Organizations of the United Nations system*: World Bank (WB);
 - (b) *Invited intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO), Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA);
 - (c) *Invited international non-governmental organizations*: American Bar Association (ABA); Fondation pour le droit continental (FDC); the National Law Center for Inter-American Free Trade (NLCIFT); New York State Bar Association (NYSBA); and the Law Association for Asia and the Pacific (LAWASIA).
14. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Mr. Arjuna Obeyesekere (Sri Lanka)
15. In addition to 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.97);
 - (b) Note by the Secretariat on a Draft legislative guide on an UNCITRAL limited liability organization (A/CN.9/WG.I/WP.99 and Add.1); and
 - (c) Observations by the Government of the French Republic (A/CN.9/WG.I/WP.94).
16. 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.
 5. Other business.
 6. Adoption of the report.

III. Deliberations and decisions

17. The Working Group considered the observations in document A/CN.9/WG.I/WP.94 and engaged in discussion in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular on a draft legislative guide on an UNCITRAL limited liability organization on the basis of Secretariat documents A/CN.9/WG.I/WP.99 and Add.1. 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: draft legislative guide on an UNCITRAL limited liability organization

Preliminary matters

Introduction of the legislative guide on an UNCITRAL limited liability organization

18. The Working Group recalled that the draft legislative guide on an UNCITRAL limited liability organization (“UNLLO”) contained in A/CN.9/WG.I/WP.99 and Add.1 had been prepared with a view to including all of the concepts that the Working Group had considered to date, as well as those it had agreed upon, in respect of the preparation of a legal text on a simplified business entity. In summarizing the introduction to the draft legislative guide in paragraphs 1 to 24 of A/CN.9/WG.I/WP.99, a number of observations were made in regard to the preparation of the text, including the following:

(a) The draft text took a “think small first” approach, focusing on the perceived needs of various types of MSMEs wishing to participate in the legally regulated economy and accommodating their growth over time;

(b) The purpose of the text was to attempt to satisfy those perceived MSME needs;

(c) Discussions in the Working Group to date had considered a number of different simplified business forms reflected in legislation from many different States, which had proven a rich source of information for distilling best practices for a cross-border approach;

(d) Freedom of contract was an important aspect of the draft legislative guide, as were mandatory provisions and default rules intended to fill any gaps in the agreement of parties forming the enterprise; and

(e) The draft legislative guide followed the Working Group’s discussions to date in taking an informed but innovative approach to creating a free-standing legal regime that could meet the needs of MSMEs and that was derived from the collective domestic experience of States but attempted to avoid unnecessary formalistic and rigid corporate law rules that were not suited to MSMEs.

19. It was further noted that the draft legislative guide adopted neutral terminology in an attempt to establish clear concepts unencumbered by existing corporate law regimes. These terms included “UNLLO” (which the Working Group was encouraged to use at least as an interim term until it could decide on a preferred name); “members” instead of “shareholders”; “ownership” or “interest” instead of “shares”; “formation information” to denote the data required for formation of the UNLLO; and “members’ agreement” to indicate the rules agreed among members for the operation of the UNLLO. It was observed that definitions of these and other concepts would be required in the introductory section of the draft text, but that those definitions would be prepared in future, as the text took shape.

Preliminary issues

20. Various delegations in the Working Group raised the following preliminary matters:

(a) Some delegations were of the view that it would be necessary to prepare a model law with standard forms in addition to a legislative guide in order to provide effective assistance to developing countries in reforming their laws;

(b) It was observed that de-linking the draft legislative guide from corporate law would not be possible since gaps in the UNLLO approach would need to be filled by corporate law. It was pointed out that other reforms that have taken place with regard to simplified incorporation have done so. It was further observed that the terminology would need to be adjusted to make this possible;

(c) Support was expressed for the commentary in A/CN.9/WG.I/WP.99 to more fully discuss the list of considerations for simplified incorporation in footnote 19 of A/CN.9/WG.I/WP.99 and paragraph 66 of A/CN.9/825, repeated in paragraph 2 of A/CN.9/WG.I/WP.89 and echoed in section D.3 of A/CN.9/WG.I/WP.98, which set forth the views of the UNCTAD secretariat;

(d) Reservations were expressed in respect of using the term “UNLLO”;

(e) It was suggested that alternative dispute resolution should be included in the draft legislative guide (in response, reference was made to the mention of dispute resolution in paragraph 52 of A/CN.9/WG.I/WP.99/Add.1); and

(f) Some concern was expressed that the UNLLO had not yet been implemented in any economy (in response, it was observed by some delegations that neither the Dutch East India Company nor the German GmbH — Gesellschaft mit beschränkter Haftung — had been tested in any economy prior to becoming huge successes of company law globally).

A. General Provisions

Recommendation 1 and paragraphs 25 to 30 of A/CN.9/WG.I/WP.99

21. A delegation expressed the concern that the phrases “members’ agreement” and “formation information” might be confusing, since the phrase “members’ agreement” could not distinguish the agreements intended here from other agreements among some but not all of the members, and suggested that the Working Group revert to its previous use of “operating document” and “formation document”. That suggestion was not taken up and it was noted that “formation information” should be defined in the text, as should “members’ agreement”, particularly in the case of a single member UNLLO.

22. It was suggested that draft paragraph 25 would need to be revised to the extent that it suggested that the draft legislative guide need not be specifically linked to existing legislation in the enacting State. It was pointed out that the recent legislative reforms on simplified incorporation for MSMEs have been done in the context of revising the corporate code. For example, in some States, legislation on simplified incorporation for MSMEs has incorporated by reference general corporate law on mergers, consolidations, spin-offs and sales of substantially all the

assets. In response it was clarified that the UNLLO draft legislative guide simply intended to establish an innovative and freestanding legislative approach for dealing with MSME concerns, but that the UNLLO legal form would need to be consistent with a State's domestic law and general principles of law would continue to apply to fill any gaps. In addition, it was noted that in order for it to represent an innovative international standard, it was logical that the UNLLO regime would have to avoid being directly linked to existing domestic company law. Moreover, it was observed that the list of suggested gaps was certainly relevant for more sophisticated enterprises and might be kept in mind for UNLLOs that were scaling up their operations and converting to other forms, but that it was less likely to be relevant in respect of MSMEs. A suggestion was made that more sophisticated rules of that nature might be mentioned in the commentary, but that such rules should not be the focus of the draft legislative guide. The Working Group agreed to revert to this discussion at a later stage.

23. There was support for the suggestion that mention of "expansive freedom of contract" in paragraph 30 of A/CN.9/WG.I/WP.99 could also be accompanied by mention of the protection of third parties dealing with the UNLLO, perhaps by way of inclusion in a definition of "members' agreement" (which could set out the relationship among members and vis-à-vis third parties) or in connection with draft recommendation 11. In addition, some terminological questions were raised in respect of the different language versions of the draft legislative guide, and delegations were invited to contact the Secretariat with specific instances so that they could be followed up with the translation teams.

24. A concern was raised that the phrase "if any" in draft recommendation 1 was unnecessary, since the members of an UNLLO would always have a members' agreement, whether that agreement was in writing or otherwise. It was observed that the phrase could refer to the possibility that there might be gaps in aspects of the member agreement governance of the UNLLO, but there was support for the view that the phrase "if any" was confusing, if not redundant, and it was agreed that that phrase could be deleted.

25. A suggestion was made to reverse the order of the references to the members' agreement and the governing law in draft recommendation 1 in order to emphasize that the members' agreement was of greater importance as between the two. Other delegations were of the view that the two sources were of equal importance and that reversing their order would not in any event render one more important than the other. The suggestion to reverse the order was not taken up, nor was a suggestion to include "formation information" in draft recommendation 1.

26. Concern was expressed that draft recommendation 1 was in itself redundant, since it should be clear that the law enacted on the basis of the draft legislative guide governed the UNLLO, and that stating it might seem circuitous. It was further suggested that reference need not be made in the draft recommendation to the members' agreement at all, since its importance as an element of the regime governing the UNLLO was obvious through its inclusion in draft recommendation 11. However, in view of the importance of the members' agreement to the governance of the UNLLO, some delegations preferred to retain mention of it in draft recommendation 1.

27. In an effort to clarify draft recommendation 1, text was suggested along the lines of: "Except when statutory default rules are mandatory, the members' agreement governs the rights, duties and relations among the members, and controls over any contrary provisions of the statute. To the extent the members' agreement does not otherwise provide, the provisions of the statute control." A suggestion was also made to separate draft recommendation 1 into two separate concepts dealing with: (1) how other laws applied to the UNLLO and (2) the application of the members' agreement to the relationship among members and to third parties. Alternatively, it was suggested that draft recommendation 1 could consist of text along the lines of: "The law should provide that it governs the UNLLO."

28. After discussion, the Working Group agreed that it should defer its decision on draft recommendation 1 and its commentary until after it had considered recommendation 11 and its accompanying commentary.

Recommendation 2 and paragraphs 31 to 34 of A/CN.9/WG.I/WP.99

29. A drafting suggestion was made that the commentary in draft paragraph 34 could enumerate the industrial sectors in which an UNLLO could participate and leave to a footnote the list of regulated sectors in which an UNLLO could be prohibited from engaging.

30. There was some support in the Working Group for the view that draft recommendation 2 was too broad in permitting an UNLLO to be organized for "any lawful activity." There was also support for the alternate view that the phrase was appropriate in that the activities of the UNLLO should not be unnecessarily constrained, leaving it to an enacting State to decide upon any necessary exclusions. There was, however, general agreement in the Working Group that the main focus of the UNLLO's activities was intended to be commercial in nature. It was noted that UNCITRAL texts broadly defined "commercial" activities, and it was suggested that that definition might be considered for inclusion in the text. It was also observed that the terms "commercial" or "business" might exclude certain activities in some jurisdictions. After discussion, the Working Group agreed to insert the phrase "business or commercial" between the words "any lawful" and "activity" in draft recommendation 2, and to clarify in the draft commentary that States should interpret those terms broadly, and could in fact permit broader application of the UNLLO regime.

Recommendation 3 and paragraphs 35 to 38 of A/CN.9/WG.I/WP.99

31. It was suggested that the second sentence in draft paragraph 37 should be moved elsewhere since it could be said to detract from draft recommendation 3, by referring to legislative models adopted in some States that permitted the separation of business assets of an entity from the personal assets of its members without resort to the concept of legal personality. However, other delegations were of the view that it was important to maintain reference in the draft text of such other business models. After discussion, the Working Group requested the Secretariat to resolve the matter by attempting to locate an appropriate section in the draft text where mention of those business models could be included.

32. There was agreement in the Working Group that draft paragraph 37 should be corrected by deleting the phrase “and limited liability”, which appeared after the phrase “without resort to legal personality” in the current text.

33. The Working Group also agreed to add the phrase “distinct from its members” after the phrase “legal personality” at the end of draft recommendation 3.

Recommendation 4 and paragraphs 39 to 43 of A/CN.9/WG.I/WP.99

34. The Working Group agreed to delete the following phrases from the draft commentary:

(a) In paragraph 41, third sentence, the phrase “or liability to other members of the UNLLO” since it concerned liability matters of a different nature from the member’s liability solely by reason of being a member of the UNLLO; and

(b) In paragraph 42, first sentence, the phrase “in the ordinary course of business”, since it was not a phrase commonly used in lifting limited liability protection of an UNLLO (“piercing the corporate veil”), which more often referred to fraud or abuse of the legal business form.

35. A question was raised concerning footnote 42 in A/CN.9/WG.I/WP.99 and the suggestion that if the law were completely de-linked from corporate law, it would still be possible for courts to pierce the corporate veil under State law. After discussion, it was generally agreed that, as set out in footnote 42, “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 the establishment of standards on it to enacting States.” It was also observed by some delegations that in countries with a civil law tradition, as was equally the case in States with a common law tradition, the suppletive law would provide for piercing the corporate veil, even if it was not specifically included in a law enacted on the basis of the UNLLO legislative guide.

36. The Working Group expressed its preference for the drafting of recommendation 4 as reflected in footnote 37. However, some concern was expressed that draft recommendation 4.2 might require clarification, in that it referred to liability beyond the member’s personal liability for the obligations of the UNLLO solely by virtue of being a member. For the same reason, a proposal to add cross-references to other instances of member liability in the draft legislative guide — for example, in recommendation 21 — was not taken up. Further, although it was observed that in some States, members could agree that they would bear unlimited liability to third parties for obligations incurred by the business, the Working Group was of the view that such an approach was too complex for the UNLLO context, particularly since it raised issues of notice to third parties. While draft recommendation 4.2 was thought to have some value in making it clear that members had the freedom to decide among themselves on how to apportion liability, the Working Group was of the view that that point might best be highlighted elsewhere in the text and in reference to the members’ agreement.

37. After discussion, the Working Group agreed to retain the text of recommendation 4.1 as it appeared in footnote 37, but to delete draft recommendation 4.2.

Recommendation 5 and paragraphs 44 to 47 of A/CN.9/WG.I/WP.99

38. The Working Group recalled that it had at previous sessions considered the issue of whether or not an UNLLO should be required to have minimum capital at the time of its formation (see, for example, paras. 29 and 51 to 59 of A/CN.9/800; paras. 56 and 75 to 76 of A/CN.9/825; paras. 26 to 29 of A/CN.9/WG.I/WP.85; and paras. 10 to 12 of A/CN.9/WG.I/WP.86/Add.1). It was noted that draft recommendation 5 advised that the law should not contain a minimum capital requirement for the formation of an UNLLO. Further, it was observed that paragraph 45 of the commentary noted a number of mandatory mechanisms in the draft legislative guide for the protection of third parties dealing with the UNLLO, as well as suggesting in paragraph 47 certain other mechanisms that might be implemented by States whose policy considerations required the imposition of a minimum capital requirement.

39. A proposal was made that the text should also permit States to require a nominal amount of minimal capital at the time of formation of the UNLLO, or to impose progressive capital requirements over time. The reason for that suggestion was said to be that minimum capital requirements functioned not only to protect third parties, but that they also assisted in terms of the soundness, effectiveness and productivity of the enterprise and provided information in respect of financial and governance rights.

40. In response, reference was made to previous discussions in the Working Group opposing the imposition of minimum capital requirements on MSMEs (see the references in para. 38 above), as well as to the fact that draft recommendation 5 did not preclude the UNLLO from raising capital later in its life cycle, after its formation.

41. In reference to consideration in the Working Group of paragraph 47, it was observed that some regional and State legal systems contained a conversion mechanism requiring very small enterprises to be converted to more complex legal business forms once they reached a certain size. It was also noted that some States provided assistance for micro-enterprises only until they reached a certain size. There was some support in the Working Group for the content of draft paragraph 47, which some delegations were also in favour of expanding, for example by emphasizing in the commentary the importance to the UNLLO of building up its capital over time. There was also support for retaining the first sentence of paragraph 47 in its current location and for relocating the second and third sentences of that paragraph, possibly in relation to draft recommendations 23 and 24 in respect of the later stages of the UNLLO's life cycle. It was also observed that the Working Group may wish to consider draft recommendation 5 in relation to its future consideration of draft recommendation 17 in respect of members' contributions, although it was observed that the context of the two was different in that recommendation 5 concerned capital required at the formation of the UNLLO, while recommendation 17 was in respect of the operation of the UNLLO after its creation.

42. After discussion, the Working Group agreed that the general view and the current prevailing practice was that minimum capital requirements should not be imposed since such requirements could create barriers for MSMEs wishing to enter the legally regulated economy. As such, it was agreed that draft recommendation 5 should be retained in the text as prepared. In addition, the Secretariat was requested

to reflect the considerations raised in the Working Group during the current and previous sessions in regard to policy choices for and against capital requirements in the commentary of the draft legislative guide for review at a future session.

Recommendation 6 and paragraphs 48 to 52 of A/CN.9/WG.I/WP.99

43. The Working Group was in agreement with the general principle of draft recommendation 6 that the name of the simplified business entity should include a phrase or abbreviation that put third parties on notice of its nature. While there was agreement to use UNLLO on an interim basis as suggested earlier in the session, some concern was raised in respect of its appropriateness due to its reference to “UNCITRAL” (“UN”) and its use of the word “organization”. The Working Group agreed that, particularly in light of the considerations outlined above in paragraphs 18, 19 and 22, the draft legislative guide in A/CN.9/WG.I/WP.99 and Add.1 were an appropriate starting point for the Working Group in the fulfilment of its mandate.

44. A proposal was made to combine draft recommendation 6 with draft recommendation 9(a)(i). The Working Group did not take up that proposal, as the prevailing view was that the two recommendations concerned different matters (recommendation 6 concerned disclosure of the UNLLO’s limited liability status to third parties, while recommendation 9 concerned what information must be filed for the UNLLO’s creation), and that the concepts should be kept separate for the sake of simplicity and clarity.

45. In relation to paragraph 49 of the commentary, it was observed that while there was agreement that strict sanctions for UNLLOs failing to use their distinctive name or abbreviation in correspondence with third parties might not be recommended, the Working Group might wish to consider at a later stage whether it should include a recommendation in respect of the consequences for an UNLLO that did not observe its legal requirements.

46. It was suggested that paragraphs 50 to 52 of the commentary were more in keeping with the Working Group’s preparation of a draft legislative guide on business registration. In reference to draft paragraph 52, a view was expressed that access to modern technology could be a complicating factor for businesses with a similar name, even when they operated in different industries or geographic regions; however, it was also observed that similar names were likely to arise given the sheer number of small businesses and that prohibiting their use might not be practical. The Working Group agreed to delete paragraphs 50 to 52 and to replace them with an appropriate reference to the draft legislative guide on business registration. The Working Group agreed to retain the text of draft recommendation 6 as drafted.

B. Formation of the UNLLO

Recommendation 7 and paragraphs 53 to 55 of A/CN.9/WG.I/WP.99

47. In keeping with the previous decision of the Working Group (see footnote 51 of A/CN.9/WG.I/WP.99), there was broad support for the suggestion that draft recommendation 7 should be adjusted to state expressly that any “legal or natural” person could be a member of the UNLLO. Concern was expressed that if a legal

person, and especially another UNLLO, were permitted to be the sole member of an UNLLO such an arrangement might increase the risk of money-laundering, fraud and other illicit behaviour on the part of the UNLLO. It was observed that business law was not thought to be an appropriate tool for such regulation and that it should be left to enacting States to adopt the necessary measures to prevent such illicit activity, but that the commentary might include additional reference to the work of the Financial Action Task Force (FATF) on disclosure of beneficial ownership (see also footnote 67). After discussion, the Working Group agreed that the draft legislative guide should facilitate broad use of the UNLLO, and should thus permit the UNLLO to have legal persons among its members. The Working Group requested the Secretariat to consider how best to reflect that decision, whether through including in draft recommendation 7 the phrase “legal or natural” between “any” and “person” or whether to include it in a definitional section, as well as to ensure that the understanding of “a legal person” was broad enough to include legal entities capable of making an investment. A delegation observed that the approach in recommendation 7 was too restrictive, because it precluded additional alternatives to become a member in this type of entity such as through trusts and other patrimonial structures existing in both civil law and common law jurisdictions.

48. It was suggested that an addition be made to paragraph 54 of A/CN.9/WG.I/WP.99 including the possibility of States having a limit on the number of UNLLOs of which a legal or natural person could be a member. There was support in the Working Group that the phrase “an UNLLO may have a maximum number of members, or that” in paragraph 54 of A/CN.9/WG.I/WP.99 should be deleted. Further, it was observed that the final sentence of paragraph 53 should be maintained, and possibly moved to the beginning of paragraph 54, to signal that stipulating a maximum number of UNLLO members was not recommended. A proposal was also made that the draft commentary to draft recommendation 7 could clarify that the UNLLO was not permitted to be listed in the stock market. It was, however, noted that paragraphs 26 and 27 of A/CN.9/WG.I/WP.99 already addressed the issue of the nature and main features of the UNLLO, but that if necessary, additional detail could be added to those paragraphs for consideration by the Working Group at a later stage.

49. A suggestion was made to divide draft recommendation 7 into two recommendations along the following lines: (a) The law should provide that the UNLLO must have at least one member from the time of its formation until its dissolution; and (b) Any legal or natural person may be a member of the UNLLO. A view was expressed that adjusting the recommendation as suggested could result in a situation in which a sole member who passed away would leave the UNLLO without a member, however, it was agreed that the inheritance laws of the State or the dissolution and winding-up provisions of the legislative guide would govern such an eventuality. Although the Working Group agreed to leave the issue of whether or not to divide draft recommendation 7 for future consideration, there was agreement that the commentary to draft recommendation 7 should emphasize the requirement that an UNLLO should have at least one member at all times (see para. 55 of A/CN.9/WG.I/WP.99).

Recommendation 8 and paragraphs 56 to 59 of A/CN.9/WG.I/WP.99

50. The Working Group recalled that at a previous session there had been broad agreement that the preferred time of formation was at the moment of issuance of the certificate of registration of the simplified business entity (see para. 58, A/CN.9/WG.I/WP.99 and para. 65 of A/CN.9/831). It was observed that that approach would likely be included in the draft legislative guide on business registration and should be linked to the current text, and further that draft recommendation 8 and its commentary left scope for the enacting State to specify the precise moment at which an UNLLO came into existence as a legal entity. After discussion and consideration of whether it should be possible for the UNLLO to come into legal existence at a time before or after the moment of its registration, the Working Group agreed to revise the text of draft recommendation 8 along the following lines: “The law should specify the moment at which the UNLLO acquires its legal personality.” The Working Group agreed that the commentary should recommend that the time of constitution of legal personality should be either at the time of registration or after registration.

51. It was observed that the Working Group might wish to consider including commentary in the legislative guide in respect of contracts that were entered into prior to the legal formation of the UNLLO. It was suggested that such commentary could be inserted at an appropriate location in the current draft so as to highlight that members may wish to consider how such matters are to be dealt with in their members’ agreement.

Recommendation 9 and paragraphs 60 to 67 of A/CN.9/WG.I/WP.99

52. The Working Group agreed to revert in the draft legislative guide to the use of the phrase “formation document” (as found in the draft model law in A/CN.9/WG.I/WP.89 and the annex to A/CN.9/WG.I/WP.83) in lieu of the phrase “formation information,” on the understanding that the word “document” was intended to refer to electronic, paper-based and mixed media information that must be submitted to the designated State authority in order to create an UNLLO. The Working Group also widely supported a suggestion that at this stage of its discussion on draft recommendation 9 it should only consider the information required for the valid formation of an UNLLO, and that it would discuss at a later stage which information on the formation and organization of the UNLLO should be required to be publicly disclosed.

53. It was observed that the current text of draft recommendation 9 was intended to contain the minimum information required for the valid formation of the UNLLO. Views were expressed that additional information should be added to that minimum requirement. However, the Working Group was reminded that in the spirit of the “think small first” approach taken by the draft legislative guide, the purpose of the recommendation was to list only the minimum information necessary for the establishment and operation of the UNLLO and that any additional requirements could create an unnecessary burden for MSMEs and could jeopardize their resort to the UNLLO legal form. Although some views were expressed that it was not necessary to include the names of the managers of the UNLLO, the Working Group was in general agreement that the information listed in subparagraph (a) of draft recommendation 9 met the threshold for the minimum information necessary

to create the UNLLO, although some clarification of the terminology in subparagraph (a)(iii) might be necessary.

54. It was suggested that in keeping with the approach outlined in the paragraph above, information in subparagraph (b) of draft recommendation 9 on the name and address of each member of the UNLLO should not be required for the valid formation of the UNLLO. It was observed that such a requirement might place an unnecessary burden on entrepreneurs in terms of the need to update the information whenever membership in the UNLLO changed. It was further suggested that errors in the spelling of names and addresses of the members could raise questions relating to the legal validity of the UNLLO. It was observed that the issue of the correction of errors was one of the matters considered in the legislative guide on business registration also under preparation by the Working Group. It was also observed that this matter might need to be addressed in the commentary to the UNLLO. Moreover, it was noted that compliance by an enacting State with FATF recommendation 24 (see footnote 67 of A/CN.9/WG.I/WP.99 as well as para. 47 above) required only information on the name(s) of the UNLLO manager(s), and not of the members of the UNLLO. Further, it was suggested that for transparency and other purposes, information on the names and addresses of its members could be maintained by the UNLLO, and that such information could be made available upon the request of the State or of interested parties. Although some delegations remained of the view that the name(s) of at least the founding member(s) should be included in draft recommendation 9, after discussion, the Working Group agreed that the names and addresses of the UNLLO members need not be included in the information required for the formation of the UNLLO and that paragraph (b) of draft recommendation 9 should be deleted.

55. After discussion and although different views were expressed on this issue, the Working Group agreed that the following information was not necessary for the valid formation of an UNLLO, and thus should not be included in draft recommendation 9: (i) the limited liability status of the UNLLO, which was noted to be explicit in the UNLLO's name; (ii) the moment at which the UNLLO possessed legal personality, which would form part of its business registry file; (iii) the business activities of the UNLLO; (iv) the capital of the UNLLO, if any; (v) any limitation on the extent to which UNLLO managers could legally bind the UNLLO; (vi) any limitation on the number of members of the UNLLO; and (vii) any restrictions on the transfer of ownership interests in the UNLLO.

Recommendation 10 and paragraph 68 of A/CN.9/WG.I/WP.99

56. It was observed that draft recommendation 10 might be unnecessary and could cause confusion by seeming to suggest that a manager could unilaterally change the content of the formation document of the UNLLO. Such information could possibly include key features of the UNLLO including its name or type of management, and there was a general view that such decisions should be left to UNLLO members. The Working Group further noted that if the goal of the draft recommendation was to keep the information in the business registry current, that issue might be sufficiently dealt with in the draft legislative guide on business registration, which considered various mechanisms for that purpose (see also para. 61 of A/CN.9/WG.I/WP.99).

57. After discussion, the Working Group agreed to delete draft recommendation 10 from the text, requesting the Secretariat to consider whether elements of the commentary in draft paragraph 68 should be retained elsewhere in the text, possibly in respect of draft recommendation 9.

C. Organization of the UNLLO

Recommendation 11 and paragraphs 1 to 4 of A/CN.9/WG.I/WP.99/Add.1

58. The Working Group agreed to defer consideration of draft recommendation 11 until a later stage of its deliberations in light of its reference to a list of the mandatory recommendations drawn from throughout the text, including some that had not yet been considered by the Working Group.

Recommendation 12 and paragraphs 5 to 8 of A/CN.9/WG.I/WP.99/Add.1

59. The view was expressed that recommendation 12 as currently drafted might be cumbersome for UNLLOs wishing to scale up in size. The reasoning for that view was said to be that the increased number of members would not easily permit each of them to share equally in management, as established by the default rule, and that it might not be practical for members to nominate a manager, despite the default rule in draft recommendation 16 that they could do so by way of a simple majority decision. It was proposed that draft recommendation 12 should instead be adjusted such that the default rule would be that only a single member UNLLO would be member-managed, while the default position for all multi-member UNLLOs would be that they would be manager-managed. Academic research was also cited in support of that position, and there was some support for the proposal in the Working Group.

60. In response to that proposal, it was noted that draft recommendation 12 was designed with the “think small first” principle in mind and that, in that context, the appropriate default rule was thought to be the simple approach that all members of the UNLLO should share equally in its management. The appropriateness of that approach was thought to be particularly so in the case of micro and small enterprises, since those UNLLOs that were larger in size would have greater understanding of management concepts and more resources so as to better be able to contract out of the simple member-manager default rule and adopt a management regime considered more appropriate for their context. In addition, it was noted that unless the proposal intended to limit the number of managers to one, the issue of multiple decision-makers could equally arise if the proposal were adopted by the Working Group. It was further observed that members of the UNLLO were free, in any event, to agree by unanimous decision to adopt a manager-managed system in lieu of the member-managed default approach, and in doing so each member would thus have to agree consciously to give up any management role, but that if the default rule were changed to require the appointment of a manager for multiple member UNLLOs, a member could effectively be deprived against that member’s will of an opportunity to manage the business.

61. Reference was made to paragraph 84 of the report of the twenty-fifth session of the Working Group (A/CN.9/860) which listed a number of features that the Working Group agreed should be contained in the text being prepared on a

simplified business entity. It was noted that although that list had been prepared in reference to the draft model law contained in A/CN.9/WGI/WP.89 that had then been under consideration by the Working Group and was thus quite detailed, each of the features listed in paragraph 84 was in fact consistent with the draft legislative guide on an UNLLO currently under consideration.

62. The prevailing view in the Working Group was that recommendation 12 should be retained in the text as currently drafted, and the proposal to change it was not taken up. Later in the session, the Working Group revisited that decision (see para. 69 below).

Recommendation 13 and paragraphs 9 to 11 of A/CN.9/WGI/WP.99/Add.1

63. There was broad agreement in the Working Group that the unanimous consent rule in draft recommendation 13(c) might not be workable in practice, particularly if the UNLLO could have an unlimited number of members. It was agreed that the rule for decisions on matters outside of the ordinary course of business should instead be that of a “qualified majority” such as, for example, a two-thirds majority. It was also agreed that the phrase “simple majority” as used in the text should be modified by referring either to “majority” or “absolute majority” and that consideration might be given to whether such terms should be defined in the text. In determining which matters would be considered “outside of the ordinary course of business and activities of the UNLLO”, the Working Group agreed that those instances, which would require a qualified majority, could be illustrated by reference to the non-exhaustive list found in paragraph 10 of the commentary, which should later be specified clearly.

64. The view was expressed that draft recommendation 13 might be clearer if the concepts of management and control (i.e. members’ authority to make decisions) that it contained were separated out into two distinct recommendations irrespective of whether the UNLLO was member-managed or manager-managed. For example, it was said to be unclear whether paragraph (c) of draft recommendation 13 would also apply to manager-managed UNLLOs, since it concerned matters outside of the ordinary course of the activities and affairs of the UNLLO. It was also suggested that additional clarification might be achieved by considering separately the application of the draft recommendation in the member-manager context, particularly in reference to paragraphs (b) and (c) of recommendation 13, and in the manager-managed context. There was support in the Working Group for those views.

65. In order to further clarify the text, a proposal was made to differentiate the concepts represented in draft recommendation 13 into two distinct recommendations, with one dealing with daily management issues and the other dealing with control of the UNLLO by its members. The proposal was: to move draft recommendation 12 and issues relating to the daily management of the UNLLO to Chapter D (“Managers”); to change the name of Chapter C to “Organization and Control of the UNLLO”; and to change the word “manage” in paragraph (a) of recommendation 13 to “control”. It was explained that an “equal right to control” would mean that the default approach would be that each member would have a vote, which could be cast in making majority decisions in the cases outlined in paragraph (b), which concerned day-to-day operational aspects of the business, and by way of qualified majority in the cases outlined in paragraph (c),

which concerned decisions of fundamental importance to the UNLLO itself. There was some support in the Working Group for that proposal.

66. In considering the proposal outlined in the paragraph above, a number of additional issues were raised in the Working Group, including:

(a) That discussion of control might be more appropriate in connection with recommendations 17 and 18 on contributions by members of the UNLLO;

(b) That discussion, in particular, of voting rights might also be had in connection with contributions, and that such rights might be linked to the proportion of a member's contribution;

(c) That it could be difficult to value a member's contribution to the UNLLO, which could consist of goodwill or other intangibles, suggesting that equal allocation of voting rights might be a better default rule;

(d) That members would be likely to agree on their voting rights based on their contributions, such that resort to a default rule for equal voting was unlikely in practice;

(e) That the UNLLO could be required to make decisions on a variety of matters at the time of its formation; however, it was observed that that approach could in itself create barriers to entry; and

(f) That the draft legislative guide generally contained default rules based on equality, for example, in respect of control, contributions, and distributions, but that they were in the text as a consequence of having been agreed as appropriate at previous sessions of the Working Group and that, in any event, broad freedom of contract for members to decide their own rules was the underlying principle of the text.

67. After discussion in the Working Group, it was proposed that paragraph (a) of draft recommendation 13 should be replaced with the text along the following lines: "(a) The members of the UNLLO have rights of control in proportion to their contributions, if the value of the contribution is stated in the formation document or members' agreement. If the value of the contribution is not stated in the formation document or members' agreement, members have equal rights of control." Although it was observed that the phrase "unless otherwise agreed" might not be needed in the chapeau of draft recommendation 13, it was noted that it might still be needed in respect of paragraphs (b) and (c) and that efforts to rationalize the drafting could be made in a future iteration of the text. In response to a question whether the adoption of the proposal would necessitate a change to the agreed text of draft recommendation 5 that the law should not contain a minimum capital requirement, it was observed that members were entitled to provide information in the formation document in addition to the recommendation 9 minimum requirements (see, also, the commentary in paragraph 67 of A/CN.9/WG.I/WP.99). An additional proposal was made that the phrase "voting rights" could be substituted for the phrase "rights of control" in the proposal, and with that adjustment, the Working Group agreed to adopt the proposed text for draft recommendation 13(a).

68. It was noted that in order to create an UNLLO, draft recommendation 9(a)(iii) already required its founders to indicate whether the UNLLO was to be member-managed or manager-managed. There was general agreement in the

Working Group that this requirement effectively obviated the need for a default rule on the matter, since the choice would already be made upon the establishment of the UNLLO.

69. In light of the Working Group's consideration of draft recommendation 13 and of its agreement that draft recommendation 9 required an indication of whether the UNLLO was member-managed or manager-managed at the time of its formation, a proposal was made to revise the decision of the Working Group in respect of the text of draft recommendation 12 (see para. 62 above) by replacing it with text along the following lines: "The UNLLO may be member-managed or manager-managed. A single member UNLLO will be member-managed unless otherwise agreed." It was queried whether the second sentence of the proposal was necessary, since all UNLLOs, including single member UNLLOs, would have to choose at the time of formation whether they were member-managed or manager-managed. An additional question was raised whether an UNLLO would be validly formed if a member was declared manager in the formation document or submitted the formation document without expressly being appointed manager in the members' agreement. After discussion, the Working Group agreed to replace the text of draft recommendation 12 with the proposed text. A few delegations supported the view that commentary should be added indicating that it was also recommended that enacting States should provide that UNLLOs with only a few members would also be subject to the default rule of member-management.

D. Presentation of A/CN.9/WG.I/WP.94

70. The Working Group heard a short introduction of working paper A/CN.9/WG.I/WP.94 which presented a legislative approach that allows individual entrepreneurs to benefit from limited liability without requiring them to create a legal person that is separate from the natural person. It was said that under such a scheme, defined as Entrepreneur with Limited Liability (EIRL), the individual entrepreneur could allocate assets to its professional activity that were segregated from its personal assets. Pursuant to this form of asset partitioning, business creditors could only pledge the assets allocated to the commercial activity of the entrepreneur and not its personal assets or those of the entrepreneur's family. It was also said that the principle of asset segregation, along the lines presented in A/CN.9/WG.I/WP.94, was not new and that several States had prepared legislation based on that principle in the past fifty years. It was further noted that similar principles to those underlying the scheme of the Entrepreneur with Limited Liability had inspired the legislative scheme of the "entrepreneur" adopted by the seventeen OHADA Member States.

V. Other matters

71. The Working Group recalled that its twenty-eighth session was scheduled to be held in New York from 1 to 9 May 2017. The Working Group further noted the decision of the Commission at its forty-ninth session (para. 394, A/71/17) that the fifty-first session of Working Group V (Insolvency Law) would be held from 10 to 19 May 2017. The Working Group was advised that Working Group V intended to consider issues related to MSMEs (pursuant to the decision of the Commission

confirmed in 2016, see para. 246, A/71/17) on the first day of its session, i.e. 10 May 2017, and that delegates to Working Group I were invited to attend and participate in that discussion.

72. The Working Group confirmed that it would consider the draft legislative guide on key principles of business registration currently under preparation during the first week of its twenty-eighth session, i.e. from 1 to 5 May 2017. Further, the Working Group decided that from 8 to 9 May 2017, it would continue its discussion of a draft legislative guide on an UNLLO (A/CN.9/WGI/WP.99 and Add.1), as well as consider possible future work.
