PAULA M. ALL
JORGE OVIEDO ALBÁN
EDUARDO VESCOVI
(DIRECTORES)

LA ACTIVIDAD INTERNACIONAL DE LA EMPRESA

PAULA M. ALL
ISABELLA ALMEIDA DE SÁ E BENEVIDES
GILBERTO BOUTIN I.
JUAN JOSÉ CERDEIRA
CECILIA FRESNEDO DE AGUIRRE
EUGENIO HERNÁNDEZ-BRETÓN
CAROLINA D. IUD
LUCIANE KLEIN VIEIRA
CLAUDIA LIMA MARQUES
CARLOS E. ODRIOZOLA MARISCAL

JORGE OVIEDO ALBÁN
SEBASTIÁN PAREDES
ALBERTO M. POLETTI ADORNO
CLAUDIA MADRID MARTÍNEZ
MARILDA ROSADO DE SÁ RIBEIRO
JENNER A. TOBAR TORRES
JEANNETTE M.E. TRAMHEL
M. FERNANDA VÁSQUEZ PALMA
ANA E. VILLALTA VIZCARRA
CARLOS E. WEFFE H.

IBAÑEZ

ASADIP

REGIONAL CODIFICATION OF THE CORPORATE FORM: A CONTRIBUTION TOWARDS HEMISPHERIC INTEGRATION AND ECONOMIC DEVELOPMENT

JEANNETTE M.E. TRAMHEL*

Abstract: The Model Law on the Simplified Corporation that emanated from the 2017 OAS General Assembly has the potential to contribute significantly towards hemispheric integration and economic development. This paper examines how that can be achieved and, within the context of corporate social responsibility, considers a possible complementary responsibility of states to simplify and modernize the process of incorporation such that the benefits of a simplified incorporation process and simplified corporate form are available to all businesses, including Micro, Small, and Medium Sized Enterprises (MSMEs); implementation of legislation consistent with global standards can encourage formalization of the informal sector and thereby facilitate more equitable and sustainable economic development.

Resumen: La ley Modelo sobre sociedad por acciones simplificada que emanó de la Asamblea General de la OEA en 2017 tiene el potencial de contribuir a la integración hemisférica y al desarrollo económico. Este trabajo examina cómo se puede lograr esto y en el contexto de la responsabilidad social corporativa considera una posible responsabilidad complementaria de los Estados de simplificar y modernizar el proceso de incorporación de forma tal que los beneficios de un proceso simplificado de incorporación y simplificación corporativa estén a disposición de todas las empresas, incluidas las MIPYMES; la aplicación de leyes compatibles con las normas mundiales puede fomentar la formalización del sector no estructurado y facilitar así un desarrollo económico más equitativo.

Summary

---

* Senior Legal Officer, Department of International Law, Secretariat for Legal Affairs, Organization of American States. The views and opinions expressed in this article are solely those of the author and are not intended to reflect the official policy or position of the Organization of American States or the Secretariat for Legal Affairs.

I. INTRODUCTION

At its most recent session in june 2017, the General Assembly of the Organization of American States ("OAS") resolved "to take note" of the Model Law on the Simplified Corporation, requested its widest possible dissemination and encouraged its adoption by Member States[1]. As per the second perambulatory paragraph of the resolution, the General Assembly is "mindful of the contribution that these new forms of companies may make to economic development in member states"; accordingly, the intention of this paper is to examine that anticipated contribution and how it might be expected to unfold. The paper will not analyze the Model Law in relation to international standards for simplified incorporation, given that this was explored in some depth in another paper that is forthcoming presently[2]. Instead, this work considers firstly, whether incorporation should be considered at all, in light of criticisms of the corporate form in recent years; secondly, responses to those criticisms; thirdly, within that framework the role of simplified incorporation in formalization and improved access to credit, and finally, possible responsibility of states to effect such change.

II. CRITICISMS OF THE CORPORATE MODEL

With a conference theme dedicated to the "corporation", a useful starting point may be to consider criticisms of the corporate model. After all, it would be imprudent to promote something under scrutiny without first examining the validity of these criticisms. Although corporations and their activities had been the

---

1 Model Law on the Simplified Corporation. AG/DOC. 5579 (adopted at the 47th OAS General Assembly on June 21, 2017). Operative language is "to take note of the (Model Law); to request the (CJI) and its Technical Secretariat to disseminate the (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 (Model Law) that are in their interest; and to instruct the Department of International Law to provide those member states that so request with all collaboration and support necessary (for implementation)". The Model Law, which is modelled after Colombia's Law of Simplified Companies, L. 1258, 5 December 2008, *Diario Oficial* [D.O.] (Colom.), had previously been considered by the InterAmerican Juridical Committee ("CJI"), which approved a resolution in that regard in 2012. 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". That resolution was subsequently transmitted to the political organ, the OAS Permanent Council for its due consideration. Being of a juridical nature, the resolution was referred by the aforementioned council to its Committee on Political and Juridical Affairs where it was considered at meetings, including those held December 4, 2014 and December 1, 2016. At its meeting held March 30, 2017, the CAJP agreed upon Draft Resolution: Model Law on the Simplified Corporation. OEA/Ser. G, CP/CAJP-3408/17 rev. 1, April 4, 2017.

2 J.M.E. TRAMHEL, "The Simplified Joint Stock Corporation: A New Structure for Doing Business in the Americas?" *Agenda Internacional*, Instituto de Estudios Internacionales (IDEI), Pontificia Universidad Católica del Perú (PUCP), vol. 24, n° 35, 2017 (forthcoming).

subject of criticism for decades, it was discussions prompted by the documentary and accompanying book, both entitled "The Corporation"[3] that pushed to the forefront of mainstream populism an examination of the corporate structure itself as the possible root cause for corporate "misbehavior"[4]. In summary, it was argued that two fundamental elements of an incorporated entity, namely, "limited liability" and "separate legal personality" are key elements that in combination enable the corporation to conduct its business affairs in order to maximize profit at the behest of shareholders and, unlike other "natural persons", to do free from social conscience. Moreover, these characteristics also enable the incorporated entity to attract investment capital and expand its business activities in ways that would otherwise be extremely difficult. With accountability only to its shareholders, so it is argued, the corporation enjoys a type of liberation that can lead to, if not encourage, corporate misbehavior.

Although it would be unfair and inaccurate to attribute criticisms and subsequent consequences entirely to a single work, it must be acknowledged that in the time since its release, "things have changed". As the author has stated "the original film was a call to action. Now an entire generation of advocates, from both within and outside corporations is successfully demanding that major corporations redefine their very purposes and missions to include social and environmental values"[5].

That quotation is informative on several points: "major" corporations are often "international" corporations. Although major international corporations have been the subject of scrutiny for decades, this has been largely from the perspective of others (including other lawyers), such as those in the fields of human rights, labor, environment, international trade or taxation. And although international activities of corporations and/or the activities of international corporations have been the subject of interest for those in the field of private international law ("PIL"), it is only relatively recently that the structure of the corporate entity itself has become of interest[6]. Quite probably, this is because governance of the corporate structure

---

3 J. Bakan, "The Corporation: The Pathological Pursuit of Profit and Power", 2003; M. Achbar / J. Abbott / J. Bakan, "The Corporation", documentary film, 2003. Big Picture Media Corporation, available at: http://thecorporation.com/

4 The term "misbehaviour" is used here simply as a catch-all and is not intended to minimize the serious and egregious activities that have been undertaken frequently by incorporated entities, including human rights abuses, environmental degradation, corrupt practices, etc. These activities have been reviewed extensively in "The Corporation" and in work by others, for which lack of time precludes their citation.

5 J. BAKAN, "Breaking News: The Sequel is Underway", available at: http://www.thecorporation.com/ (accessed September 11, 2017).

6 The CJI began consideration of the topic of simplified companies in 2011, Annual Report of the [CJI] to the General Assembly. OEA/Ser.Q, CJI/doc.425/12, August 10, 2012, Chapter II, Topics Discussed by the [CJI] at the Regular Sessions held in 2012, Topic 5–Simplified joint stock companies. The United Nations Commission for International Trade Law ("UNCITRAL") Working Group I began

has been considered to fall within the scope of domestic law. As PIL has expanded its scope (or Private International Law has evolved into the camps of "pure" PIL and International Private Law[7]) and as methods of harmonization and codification have evolved towards greater use of models and soft law instruments, this too, has expanded the range of subjects that have become of interest, with corporate structure being one.

Given that many business entities that conduct international business are incorporated entities, it would seem appropriate to consider corporate structure both from the "pure" PIL perspective as well as from the viewpoint to promote development of international private law. A primary rationale for harmonization, namely, to reduce uncertainty and thereby encourage commerce and trade, applies very well to the corporate form.

Moreover, this topic provides us with a unique opportunity as international lawyers; it is an invitation to take off the PIL hat, or at least raise it a little, to look at these issues more broadly and both from the "public" and the "private" law perspective. Whereas one looks at the function and role of the corporation within a social context, the focus of the other is the entity itself. Despite the continuing tendency of specialization, there is growing recognition of the need for an interdisciplinary approach, even within law, by which we can reach out to others and bring a wider lens to the discussion.

III. RESPONSE TO CRITICISMS – PROMOTE CORPORATE RESPONSIBILITY

Al though criticism of international business is not new, in the past, the focus has largely been on activities of the business, rather than the corporate form, although as was explained above, it has been argued that some corporate actions may be enabled by certain of the elements that are characteristic of the corporate form (i.e., limited liability and legal personality). The calls to action that have been made, although they pre-date the term, can be considered to fall within the broadly defined scope of corporate responsibility or (corporate "social" responsibility (CSR) which may or may not include environmental responsibility).

"an assessment of the legal and regulatory issues at stake in the field of microfinance" in 2009, which evolved to include consideration of simplified business start-up. UNCITRAL, 2017. Annotated Provisional Agenda. A/CN.9/WG.I/WP.105, see paras. 5-12.

7 The term "Private International Law" is considered by some to refer only to the traditional and narrow scope of the field comprising conflict of laws rules, whereas the term "International Private Law" is considered to refer to the more expansive field. In this paper, the abbreviation "PIL" is generally used to encompass the latter and broader concept.

An early response to the call was development of corporate codes of conduct. Some corporations developed and adopted internal, voluntary codes to regulate their own activity[8]. Others developed industry-specific codes[9]. Some codes were developed by international organizations or associations that encouraged their adoption. An early example dates back to the original Sullivan Principles of 1977[10].

Without embarking upon a historical account, it may be summarized that in recent years these efforts have developed within the rubric of international dialogues on "business and human rights" and/or "business and the environment". What has emerged as the current formulation and among the most well-known of these developments are the Guiding Principles on Business and Human Rights, also known as the Ruggie Principles[11]. At the same time, there has also emerged the UN Global Compact, a voluntary group of companies and non-business that encourages business to align their strategies with ten principles on human rights, labour, environment and anti-corruption and to advance broader social goals such as the UN Sustainable Development Goals[12].

These international developments have also been matched with similar initiatives within our own hemisphere, as the OAS has addressed CSR over the past decade in various instruments. Most notably, in the Declaration of Mar del Plata of November 5, 2005, Heads of State and Government recognized that "sustained economic growth, with equity and social inclusion, is an indispensable condition to create jobs, fight extreme poverty, and overcome inequality in the Hemisphere" and that "(t)o achieve these ends, it is necessary to improve transparency and the investment climate in our countries, build human capital, encourage increased incomes and improve their distribution, promote corporate social responsibility, and foster a spirit of entrepreneurship as well as strong business activity"[13].

---

8 Examples include the following from Pepsi and McDonalds, available at: http://www.pepsico.com/company/global-code-of-conduct http://corporate.mcdonalds.com/mcd/investors/corporate-governance/codes-of-conduct/standards_of_business_conduct.html

9 One example is the NICE Code of Conduct and Manual for the Fashion and Textile Industry, May 2012, produced by the Nordic Fashion Association, available at: http://ethics.iit.edu/codes/NICE2012.pdf (accessed September 15, 2017).

10 The focus of the original Sullivan Principles was the end of apartheid in South Africa by means of economic pressure sustained through corporate social responsibility; the principles comprised conditions for doing business that a corporation was to demand for its employees, which included non-segregation. In 1999, new "Global" Sullivan Principles had a more expanded focus.

11 United Nations Human Rights Office of the High Commissioner, 2011. Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework. HR/PUB/11/04, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed September 15, 2017).

12 United Nations Global Compact, available at: https://www.unglobalcompact.org/what-is-gc (accessed September 15, 2017).

13 Fourth Summit of the Americas, Declaration of Mar del Plata "Creating Jobs to Fight Poverty and Strengthen Democratic Governance" Mar del Plata, Argentina, November 5, 2005, available at : http://www.summit-americas.org/iv_summit/iv_summit_dec_en.pdf (accessed September 15, 2017).

Most recently, in June 2017, the OAS General Assembly adopted the latest in a series of resolutions concerning promotion and protection of human rights in business[14]. Several points can be elicited from the perambulatory paragraphs. Firstly, the OAS underscores the United Nations 2030 Agenda for Sustainable Development, which "promotes development based on responsible corporate behavior" and makes reference to the aforementioned Ruggie Principles. As such, the body of international instruments on the subject is acknowledged.

Secondly, the OAS recognizes "that companies have the capacity to contribute to economic wellbeing, development, technological progress, and wealth, together with the responsibility for respecting human rights and promoting gender equality and equity and the economic empowerment of women, among other issues". This constitutes important recognition of the two components and their complementarity; the capacity of companies to contribute towards economic growth and corporate social responsibility.

Thirdly, the OAS considers "the importance of continuing progress on the subject of business and human rights in the hemisphere through constructive dialogue among *all* actors involved, whether from the public sector, private sector, or civil society (emphasis added)". This inclusive approach is acknowledgement of the role and contributions from the corporate and private law sectors, including the PIL component.

Fourthly, the OAS takes note of the reports prepared on this topic by the Inter-American Juridical Committee (CJI) and the Inter-American Commission on Human Rights ("IACHR"). The reports of the CJI will be considered further below.

The last perambulatory paragraph notes previous resolutions on the matter that have been adopted by the General Assembly. Specifically mentioned is AG/RES. 2887 (XLVI-O/16), in which the IACHR was requested to conduct a study on inter-American standards on business and human rights based on an analysis of conventions, case law, and reports put forth by the inter-american system. Resolutions on the broader topic of promotion of corporate responsibility have also been numerous[15].

---

[14] Promotion and Protection of Human Rights (adopted at the third plenary session held on June 21, 2017) AG/RES. 2908 (XLVII-O/17), title ix. Promotion and protection of human rights in business.

[15] Promotion and Protection of Human Rights, AG/RES. 2840 (XLIV-O/14) recalls in the preamble previous resolutions adopted by the General Assembly on the subject of promotion of corporate social responsibility in the Hemisphere, *inter alia*, AG/RES. 1871 (XXXII-O/02), AG/RES. 1953 (XXXIII-O/03), AG/RES. 2013 (XXXIV-O/04), AG/RES. 2123 (XXXV-O/05), AG/RES. 2194 (XXXVI-O/06), AG/RES. 2336 (XXXVII-O/07), AG/RES. 2483 (XXXIX-O/09), AG/RES. 2554 (XL-O/10), and AG/RES. 2753 (XLII-O/12).

The CJI, which serves the organization as the advisory body on juridical matters[16], has also taken up the subject. As was noted in the most recent General Assembly resolution discussed above, in response to an earlier mandate from that body, at its 90th regular session held in March 2017, the CJI adopted a resolution and accompanying report on the Conscious and Effective Regulation of Business in the Area of Human Rights[17]. It had previously also adopted Guidelines Concerning Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas[18], which contains recommended guidelines for OAS member states. These Guidelines have been considered by the political organ at a special meeting to "foster the exchange of best practices and experiences in the promotion and protection of human rights in business" scheduled as mandated pursuant to OAS General Assembly resolution[19].

It may be concluded from this brief overview that initiatives at the international and regional levels continue to actively promote corporate social responsibility.

IV. RESPONSE TO CRITICISMS – REVISE THE CORPORATE MODEL

Modernization and simplification of the corporate model can also contribute toward the ultimate goals of corporate responsibility, a more just and fair social order, and economic growth and development. Let us consider how that may be so.

1. DOMESTIC LEVEL

A) Modernize Outdated Corporate Law

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[20].

---

16 Charter of the OAS, Article 99.

17 Conscious and Effective Regulations for Companies in the Sphere of Human Rights, CJI/RES. 232 (XCI-O/17); Report (by the same name), CJI/doc.522/17 rev. 2. Both dated March 9, 2017.

18 Corporate Social Responsiblity in the Area of Human Rights and the Environment in the Americas, CJI/RES/ 205 (LXXXIV-O/14), March 13, 2014; Report (by the same name), CJI/doc.449/14 rev. 1, corr. 1, February 24, 2014.

19 Promotion and Protection of Human Rights in Business, AG/RES. 2840 (XLIV-O/14).

20 F. REYES, "Modernizing Latin American Company Law: Creating an All-Purpose Vehicle for Closely-Held Business Entities–The New Simplified Stock Corporation," *Penn. State Int'l. Law. Rev.*, vol. 29, n° 3, 2011, (Early draft), Article 8, p. 1. 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*).

Moreover, in many such jurisdictions, legislative reform would entail reform of an entire uniform commercial code, unlike legal systems wherein each type of business association is governed by its own statute that can be updated as necessary and more easily[21]. Some aspects of the company law that is prevalent across most of Latin America constitute inherent barriers to the development and modernization of the corporate form, including the following: 1) aforementioned challenges of comprehensive 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, 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[22]. More detailed examination of these restrictions and their incompatibility with global best practices has been considered elsewhere[23].

---

21 F. REYES (note 20), p. 7.

22 F. REYES (note 20), pp. 7-21.

23 J. TRAMHEL (note 2), Part III.

As a result of these aspects of company law, in most of these jurisdictions, creating and operating an incorporated business is complex, time-consuming and expensive; consequently, many Latin American businesses are significantly restricted and operate at a competitive disadvantage on the global playing field. Although this situation affects all business, the consequences are particularly severe for MSMEs. Should the benefits and advantages associated with incorporation not be made available and accessible to all kinds of businesses, both large and small? What steps can be taken by states to ameliorate these disadvantages?

B) Facilitate Business "Registration" and "Registry" – Simplify the Process

Various global and regional initiatives[24] point towards consensus on the need to simplify the process for "starting" a business, that is, the entire spectrum of business "registration." In most jurisdictions, that process involves a series of steps that can be classified into one of three categories[25]. Most jurisdictions require three initial basic steps, the first of which is business "registry." For incorporated entities, this step is known as "incorporation" by which the business is "born" into legal existence and given a business name. The next two steps constitute registration as a tax payer and registration as an employer. A second category of steps that may also be required and that vary by jurisdiction include registration with other government entities, such as subnational tax administration units (e.g., regional, state or municipal authorities), employment or labor ministries (regarding employee benefits, etc.). A third category of steps that may be required are the "business-specific" registrations, such as licenses concerning hygiene, health and safety (e.g., for food services or vehicle operation), sale of restricted substances (e.g., alcohol or medicine) or to verify conformity with municipal bylaws (e.g., restrictive zoning)[26].

---

[24] These include the following: UNCITRAL, Working Group I, pursuant to its mandate to reduce legal obstacles faced by MSMEs throughout the business life cycle, as of 2014 began to focus on "the legal questions surrounding the simplification of incorporation." UNCITRAL (2017). Annotated Provisional Agenda. A/CN.9/WG.I/WP.105, para. 12. The World Bank Group provides practical advice on simplifying incorporation and business registration in its toolkit. World Bank Group, 2013. Reforming Business Registration, A Toolkit for Practitioners, available at http://documents.worldbank.org/curated/en/577211468155378578/Reforming-business-registration-a-toolkit-for-the-practitioners. The Asia-Pacific Economic Cooperation ("APEC") in 2009 launched an Ease of Doing Business Action Plan, the goal of which is to make the process of starting a business "cheaper, easier and faster" in the APEC region. APEC Policy Support Unit (2016). APEC's Ease of Doing Business – Final Assessment 2009-2015: A Collaborative Report Between the APEC Economic Committee and the APEC Policy Support Unit, p. 1, available at: http://www.iri.edu.ar/wp-content/uploads/2016/10/APEC-Doing-business.pdf.

[25] Adapted from UNCITRAL (2016). Contribution by UNCTAD: Lessons Learned on Business Registration. A/CN.9/WG.I/WP.98, p. 4.

[26] UNCTAD Lessons Learned (note 25).

Thus, business "registration" has been described as "a series of processes involving registration with multiple public agencies to be able to operate legally and within the 'formal' economy"[27]. It is important to note that business "registry" is only the first step–albeit an important one–along that continuum. It is simplification of that initial step which is a primary objective of the Model Law on the Simplified Corporation.

C) *Encourage Formalization of the Informal Economy*

Noteworthy from the above quotation is that registration pursuant to this process will enable a business "to operate legally and within the 'formal' economy." As has been pointed out by Hernando de Soto, many people across Latin American already run businesses according to agreements and social contracts among themselves and what is needed is "(...) to create one legal system that everybody recognizes and obeys"[28].

The informal economy has been defined as "all economic activities by workers and economic units that are –in law or in practice– not covered or insufficiently covered by formal arrangements"[29]. This definition encompasses both informal employment (which takes place in both informal and formal sectors) and informal economic activity.

Because of its very nature, the informal economy is difficult to quantify, but in broad terms, it has been estimated to comprise more than half of the global labor force and more than 90% of MSMEs worldwide"[30]. In Latin America and

---

27 UNCTAD Lessons Learned (note 25).

28 Cited in Commission on Legal Empowerment of the Poor and United Nations Development Programme, 2008, Making the Law Work for Everyone, vol. II. Working Group Reports, back cover, available at: http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/legal-empowerment/reports-of-the-commission-on-legal-empowerment-of-the-poor/making-the-law-work-for-everyone—-vol-ii—-english-only/making_the_law_work_II.pdf

29 ILO, *Recommendation Concerning the Transition from the Informal to the Formal Economy. Adopted by the General Conference at its One hundred and Fourth Session*, Geneva, 2 June 2015, para. 2(a) and (b). "Economic units" in turn, are defined as "units that employ 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". The term "informal" is not synonymous with "illegal" and as defined in para 2(b), it "does not cover illicit activities". It may best be considered as "extra-legal, namely, employment and economic activities that fall outside of the formal economy".

30 ILO Website: Informal Economy, available at: http://www.ilo.org/employment/units/emp- invest/informal-economy/lang—en/index.htm (accessed May 2, 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.

the Caribbean, informal employment averaged 46.8% in 2013[31] with rates of informal employment by country that range from approximately 40 – 75%.[32].

"Formalization", or integrating the informal economy into the formal[33], is of benefit both to individual actors and society as a whole. Individual workers gain the protections afforded by legal contracts of employment and social security. 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. 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. Formalized businesses are required to pay taxes, which generates government revenues and also provides a valuable source of economic data.

The benefits of formalization and growth of MSMEs has been recognized as an important way to promote economic development, as acknowledged in international instruments, particularly the United Nations Sustainable Development Goals[34]. Reaffirming SDG commitments, the OAS General Assembly also "encourage(s) models for development and economic growth that are more inclusive" and promotion in particular of the growth of MSMEs[35].

---

31 ILO, *Regional Office for Latin America and the Caribbean. Thematic Labour Overview: Transition to Formality in Latin America and the Caribbean*, 2014, p. 8.

32 ILO, *Women and Men in the Informal Economy: A Statistical Picture*, 2ª ed., 2013, p. ix, available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_234413.pdf

33 This is not a one-way, irreversible process, but rather one of fluidity.

34 SDG #8 aims to "promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all" and 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)". UN General Assembly, *Transforming our World: the 2030 Agenda for Sustainable Development*, 2015. A/RES/70/1 (Resolution adopted by the United Nations General Assembly on September 25, 2015), available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E

35 Advancing Hemispheric Initiatives on Integral Development. Adopted at the fourth plenary session held on 15 June 2016, AG/RES. 2881 (XLVI-O/16), paras. 38 and 41

To achieve these benefits and encourage formalization of the informal economy, it is imperative to simplify business registration. It is simplification of the initial step within that process–business registry (i.e., incorporation) – that is a primary objective of the Model Law on the Simplified Corporation.

2. INTERNATIONAL LEVEL

A) Advance International Standardization

The Model Law on the Simplified Corporation is consistent with and has contributed towards emerging international standards for the simplified corporate form. As has been discussed elsewhere[36], this Model Law was designed around twelve key elements that constitute "emerging globally recognized best practices for simplified incorporation"[37]. These elements are as follows: separate legal personality, limited liability, possibility of a single shareholder, possibility of a single director, no minimum capital contribution, broad purpose clause or none at all, simplified incorporation documents[38], flexible organizational structure, no mandatory requirement for intermediaries (e.g., notaries) to incorporate, decisions by majority vote, no mandatory requirement for internal auditors, and maximum freedom of contract[39].

By simplifying the requirements, in particular, elimination of the mandatory requirements for intermediaries and internal auditors, the process of incorporation becomes easier and affordable and, therefore, more accessible to a wider range of business owners.

B) Improve Access to International Markets

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 participation in the formal sector. A formalized business is more likely to expand to international markets as it will

---

36 J. TRAMHEL (note 2).

37 Most, if not all twelve and if not in explicit form, have been identified as key by various entities, including the World Bank, UNCITRAL and UNCTAD. See J. TRAMHEL (note 2), text accompanying footnotes 41-46. See also, M. DENNIS / J.M. PLIEGO RAMOS, "Creating an Enabling Legal Environment for Micro-, Small-, and Medium-Sized Enterprises: Simplified Incorporation and Registration," *Ar. J. Int'l & Comp. Law*, vol. 33, n° 1, 2016, p. 71.

38 Some suggest that annual reporting requirements should also be simplified.

39 Although the Model Law does not include a specific provision on freedom of contract, this is implicit from the aforementioned and other provisions.

have the legitimate status necessary to obtain customs clearances and other documentation for cross-border trade. Formalization is almost a prerequisite for access to international markets, which is virtually impossible for the vast number of MSMEs that operate within the informal sector.

Secondly, for existing formalized businesses, use of a regionally recognized, standard corporate form may facilitate cross-border trade and commerce. As per the recent resolution, the OAS General Assembly "invite(s) member states to adopt, in accordance with their domestic laws and regulatory framework, those aspects of the [Model Law] that are in their interest"[40]. One can surmise that were several states to do so, a regional "corporate model" might emerge, which would facilitate the ease of doing business in the Americas.

C) *Enable Foreign Investment into Domestic Markets*

Although the emphasis throughout this paper has been on the advantages of the Model Law for MSMEs, "simplified" should not be considered synonymous with "small". Larger businesses can also benefit from modernized legislation on incorporation, structure and governance. The twelve elements described above are advantageous to businesses of all sizes, and larger companies will benefit in particular from provisions that permit flexibility in the organizational structure and that ensure maximum freedom of contract. In addition to these twelve elements considered essential to simplified incorporation, the Model Law also contains additional provisions that will help to modernize and streamline corporate structure and governance. The "simplified" corporation would better be equated with one that is efficient and cost-effective.

Secondly, availability of a simplified process and form of incorporation should also encourage foreign investment. The same advantages that benefit local businesses, those of lower cost and less complexity, are also attractive to foreign businesses. Availability of a recognizable corporate form would serve to reduce uncertainty and promote cross-border trade and commerce.

V. REFLECTIONS

Concerns have been raised over the years about corporate "misbehavior" and rightly so. And as this overview has briefly described, there have been responses at both international and regional levels that have raised the consciousness and made the call for greater corporate social responsibility. That work is not yet complete and the urging must continue.

---

40 See note 1.

However, States have responsibilities, too. Pursuant to the principle of progressive realization as articulated in the International Covenant on Economic, Social and Cultural Rights, states shall undertake "to take steps (...) with a view to achieving progressively the full realization of the rights recognized"[41]. These rights include the right to decent work, right to an adequate standard of living, and social security. People unable to secure decent work in the formal economy invariably resort to informal means of earning a living; informality is a response to a dysfunctional formal economy. Rather than acting as a barrier to restrict informal economic activities, law should serve as a tool to facilitate and encourage transition to formalization.

As noted above, in the June 2017 OAS General Assembly States acknowledged that "companies have the capacity to contribute to economic wellbeing, development, technological progress, and wealth"[42]. If such capacity is recognized on the one hand, it would seem counterproductive to retain outdated corporate legislation that hamstrings incorporation and effective operations on the other. Therefore, perhaps greater advocacy is required to encourage states to examine the laws on the books and to take steps as may be appropriate. That, in fact, is just what was recommended: at the June 2017 General Assembly, States resolved "to take note of the Model Law on the Simplified Corporation; to request the (CJI) and its Technical Secretariat to disseminate the (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 (Model Law) that are in their interest (...)"[43].

Business has been called to task to carry out its activities responsibly; states must carry out their corresponding responsibilities so that businesses may do so. Together, this work will realize the potential of business to serve as economic engines of development that is fair, just and sustainable.

41 International Covenant on Economic, Social and Cultural Rights, signed 16 December 1966, entered into force 3 January 1976, Article 2.

42 See note 14.

43 See note 1.