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Report of Working Group I (MSMEs) on the work of its twenty-fifth session (Vienna, 19-23 October 2015)

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I. Introduction

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

2. At its twenty-second session (New York, 10 to 14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. The Working Group engaged in preliminary discussion in respect of a number of broad issues relating to the development of a legal text on simplified incorporation³ as well as on what form that text might take,⁴ and business registration was said to be of particular relevance in the future deliberations of the Working Group.⁵

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

4. At its twenty-third session (Vienna, 17 to 21 November 2014), Working Group I continued its work in accordance with the mandate received from the Commission. Following a discussion of the issues raised in Working Paper A/CN.9/WG.I/WP.85 in respect of best practices in business registration, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of that Working Paper for discussion at a future session. In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group explored the legal questions surrounding the simplification of incorporation by considering the issues outlined in the framework set out in Working Paper A/CN.9/WG.I/WP.86, and agreed that it would resume its deliberations at its twenty-fourth session beginning with paragraph 34 of that document.

5. At its twenty-fourth session (New York, 13 to 17 April 2015), the Working Group continued its discussion on the legal questions surrounding the simplification of incorporation. After initial consideration of the issues as set out in Working Paper A/CN.9/WG.I/WP.86, the Working Group decided that it should continue its work by considering the first six articles of the draft model law and commentary thereon contained in Working Paper A/CN.9/WG.I/WP.89, without prejudice to the final form of the legislative text, which had not yet been decided. Further to a proposal from several delegations, the Working Group agreed to continue its discussion of the issues included in A/CN.9/WG.I/WP.89, bearing in mind the general principles

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

² For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.91, paras. 5-17.

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

⁴ *Ibid.*, paras. 32-38.

⁵ *Ibid.*, paras. 47-50.

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

outlined in the proposal, including the “think small first” approach, and to prioritize those aspects of the draft text in A/CN.9/WG.I/WP.89 that were the most relevant for simplified business entities. The Working Group also agreed that it would discuss the alternative models introduced in A/CN.9/WG.I/WP.87 at a later stage.

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

II. Organization of the session

7. Working Group I, which was composed of all States Members of the Commission, held its twenty-fifth session in Vienna from 19 to 23 October 2015. The session was attended by representatives of the following States Members of the Working Group: Argentina, Brazil, Canada, China, Colombia, Croatia, Czech Republic, Ecuador, France, Germany, Indonesia, Italy, Japan, Kenya, Malaysia, Mauritania, Mexico, Pakistan, Panama, Poland, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

8. The session was attended by observers from the following States: Bolivia, Chile, Cuba, Cyprus, Dominican Republic, Finland, Luxembourg, Peru, Portugal, Qatar, Romania, Saudi Arabia, Slovakia, Sudan and United Arab Emirates.

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

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

(a) *Organizations of the United Nations system*: United Nations Conference on Trade and Development (UNCTAD); World Bank (WB);

(b) *Invited international non-governmental organizations*: Association for the Promotion of Arbitration in Africa (APAA); Centro de Estudios de Derecho, Economía y Política (CEDEP); Commercial Finance Association (CFA); European Commerce Registers’ Forum (ECRF); European Law Students’ Association (ELSA); Fondation pour le droit continental; Inter-American Bar Association (IABA); International Bar Association (IBA); International Center for Promotion of Enterprises (ICPE); the Law Association for Asia and the Pacific (LAWASIA); and the National Law Center for Inter-American Free Trade (NLCIFT).

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

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

11. The Working Group elected the following officers:
 - Chair:* Ms. Maria Chiara Malaguti (Italy)
 - Rapporteur:* Ms. Ruenvadee Suwanmongkol (Thailand)
12. In addition to documents presented at its previous sessions (Legal questions surrounding the simplification of incorporation, A/CN.9/WG.I/WP.86; Draft model law on a simplified business entity, A/CN.9/WG.I/WP.89; Best practices in business registration, A/CN.9/WG.I/WP.85; and Observations by the Government of Colombia, A/CN.9/WG.I/WP.83), the Governments of Italy and France (A/CN.9/WG.I/WP.87), and the Government of Germany (A/CN.9/WG.I/WP.90), the Working Group had before it the following documents:
 - (a) Annotated provisional agenda (A/CN.9/WG.I/WP.91);
 - (b) A note by the Secretariat on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs) (A/CN.9/WG.I/WP.92);
 - (c) Notes by the Secretariat concerning the key principles of business registration (A/CN.9/WG.I/WP.93, Add.1 and Add.2); and
 - (d) Observations by the Government of the French Republic (A/CN.9/WG.I/WP.94).
13. The Working Group adopted the following agenda:
 1. Opening of the session.
 2. Election of officers.
 3. Adoption of the agenda. After discussion in the Working Group, the agenda was adopted with a modification to paragraph 23 under “Scheduling of Meetings”, in that the Working Group decided to devote the time from 19 to 21 October 2015 to a consideration of the materials prepared by the Secretariat further exploring key principles and good practices in business registration and to thereafter continue its discussion from its twenty-fourth session in respect of simplified business entities.
 4. Preparation of legal standards in respect of micro, small and medium-sized enterprises.
 5. Other business.
 6. Adoption of the report.

III. Deliberations and decisions

14. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular on the legal issues surrounding the simplification of incorporation and related matters on the basis of documents presented at its previous sessions and on Secretariat documents A/CN.9/WG.I/WP.92, A/CN.9/WG.I/WP.93, Add.1 and Add.2, as well as the observations of the Government of the French Republic contained in document A/CN.9/WG.I/WP.94. The deliberations and decisions of the Working Group on these topics are reflected below.

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

15. The Secretariat drew the attention of the Working Group to Working Paper A/CN.9/WG.I/WP.92, which contained a general note by the Secretariat in respect of reducing the legal obstacles faced by MSMEs. The Secretariat explained that it had prepared the document with a view to providing context for the overall work of Working Group I, beginning with a general discussion of MSMEs in the global economy and describing the broad heterogeneous nature of MSMEs. The Working Paper also contained a discussion of the disadvantages of enterprises operating in the extralegal economy, and considered how to make entry into the legally regulated economy simple and desirable for MSMEs, including a description of the advantages for the State and for the entrepreneur(s), and discussing possible incentives to enter into the legally regulated economy. The final section of the Working Paper considered ways to facilitate the entry of MSMEs into the legally regulated economy, including through providing flexible and simplified business forms (for example, as in the draft model law on a simplified business entity — A/CN.9/WG.I/WP.89 — or the forms described in A/CN.9/WG.I/WP.87) and through providing for simplified and streamlined business registration, both of which were being considered by the Working Group.

16. The Secretariat noted that the content of Working Paper A/CN.9/WG.I/WP.92 could be examined in detail later, and that the Working Group may wish to consider whether it, or portions of it, should be included as part of the legislative materials being prepared in respect of MSMEs. A preliminary suggestion was made that the Working Paper could include additional focus on the legal obstacles faced by MSMEs from a cross-border perspective. Some concerns were also raised in respect of the use of the terms “extralegal” business activity and commercial activity occurring within the legally regulated economy.

A. Key principles of business registration

1. Presentation of Working Papers A/CN.9/WG.I/WP.93, Add.1 and Add.2

17. The Working Group considered the issues contained in documents A/CN.9/WG.I/WP.93, A/CN.9/WG.I/WP.93/Add.1 and A/CN.9/WG.I/WP.93/Add.2 which were prepared in response to a request by the Working Group at its twenty-third session, in November 2014.⁹ The Secretariat highlighted certain aspects of the Working Papers, which had been prepared in the form of a commentary for a legislative guide (leaving any recommendations for future discussion), but without prejudice to the final form of a future legislative text that the Working Group might decide to adopt on the topic of business registration. Reference was also made to the main sources used in the preparation of the Working Papers, which were indicated in paragraph 6 of A/CN.9/WG.I/WP.93.

18. The Secretariat explained that the documents noted key objectives of an effective business registration system, such as permitting the visibility of enterprises in the marketplace and enabling MSMEs to increase their business opportunities. In

⁹ A/CN.9/825, paras. 43-46.

addition, an effective business registration system should ensure that: the registration process was time and cost effective, as well as user-friendly; the registered information was easily searchable and retrievable; and that the information was also current, reliable and secure.

19. In keeping with A/CN.9/WGI/WP.85 (see, for example, para. 10), Working Paper A/CN.9/WGI/WP.93 noted that while the organization and structure of a business registry could vary considerably among States, there were certain core functions which were common to all registries. These included, among others: recording the identity and disclosing the existence of the business; providing a commercial identity to the business; providing authority for the business to interact with other private and public entities; facilitating trade; and determining whether the enterprise continued to fulfil the conditions to operate in the business sector.

20. Working Paper A/CN.9/WGI/WP.93 further considered issues of organization and structure of the registry as well as aspects of reform that States should address in streamlining their registration system. In particular, it was highlighted that the use of information technology and electronic services was particularly well-suited to improving registration services as it brought about several benefits, such as: reducing the time and cost of registration; facilitating access to registration for MSMEs; and permitting the handling of increasing demands for company information by other government authorities. However, it was observed that introducing information and communication technology (ICT)-based registration systems usually required an in-depth reengineering of the way the service was delivered, which might involve several aspects of the State's apparatus, such as financial capability, organization and human resources capacity, as well as its legislative framework. In addition, online registration systems would require careful consideration of several aspects, such as: the scalability of the system; its flexibility; interoperability; and costs.

21. The Working Papers further noted that recommended steps to streamline a business registration system were: determining the scope of the examination to be carried out by the registry; defining the commercial entities that were required to register under the applicable law; and establishing the requirements that businesses should meet in order to be registered. General requirements for the registration of all legal forms and sizes of enterprises were said to be the payment of any required fee, providing information in respect of the business and its founders (i.e. the name and address of the business and information on the person(s) registering the business), as well as indicating the legal form of the business being registered. In order to remain validly registered, businesses should also provide certain information throughout their lifecycle.

22. The Secretariat highlighted that in order to maintain high quality, current and reliable information, States should define in their legislative or regulatory framework the accountability and procedures of the registry system, as well as the requirements of the information and documentation submitted, including the language in which they should be submitted. Facilitating access to business registration services both to businesses that wished to register and to interested users who wanted to search registered information was also noted. In this regard, it was emphasized that information should not only be made available, but that it should also be valuable, meaning of good quality, reliable and accessible, and that States could achieve these goals through various actions.

23. The Secretariat also introduced Working Paper A/CN.9/WG.I/WP.93/Add.2, which provided greater detail on several best practices in the implementation of a business registry and relevant principles previously noted in A/CN.9/WG.I/WP.85. The relevance of one-stop shops, the use of information and ICT technology and unique identifiers were emphasized as important factors to facilitate business registration. In particular, the Secretariat stressed the importance of developing an appropriate legislative framework to support ICT-based registration and the role of unique identifiers in allowing interoperability between the business registry and other government authorities, as well as in furthering cross-border data exchange.

24. The Working Papers also contained a discussion of streamlining business registration, which could entail amending a State's legislative framework in order to reduce the number of steps required for registration and provide a transparent process with clear accountability. The documents further noted that legislative reform might involve changing laws that did not govern the registration system directly, but that affected the registration process in various ways.

25. Finally, the Secretariat observed that the payment of fees in order to ensure the provision of registration and related services was a common practice across jurisdictions and that such fees, although they generated revenue for the registries, could affect the business' decision whether or not to register. Therefore, fees, if any, should be set at a level that encouraged MSMEs to register.

2. General discussion of A/CN.9/WG.I/WP.93, Add.1 and Add.2

26. Following the presentation of the Working Papers by the Secretariat, the Working Group engaged in a general discussion of whether the documents could form an acceptable basis on which to continue its work in the area of business registration. Following a reiteration of certain perspectives on the advantages and disadvantages of a declaratory approach versus an approval system for business registration, the view was expressed that it would probably not be possible to recommend one approach or the other; however, as outlined in the Working Papers, the Working Group could, at this stage, remain neutral and nonetheless agree on principles common to both approaches. The Working Group was in agreement with that suggestion, although a large number of States continued to express a preference for the declaratory system in international instruments.

27. In addition, it was suggested that there appeared to be three important principles that ran through the Working Papers: efficiency, reliability, and transparency, and that these themes formed an appropriate foundation for continuation of the work. There was support in the Working Group for that view.

28. It was observed that enterprises in some States could engage in business through merely obtaining a tax registration number, and that registration was not generally necessary for commercial enterprises to operate legally (except in the case of those with limited liability). It was also noted that MSMEs should not be required to register with the business or commercial registry, but that such enterprises should be given incentives to register. However, it was explained that the Working Papers were prepared on the basis not that all businesses were required to register, but that while each State would decide for itself which businesses were required to register (and how much information they would have to provide), registration of all businesses regardless of size or legal form was thought to be the main conduit

through which enterprises had contact with the State. Through the contact provided by registration, States could identify MSMEs to ensure they received appropriate incentives and assistance. There was support in the Working Group for that approach — also described as a “tiered” approach — which could be clarified in the materials.

29. The members of the Working Group were encouraged to use the experience in their respective States to inform the discussion, but urged to remain cognizant of the Working Group’s task to prepare legal standards that would be recognized and acceptable in the world community generally.

3. Key objectives of an effective business registration system (para. 10, A/CN.9/WG.I/WP.93)

30. Without prejudice to the final form that the materials might take, the Working Group proceeded to a more detailed examination of the Working Papers, beginning with paragraph 10 of A/CN.9/WG.I/WP.93. Suggestions were made that in subparagraph (a), the term “business registration is the key ...” could be made less definitive, possibly by replacing it with “business registration is a key ...”, and that in subparagraph (b) the term “particularly” could be deleted since paragraph 10 applies to enterprises of all sizes. The Working Group was in agreement with both suggestions.

31. A concern was expressed in respect of the use of the word “reliable” in subparagraph (c)(iii), in that the approach to ensuring the reliability of information in certain States differed from that in others depending upon their use of a declaratory or approval approach. However, it was observed that regardless of which registration system was in place, the information it contained should be reliable, current and secure. There was some support for that view and that it was for States to ensure those features.

32. In response to a question, it was observed by several delegations that the Working Group should not attempt to define in detail to which entities the business registration materials should apply, but that the term “commercial entities”, in accordance with the phrase “legally regulated commercial environment” in subparagraph (a), would be a term broad enough to cover different types of enterprises. It would be for the domestic legislation to decide which business forms must be registered.

33. In response to a suggestion to delete the term “as possible” in subparagraph (c)(ii), it was noted that such term was related to the capacity of a State to ensure easy access to registration services. Because of the different level of development of their infrastructure not all States were said to be able to ensure continuous access to the business registry services. States whose registration systems were not based on the extended use of ICT might not be able to provide continuous access. It was further noted that, consistent with A/CN.9/WG.I/WP.93/Add.2, the term “as possible” could also refer to data protection, since in certain States national legislation might require that some types of registered information (for example, personal information) was not publicly disclosed.

4. Core functions of business registries (para. 12, A/CN.9/WG.I/WP.93)

34. A concern was raised regarding subparagraph 12(e), since the core function of determining “whether a business has fulfilled or continues to fulfil the conditions to operate in the commercial sector” could suggest that the business registry had the authority to subjectively delay the granting of registration and thereby delay the start of the business. In response to that concern, it was observed that such paragraph was not intended to refer to a State’s consent to start a business, but rather concerned, for example, the authority of the business registry to request the business to file certain information throughout the course of its lifetime. It was proposed that subparagraph (e) could be clarified in this regard. There was support for that suggestion as well as for the related suggestion to replace the term “authority” in subparagraph (c) with a more appropriate term, so as not to imply the exercise of State power. Additional drafting suggestions were made to commence the list of core functions with the more general statement in subparagraph (d), followed by the more specific functions in subparagraphs (a) to (c).

35. A concern was again expressed in respect of the term “reliable” in subparagraph (d); broad agreement was expressed that provision of reliable information was a core function of the business registry but that the meaning of the term “reliable” could better be understood in the context of the chosen approach of the State to registration.

36. It was suggested that aspects of the concepts in paragraphs 10 and 12 of A/CN.9/WG.I/WP.93 might overlap, and there was agreement in the Working Group that care should be taken to use consistent terminology. For example, it was proposed that the terms “publicly accessible” and “secure” should be used consistently throughout the paper.

5. Overview of standard registration procedures (paras. 14 to 22, A/CN.9/WG.I/WP.93)

37. The Working Group next considered section E of Working Paper A/CN.9/WG.I/WP.93 which provided an overview of the standard business registration procedures. There were no specific comments on draft paragraph 14.

Business name (paras. 15 to 16, A/CN.9/WG.I/WP.93)

38. The Working Group agreed that registration of a business name should be mandatory, and that entrepreneurs should be assisted in searching and registering their business name, a feature not offered in all States. In terms of the business name being sufficiently “distinguishable” from other business names in the jurisdiction (para. 15), it was noted that this feature was not required in all States. Further, it was suggested that businesses could be distinguished by indicating the type of businesses in which the entrepreneur was engaged. Alternatively, it was suggested that the issue of distinguishing between business names might best be left to domestic legislation. In this regard, a concern was raised that duplication of business names could be an issue in some States where registries had no mechanism for resolving the issue.

39. It was further observed that duplication of names could also be a problem in cross-border information exchanges, and that the use of unique identifiers could be important to ensure the identity of a business within and across jurisdictions.

Support was expressed for this view, and it was further noted that in at least one jurisdiction, the role of the business registry was to allocate unique identifiers rather than to register commercial business names. It was further suggested that an optimal approach could be for a business registry to first ensure that the chosen business name was unique and then to allocate a unique identifier.

Business entry (paras. 17 to 19, A/CN.9/WG.I/WP.93)

40. In considering paragraphs 17 to 19, different issues were highlighted concerning the role of the business registry in performing a series of checks on the application for registration (para. 17); the payment of registration fees (para. 18); and the public availability of the registered information (paras. 18 to 19). It was suggested that paragraph 17 should also mention the “declaratory registration system” implemented in several States, which was fully automated and where no checks or control procedures were carried out by registry staff. It was further suggested that a distinction should be made between pre- and post-registration payment, as well as to consider the topic of fees at a later stage in relation to paragraphs 72 to 80 of A/CN.9/WG.I/WP.93/Add.2. In regard to registration fees, a view was expressed that while acknowledging the existence of different practices and systems where registration was subject to payment of a fee, the Working Group should consider promoting the adoption of no or low registration fee policies to encourage MSMEs to register. Furthermore, a question was raised regarding the impact of the registration fee on the process of registration.

41. With regard to the availability of information in paragraphs 18 and 19, the importance of public access to registered information at no charge was emphasized, and it was also suggested that information regarding the representative of the business entity and the business name or the identification number of the entity (para. 19) should mandatorily be made public. It was suggested that paragraph 19 could be amended by replacing the term “sophisticated information” with “more specific information”, and that “basic information”, such as the names of directors and legal representatives, should be free, while a fee could be charged for “more specific information” such as the voting rights or assets of the business.

42. A concern was raised in regard to the last sentence of paragraph 19, that “in some jurisdictions, the registered information is legally binding upon third parties”, which could suggest that third parties were bound by the registered information even if it was not correct. This was also said to be tied to the issue of reliability of the information addressed earlier in the session (see paras. 31 and 35 above). Future drafts of the text may need to be reformulated in this regard.

43. It was also observed that in one State, a special track for business entry was devoted to MSMEs, which permitted the State to monitor and incubate them.

Registration with other public authorities (para. 20, A/CN.9/WG.I/WP.93)

44. A concern was raised that the second sentence of paragraph 20 might suggest that in order to register with other public authorities, entrepreneurs should personally visit those agencies. It was agreed that the text should be consistent with the approach taken elsewhere in the materials that highlighted the importance of one-stop shops as a single interface for business registration and registration with other public authorities. There was broad agreement in the Working Group that

establishment of one-stop shops was one of the best practices in business registration and that it should be recommended as a preferred approach to all States wishing to streamline their business registration system.

Life cycle of a business (para. 21, A/CN.9/WG.I/WP.93)

45. The Working Group considered which information businesses should be required to submit to the registry throughout their life cycle in order to keep the registry apprised of the changing circumstances of the business. It was noted that paragraph 21 did not specifically include the filing of annual returns, which were required in many jurisdictions, and should thus be added to the paragraph.

46. It was noted that in terms of financial information, three different aspects were of importance: whether a particular type of business should have to submit financial statements, what amount of detail those statements should contain, and whether that information should be made public. It was noted that while the submission and possible publication of detailed financial statements might be appropriate for public companies, it could not be considered good practice for MSMEs. It was observed that MSMEs in general were required to submit far less detailed financial statements, if at all, and that such statements were unlikely to be made public unless desired by the MSME. It was further noted that although MSMEs may not be required to submit and make public their financial statements, it may be desirable to encourage them to do so in order to improve transparency and accountability (see, for example, footnote 21 in A/CN.9/WG.I/WP.89). Public access to financial data of businesses was, in fact, said to foster competition among service providers, since it provided them with relevant economic information.

47. The Working Group agreed that these considerations could be reflected in the draft text as appropriate, but that further discussion in respect of the submission, required detail and disclosure of financial statements of MSMEs might be required in relation to the Working Group's continuing discussion on simplified business entities.

Deregistration: removal of a business from the registry (para. 22, A/CN.9/WG.I/WP.93)

48. The Working Group next considered paragraph 22 of A/CN.9/WG.I/WP.93, which was generally supported as drafted. It was observed that in some States, the business registry did not play a role in the protection of creditors in cases of insolvency, as that aspect was left to insolvency officials, who advised of business insolvencies in official publications. In addition, it was noted that in some States, there could be "sleeper" businesses, which had only temporarily, but not permanently, ceased to operate, and which were thus maintained on the business registry. It was further observed that, in some cases, the retention of such businesses on the register could be problematic in the long run if the business register did not have a mechanism to eventually deregister them.

49. A question was raised in respect of whether business registries should retain the historical information on businesses that had been deregistered. There was support in the Working Group for the view that such information should be retained. It was observed that if the business had a unique identifier, the information would in any event remain linked to that identifier, even if the business were deregistered.

50. The Working Group reiterated its view that the business registrar's ability to deregister businesses should be limited to ensuring compliance with clear and objective legal requirements for the continued registration of a business. In addition, it was observed that this section of the paper was not intended to deal with the business law concepts of liquidation or winding-up of a business.

6. Organization of the registry (paras. 23 to 26, A/CN.9/WG.I/WP.93)

51. The Working Group next considered the paragraphs of A/CN.9/WG.I/WP.93 dealing generally with how a business registry could be organized and operated. It was agreed that the draft text should not recommend a specific approach in terms of whether a State should opt for a public, private or combined model, or for a centralized or decentralized approach, since those were policy decisions best left to the State, but that the materials might set out the advantages and disadvantages of the various options.

52. In terms of whether the draft text should recommend that a business registry should be supervised by the executive or by judicial State bodies, the Working Group reiterated a number of views that had been aired in previous sessions in relation to the perceived advantages and disadvantages of each system. A third type of system that consisted of a mixed approval-declaratory system was also identified. It was clarified that even in States where the judiciary had oversight of the business registry, business registrations could be processed and approved in as little as one to three days. In addition, it was noted that judicial supervision of business registration was strictly on an administrative basis, in which the registrar was an administrative entity, and that judicial supervision did not equate with a requirement for prior judicial approval of a business wishing to register. It was further observed that a State could decide to change its system of business registration over time, and that States had sometimes moved from court-based systems to non-court-based systems. Moreover, the Working Group was informed that both systems of business registration were evident in developing and developed States.

53. The Working Group discussed whether the draft text should recommend either the executive or the judicial approach to business registration, and was of the view that it should instead focus for the moment on the principles relevant to good practice (see paras. 26 and 27 above). It was further agreed that the drafting of paragraph 23 should be clarified or adjusted, as necessary, to ensure a balanced approach and a proper understanding of the administrative nature of the judicially supervised system, as well as taking into account that, of course, the judiciary is a branch of government.

54. It was further observed that the final phrase of paragraph 23 would be more accurate if it referred to "the applicable commercial code", which was more frequently the case, rather than the current reference to "the applicable law governing the judiciary."

7. International cooperation among business registries (paras. 27 and 28, A/CN.9/WG.I/WP.93)

55. The Working Group was generally in support of draft paragraphs 27 and 28. It was suggested that some current examples of cross-border information exchange could be added to the text to enhance it, including the cross-border exchange pilot

project between Portugal and Estonia, that between Australia and New Zealand, or that established between various provinces in Canada. However, it was cautioned that full international cooperation and cross-border recognition of business registration would require States to make specific policy decisions, and that the most that these materials should do would be to recommend international cooperation.

56. It was further observed that a unique global identifier could assist in terms of international cooperation, but consideration of that issue was deferred until consideration of the issue of unique identifiers would be given in greater detail in paragraphs 28 to 58 of A/CN.9/WG.I/WP.93/Add.2.

8. Preliminary considerations on the use of information technology and electronic services (paras. 29 and 30, A/CN.9/WG.I/WP.93)

57. The Working Group reiterated its support for the use of ICT technology as a good practice in business registration. It was suggested that paragraph 30 might include reference to changes that could be required to the commercial code and company law of a State, provided that these concepts were not sufficiently clearly included in the current phrase “legislative framework”.

58. Reference was made to the availability of relatively inexpensive software to establish fully electronic business registries, but caution was expressed in that the context of each State would dictate how expensive that process might be. Further, it was clarified that while the software might be broadly available and relatively inexpensive, the infrastructure and hardware necessary to successfully implement the software could still be very expensive, particularly in developing States.

9. Drafting considerations (para. 31, A/CN.9/WG.I/WP.93)

59. The Working Group was generally in support of paragraph 31 as drafted, observing that it was based on paragraph 72 of the UNCITRAL Guide on the Implementation of a Security Rights Registry. It was observed that additional work done in terms of the draft Model Law on Secured Transactions had suggested that, in that context, the preferred method of enactment was by way of a statutory act.

10. Establishing the business registry (paras. 32 to 55, A/CN.9/WG.I/WP.93)

60. The Working Group had no comment on paragraph 32 as drafted.

Foundations of the business registry (para. 33, A/CN.9/WG.I/WP.93)

61. A concern was expressed that the final three sentences of the paragraph, beginning with “Subject also to the legal systems ...” suggested that the reliability of the information contained in the business registry was dependent on whether the State had adopted a declaratory or an approval approach in establishing its business registry system. The Working Group reiterated its support for the view expressed earlier in the session (see paras. 31 and 35 above) that information in the business registry should be reliable, but that it would be left to the State to determine how best to ensure its reliability, regardless of the particular approach adopted in the business registry. It was agreed that the drafting of paragraph 33 should be adjusted, if necessary, to bring it in line with that earlier view. It was further suggested that

that approach could be more viable as it would also permit consideration of those systems that adopted a mixed approach, with features borrowed from both systems.

Appointment of the registrar (para. 34, A/CN.9/WG.I/WP.93)

62. With regard to the last sentence of paragraph 34, it was observed that care should be taken to not appear to dictate who the State might name as registrar by too restrictively specifying a registrar's attributes. After discussion, there was agreement in the Working Group on the principles expressed in the paragraph, with the understanding that additional insight might be gained from additional work undertaken by Working Group VI on similar provisions in the secured transactions materials.

Functions of the registry (para. 35, A/CN.9/WG.I/WP.93)

63. There was support in the Working Group for the suggestion that care should be taken in the drafting of paragraph 35 so that it was not seen to impose excessive limitations on the registry. Such a reading could make it more difficult to establish the registry's interoperability with other registries in the jurisdiction, and to access the information maintained in the registry.

Implementation considerations (paras. 36 to 44, A/CN.9/WG.I/WP.93)

64. The Working Group also agreed that, subject to its future deliberations, the entire section D (paras. 36 to 44) might be moved to a more prominent position in the text, such as to the introduction of A/CN.9/WG.I/WP.93 or to A/CN.9/WG.I/WP.92, since it contained key elements to guide the reform process of a business registration system. In addition, it was observed that efforts should be made to ensure that the text in paragraph 44 was consistent with what was previously decided by the Working Group in terms of paragraphs 23 to 26 of A/CN.9/WG.I/WP.93 (see paras. 51 to 54 above).

Registry terms and conditions of use (paras. 45 to 46, A/CN.9/WG.I/WP.93)

65. It was noted that paragraph 45 could address the issue of how to reduce the risk that changes be made in the registry without the authority of the registrant rather than simply advising users of the risk. In that respect, it was suggested that the paragraph might consider the issue of who would be held responsible in such a scenario.

66. The Working Group also heard a view that the services mentioned in subparagraphs (b) and (c) of paragraph 46 should be considered additional and not compulsory services that a registry might offer, since not every State might want to establish registries carrying out those functions. There was agreement in the Working Group for both proposals.

Electronic or paper-based registry (paras. 47 to 55, A/CN.9/WG.I/WP.93)

67. The Working Group agreed that an appropriately balanced presentation of paper-based and mixed paper and electronic registries should also be presented in paragraphs 47 to 55. It was suggested that, while achieving a completely electronic system might be the goal to which all registries could aspire, it would not be appropriate to suggest that a paper-based or mixed system was a less valid or

valuable system of business registration, particularly since the chief goal of the materials was to provide guidance on good practice and encourage registration generally. It was observed that the draft should recognize that in several developing States, paper-based registries might be the only option available due to a lack of advanced technological infrastructure, possibly even pointing to positive aspects of a paper-based system. For example, it was noted that although more expensive and cumbersome than electronically-based registries, paper-based registries could allow for “face to face” communication between the registrant and the registry, which might offer an opportunity to clarify aspects of the requirements for registration. Although an increasing number of users in developing States had access to the Internet, it was noted that a digital divide still existed between the developed and the developing world, and the Working Group was encouraged to acknowledge that a mixed or paper-based system might be necessary in many developing States.

68. It was further noted that providing for the electronic filing of documents and applications for registration and providing electronic access to the registry were different aspects, and that each was subject to different technical standards. As such, it was suggested that paragraphs 47 to 55 could be adjusted in order to make a clearer distinction between the adoption of an electronic registry and the possibility of carrying out online registration, perhaps through focusing first on the features required to register, and secondly on the accessibility of the system. Another observation was made that some States might benefit from the implementation of a phased-in approach, starting with the adoption of more simple electronic solutions (like the creation of a searchable database) and then progressing to more sophisticated solutions, including the possibility of registering completely online. The view was expressed that developing States would need technical and capacity building assistance in order to move from paper-based to electronic registries.

11. Approach to additional work on key principles in business registration

69. Having concluded its consideration of A/CN.9/WG.I/WP.93, and prior to embarking on a discussion of the more detailed materials in A/CN.9/WG.I/WP.93/Add.1 and 2, which would take place at its next session, the Working Group took stock of how ongoing work on key principles in business registration should be conducted.

70. A proposal was made that based on the work completed to date, the Working Group should proceed by commencing the preparation of a draft model law on business registration of legal persons which could be structured using the following outline:

Chapter 1. General provisions

Article 1 Scope of application of the law

Article 2 Main definitions

Article 3 Main principles of registration of legal persons and of maintenance of registers

Chapter 2. Registration bodies

Article 4 Bodies responsible for the registration procedure and their powers

Article 5 Requirements applicable to registration bodies

Chapter 3. Registration of legal persons

Article 6 Types of legal person required to register

Article 7 Persons having the right to register a legal person

Article 8 List of documents to be submitted by legal persons for the purposes of registration

Article 9 Registration fee

Article 10 Reservation of the name of a legal person

Article 11 Limits of verification, by the body responsible for registration, of documents submitted by the legal person

Article 12 Legal consequences of registration of a legal person

Article 13 Grounds for refusal to register a legal person

Chapter 4. Rules governing the maintenance of a register

Article 14 Information included in the register

Article 15 Time limit for the storage of information concerning a legal person

Article 16 Language of the register

Article 17 Amendment of the register

Article 18 Exclusion of a legal person from the register and legal consequences thereof

Article 19 Use of information technologies in maintaining a register

Article 20 Furnishing information from a register to third parties

Article 21 Liability of the registrar

71. It was observed that the framework suggested in the paragraph above identified a series of important issues that were also considered in A/CN.9/WG.I/WP.93, Add.1 and Add.2, and that the main issue was for the Working Group to decide which type of legal instrument should be prepared in respect of business registration. There was support for a proposal that consideration of the three Working Papers, particularly paragraphs 5 to 13 of Add.1 on legal forms of the entity registered, should be linked to the alternative business forms described in Working Papers A/CN.9/WG.I/WP.87 and 94.

72. It was further noted that the Working Group had achieved a level of common understanding in respect of certain issues, including that it was positive for MSMEs to move from the informal to the formal economy, that incentives and a demonstration of the advantages of doing so should be provided to them, and that formalization often involved some sort of action along the lines of registration in a business or commercial register. It was proposed that, on that common basis, and taking into account the documents before the Working Group at this session (including A/CN.9/WG.I/WP.92), work could proceed on a legislative guide in which an opening section could consider why MSMEs should formalize and a

second section could set out how to formalize. Further assistance could be provided to MSMEs by adding to the legislative guide a consideration of the possible tools they could use to successfully operate their businesses, including a variety of tools and legal forms they might consider, such as: limited liability; separate legal personality; limited liability companies (LLCs); simplified LLCs; single member LLCs, corporations, sole proprietorships, individual entrepreneurs, partnerships, business network contracts, techniques of segregation of assets, and cooperatives. Additional guidance could be provided in terms of model provisions on those forms that appeared to be of particular utility and relevance to MSMEs. Support was expressed in the Working Group for proceeding with its mandate in general along the lines described in this paragraph.

73. In terms of specific work on key principles in business registration and how best that work could assist States in fostering MSMEs, the Working Group expressed strong support that it should first prepare an instrument along the lines of a concise legislative guide, without prejudice to considering at a later time whether draft provisions or a model law would be appropriate. To that end, the Secretariat was requested to prepare a set of draft recommendations to be read along with Working Papers A/CN.9/WG.I/WP.93, Add.1 and Add.2 when their consideration was resumed at the next session of the Working Group.

12. UNCTAD's work on business registration and facilitation

74. The Working Group heard a presentation¹⁰ by the United Nations Conference on Trade and Development (UNCTAD) on their Business Facilitation Programme (see www.businessfacilitation.org), which aimed at supporting developing States and countries in transition to implement business facilitation through simplification and automation of rules and procedures relating to business creation and operation. Examples of obstacles to business start-up were mentioned and it was stressed that business registration was a complex process that usually required registering with several public authorities rather than only the business registry. Several factors were said to present obstacles to registration for MSMEs, including: a complex administrative apparatus in which multiple administrations were involved in setting up a business; biased and negative control over the applications filed for registration; predominance of form over substance where the information required was often not processed and "nominal" requirements were considered more important than substantial requirements. In addition, multiplicity and disparity of laws governing the registration process; differing interpretation and application of those laws according to the person, the office and administration were also said to negatively affect the decision of MSMEs to register. UNCTAD also maintained "ger.co" which provided links to online business registration websites throughout the world.

75. It was noted that in order to assist States in improving their business registration procedures, UNCTAD had developed various tools including electronic single windows, which could combine the procedures of multiple agencies (for example, the business registry, the tax office, and social security authorities) and allow easy and fast online registration for the user with a single form. Such single windows (eRegistrations) were currently in operation in four States and under

¹⁰ See www.businessfacilitation.org/vienna.

construction in two additional States. Other tools developed by UNCTAD included assisting States to establish information portals and to make their regulations transparent (eRegulations), as well as establishing principles to simplify administration procedures (eSimplifications).

B. Draft model law on a simplified business entity

76. The Working Group recalled the work that it had undertaken at its last session in terms of having completed its consideration of the first six articles of the draft model law on a simplified business entity as contained in A/CN.9/WG.I/WP.89, and other relevant documents. Reference was made to the deliberations of the Commission at its forty-eighth session (2015) as noted in paragraph 6 above. In keeping with the working methods of the Working Group to date, delegates were invited to raise any principles included in the model law annexed to A/CN.9/WG.I/WP.83 which were thought to be relevant in the discussion on simplified business forms as it progressed.

77. The Working Group recalled paragraph 6 of A/CN.9/WG.I/WP.89, which noted that while the draft model law had been prepared using a corporate approach, its provisions could be adjusted to accommodate a more flexible business form that might be more suited to MSMEs and would avoid seemingly heavier corporate-type structures. It was also recalled that the Working Group had decided at its twenty-fourth session to use in future texts the term “member” rather than “shareholder” (see para. 48, A/CN.9/831); to place the phrase “simplified business entity” in square brackets throughout the text (see para. 38, A/CN.9/831) pending agreement on the appropriate term; and to find an appropriate term to replace “formation document” and “operating document”, but that those changes had not yet been reflected in existing texts such as A/CN.9/WG.I/WP.89. It was further recalled that the Working Group had previously agreed to prepare definitions (see para. 68, A/CN.9/825) and standard forms to assist MSMEs (see para. 63, A/CN.9/800, as well as para. 7, A/CN.9/WG.I/WP.89), but that the draft text would have to be more fully developed before that would be possible.

78. Finally, although some States were said to have a closed approach that did not permit MSMEs to transform into other legal forms, the Working Group referred to its earlier decision to focus on a single legal text that could accommodate the evolution of a business entity from a single member to a more complex multi-member entity (see para. 67, A/CN.9/825 and para. 19, A/CN.9/831). To that end, the Secretariat had been requested in its drafting of the model law to proceed in such a way so as to highlight the rules applicable to the simplest or single member business entity (in respect of which the concepts in A/CN.9/WG.I/WP.86/Add.1 might be useful), as distinct from the rules required for the more complex business forms.

79. It was further recalled that the Working Group had requested the Secretariat to recommend which provisions of the draft model law were considered key to the establishment of a simplified business entity, and might next be considered by the Working Group. In that regard, it was agreed that the next provisions to be taken up would be those in Chapter VI of the draft model law, commencing with draft articles 24 and 25.

1. Chapter VI — Organization of the simplified business entity

80. In commencing its deliberations on Chapter VI, the Working Group considered a number of issues relating to draft articles 24 and 25 of A/CN.9/WG.I/WP.89.

81. It was observed that while all States had some form of general company law, the Working Group was focusing on the creation of a special company law; there was support for the suggestion that the draft model law should clarify its intended interaction with the existing law on business forms in the enacting State. Another proposal was that for greater simplicity, draft article 24(1) should be retained in the text (with revisions), but that the concepts in paragraphs 2 to 8 could be moved to the commentary. While there was some support for that suggestion, it was not taken up by the Working Group due to the perceived dearth of detail that such an approach would provide to assist MSMEs.

82. Another issue raised for discussion was whether the Working Group should reconsider its view on freedom of contract, and opt for more prescriptive drafting in its text so as to provide even the smallest and least sophisticated MSMEs with a legal construct that was complete, stable and could be used immediately to run their business without resort to additional legal advice. There was some support for that view.

83. It was observed that draft article 25 raised certain issues in respect of disclosure of the formation (or operating) document, since the identity of the representative should be publicly available to third parties. The question was also raised whether a manager could be a legal person, particularly in the case where there was only one manager, but the Working Group agreed to defer consideration of that issue to a later discussion.

84. After discussion on each of the following aspects, the Working Group agreed that Chapter VI should be redrafted along the following lines:

(a) First, a general default rule should indicate that it was not necessary for the simplified business entity to have a board of directors unless it was required in the formation (or operating) document, taking into consideration draft section 25 of the annex to A/CN.9/WG.I/WP.83;

(b) Second, in the case of a single member business entity, that member would manage the entity and would represent it, unless otherwise provided in the formation documents;

(c) Third, a manager or board of directors could be named by the member(s) and should consist of one or more persons;

(d) Regardless of whether the simplified business entity was managed by a single member or by a board of directors, the text should include the appropriate procedure to appoint a manager or board of directors, the grounds for their removal, and for naming authorized representatives of the entity, as well as the decision-making procedures;

(e) Any manager or board of directors should be subject to any rules of procedure set out in the formation (or operating) document, as well as to the duties referred to in draft article 24(6) of A/CN.9/WG.I/WP.89; and

(f) In any event, it would not be necessary to include provisions on a supervisory board (draft article 26) at the current stage of development of the draft.

2. Chapter VIII — Dissolution and winding-up

85. In considering draft article 32, it was suggested that, while cognizant that each enacting State would be likely to have a bankruptcy regime, it might be useful to ensure that bankruptcy was included in the scheme established in the list in paragraph 1. Other aspects of bankruptcy were thought to be relevant in relation to this provision, including a requirement for appropriate public notice of any bankruptcy (see draft paragraph 32(2)).

86. A suggestion that voluntary dissolution be prohibited was not taken up. However, related questions were raised in respect of whether a rule on the distribution of remaining assets in the case of a voluntary dissolution was required, and more generally, whether the Model Law should recommend that some mechanism be included for providing notice to creditors in the case of dissolution or winding up. Such rules could be particularly important should the Working Group decide in its future discussion in respect of draft article 5 that a legal person would be entitled to be the sole member of a simplified business entity, and would thus receive transfer of all the assets of the dissolved company, potentially without notice to creditors. There was support for the suggestion that commentary might be included in the text along the lines of suggesting that States ensure that adequate means of protecting creditors were in place.

87. However, concern was raised in respect of the requirement in subparagraph 32(1)(d) that a majority member decision was required for voluntary dissolution of the entity. It was observed that some States required a two-thirds majority, rather than a simple majority, for such decisions. The Working Group embarked upon a general discussion of issues relating to the internal organization of the entity, in effect, on the rules which ought to govern the relationship between members, particularly in terms of the issue of the number of votes required for various actions such as amending the formation document. Other issues raised in the course of discussion concerned voluntary and forced exit rules, minority member rights, and the like (see, generally, the discussion in paras. 31 to 35 of the commentary in A/CN.9/WG.I/WP.89). It was agreed that succession in cases of dissolution and winding up should be carefully considered in terms of deciding on the appropriate decision-making number of votes required among members for various acts, and that efforts should be made to take a consistent approach to such matters in this and other chapters, including any chapter on the interrelationship of members.

88. The Working Group agreed that draft article 32 would generally not be amended, but for consequential adjustments required as a result of other decisions and efforts to render the text as consistent as possible.

89. The Working Group had no comment on draft articles 33 and 34, but for a concern raised in respect of the limit of one year for curing any event of dissolution in draft article 33.

3. Chapter VII — Restructuring

90. The Working Group next considered Chapter VII on restructuring the simplified business entity. In regard to draft articles 27 and 29 (as well as to the threshold for the operation of draft article 28), and in keeping with the previous discussion under Chapter VIII (see paras. 85 to 89 above), views were expressed

that a “unanimous” decision might not be the most appropriate number of votes required for MSMEs in these cases. The Working Group agreed that the draft articles should be made consistent with the number of votes required for dissolution and winding up and that draft article 27 should be grouped with similar rules in the draft text, since those norms had a similar economic rationale and therefore should be treated in the same way. A further drafting suggestion was made that the draft provision should be adjusted to clearly cover single member entities as well as multiple member entities.

91. Similarly to the concerns raised above (see para. 83 above), a concern was expressed that draft articles 28 and 29 seemed to focus on the protection of shareholders without any consideration for the protection of third parties. In this regard, it was emphasized that structural changes in the business entity should not result in third parties losing their assets, since the net result of the change was that the same legal entity continued to exist in a different form, and should be liable for its past obligations. A suggestion was made that Chapter VII could deal with third party protection perhaps by way of adopting an ad hoc norm or by reference to national law of the enacting State, or, again, through the inclusion of commentary suggesting that States ensure that adequate means of protecting creditors were in place.

92. A further drafting suggestion was made to group the provisions in Chapter VII according to their increasing complexity, perhaps by grouping restructuring and conversion first, and then grouping split-offs and mergers. It was also observed that there might be inconsistency in terms of the references in the draft model law to existing legal frameworks in some provisions, and the establishment of a “free-standing” model in others. Finally, a suggestion was made that, in light of its purpose, a more appropriate title for this chapter might be “transition”, and that special provisions for the transition of the simplified form into the more standard business form already provided for in each jurisdiction should be considered, thus leaving untouched existing restructuring regimes.

4. Chapter IX — Miscellaneous

Article 35 — Financial Statements

93. The Working Group next considered draft paragraph 35 on financial statements, during which the following issues were raised as a matter of importance:

(a) It was clarified that the Working Group had already agreed that in a future iteration of the text, rules in respect of auditing organs should be dealt with in conjunction with the rules applicable to the board of directors or managers;

(b) It was important for members of all sizes of simplified business entity to have regular access to the financial information in respect of the entity;

(c) It might be necessary to find terminology other than “financial statements and annual accounts” in order for the provision not to be confused with the rules in respect of public companies; the suggested term “financial information” was not thought to be sufficiently precise to be suitable, but it was observed that definitions included in the text might be of assistance;

(d) There might be no need for mandatory disclosure of financial statements in the case of MSMEs, particularly in terms of the smaller enterprises, but financial

records should be kept by the entity and disclosure of them should be permitted if the entity so desired; and

(e) Simplified accounting was likely to be an important feature for MSMEs, and some examples were available in national law (for example, in A/CN.9/WG.I/WP.94), but other than recommending that an enacting State should permit and enable the use of simplified accounting for MSMEs, it might not be advisable to prepare detailed accounting or bookkeeping rules.

94. The Working Group agreed that the text in draft paragraph 35 was generally acceptable, but that some drafting adjustments should be made to it in order to differentiate it from the usual approach to financial statements of public companies. It was agreed that the phrase “financial statements and annual accounts” in draft paragraph 35(1) should be placed in square brackets to indicate that terminology more in keeping with the context of a simplified business entity (as opposed to a public company) might be identified in a future text. It was further agreed that draft paragraph 35(2) may need to be clarified in order to indicate that it referred to “internal” company books and records, and did not refer to public disclosure by way of a commercial or other registry. The Working Group also agreed that draft paragraph 35(3) should refer to legislation in the enabling State applicable to MSMEs, but that it should separate the concepts of accounting standards and disclosure requirements. Finally, agreement was also reached that more detailed guidance could be included in the commentary to assist enacting States in respect of the matters considered by the Working Group in respect of draft article 35.

95. In respect of A/CN.9/WG.I/WP.89, some States expressed a view that the terminology used in relevant domestic legislation should be maintained and that no changes should be made. Other States did not share that view. It was agreed that that issue would be revisited at a future session.

V. Next session of the Working Group

96. The Working Group recalled that its twenty-sixth session was scheduled to be held from 4 to 8 April 2016 in New York. After discussion in respect of work priorities, the Working Group agreed that in order to take note of all views expressed and to facilitate the planning of attendance by representatives of States and interested organizations, it would devote the time from 4 to 5 April 2016 to a continuation of its consideration of issues relating to a simplified business entity, and the time from 6 to 7 April 2016 to further exploring the topic of key principles and good practices in business registration.