

The Simplified *Joint Stock* Corporation: A New Structure for Doing Business in the Americas?^{*}

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ABSTRACT

This article is an introduction to the *OAS Model Law on the Simplified Corporation (SAS)*. As a simple and easy alternative corporate form that reduces complexity and hence, also the cost, the SAS extends the availability of incorporation to all business operations, particularly MSMEs, and so serves an important function in encouraging formalization. The article reviews the benefits associated with formalization, simplification of the process of business registration, and explains key elements of the *Model Law* in light of emerging global best practices.

Keywords: Simplified corporation, SAS, simplified incorporation, formalization, model law, private international law, Organization of American States (OAS)

La sociedad por acciones simplificada: una nueva estructura para hacer negocios en las Américas

RESUMEN

Este artículo es una introducción a la *Ley Modelo sobre la Sociedad por Acciones Simplificada (SAS)* de la OEA. La SAS es una estructura societaria que constituye una alternativa sencilla y fácil, pues reduce la complejidad y, por lo tanto, los costos para su formación y funcionamiento. Por ello, ofrece la posibilidad para la constitución de toda clase de empresas industriales

^{*} Strike-through is not erroneous; simplification—in every aspect, including descriptive titles—will improve accessibility to the governing concepts, laws, regulations and the prevailing legal system that enable incorporation of business entities. See text accompanying footnote 14, *infra*.

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o comerciales y, en particular, a las mipymes. De ahí que cumpla una importante función para el fomento de la formalización empresarial. En este artículo se analizan los beneficios relacionados con la formalización y la simplificación del proceso de registro de empresas y explica, así mismo, los elementos básicos de la *Ley Modelo* a la luz de las mejores prácticas globales emergentes.

Palabras clave: Sociedad por Acciones Simplificada, SAS, simplificación del proceso de registro de empresas, formalización, ley modelo, derecho internacional privado, Organización de los Estados Americanos (“OEA”)

Many people pursue a legal career out of a desire to make a difference for the betterment of society. Others, out of that same motivation, choose to enter the diplomatic corps. With such ambitions, a choice to pursue public international law would seem logical. And indeed, a field that encompasses human rights, law of the sea, and so much more, is one in which not only fundamental international norms, but also important goals, are established within the legal framework comprised of both conventional and soft law instruments.¹ An important and frequently overlooked compliment, however, is the field of private international law, which can provide the tools with which to actualize some of the rights and standards established by the more familiar (and publicized) instruments of public international law. This paper seeks to illustrate this complementarity with a recent development at the Organization of American States (“OAS”) - the *Model Law on the Simplified Corporation* (“*SAS Model Law*”).

The paper is presented in three parts. It begins with a brief overview of private international law, particularly its development in the Inter-American system. The second part will consider the *SAS Model Law* in the broader context and will explain the background to its development, what it seeks to achieve and whether it does indeed offer a new structure for doing business. The third part of the paper will examine the *SAS Model Law* itself and will compare certain of its provisions in light of international best practices and with other emerging instruments.

I. Private International Law in the Inter-American System – A Brief Overview

Private international law (“PIL”) is the body of law that regulates relationships between private actors in an international context. These actors can be natural or legally created persons (such as a corporation) but they are private, rather than public or state actors.³ The relationships can concern civil or family matters (*e.g.*, cross-border litigation, adoption or divorce), succession or commercial matters (*e.g.*, international contract or bankruptcy). Just as with public international law, the legal framework of PIL is comprised of international instruments (such as conventions and model laws), jurisprudence, practice and custom.

¹ For example, consider the *International Covenant on Economic, Social and Cultural Rights* (“ICESC”) and the principle of progressive realization as articulated in Article 2 by which States shall undertake “to take steps... with a view to achieving progressively the full realization of the rights recognized” which include, *inter alia*, the right to decent work, right to an adequate standard of living, and social security. (ICESC, signed 16 December 1966, entered into force 3 January 1976).

² The title in Spanish is *Ley Modelo sobre la Sociedad por Acciones Simplificada* (“SAS”) and as the acronym “SAS” has entered common usage both in Spanish and English, “*SAS Model Law*” will be used as the short title throughout this paper.

³ Rules of PIL can also apply to a state when it assumes the role of private actor.

Originally, the field of PIL was limited to “conflict of laws” or, the determination of which state’s law should be applied to govern or resolve cross-border cases. With greater congruence among the laws of different states, the greater is the ease with which private actors can conduct cross-border business and arrange their personal affairs. Harmonization, codification and the development of PIL is the process by which such congruence between the laws of states can be achieved over time.

Since the start of the codification of PIL, two different approaches have been taken. The first, a “unitary approach”, envisaged a single comprehensive code to encompass all of the rules of this discipline, while the other “sectoral approach” envisaged a process that was more gradual and progressive, to develop specific international instruments in discrete areas of the law.

In Latin America, the unitary approach prevailed from the late 1880s until approximately the 1970s (Arrighi, 2015, p. 165).⁴ Beginning with the Congress of Lima of 1877, adoption of the Treaties of Montevideo (in 1889 and 1939/40) and the Bustamante Code in 1928, the foundations of PIL within the region were essentially established (Fernández Arroyo, 2000, p. 19). During the period following the creation of the OAS in 1948, the Inter-American Juridical Committee (“CJI”), which serves as the legal advisory body for the organization,⁵ made efforts to codify various areas of PIL. Towards that end, the CJI proposed to review the Bustamante Code to determine whether it was possible to merge its provisions with those of the aforementioned Montevideo treaties, in light of the U.S. Restatement (Second) of the Conflict of Laws. Although the CJI prepared a draft code, ultimately this was not supported by Member States of the organization (Acevedo, 2001, p. 21). This led to the abandonment of the unitary approach to codification and the beginning of the next phase, during which sectoral codification of PIL has predominated (Acevedo, 2001; Lorenzen, 1930).

Thus, beginning in 1971, the mechanisms previously used in the treatment of PIL in the Inter-American context were superseded by the Inter-American Specialized Conferences on Private International Law (known by the Spanish acronym as “CIDIP”).⁶ These Conferences have produced 26 international instruments (including 20 conventions, three protocols, one model law and two uniform documents). These instruments cover various topics and are designed to create an effective

⁴ This phase essentially “concluded” with the adoption of the *Inter-American Convention on General Rules of Private International Law* in 1979 at CIDIP-II held in Montevideo, Uruguay.

⁵ *Charter of the OAS*, Article 99 states that “the purpose of the [CJI] is to serve the Organization as an advisory body on juridical matters...”

⁶ *Charter of the OAS*, Article 122 describes Specialized Conferences as “intergovernmental meetings to deal with special technical matters or to develop specific aspects of inter-American cooperation.”

legal framework for judicial cooperation between states and to add legal certainty to cross-border transactions in civil, family, commercial and procedural dealings of individuals.⁷ However, as will be illustrated below using as an example the *SAS Model Law*, the CIDIP is not the only vehicle by which PIL instruments can be developed within the OAS organizational structure.

II. The *Model Law on the Simplified Corporation*⁸ – A Bird’s Eye Perspective

1. Background

As the legal advisory body of the OAS, the CJI carries out studies and preparatory work as mandated by the General Assembly and other named political organs; however, “it may also, on its own initiative, undertake such studies and preparatory work as it considers advisable.”⁹

It was under this rubric in 2011 during the 78th regular session of the CJI that the Chairman presented the topic of simplified companies and, after having been so requested, that Dr. David Stewart agreed “to review the proposed Model Law of Colombia and compare it to legislation in other countries.”(OAS, 2012)¹⁰ During the 79th regular session, Dr. Stewart presented his report and proposed “that the Committee draft a model law for OAS member states.”(OAS, 2012, p. 65) The CJI also heard from Professor Francisco Reyes Villamar, expert in and primary author of the Law of Simplified Companies that had been adopted in Colombia in 2008. Dr. Stewart, having been appointed Rapporteur, accepted the task of preparing a model law, but asked the other members of the CJI to review his report and comment on it (OAS, 2012, p. 67). In his written report, Dr. Stewart had stated

⁷ For more information, visit the OAS website on private international law: http://www.oas.org/en/sla/dil/private_international_law.asp

⁸ The Spanish term “la sociedad de acciones simplificada” was originally translated into English as “the simplified joint-stock corporation.” In subsequent discussions among the Rapporteur, the Colombian legal expert, OAS translators and the technical secretariat, it was determined that the more accurate translation would be “simplified corporation.” Thus, the correct title as adopted reflects this change. As it is used in the *SAS Model Law*, the term encompasses a corporate entity with capacity to issue “stock” or “shares” that could be held jointly. The translated English title eliminates superfluous terminology and is more accessible to its intended users. In the field of PIL, extensive discussions have been held over decades as to appropriate terminology depending on the context – “company”, “corporation”, etc. As this instrument is a model law, in contrast with a treaty or convention, the title and terminology can be amended as necessary for convergence with the legal system of the enacting state.

⁹ *Charter of the OAS*, Article 100.

¹⁰ See Chapter II, Topics Discussed by the [CJI] at the Regular Sessions held in 2012, Topic 5. Simplified joint stock companies.

that “Professor Reyes proposal, and in particular the Model Act, is worthy of the Committee’s endorsement.”¹¹

During the 80th regular session held in March, 2012, Dr. Stewart said that he had not received any comments from other members and proposed that the document be remitted for the OAS Member States to study. Consequently, the CJI approved unanimously a resolution pursuant to which it approved the aforementioned report, which included the annexed Model Act.¹² This resolution was transmitted “to the OAS Permanent Council for its due consideration and to send it to the General Assembly.”¹³ Accordingly, during its 2012 regular session the General Assembly thanked the CJI for adopting the resolution and instructed the Permanent Council to include consideration thereof on its agenda.¹⁴ Being of a juridical nature, the matter was referred by the Permanent Council to its Committee on Political and Juridical Affairs (“CAJP”) where it remained on the agenda for consideration in due course.

To assist the CAJP with its deliberations, presentations were made on Dec. 4, 2014 by Drs. Stewart and Reyes (OAS, 2014) and again on Dec. 1, 2016 by the Department of International Law (“DIL”), Secretariat for Legal Affairs, accompanied by Dr. Reyes. (OAS, 2016c) Moreover, in 2016, the OAS General Assembly had adopted a resolution to offer a bit of “encouragement” to the CAJP; “[to] request that the Permanent Council, through its [CAJP], study the possibility of having the General Assembly consider this Model Law during its next regular session.”¹⁵

¹¹ *Report of the [CJI]: Recommendations on the Proposed Model Act on the Simplified Stock Corporation*, CJI/doc.380/11 corr.1, reproduced in OAS, 2012, p. 69. Annexed to the report are the two Model Acts from a draft book by Reyes entitled *A New Policy Agenda for Latin American Company Law: Reshaping the Closely-Held Entity Landscape*; Annex A, Model Act on the Simplified Stock Corporation and Annex B, Model Act on Procedural Rules for the Resolution of Conflicts in Simplified Stock Corporations.

¹² *Project for a Model Act on the Simplified Corporation*. CJI/RES. 188 (LXXX-O/12) corr. 1 states in para. 2, “to approve the Report of the [CJI]: Recommendations on the proposed model act on the simplified stock corporation, (CJI/doc.380/11 corr.1), which is attached to this resolution.”

¹³ It was explained that the CJI had two options: either to include the topic in its annual report (in which case it would come to the attention of the General Assembly the following year (2013), or send it immediately to the Permanent Council for the General Assembly to review (in which case it would come to the attention of the GA during the within year (2012)). The CJI chose the latter option.

¹⁴ *Observations and Recommendations on the Annual Report of the [CJI]*. Adopted at the second plenary session held on 4 June 2012, AG/RES. 2722 (XLII-O/12), para. 3. The resolution included a request that the Permanent Council report to the following regular session of the General Assembly on implementation. Similar resolutions were adopted in subsequent years. *Observations and Recommendations on the Annual Report of the [CJI]*. Adopted at the fourth plenary session held on 6 June 2013, AG/RES. 2806 (XLIII-O/13), para. 2. *Annual Reports of the Inter-American Court of Human Rights, Inter-American Commission on Human Rights, [CJI] and Justice Studies Center of the Americas*. Adopted at the second plenary session held on 4 June 2014, AG/RES.2849 (XLIV-O/14), Section III, paragraph 15.

¹⁵ *International Law*. Adopted at the second plenary session held on 14 June 2016, AG/RES. 2886 (XLVI-O/16) Item ii. Observations and recommendations on the Annual Report of the [CJI], para. 2. Full text as follows: “To thank the CJI for preparing the document Model Law on Simplified Joint-Stock Companies [CJI/RES. 188 (LXXX-

Accordingly, at its meeting held March 30, 2017, the CAJP agreed upon a draft resolution.¹⁶ This draft was forwarded to the Permanent Council for its approval and the resolution was ultimately adopted June 20, 2017 by the OAS General Assembly, by which it has resolved “to take note of the [*SAS Model Law*]; to request the [CJI] and its Technical Secretariat to disseminate the [*SAS Model Law*] as widely as possible among the member states; to invite member states to adopt, in accordance with their domestic laws and regulatory framework, those aspects of the [*SAS Model Law*] that are in their interest; and to instruct [DIL] to provide those member states that so request with all collaboration and support necessary [for implementation].”¹⁷

2. The Experience of Colombia

First, it should be noted that subsequent to consideration of the *SAS Model Law* by the CJI in 2012 as was described above, other states have passed similar legislation;¹⁸ however, as the *SAS Model Law* was modelled after the Colombian Law, it is the experiences from Colombia that have served as the comparative example. Nevertheless, experiences from other states offer equally valuable contributions to the body of lessons learned.

O/12)] and request that the Permanent Council, through its [CAJP], study the possibility of having the General Assembly consider this Model Law during its next regular session.”

¹⁶ *Draft Resolution: Model Law on the Simplified Corporation*. (Agreed upon by the [CAJP] at its meeting held on 30 March 2017). OEA/Ser. G, CP/CAJP-3408/17 rev. 1, 4 April 2017.

¹⁷ *Model Law on the Simplified Corporation*. AG/DOC. 5579 (adopted at the 47th OAS General Assembly on June 21, 2017).

¹⁸ These include the following:

- Mexico recently modified its *General Company Act* to enable formation of SAS companies. See: *Ley General de Sociedades Mercantiles*, DOF 14 March 2016. See also, *Dictamen con Proyecto de Decreto* por el que se reforman y adicionan diversas disposiciones de la Ley General de Sociedades Mercantiles, in *Gaceta Parlamentaria*, Cámara de Diputados del Honorable Congreso de la Unión, LXII Legislatura, 29 April 2015, Número 4264-V, Anexo V. Included in the outlined objectives is the following: “La presente iniciativa considera que el proceso legislativo debe estar dirigido a la constitución y formalización de la operación de las “sociedades anónimas simplificadas”, a través de una regulación mercantil que incentive y facilite la formalización de nuevas empresas, para simplificar su conformación y lograr una operación eficaz, que genere certidumbre jurídica y que contribuya a resolver las dificultades que actualmente enfrentan este tipos de empresas. Además con todo ello se espera detonar e incentivar la inversión, el empleo y el desarrollo económico del país.”
- Brazil also has introduced recent changes to its *Corporations Law* that would reduce the burden of incorporation for smaller companies (those with less than 20 shareholders and shareholders’ equity less than \$10M reais) by exempting them from certain publication requirements, annual meeting notices, annual financial statements, and independent auditors. See *Projeto de Lei do Senado* No. 286 de 2015, *Diário do Senado Federal*, May 2015, at page 84.
- Argentina has a pending bill, known as the *Proyecto de Ley de Emprendedores*, which was approved by the House, 17 November 2016 and is currently in the Senate for final approval.
- Chile had already enacted its law, *Sociedades por Acciones*, Ley 20.190, published in the *Diario Oficial* 5 June 2007.

As was noted above, both the CJJ and the CAJP had been briefed by Dr. Reyes on the experiences of Colombia after the enactment of Law 1258,¹⁹ which “introduced a new type of business entity to the Colombian system, which is referred to as a Sociedad por Acciones Simplificada (SAS)” (Reyes, 2015, p. 392). In brief, this experience has been encapsulated in the chart reproduced in Appendix A. (Reyes, 2015, p.403). As is shown in this chart, during the period after enactment of the new law, Colombia experienced exponential growth in the numbers of newly-founded SAS companies; after the first three years, these increased by 92% in comparison with an 8% increase in newly founded companies in other categories. (OAS, 2012, pp. 65-66) After the first five years, more than 200,000 SAS companies had been incorporated (UNCITRAL, 2013, para. 44). This trend has continued.²⁰

3. The *SAS Model Law* – Key Elements

Those numbers speak for themselves and behoove an examination of the appeal of the Colombian Law that encouraged such an overwhelming response by businesses seeking to incorporate. The Rapporteur summarized this as follows:

Under the Colombian approach, the SAS can be formed by one or more shareholders and can be incorporated by a relatively simple private or electronic document (as opposed to an expensive notarial deed of incorporation). The cost is minimal. The act of incorporation provides limited liability to its shareholders (except when the corporate veil is used to perpetrate a fraud or abuse the corporate form). It also provides protection to third party victims of the abusive or fraudulent use of the *ultra vires* doctrine by corporate officials. It enables the founders to choose an unlimited duration for the incorporation, and replaces the costly and ineffective formality of mandatory internal comptrollers (*comisarios*) with a more effective and less expensive supervision of external but fully qualified auditors. It also provides flexibility to corporate capital, greater contractual freedom, and increased access to capital (OAS, 2012, p. 69).

In other words, both the Colombian Law and the *SAS Model Law* on which it is based contain the key elements that are essential to simplified incorporation. These are summarized in the chart provided in Appendix B and are as follows: legal personality, limited liability, possibility of a single “shareholder”,²¹ possibility of a single “director”, no minimum capital contribution, broad purpose clause or none

¹⁹ See L. 1258, 5 December 2008, *Diario Oficial* [D.O.] (Colom.).

²⁰ Figures for the SAS type as a percentage of all types are 96.56% (2014), 97.24% (2015) and 97.92% (2016 – as of April). Powerpoint presentation made by Dr. Reyes to CAJP on 1 December 2016, Slide 24 (copy on file with author).

²¹ For discussion on the choice by UNCITRAL WGI on use of neutral terms such as “UNLLO”, “member”, etc.

at all, simplified incorporation documents,²² flexible organizational structure, no requirement for notarial involvement to incorporate, decisions by majority vote, no mandatory internal auditors and maximum freedom of contract.

These elements could be considered to comprise “global best practices” as most have been identified as key by various entities, including the World Bank, the United Nations Commission on International Trade Law (“UNCITRAL”) and the United Nations Conference on Trade and Development (“UNCTAD”), among others (Dennis & Pliego, 2016, p. 71). For example, in the context of its *Doing Business Reports*, the World Bank has found that in the top ten performing global economies, the laws that provide for incorporation contain several of these characteristics (Christow, 2014).²³ At UNCITRAL in recent years, Working Group I (“WGI”) has been focusing on the legal questions surrounding the simplification of incorporation (UNCITRAL, 2017b).²⁴ In the course of that work, WGI is in the process of developing recommendations on an UNCITRAL Limited Liability Organization (“UNLLO”) (UNCITRAL, 2016b)²⁵ that include many of the aforementioned elements.²⁶ The UNCTAD Secretariat has also compiled lessons learned on business registration that “reflect insights and best practices learned over the past decade” (UNCITRAL, 2016a, para. 2). Specifically with regard to business incorporation, it has stated that “incorporation should be simplified through regimes such as the ‘SAS’ (*e.g.*, no minimum capital, no need for notarized by-laws, possibility of having only one shareholder, standardized incorporation documents, broad purpose clause permitting MSMEs to engage in all lawful activities, flexible organizational structure, maximum freedom of contract, full-fledged limited liability)” (UNCITRAL, 2016a, p. 6).

As the chart provided in Appendix B illustrates, these key elements of the *SAS Model Law* correspond with “global best practices” as identified by these three organizations. Each of these key elements will be discussed in greater detail in Part III of this paper.

²² Concept can also be extended to include simplified annual reporting requirements and documentation.

²³ Global good practices include: no or optional minimum capital requirement; standardized forms (meaning no purpose clause, no intermediaries, no witnesses required for the incorporation documents, no stamp or seal required on documents); no courts involved; fixed or low registration fee; no publication in Official Gazette required; online registration; online payment; interoperability with tax and other regulators; expedient start-up (5 days on average). These global good practices are found across several jurisdictions including: New Zealand, Australia, Canada, United States, Singapore, Macedonia, Hong Kong, Belarus, Georgia and Rwanda.

²⁴ For a history of the evolution of the topic of MSMEs on the UNCITRAL agenda, see paras. 5-12. Colombia had suggested a new Working Group focused on the life cycle of a business, particularly in relation to MSMEs; see para. 11.

²⁵ *Annex. Draft Recommendations on an UNLLO* (hereinafter “UNCITRAL draft Recommendations”). Support for the term was given on an interim basis on the understanding that it will be considered again at a later stage.

²⁶ It was noted that “the Working Group’s combined experience regarding the various domestic approaches to creating and reforming legal business forms—both MSME-specific and otherwise—has highlighted that States’ good practices share a number of key principles. These principles appear to transcend national borders and could be said to be international in their application.” (UNCITRAL, 2016b, para. 8).

4. The *SAS Model Law* – Expected Benefits

Having demonstrated the consistency of the *SAS Model Law* with, and in fact, its contributions towards, (UNCITRAL, 2013) the evolution of international standards for simplified incorporation, it is important to consider why this development is particularly important for the region. It has been suggested that company law throughout many Latin American jurisdictions is outdated and unnecessarily rigid, that it is based on forms of business association inherited from nineteenth century European codification and, consequently, lacks the flexibility to adapt to new economic realities (Reyes, 2011, p. 1).²⁷ In such countries where the civil and commercial codes “define the backbone of private law,” reform of a uniform code is difficult and infrequent, unlike legal systems wherein each type of business association is governed by its own statute that can be easily updated (UNCITRAL, 2011, p. 7). Several limitations inherent in the company law prevalent across most of Latin America have been identified, as follows: 1) the aforementioned reluctance of code reform and related inflexibility of the *numerous clausus* approach; 2) the “public order” and “public policy” character of a large number of provisions in company law that have as their underlying purpose the protection of investors, which may be appropriate for publically-held companies but which are unnecessarily restrictive for most businesses that operate outside the securities market; 3) the differentiation between civil and commercial companies and application of different rules dependent upon the nature of the business, which requires detailed analysis of the purpose clause and thereby raises costs and creates uncertainty; 4) the consequence of the contractual basis of company law, wherein business associations arise out of a contractual agreement between two or more persons, which precludes the single-owner incorporated entity; 5) the reluctance to recognize and enforce shareholder agreements; 6) the expansive exceptions to limited liability that are beyond the scope of corporate grounds so that exposure is tantamount to strict liability, which discourages domestic and foreign investment; 7) the excessive legal formalities to incorporate and that require participation of a notary, attorney or certified accountant, which create significant barriers; 8) the limited function of the mercantile registry which serves only to provide publicity, instead of a “constitutional” registry where legal existence could be presumed upon filing; 9) the numerous causes for nullification that allow any party at almost any time to challenge validity of incorporation, which creates legal uncertainty; 10) the nature of company laws as regulatory, rather than enabling, so that failed compliance with extensive and complex mandatory provisions results in nullification; 11) where legal capacity is dependent upon the purpose clause,

²⁷ These forms are usually the following: partnerships, (*sociedad colectiva*), stock corporation (*sociedad anónima*), limited liability company (*sociedad de responsabilidad limitada*) and limited partnership (*sociedad en comandita*).

the possibility that a corporate act may at any time be declared as *ultra vires* creates uncertainty for third parties; 12) rigid rules regarding capital contributions negatively influence the ability to attract investment; and, 13) lack of effective judicial control that corresponds with modernized company law and a highly formalistic approach in procedural laws reduce the options for effective and efficient dispute resolution (Reyes, 2011, pp. 7-21). Several of these restrictions will be considered in more detail in Part III of this paper.

As a result of these aspects of company law, which run counter to global best practices described above, many Latin American businesses are significantly restricted and operate at a competitive disadvantage. Although this situation affects all business, the consequences are particularly severe for MSMEs. For that reason, the next sections of the paper will focus on the potential benefits of the *SAS Model Law* primarily from the perspective of the MSME.

a. Simplification, Incorporation, Registration and Formalization

i. Formalization

As is evident from the above, the commonly-held assumption is that incorporation should be simplified because it will encourage economic development. This requires an understanding of the connection between simplified incorporation and formalization.

It is useful to start by considering what is meant by the informal economy, which has proved both difficult to define and difficult to measure (ILO, 2013a).²⁸ As used in a recent and key document²⁹ from the International Labour Organization (“ILO”), the term “informal economy” refers to “all economic activities by *workers* and *economic units* that are—in law or in practice—not covered or insufficiently covered by formal arrangements *and does not cover illicit activities*” (emphasis added)

²⁸ In 1993 the 15th International Conference of Labour Statisticians (“ICLS”) adopted an enterprise-based definition of the informal sector but “it was clear from the start that the definition did not capture the full extent of informal employment.” In 2003, the 17th ICLS endorsed a broader concept of “informal employment.” For a discussion on developments of a conceptual framework for the measurement of the informal sector, see paragraphs 1.14-1.16. “Informal employment now refers to all employment arrangements that do not provide individuals with legal or social protection through their work, thereby leaving them more exposed to economic risk than the others, whether or not the economic units they work for or operate in are formal enterprises, informal enterprises or households.” (ILO, 2013b, p.3).

²⁹ This recommendation (cited *infra*, note 53) has been described as being “of strategic significance for the world of work and for the future of work: it concerns half of the global labour force and more than 90 percent of small and medium enterprises worldwide who are working and operating in conditions of informality. This is the first international labour standard to focus on the informal economy in its entirety and diversity and to point clearly in the direction of transition to the formal economy as the means for realizing decent work for all and for achieving inclusive development.” (ILO, 2017).

(ILO, 2015, para. 2(a) & (b)). Economic units are defined to include “units that employ hired labour; that are owned by individuals working on their own account, either alone or with the help of contributing family workers and cooperative and social and solidarity economy units” (ILO, 2015, para. 3). Thus, this definition encompasses both informal *employment* (which takes place in both informal and formal sectors) and informal *economic activity*, which are frequently considered and measured independently. Secondly, as is evident from this definition, “informal” is not to be equated with “illegal” (ILO, 2015, para. 2(b)). Instead, “informal” may better be considered as “*extra-legal*” that is, employment and economic activities that fall outside of the formal economy.

Figures vary, depending on the definition used. In broad measures, the informal economy currently comprises “more than half of the global labour force and more than 90% of MSMEs worldwide.”³⁰ In Latin America and the Caribbean (“LAC”), informal employment averaged 46.8% in 2013 (ILO, Regional Office for Latin America and the Caribbean, 2014, p. 8)³¹ with rates of informal employment by country that range from approximately 40–75% (ILO, 2013, p. ix). Worldwide, women are among the most vulnerable and comprise a disproportionate percentage of the informal workforce; the informal sector is frequently the primary source of employment available to women. In LAC countries, informal employment of women comprises on average 59% of total employment (UN Women, 2016, p. 71). None of this economic activity generated by the informal economy is captured in GDP figures; its size and contribution in dollar figures is difficult to determine and little reliable data appears to be available. Therefore, employment data provides the primary snapshot.

Formalization of the informal sector has been recognized as an important way to promote economic growth, specifically through the development of MSMEs. Among the Sustainable Development Goals (“SDGs”) adopted by the United Nations in 2016, SDG #8 aims to “promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.”

³⁰ See ILO Website: [Informal Economy](http://www.ilo.org/employment/units/emp-invest/informal-economy/lang-en/index.htm). <http://www.ilo.org/employment/units/emp-invest/informal-economy/lang-en/index.htm> (accessed 2 May 2017). According to a 2009 study by the OECD, out of a global working population of 3 billion, 60% (1.8 billion) is informally employed and that figure is predicted to rise to 66% by 2020. Organisation for Economic Co-operation and Development OECD Website: *Is Informal Normal? Messages, figures and data*. <http://www.oecd.org/dev/inclusivesocietiesanddevelopment/isinformalnormalmessagesfiguresanddata.htm#messages>

OECD Website: *Rising informal employment will increase poverty*. <http://www.oecd.org/development/risinginformalemploymentwillincreasepoverty.htm> (accessed 2 May 2017).

³¹ Rate was compiled from 14 countries for non-agricultural informal employment. (Figures are generally higher if agricultural employment is included.) http://ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_314469.pdf

(UN General Assembly, 2015). To achieve that goal, target 8.3 encourages states “to promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, *and encourage the formalization and growth of [MSMEs],*” (emphasis added) (UN General Assembly, 2015). The need for such action has also been recognized at the regional level. Reaffirming SDG commitments assumed by Member States, a recent declaration from the OAS General Assembly “encourage(s) models for development and economic growth that are more inclusive”, “(promotion of) the potential of the private sector”, and promotion “in particular, (of) [MSMEs] and other organizational models, in order to improve their ability to establish trading relations and leading to the development of value chains among the region’s businesses, which will serve to improve their complementarity and competitiveness” (OAS, 2016b, paras. 4, 24 & 25). At that same OAS General Assembly, Member States adopted a resolution that affirmed continuing support “to promote the development of financial inclusion policies and programs” and “to request that the Fifth Inter-American Dialogue of High-Level Authorities for [MSMEs] addresses, as a main issue, the strengthening of the institutions that support [MSMEs]...” (OAS, 2016b, paras. 38 & 41).³²

The benefits of formalization—and the use of legal tools to encourage the process—have long been recognized. One of the earliest proponents was Hernando de Soto, who pointed out that “poor people already have agreements among themselves, social contracts, and what you have to do is professionally standardize these contracts to create one legal system that everybody recognizes and obeys.”³³ Such ideas were further developed in subsequent work by others, such as the Commission on Legal Empowerment of the Poor (“LEP”). (Commission on Legal Empowerment of the Poor and United Nations Development Programme, 2008).³⁴ Among its four areas of focus, one was consideration of legal mechanisms to empower informal businesses, with specific focus on the regulatory environment for MSMEs.

The benefits of formalization accrue both to individual actors and society as a whole. Individual workers gain the protections afforded by legal contracts of employment

³² The OAS General Secretariat, through its Executive Secretariat for Integral Development (“SEDI”) and in cooperation with other institutions working on MSME issues, has been supporting these High-Level Dialogues on MSME public policies and programs in the region (see <http://www.oas.org/en/sedi/desd/iadialogues/about-us.asp>).

³³ Cited in *LEP Report*, *infra* note 65, back cover.

³⁴ Co-chaired by former US Secretary of State, Madeleine Albright and Peruvian economist Hernando de Soto, the Commission on Legal Empowerment of the Poor described itself as “the first global initiative to focus specifically on the link between exclusion, poverty and law.” It stated one of its objectives “to legally empower informal sector actors so that their informal contracts have the protection of the law, and that a safe, secure and equitable way is found for their integration within the mainstream economy.” Introduction.

and social security.³⁵ Individual businesses (*i.e.*, “economic units”) also benefit from legal contracts throughout the supply chain and thereby gain access to legal redress and dispute resolution mechanisms. One of the key advantages for small business, however, is improved opportunities for access to credit. Lenders are much more willing to offer financing to formally recognized businesses and at lower rates of interest; institutional lenders usually require formal documentation as security and as a prerequisite to extending credit (Commission on Legal Empowerment of the Poor and United Nations Development Programme, 2008, p. 227). Moreover, improved access to credit is frequently accompanied by access to financial and business advisory services.

Formalization also results in benefits to government and society overall. The formalized business can be more easily regulated, which leads to improved sanitation, health and safety. Opportunities for extortion and corruption are reduced (Commission on Legal Empowerment of the Poor and United Nations Development Programme, 2008, p. 225).³⁶ Formalized businesses are required to pay taxes, which generates government revenues and also provides a valuable source of economic data. A formalized business is more likely to expand to international markets as it will have the legitimate status necessary to obtain customs clearances and other documentation for cross-border trade. In summary: “Even formalizing small portion of the informal sector can result in significant increases in government fiscal revenues, support infrastructure development and attract foreign investment” (UNCITRAL, 2016a, p. 3).

ii. Registration

Given the benefits of formalization, the question becomes how a shift from the informal to the formal economy can be encouraged. This requires re-evaluation of past approaches, especially in countries that may be emerging “from a history of heavy-handed regulation, with approvals required for even the smallest activity, and authority overly-centralized and inflexible” (Commission on Legal Empowerment of the Poor and United Nations Development Programme, 2008, p. 223). To begin, it is important to recognize that the informal sector exists as an “adaptive response” based out of need and that there is continuous fluidity and co-existence between the informal and formal sectors. Rather than restrictive methods to control or constrain informality, a more effective approach may be through increased incentives that encourage and enable participants to choose formality (Commission on

³⁵ Individuals working in informal employment are often exposed to inadequate and unsafe working conditions; have high illiteracy levels, low skill levels and inadequate training opportunities; have less certain, less regular and lower incomes; suffer longer working hours without protections and benefits afforded under labour laws and social security schemes. (ILO, 2014, p. 3).

³⁶ Citing examples from Latin America, the LEP Report notes that when incorporation is complex and expensive, entrepreneurs frequently resort to bribes of professional “fixers” in order to expedite the process.

Legal Empowerment of the Poor and United Nations Development Programme, 2008, p. 229).

For “economic units”, the road towards formalization requires business *registration*. This has been defined as “a series of processes involving registration with multiple public agencies to be able to operate legally and within the ‘formal’ economy” (UNCITRAL, 2016a, p. 3). Although the steps involved differ by jurisdiction and type of business activity, the following table lists the registration types that are most commonly required (UNCITRAL, 2016a, p. 4; (Commission on Legal Empowerment of the Poor and United Nations Development Programme, 2008, p. 225).

1. *Basic* (required in most countries):

- Business *registry* (incorporation) (legal existence & business name)
- National tax administration (registration as a tax payer)
- Social security (registration as an employer)

2. *Possible Additional Registrations* (may also be required):

- Subnational tax administration (region/state or municipal level)
- Ministry of Labor (if business employs personnel)
- Pension funds
- Chamber of Commerce
- Statistical office

3. *Business-specific Registration* (“licenses” that may be required include):

- Hygiene, health and safety (food services, vehicle operation, etc.)
- Sale of restricted substances (liquor and tobacco, etc.)
- Conformity with zoning bylaws

What this list indicates is the complexity involved in formalizing a business. If the process is complex, it usually requires a high level of skills and is costly; consequently, it is often beyond the reach of most people in the informal sector. Among the lessons learned with regard to business registration is that “the government’s goal at all times should be simple, efficient, low cost registration, and cost-effective procedures, as seen from the user’s point of view” (UNCITRAL, 2016a, p. 4). Although the simplified business registration process benefits all businesses, large and small, the greatest benefit accrues to those previously left out of the formal sector entirely.

iii. Business registry (i.e., incorporation)

As shown above, business *registration* encompasses a full spectrum of requirements of which business *registry* (i.e., incorporation) is one element. It is usually the first step

in the process and involves the creation of the business as a legal entity, often with a separate identity and its own name. This step does not necessarily require incorporation, as most legal systems allow for many different kinds of business types (such as the sole proprietorship, partnership, among others). However, in the context of this discussion, an incorporated business is the type under consideration. In that regard, among the lessons learned is that incorporation should also be simplified particularly “though regimes such as the ‘SAS.’” (UNCITRAL, 2016a, p. 6)³⁷ Although not every business will choose to incorporate, simplification of the process will facilitate this choice.

At this juncture it should be noted that the *SAS Model Law* does not offer a panacea; it does not purport to simplify the entire process of business *registration* but rather, it serves as a way to simplify the first step, namely that of business *registry* by incorporation.

iv. Simplification

Accordingly, simplification of business registry and across the full spectrum of steps required in business registration will greatly facilitate the ease of doing (formal) business. The Global Enterprise Registration (“GER”) provides useful tools in this regard: links that enable comparisons of different business registration websites, a rating system and references to best practices.³⁸ One of the GER parameters of evaluation is the “online single window”; of all 35 OAS Member States, at the time of writing, 19 states offered an information portal and eleven offered an online single window.³⁹ Such tools can also serve to illustrate the connection between simplified incorporation and formalization.

³⁷ The key elements of a SAS are listed therein and as reproduced in the chart in Appendix B, namely: no minimum capital, no need for notarized by-laws, possibility of having only one shareholder, standardized incorporation documents, broad purpose clause permitting MSMEs to engage in all lawful activities, flexible organizational structure, maximum freedom of contract, full-fledged limited liability.

³⁸ GER was launched in 2014 and is an initiative of UNCTAD, the Kauffman Foundation’s Global Entrepreneurship Network, and the U.S. Department of State. It became a formal partnership in June 2016. See also UNCITRAL, 2016a, pp. 2-3.

³⁹ States with information portals are listed as follows: Antigua and Barbuda, The Bahamas, Barbados, Belize, Canada, Costa Rica, Dominica, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Nicaragua, Panama, Paraguay, St. Kitts and Nevis, Trinidad and Tobago, United States of America, and Uruguay. Those with an online single window are listed as follows: Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Trinidad and Tobago, United States of America, Uruguay. An “information portal” is a website that provides information on the business registration process and that details all of the mandatory registration processes with various public agencies *or aims to do so in the future*.” An “online single window” is a website that “either allows entrepreneurs to apply simultaneously for all mandatory registrations with various public agencies *or will allow for this in the near future*” (emphasis added). See: www.ger.co.

b. Advancing International Standards

Having demonstrated how law can act either as a barrier or an invitation to formalization, the next step is to consider legislative tools that can facilitate this transition. As was illustrated above, not only is the *SAS Model Law* consistent with, it has significantly contributed towards, emerging international standards on this subject. As other organizations are also working towards similar legislative tools, these initiatives will be briefly reviewed below.

UNCITRAL has been considering various legal issues in relation to microfinance since 2009.⁴⁰ At its forty-sixth session in 2013, the Commission noted broad consensus as to the need to address the legal aspects of creating an enabling environment for MSMEs and also heard a proposal from the Government of Colombia for a new working group that would focus on the life cycle of a business, particularly in relation to MSMEs, and that would begin with the facilitation of simplified business incorporation and registration (UNCITRAL, 2017b, paras. 10-11). Since February 2014, WGI has been working pursuant to its mandate from the Commission to reduce legal obstacles faced by MSMEs throughout the business life cycle, in particular in developing economies, and it began by focusing on “the legal questions surrounding the simplification of incorporation” (UNCITRAL, 2017b, paras. 12-13). From the outset, WGI has had available for its deliberations observations by the Government of Colombia regarding that state’s experiences with corporate law reform and the *SAS Model Law*,⁴¹ in addition to subsequent contributions by other states and organizations. While different approaches have been considered, there was broad agreement early on within WGI that the goal “should not be to reform and simplify outdated company law regimes, but rather to develop a separate and innovative approach based on the collective domestic experience [of States] and to specifically tailor it to MSMEs” (UNCITRAL, 2013, para. 18). Towards that end, a comparative analysis was conducted based on 11 states and 16 different legal regimes (UNCITRAL, 2013, para. 5). The approach was to “think small first” with the objective being a legal text that could accommodate the evolution from a single entrepreneur to more complex, multi-member entity (UNCITRAL, 2013, para. 10). Based on that approach, WGI identified the needs of MSME entrepreneurs operating MSMEs, and that any such text should address, to be as follows (UNCITRAL, 2013, paras. 12-16):⁴²

⁴⁰ For a history of the evolution of the topic of MSMEs on the UNCITRAL agenda, see UNCITRAL, 2017b, paras. 5-12.

⁴¹ UNCITRAL, 2013: This document included as an Annex the *SAS Model Law*, which had been annexed to the resolution approved by the CJI in 2012; see *supra* note 21.

⁴² Compare with the five pillars of the *SAS Model Law*: (i) Full-fledged limited liability; (ii) Simple incorporation requirements; (iii) Contractual flexibility; (iv) Simple organizational structure; and (v) Fiscal transparency, as outlined in UNCITRAL, 2013, para. 15.

1. freedom, autonomy and flexibility - in business operations
2. speed and simplicity – in legal establishment and administration
3. identity and visibility – to compete and attract clients
4. certainty in and protection of property rights
5. to control and manage the business

The work by WGI continues to evolve and currently under discussion is the development of a legislative guide on each of the following: 1) UNCITRAL Limited Liability Organization (“UNLLO”) and 2) key principles of a business registry (UNCITRAL, 2017b, para. 20).⁴³

The World Bank Group is renowned for its *Doing Business Reports* through which it works to promote business law reform in accordance with international standards (World Bank Group Website). Practical advice on simplifying business registration and incorporation is provided in its guide, *Reforming Business Registration, A Toolkit for Practitioners* (World Bank Group Website, 2013b).

In addition to work at the OAS, other relevant regional initiatives are also underway. These include work by the Organization for the Harmonization of Business Law in the Caribbean (“OHADAC”), which has produced a *Draft Model Law for Commercial Companies*. The Asia-Pacific Economic Cooperation (“APEC”) in 2009 launched an *Ease of Doing Business (“EoDB”) Action Plan*. It uses five of the World Bank’s “Doing Business” indicator sets, one of which is starting a business that measures the number of procedures, cost, time and minimum capital requirements; the ongoing goal of this initiative is to make this process “cheaper, easier and faster” in the APEC region (APEC, 2016, p. 1; World Bank Group, 2013a).

c. Early Results

What these initiatives demonstrate is common recognition at international and regional levels of the need to simplify the process for business incorporation and registration, which in turn, will facilitate formalization and encourage economic development. Early results support this hypothesis. For example, under the

⁴³ These “would support an overarching introductory framework generally explaining the MSME work and possibly accommodating future instruments on MSMEs.” For documents see: *Draft legislative guide on an [UNLLO]* (A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1), with the *UNLLO draft Recommendations*, *supra* note 43 attached as an Annex to the latter; and *Draft legislative guide on key principles of a business registry* (A/CN.9/WG.I/WP.101). During the course of its work, WGI has also considered, *inter alia*, a *Draft model law on a simplified business entity* (A/CN.9/WG.I/WP.89) and UNCITRAL, 2013. As this work is ongoing, for the most recent documents on this topic, the reader is referred to the website for UNCITRAL WGI: http://www.uncitral.org/uncitral/en/commission/working_groups/1MSME.html

aforementioned APEC initiative, over the period 2009 to 2015, the progress achieved in the indicators for the ease of starting a business “was a remarkable 47.4% improvement.”⁴⁴ Reports on the transition to formality in the LAC region also show positive trends;⁴⁵ and although such a heterogeneous challenge requires an integrated approach, an important contributing factor is simplified legislation.

5. The *SAS Model Law* – Anticipated Criticisms

It would not be accurate to present the potential advantages the SAS business entity without considering some of the criticisms. Since the Colombian law was enacted almost ten years ago, valuable lessons have been learned.

For example, concerns have been raised that the flexibility, freedom and ease of formation offered by the SAS amounts to lack of control and that may lead to inappropriate use of the new corporate model as a façade for the execution of illegal activities, such as money laundering, or evasion of taxes and social security contributions (Jaramillo, 2014, p. 71). Although some cases have been offered to support such concerns⁴⁶, closer scrutiny is advised as other sources suggest the opposite.⁴⁷ Similar concerns were raised during the CJI’s consideration of the *SAS Model Law* (OAS, 2012, p. 67). At that time it was pointed out that such problems do not arise so much due to the type of corporate form but rather, can—and should—be linked more appropriately to adequate control and supervision (OAS, 2012, p. 67).

Some consider as disadvantageous certain of the very aspects of the SAS that distinguish it from other forms; for example, the SAS is not eligible to be listed on the stock exchange to raise private capital; if owners seek to convert the SAS to another type of corporate form, this requires unanimous shareholder approval; founders can impose long-term restrictions on the sale of shares, among others (Betancourt,

⁴⁴ Nonetheless, an EoDB Second Action Plan (2016-2018) was agreed upon to continue towards further improvements (APEC, 2016, p. 33).

⁴⁵ For the LAC region, the average rate for non-agricultural informal employment was 46.8% in 2013 with steady declines each year from 50.1% in 2009 (ILO, Regional Office for Latin American and the Caribbean, 2014, pp. 18-19). This ILO report notes that a number of countries in the region have been making major efforts to tackle informality using an integrated strategic approach that include four ways to facilitate the transition towards formality. In the area of standard setting, this includes: 1) information dissemination given that “many economic units are not fully aware of what it means to have a formal business” and 2) simplification of regulations, such as those for the creation of enterprises. See also, ILO, 2014.

⁴⁶ See, for example, *Finagro contra Mónica Colombia S.A.S. y Otros*. Proceso N° 2012-801-070.

⁴⁷ Although in the *Mónica Colombia Case*, the Superintendent of Corporations for Colombia had found that the defendant S.A.S. entities had been used to circumvent legal restrictions in order to benefit improperly from rural capitalization incentives, at the moment at which the irregular behaviour took place the entity was a traditional limited liability company; it later migrated to become a SAS after the wrongful acts had already occurred (Author’s communication with F. Reyes, June 2017).

2013, p. 218). While there are many arguments as to why these distinctions are also considered by many to be advantageous, it is certainly valid that the business person contemplating incorporation should be fully informed of the distinctions of the SAS from more traditional corporate alternatives (Betancourt, 2013, p. 218).

Complaints arise also on related matters. The process of incorporation may, in some countries, not be as fast or as simple as was expected (López, 2016, p. 16). Despite elimination of the mandatory requirement, some business persons may nevertheless continue to use the services of a notary because of continued distrust of non-formalized documents by others that the business will encounter (such as the financial sector). For similar reasons, the business may also choose to retain internal audit provisions (Betancourt, 2013, p. 220). These criticisms may all be valid, but extend beyond law reform. Legislation can only do so much and must be coupled with efforts by complimentary ministries in areas such as financial oversight and taxation control mechanisms, among others (Rodríguez & Hernández, 2014, p. 135).

A change as dramatic as this, which has been described as “the most significant progression of the Colombian corporate system in the last four decades” (Betancourt, 2013, p. 213) is bound to have its critics. What these and other comments foreshadow are the challenges that lie ahead, namely, the need for administrative support, consumer education and cross-sectoral capacity-building to raise awareness and achieve “buy-in” from all stakeholders so that the new law can achieve its fullest potential. Part III provides an opportunity to consider whether and how these lessons have been incorporated into the *SAS Model Law* and for further reflection in future recommendations.

PART III. The *Model Law on the Simplified Corporation* – A Closer Examination

In this next part twelve key elements of the *SAS Model Law* will be examined in greater detail. As was noted above and summarized in Appendix B, these elements essentially constitute “emerging globally recognized best practices for simplified incorporation.” However, it would seem that these have not yet been articulated in any other formally recognized document apart from the *SAS Model Law*. Therefore, although the work of UNCITRAL WGI is still ongoing and the draft legislative recommendations remain under consideration, for illustrative purposes and also with the best intentions of advancing the work on this topic, these twelve elements as articulated in the *SAS Model Law* will be considered in comparison with similar provisions in the WGI draft Recommendations for the UNLLO as formulated by

UNCITRAL WGI as of this date (UNCITRAL, 2016c).⁴⁸ Although many laws already include some of these provisions—for example, the first two provisions on legal personality and limited liability are common to most laws that enable the formation of a corporate entity—what is unique to the *SAS Model Law* is that it contains *all twelve* elements, which, by operation in unison, is what offers significant advantages.

1. Legal Personality

ARTICLE 3. LEGAL PERSONALITY

Upon the filing of the formation document before the Mercantile Registry [include the name of corresponding company registrar's office], the simplified stock corporation will form a legal entity separate and distinct from its shareholders.

REC. 3. The law should provide that the UNLLO has a legal personality.

Legal personality is the concept by which the entity that is created is a separate legal entity from the person or persons who create, own and operate that entity. This fundamental legal concept is presented early in the *SAS Model Law*, Article 3. It is also clearly stated in the WGI draft Recommendations, which further explain that legal personality “confers upon the UNLLO the legal rights and duties necessary for it to function within a legal system, including the ability to acquire rights and assume obligations in its own name” (para. 35) and is “a means through which the UNLLO’s assets can be separated from the personal assets of its members” (para. 36) (UNCITRAL, 2016d).

Legal personality, together with the next key element of limited liability, offers MSMEs important advantages in doing business.

2. Limited Liability

ARTICLE 2. LIMITED LIABILITY

Shareholders will only be responsible for providing the capital contributions promised to the simplified stock corporation.

Except as set forth in Article 41 of this Act, shareholders will not be held liable for any obligations incurred by the simplified stock corporation, including, but not limited to, labor and tax obligations.

REC. 4. The law should provide that, unless otherwise agreed, a member is not liable for any obligation of the UNLLO solely by reason of being a member of that UNLLO.

⁴⁸ Over the course of its deliberations, WGI decided upon a new entity, the “UNCITRAL Limited Liability Organization” or “UNLLO” in an effort to adopt neutral terminology. It has been explained that this has enabled WGI to learn from solutions offered by existing company law without the encumbrances of accompanying rigid rules (UNCITRAL, 2016b, para. 22) However, support to use the term “UNLLO” was given on an interim basis on the understanding that it would be considered again at a later stage (UNCITRAL, 2017a, para. 146).

Limited liability is closely connected with legal personality; shareholders are limited in liability to the extent of their capital contributions and will not incur personal liability for the legally separate SAS. This fundamental legal concept is presented in the *SAS Model Law*, Article 2 and also in the WGI draft Recommendations, wherein it is explained that “the UNLLO itself has unlimited liability to its creditors and all of the assets of the UNLLO are available to satisfy those claims” (UNCITRAL, 2016d, para. 41). This permits entrepreneurs to take business risks without fear that their personal assets will be jeopardized if the business should fail; the concept protects shareholders yet also promotes innovation and entrepreneurial spirit.

An important exception to the liability shield is flagged by reference to Article 41 of the *SAS Model Law*; the exception enables the court, “in case of fraud or any other wrongful act” to pierce the corporate veil and thereby impose joint and several liability on shareholders, directors and managers. Availability of such recourse is also acknowledged in the WGI draft Recommendations (UNCITRAL, 2016, para. 43).

This could represent a significant change in those Latin American countries where company law includes a more expansive range of exceptions to limited liability; it has been pointed out that where available grounds to pierce the corporate veil extend beyond the usual scope of corporate law (fraud or wrongful acts), it effectively “creates exposure that is tantamount to strict liability” and this discourages both domestic and foreign investment (Reyes, 2011, p. 12).

Given the potential consequences of dealing with a business that enjoys limited liability, it is important that the public be given appropriate notice. Therefore, the *SAS Model Law* requires in Article 5(2) that the business name be followed by appropriate wording (e.g., such as “SAS”). A similar requirement is stipulated in the WGI draft Recommendations (#6) that the name must include an identifying phrase or abbreviation.

3. Possibility of Single Shareholder

ARTICLE 2. The simplified stock corporation may be formed by one or more persons or legal entities.

ARTICLE 5. CONTENTS OF THE FORMATION DOCUMENT

A simplified stock corporation will be formed by contract or by the individual will of a single shareholder, provided that a written document is granted...

REC. 7. The law should provide that the UNLLO must have at least one member from the time of its formation until its dissolution, and that any person may be a member of the UNLLO.

The *SAS Model Law* enables even the smallest business – operated by one person – to become an incorporated entity. The WGI draft Recommendation also enables this possibility.

This feature potentially represents quite a significant change; in many Latin American jurisdictions, company law is of a contractual nature based on the concept that all forms of business association arise out of an agreement between two or more persons (Reyes, 2011, p. 11). As a consequence, the single, owner-operated company has not been an available option. But at the same time, the *SAS Model Law* also provides flexibility that allows for a number of shareholders. From the outset of its work, WGI has been striving to provide a text that would enable “evolution of a business entity from a single member model to a more complex multi-member entity” (UNCITRAL, 2014, p. 80).

As was noted previously, WGI decided upon the use of neutral terms, such as “UNLLO”, and this consistency is maintained with the choice of the term “members” rather than “shareholders.”⁴⁹ Under both the *SAS Model Law* and WGI draft Recommendations, the shareholder/member can be either a natural person or legal entity (UNCITRAL, 2016d, para. 53).

The WGI draft Recommendations go a bit further with the requirement that an UNLLO must have at least one member at all times throughout its life cycle. This intention is thought to “help prevent the creation of organizations without active business operations or assets (“shell” organizations) and make transparency and accountability requirements more easily enforceable” (UNCITRAL, 2016d, para. 55). This is a noteworthy consideration in light of some of the criticisms of the SAS in this regard as discussed above.

4. Possibility of Single Director

ARTICLE 25. BOARD OF DIRECTORS

The simplified stock corporation is not required to have a board of directors, unless such board is mandated in the by-laws. In the absence of a provision requiring the operation of a board of directors, the legal representative appointed by the shareholders’ assembly shall be entitled to exercise any and all powers concerning the management and legal representation of the simplified stock corporation. If a board of directors has been included in the formation document, such board will be created with one or more directors, for each of whom an alternate director may also be appointed. All directors may be appointed either by majority vote, cumulative voting, or by any other mechanism set forth in the by-laws. The rules regarding the operation of the board of directors may be freely established in the by-laws. In the absence of a specific provision in the by-laws, the board will be governed under the relevant statutory provisions.

REC. 7. The law should provide that the UNLLO must have at least one member from the time of its formation until its dissolution...

REC. 9. The law should provide that only the following information is required for valid formation of the UNLLO:

(a) (iii) A statement of whether the UNLLO is member-managed or manager-managed; and...

⁴⁹ See note 51.

In keeping with the objective of simplification, the *SAS Model Law* stipulates clearly that a board of directors is not required. While not explicitly stated in the WGI draft Recommendations, this may be implied from the text above.

5. No Minimum Capital Contribution

ARTICLE 5. CONTENTS OF THE FORMATION DOCUMENT

(6) The authorized, subscribed and paid-in capital, along with the number of shares to be issued, the different classes of shares, their par value, and the terms and conditions in which the payment will be made;

ARTICLE 2. LIMITED LIABILITY

Shareholders will only be responsible for providing the capital contributions promised to the simplified stock corporation.

REC. 4. The law should not contain a minimum capital requirement for the formation of an UNLLO.

Although the *SAS Model Law* does not contain a minimum capital requirement, neither does it specifically state that none is expected. However, by the language of Article 2, this may be implied. The WGI draft Recommendations state this more explicitly.

This approach reflects the modern trend.⁵⁰ At one time, it was thought that a minimum capital requirement was “a reasonable quid pro quo for members of a privately held business to receive the benefit of limited liability protection” (UNCITRAL, 2016b, para. 44). However, that intended objective is defeated if capital can be withdrawn almost immediately after registration (World Bank Group, 2013b, p. 8). Although some states still maintain the practice, it is widely recognized that a minimum capital requirement usually represents a significant financial burden for small entrepreneurs seeking to incorporate. The impact of reducing minimum capital requirements has been demonstrated in various countries.⁵¹

Rather than imposing such a requirement, other mechanisms can be introduced that serve more effectively to protect creditors and other third parties. These include the following: requiring publicity as a limited liability entity; permitting exceptions to

⁵⁰ UNCITRAL (2014, para 75): “Of the 189 economies reviewed in Doing Business 2014, 99 have no minimum capital requirement.” *Note by the Secretariat, Best Practices in Business Registration*. A/CN.9/WG.I/WP.85, paras. 29-30.

⁵¹ The Organization for the Harmonization of Business Laws in Africa (“OHADA”) with its membership of 17 sub-Saharan African economies had until recently imposed a minimum capital requirement of at least 1 million local currency units. At that time, OHADA member states ranked in the bottom 50% on the World Bank ranking for the ease of starting a business. But in 2014, OHADA authorized member states to reduce the requirement to whatever level they choose. Benin, Cote Côte d’Ivoire and Togo introduced substantial reductions and as a result, all three economies were among the 20 top improvers in the ease of starting a business in 2013/14. Cited in Dennis, *supra* note 40, at footnote 52.

the liability shield (to pierce the corporate veil); requiring appropriate duty of care and standards of conduct; imposing liability for improper shareholder distributions; requiring transparent and accessible business records and registry information; and, providing adequate supervision and oversight (UNCITRAL, 2016b, para. 45).⁵²

Restrictive terms and conditions for capital contributions have a negative impact on the ability of the company to attract investment. Contemporary financial theory suggests that ensuring adequate cash flow is preferable to fixed paid-in capital requirements (Reyes, 2011, p. 16).

6. No (or Broad) Purpose Clause

ARTICLE 1. NATURE

The simplified stock corporation is a for profit legal entity by shares, the nature of which will always be commercial irrespective of the activities set forth in its purpose clause.

ARTICLE 5. CONTENTS OF THE FORMATION DOCUMENT

The formation document... shall set forth:

(5) A clear and complete description of the main business activities to be included within the purpose clause, unless it is stated that the corporation may engage in any lawful business;

REC. 2. The law should provide that an UNLLO may be organized for any lawful activity.

The *SAS Model Law* provides a broad purpose clause slightly tailored to specify a “for profit” entity, of a commercial nature, that engages in “lawful business.” In its WGI draft Recommendation 5, WGI also decided on a very broad approach, which acknowledges that the state can “decide to narrow the permitted scope according to its particular policy requirements” (UNCITRAL, 2016, para. 31). These exemplify the modern trend whereby the law will allow business entities to engage in all lawful activities. Although the founders could themselves decide whether or not they wish to include restrictive provisions, for most businesses such a clause no longer serves any purpose and possibly hampers entrepreneurship if revisions to the founding documents are required with every new business opportunity. At one time, the purpose clause had been intended to protect shareholders and creditors by controlling how their assets were used (World Bank Group, 2013b, p.18). Today, it may still be appropriate for some entities (such as banks or insurance companies, etc.) that may be circumscribed by legislation in the range of activities in which they may engage.

This aspect of the *SAS Model Law* is of particular relevance in the Latin American context where corporate law usually differentiates between civil and commercial companies. Where such differentiation results in the application of different rules, it requires detailed analysis of the nature of the business and its purpose clause, which

⁵² See also the general discussion of these issues by WGI, A/CN.9/WG.I/WP.86 (para. 32) and A/CN.9/825 (paras. 77-78).

adds cost and creates legal uncertainty (Reyes, 2011, p. 10). A second related problem arises from the “specialty theory”; if the company’s legal capacity is dependent upon its purpose clause, then the corporation’s acts can be declared *ultra vires* –even at the initiative of the corporation itself– and this also creates uncertainty and potentially detrimental effects on third parties (Reyes, 2011, p. 15).

7. Simplified Incorporation Documents (and Annual Reporting Requirements)

ARTICLE 5. CONTENTS OF THE FORMATION DOCUMENT

- (1) The name and address of each shareholder;
- (2) The name of the corporation followed by the words “simplified stock corporation” or the abbreviation “S.A.S.”;
- (3) The corporation’s domicile;
- (4) If the simplified stock corporation is to have a specific date of dissolution, the date in which the corporation is to dissolve;
- (5) A clear and complete description of the main business activities to be included within the purpose clause, unless it is stated that the corporation may engage in any lawful business;
- (6) The authorized, subscribed and paid-in capital, along with the number of shares to be issued, the different classes of shares, their par value, and the terms and conditions in which the payment will be made;
- (7) Any provisions for the management of the business and for the conduct of the affairs of the corporation, along with the names and powers of each manager. A simplified stock corporation shall have at least one legal representative in charge of managing the affairs of the corporation in relation with third parties.

REC. 9. The law should provide that only the following information is required for valid formation of the UNLLO:

- (a) Information that will be made public:
 - (i) The name of the UNLLO;*
 - (ii) The business address or precise geographical location of the UNLLO;
 - (iii) A statement of whether the UNLLO is member-managed or manager-managed; and
 - (iv) The name of each manager; and
- (b) Information that will not be made public:

the name and address of each member.

Simplification of the formation document is a key provision of the *SAS Model Law* that, together with Item 9 - elimination of the requirement of intermediaries, extends the availability of incorporation to any business. The objective is reduce unnecessary burdens by minimizing the information required for incorporation while ensuring the information necessary for protection of third parties is also provided. Both the *SAS Model Law* and the WGI draft Recommendations seek to “strike an appropriate regulatory balance” (UNCITRAL, 2016d, para. 64).

The requirements of Article 5 are standard, such as identification as a limited liability entity, business address, etc. and are largely consistent with the WGI draft Recommendations. One major difference is that the *SAS Model Law* requires publicity of the name and address of shareholders; pursuant to the WGI draft Recommendations this need not be made public (publicity of management is

required instead) but must be provided to state authorities. As it has been stated that these information requirements “should thus assuage any concerns that the UNLLO legal form could be misused for illicit purposes, including money-laundering and terrorist financing” (UNCITRAL, 2016d, para. 66),⁵³ this too, should be taken into consideration in relation to the criticisms that were discussed above.

In the Latin American context, excessive legal formalities for incorporation have been cited as one of the most significant barriers and “(p)aradoxically, this formalistic approach represents a significant obstacle for the formalization of business enterprises” (Reyes, 2011, p. 13). One of the reasons is because when the function is regulatory, rather than enabling, any failure to comply with these mandatory rules usually results in nullification (Reyes, 2011, p. 15). While this may be appropriate for large publically-held companies, it is usually inapplicable to the closely-held. Moreover, these commercial codes usually contain many different grounds for possible nullification (including non-compliance with formalities) that can be used by any party to challenge the legal existence of the corporation; once again, the result is increased cost and legal uncertainty (Reyes, 2011, p. 14).

While simplifying the process of incorporation is important and the focus of this paper is on that initial step, it should also be noted that simplified record-keeping and annual reporting requirements can also be of great assistance in reducing the burden and costs associated with running an incorporated business. Although this is not addressed in the *SAS Model Law*, the WGI draft Recommendation #26 includes provisions for keeping “reasonable records”(UNCITRAL, 2016d)⁵⁴ that are not too burdensome and that encourage open communication and transparency, qualities that are described as important for any business entity, but of even greater importance for the SAS (UNCITRAL, 2016d, para. 53).

⁵³ Financial Action Task Force (FATF) Recommendation 24 in respect of transparency and beneficial ownership of legal persons encourages States to conduct comprehensive risk assessments of legal persons and to ensure that all companies are registered in a publicly available company registry.

⁵⁴ Recommendation 26 states that “The law should provide that the UNLLO must keep reasonable records in respect of: (a) Its formation information; (b) Any record of the members’ agreement; (c) A current list of managers and members, as well as their contact details; (d) Financial statements (if any); (e) Tax returns or reports; and (f) The activities and operations of the UNLLO, as well as its financial information.”

8. Flexible Organizational Structure

ARTICLE 17. ORGANIZATION

Shareholders may freely organize the structure and operation of a simplified stock corporation in the by-laws. In the absence of specific provisions to this effect, the shareholders' assembly or the sole shareholder, as the case may be, will be entitled to exercise all powers legally granted to the shareholders' assemblies of stock corporations, whilst the management and representation of the simplified stock corporation shall be granted to the legal representative.

ORGANIZATION OF THE UNLLO

REC. 11. The law should provide that the members of the UNLLO may adopt a members' agreement in any form, including an agreement that is written, oral or established by way of conduct. The members may agree in their members' agreement on any matter relating to the UNLLO, except in respect of the mandatory rules set out in recommendations 1, 2, 3, 6, 7, 8, 9, 14, 15, 20, 21, 24(c), 26 and 27.

S Model Law also provides for flexibility in organizational structure and freedom to structure the internal framework and operations. This is also facilitated in the WGI raft Recommendations through its provisions for member agreements. This reflects the approach agreed upon by WGI that “freedom of contract should be the guiding principle in establishing the internal organization” (UNCITRAL, 2016d, para. 1). As a consequence, operation of the UNLLO is to be governed by agreement except for the stipulated mandatory provisions that cannot be modified by member agreement (those that establish the necessary legal framework of the UNLLO and provide legal certainty, necessary to protect the rights of the UNLLO or third parties) (UNCITRAL, 2016d, para. 1).

Such an approach will require a shift in Latin America jurisprudence, however, where there still remains “traditional reluctance in company laws to recognize and enforce shareholder agreements” (Reyes, 2011, p. 12).

9. No Mandatory Requirement of Intermediaries to Incorporate

ARTICLE 5. CONTENTS OF THE FORMATION DOCUMENT

No additional formalities of any nature shall be required for the formation of the simplified stock

REC. 9. The law should provide that only the following information is required for valid formation of the UNLLO:

The provisions of Article 5 of the *SAS Model Law* eliminate requirement of “additional formalities of any nature” which includes those that frequently require involvement by an “intermediary” such as a notary, paralegal or lawyer. This would also be the effect of the WGI draft Recommendations that require only the information that is listed for valid incorporation. “Formation” can be considered as the moment of the “birth” of the newly created, legally separate entity and in most legal systems that use the “declaratory system of business registration” this occurs at the moment the

notice of registration is issued by the governmental authority. (UNCITRAL, 2016d, para. 59).⁵⁵

These two elements together —elimination of the mandatory requirement for an intermediary and simplified documentation— extend the availability of incorporation beyond the privileged few to almost anyone. Under many traditional legal regimes that usually require the services of a notary to prepare the incorporation documents, the complexity and cost have put this possibility out of the reach of most MSMEs.⁵⁶ Of course, this change does not prevent those who wish to do so from seeking third party assistance; it simply removes the mandatory aspect. It should also be noted that these provisions effectively remove the necessity for intermediary involvement only at the initial step of incorporation; this effect does not extend to other business activities where notarial —or judicial— oversight may very well continue to be a valid requirement.

10. Decisions by Majority Vote

ARTICLE 22. QUORUM AND MAJORITIES

Unless otherwise specified in the by-laws, quorum to a shareholders' meeting will be constituted by a majority of shares, whether present in person or represented by proxy.

Decisions of the assembly shall be taken by the affirmative vote of the majority of shares present (in person or represented by proxy), unless the by-laws contain supermajority provisions.

REC. 13. The law should provide that, unless otherwise agreed:

- (a) The members of the UNLLO have equal rights to manage the UNLLO;
- (b) Any difference arising between members as to matters in the ordinary course of the activities and affairs of the UNLLO shall be decided by simple majority; and
- (c) Any difference arising between members as to matters outside of the ordinary course of the activities and affairs of the UNLLO shall require unanimous consent.

The *SAS Model Law* provides that decisions shall be taken by majority vote unless the bylaws stipulate otherwise or the decision is for conversion to another corporate form (which pursuant to Article 35 requires unanimous consent). This is, for the most part, consistent with the WGI draft Recommendations, which suggest that unanimous consent should be required for matters outside the ordinary course of business, such as those relating to dissolution and winding-up, etc. (UNCITRAL, 2016d, para. 10)⁵⁷

⁵⁵ In States that do not adhere to the declaratory system of business registration, formation occurs after review of the formal correctness of the formation information as overseen by judicial authorities, an administrative agency or an intermediary.

⁵⁶ Costs of notarial services can constitute up to 80-84% of the total cost of registration. (UNCITRAL, 2014, para. 14).

⁵⁷ A requirement for two-thirds majority for such matters is also frequently encountered in domestic laws.

11. No Mandatory Internal Auditors

ARTICLE 28. AUDITING ORGANS

A simplified stock corporation shall not, in any case, be legally mandated to establish or provide for internal auditing organs [include the name of corresponding auditing entity, e.g., fiscal auditor, auditing committee, etc.].

The *SAS Model Law* eliminates the legal obligation of internal audit, which is a usual requirement throughout Latin America company law that imposes an undue burden in terms of administration and cost (Reyes et al, 2012, pp. 130-131).⁵⁸ It is usually unnecessary for MSMEs that are closely held, especially given that third parties such as creditors or contractors “tend to prefer external auditing systems” (Dennis & Pliego, 2016). The WGI draft Recommendations do not contain specific provisions in this regard, but there has been “general agreement on the need for fiscal transparency and simplified accounting” (Dennis & Pliego, 2016).

Such internal audit requirements fall within the range of Latin American company law provisions described as having a “public policy” and “public order” character with the underlying purpose to protect investors; while appropriate for publically held corporations, they can be unnecessarily restrictive for the closely held (Reyes, 2011, p. 8).

12. Maximum Freedom of Contract

REC. 1. The law should provide that an UNCITRAL Limited Liability Organization (“UNLLO”) is governed by this law and by the members’ agreement, if any.

Although the *SAS Model Law* does not include a specific provision regarding freedom of contract, this may be implied from the provisions that have been discussed above. In its deliberations, WGI agreed that freedom of contract should be the guiding principle in terms of establishing the internal organization and that therefore, operation of the UNLLO should be governed to as great an extent as possible by the contractual agreement established by its members (UNCITRAL, 2016d, para. 28). Both instruments are consistent with and acknowledge the importance of this internationally recognized principle. As one commentator has observed after reviewing several examples of domestic legislation on SAS, the common denominator is the need to favour entrepreneurial initiative where the legal framework is guided by business needs (Arcila, 2009, p. 6).

⁵⁸ Dennis & Pliego (2016, p. 71): “Experts have criticized the excessive regulation of auditors...(described by) a variety of terms...: síndico, comisario, revisor fiscal, junta de vigilancia, etc.” Cited by Dennis, *supra* note 40, at footnote 59.

These twelve elements contained in the *SAS Model Law* have been emphasized because they correspond to, and contribute towards, the emergence of globally recognized best practices for simplified incorporation. Of course, the *SAS Model Law* includes additional provisions that will also contribute towards the modernization of outdated company laws.⁵⁹ What makes the *SAS Model Law* unique is the assembly of these key elements for the first time in a single instrument. Acting in concert, these elements can serve to simplify the process of incorporation, which is the first and important step in business registration, and thereby pave the way to formalization of many MSMEs in the hemisphere.

Concluding Reflections

Does the *SAS Model Law* offer a new structure for doing business in the Americas? The answer is both “No” and “Yes”. Millions of MSMEs across the region are already doing business; what they need is a simple and cost-effective way to formalize these businesses and thereby obtain the dignity and benefits of participating in the formal sector. Larger businesses can also benefit from a streamlined and more efficient method of incorporation that will simplify the process and encourage foreign investment.

Will it work? Perhaps the best approach is to provide the SAS as an alternative to the traditional corporate model and let businesses decide for themselves; that is what happened in Colombia (Reyes, 2011, p. 30).⁶⁰ Inspired by the enthusiastic response by businesses of all types and sizes, Colombia had first approached the OAS, which it considered would be “the natural home” for a *SAS Model Law*. While work on this topic by other organizations is ongoing, including the invaluable work of UNCITRAL WGI, contemporaneous developments that have transpired over the past few years illustrate once again that stepwise advances can be made in the same topic by working simultaneously and collaboratively at regional and international levels to further the harmonization and codification of private international law.

The *Model Law on the Simplified Corporation* offers Member States of the OAS a proven legislative tool that can benefit both large and small businesses; indeed, it presents a new and simple way of doing business in the Americas—and around the world—so that the benefits of incorporation and formalization can be enjoyed by all.

⁵⁹ Reyes (2011, p. 32) provides a summarized list of these additional provisions, such as unlimited corporate duration, waiver of notice for shareholder meetings, among others.

⁶⁰ UNCITRAL (2013, p. 16): “the SAS should have to compete with other types of business forms.”

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