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THE *DOING BUSINESS* INDEX ON MINORITY INVESTOR PROTECTION: THE CASE OF SINGAPORE

LIN LIN* and MICHAEL EWING-CHOW**

The World Bank's *Ease of Doing Business* index has significantly affected regulations and policies regarding corporate matters around the world, and yet there has been scant academic attempt examining the use and implication of the index, especially in the area of investor protection, which is an essential element in doing business. In this paper, we examine in depth the research methodologies employed by the *Doing Business* project in measuring the strength of investor protection, especially in light of the recent renaming of this indicator from *Protecting Investors* to *Protecting Minority Investors* in *Doing Business 2015*. Using Singapore as a case study, we argue that, notwithstanding the positive changes brought in by *Doing Business 2015*, the variables and components chosen in this indicator essentially fail to capture the salient features of minority investor protection. We argue that minority investor protection is an area that is inherently too context-specific to be evaluated based on a unified business assumption or by pure quantitative methods. Lastly, we also provide specific suggestions to improve the *Protecting Minority Investors* indicator.

I. INTRODUCTION

The World Bank's *Doing Business* project, launched in 2002, is an important project that evaluates business regulations that apply to domestic companies throughout their life cycle.¹ By comparing these regulations and the strength of their enforcement across 189 jurisdictions in the annual *Doing Business* index, the project provides support to various government entities in designing and implementing reforms to create a sound and efficient regulatory environment for businesses.² More recently,

* Assistant Professor, Faculty of Law, National University of Singapore. Helpful comments on earlier drafts of this article were received from Mr Justin Yap, Mr Lorenzo Casini, Prof Christopher Bruner, Prof Hans Tjio, Assoc Prof Wee Meng Seng, Prof Mathias Siems, Mr Junianto James Losari, Ms Hu Ying, and participants in the 10th Annual Asian Law Institute (“ASLI”) Conference. We also thank interviewees from businesses, the government officials and academia in Singapore, and officials from the World Bank who generously shared their knowledge and insights with us. Interviews were conducted on an anonymous, background basis. This research was generously supported by the Centre for Banking & Finance Law and the Centre of Law and Business at the Faculty of Law, National University of Singapore. All errors remain our own.

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¹ World Bank Group, “About Doing Business: Measuring for Impact” in *Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises* (Washington DC: The World Bank, 2013) 15, online: The World Bank <<http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-Chapters/About-Doing-Business.pdf>>.

² Penelope J Brook & Sabine Hertveldt, “Introduction” in World Bank Group, *Celebrating Reform 2009: Doing Business Case Studies* (Washington DC: The World Bank, 2009) 1 at 1, online: The World Bank

in 2015, a number of indicators were revised to expand the scope of the *Doing Business* index. In addition to the efficiency of a transaction or service, the index now includes the quality of that transaction or service, taking into account the latest best practices.³ In particular, the *Protecting Investors* indicator has been renamed to *Protecting Minority Investors* to better reflect this expanded scope.

Although numerous academic papers have been published on the *Doing Business* topic and related policy issues, there is scant academic attempt examining the use and implication of the *Doing Business* index, especially in the area of investor protection, which is an essential element in doing business.⁴ Thus, this article seeks to fill the literature gap by examining the newly revised *Protecting Minority Investors* indicator from a legal perspective and discussing whether it captures the major areas of minority investor protection and accurately reflects law and practice. In particular, this article will look at Singapore as a case study in examining the *Protecting Minority Investors* indicator. Singapore is an excellent case study for this purpose as it has consistently enjoyed the distinction of being the world's easiest place for starting and doing business. As of March 2016, Singapore has retained its top position for the ninth year running on the *Doing Business* index, except in 2010.⁵ Also, minority investor protection is an important area in Singapore given that the vast majority of listed companies in Singapore adopt a highly concentrated block shareholding structure.⁶

The remainder of this article will proceed as follows. Part II examines how Singapore uses the *Doing Business* index to guide its business law reform and to maintain

<<http://www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Reforms/Case-Studies/2009/DB09-CS.pdf>>.

- ³ World Bank Group, *Doing Business 2015: Going Beyond Efficiency* (Washington DC: The World Bank, 2014) at 24, online: The World Bank <<http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB15-Full-Report.pdf>> [*Doing Business 2015*], including a revision of the calculation of the ease of doing business ranking, an expansion of the sample of cities covered in large economies and a broadening of the scope of the index.
- ⁴ See eg. Kevin Davis *et al*, eds, *Governance by Indicators: Global Power through Classification and Rankings* (Oxford: Oxford University Press, 2012) [Davis *et al*, *Governance by Indicators*]. In this book, Davis *et al* identifies the legal, policy and normative implications of the production and use of indicators as a tool of global governance and assesses the strengths, problems and effects of indicators in Human Rights, Humanitarian Assistance and Social Investment. However, there is scant in-depth case study assessing the role of the *Doing Business* index in specific jurisdictions from a legal perspective. While more than 100 academic papers have been published on the *Doing Business* topic and related policy issues, most of these papers employ the *Doing Business* data for economic analysis, and not legal analysis. Simeon Djankov, Caralee McLiesh & Rita Ramalho, "Regulation and Growth" (2006) 92 *Economics Letters* 395; André van Stel, David J Storey & A Roy Thurik, "The Effect of Business Regulations on Nascent and Young Business Entrepreneurship" (2007) 28 *Small Business Economics* 171.
- ⁵ In the *Doing Business* Reports of 2007, 2008, 2009, 2011, 2012, 2013, 2014, 2015 and 2016, Singapore was ranked first in terms of the overall ease of doing business. In 2005, 2006 and 2010, Singapore was ranked third, third and second respectively. See all of the *Doing Business* Reports at World Bank Group, *Doing Business Report Series*, online: The World Bank <<http://www.doingbusiness.org/reports>>.
- ⁶ Tan Cheng Han *et al*, *State-Owned Enterprises in Singapore: Historical Insights Into a Potential Model for Reform*, National University of Singapore, Working Paper No 2015/003 (2015) at 6, online: <<http://ssrn.com/abstract=2580422>>; Tan Lay Hong, *Exploring the Question of the Separation of Ownership From Control: An Empirical Study of the Structure of Corporate Ownership in Singapore's Top Listed Companies*, Working Paper (2010) at 17, 20, 25, online: The University of Auckland Business School <<http://docs.business.auckland.ac.nz/Doc/exploring-the-question-of-ownership-from-control.pdf>>.

its top ranking. Part III critically evaluates the research methodologies employed by the *Doing Business* project and points out the limitations of the *Protecting Minority Investors* indicator. It also provides specific suggestions to improve the indicator. Part IV concludes and provides a roadmap for future reform.

II. HOW SINGAPORE USES THE *DOING BUSINESS* INDEX

As observed by Davis *et al*, the use of indicators as a tool of global governance affects decision-making by government entities.⁷ In fact, *Doing Business* has inspired more than 270 business regulatory reforms globally since 2003.⁸ Policy-makers who are responsible for formulating rules and regulations concerning businesses have been particularly interested in *Doing Business*, as it helps them identify the best-performing or competitive jurisdictions for each indicator.

Singapore has consistently ranked amongst the top in various international indices for its efficient government and legal system, the high quality of its judiciary and the consistency of its application of law.⁹ Business policies and decision-making in Singapore are influenced by some of these indices. In particular, *Doing Business* has motivated policy-makers to modernise their business legislation and policies. Since 2002, the Singapore Government has participated in the global *Doing Business* survey conducted by the World Bank.¹⁰ A number of government agencies are involved in this project, such as the Ministry of Trade and Industry, the Ministry of Finance, the Ministry of Manpower, the Accounting and Corporate Regulatory Authority (“ACRA”), the Singapore Customs, the Monetary Authority of Singapore, the Land Transport Authority, the Insolvency and Public Trustee’s Office and the Singapore Land Authority.¹¹ In particular, ACRA¹² is a key government agency involved in the *Doing Business* project and has contributed significantly to Singapore’s ranking for the *Starting a Business* indicator.¹³ ACRA’s mission is to make Singapore the best place to do business. It conducts regular reviews of Singapore’s business legislation to ensure that it reflects global best practices,¹⁴ and makes recommendations to the Government on matters relating to the registration and regulation of business entities.¹⁵

A. Approaches Taken by Singapore

Generally, the procedure for government agencies in Singapore to apply the *Doing Business* index is as follows (although the details may vary from time to time).

⁷ Davis *et al*, *Governance by Indicators*, *supra* note 4 at 15, 16.

⁸ *Doing Business* Report 2011, *supra* note 5 at vi.

⁹ The Political and Economic Risk Consultancy released its annual report for 2012. Singapore ranked first, obtaining 0.67 points in this report. At the same time, the IMD “World Competitiveness Yearbook 2011” placed Singapore second in the government efficiency rankings.

¹⁰ *Doing Business* Reports 2003-2012, *supra* note 5 at Acknowledgements.

¹¹ See *Doing Business* Report 2011 and *Doing Business* Report 2012, *supra* note 5 at Acknowledgements.

¹² ACRA was formed as a statutory board on 1 April 2004, following the merger of the Registry of Companies and Businesses (“ROC”) and the Public Accountants’ Board (“PAB”).

¹³ See ACRA, *Annual Report 2011/2012* at 20, online: ACRA <https://www.acra.gov.sg/uploaded-Files/Content/Publications/ACRA_Annual_Reports/ACRAAR12_forupload.pdf>.

¹⁴ *Ibid* at 18.

¹⁵ See ACRA, *About ACRA*, online: ACRA <https://www.acra.gov.sg/about_Acra/>.

The Ministry of Trade and Industry leads a coordinated reform effort by bringing together other government agencies (typically statutory boards¹⁶) to study the *Doing Business* report and discuss how to improve the ease of doing business in Singapore.¹⁷ In particular, the *Doing Business* index is used as a benchmarking tool to evaluate Singapore's performance in various aspects of its business regulatory environment and to stimulate policy debate and dialogue for future reforms.¹⁸

The implementation role is normally assigned to various government agencies according to their respective mandates. For example, ACRA, being the national regulator of business entities and public accountants in Singapore, is mainly responsible for reviewing and implementing changes under the *Starting a Business* indicator. The Inland Revenue Authority of Singapore, which administers the collection of taxes, is responsible for the *Paying Taxes* indicator. The Insolvency and Public Trustee's Office, which handles personal bankruptcy and corporate insolvency, is in charge of the *Resolving Insolvency* indicator. As for the *Trading Across Borders* indicator, the Singapore Customs plays a major role in its improvement. In the meantime, there is close cooperation among various government agencies to improve Singapore's ranking on a specific indicator, as well as its overall ranking in the *Doing Business* index. For instance, both the Land Transport Authority and the Inland Revenue Authority of Singapore have worked jointly on the *Paying Taxes* indicator.¹⁹

The ministries and statutory boards involved in the *Doing Business* project will then conduct thorough analyses of their respective indicators, as well as comparative studies on the performance of other jurisdictions in these indicators.²⁰ Specifically, the government agencies involved will study Singapore's ranking on each indicator and identify potential areas that may require better implementation or regulatory reforms. Thereafter, they will consider proposals internally for further action.²¹ As observed by an official involved in the *Doing Business* project, comparative studies on regulations of business activities help them identify the underlying institutional and regulatory problems within the agencies, which is a useful routine exercise for them.²²

B. Other Initiatives within the Government

Apart from the ministries and statutory boards involved in the study and improvement of the *Doing Business* index, there are other internal committees within the Singapore Government that also evaluate and improve business conditions in Singapore. The Smart Regulation Committee is one example.²³ This committee was set up by the

¹⁶ In Singapore, a statutory board is an autonomous government agency that is established by an Act of Parliament and overseen by a government ministry.

¹⁷ Interview with a government official who has actively participated in the World Bank's survey on Doing Business in Singapore (anonymity required).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ See Civil Service College of Singapore, *Smart Regulation for Singapore*, online: Civil Service College <<https://www.cscollege.gov.sg/knowledge/ethos/ethos%20april%202006/Pages/Smart%20Regulation%20for%20Singapore.aspx>>.

Singapore Government in 2005 as part of its effort to change the role of agencies—from a regulator and controller to a facilitator.²⁴ It seeks to “establish an effective and responsive regulatory regime to foster self regulation and market discipline, and facilitate a competitive and innovative climate for doing business.”²⁵ In recent years, hundreds of Smart Regulation initiatives have been undertaken by different government agencies and many of these have helped to promote a more business-friendly environment in Singapore.²⁶

In addition, many statutory boards also set up internal committees to further their missions. For instance, the Business Facilitation Advisory Committee was set up by ACRA to advise on matters relating to starting and doing business in Singapore, with the aim of improving existing procedures and processes.²⁷ The Business Registry and Facilitation Division of ACRA, which oversees the registration of business entities, participates annually in the *Doing Business* survey and studies the *Doing Business* reports regularly. It also develops new initiatives to make it easier to start and do business in Singapore.²⁸

Over the years, Singapore has tapped substantial resources to improve its business regulatory environment. In particular, the *Doing Business* index has attracted the serious attention of the government, and has been used as a guide (together with other resources) in conducting business law reforms. Singapore’s experience in tapping the *Doing Business* index provides a useful guidance for other jurisdictions. In fact, before the *Doing Business* project was launched, Singapore had already been actively reducing the cost and complexity of business regulation. Singapore’s most notable regulatory improvements include BizFile (an innovative online filing and information retrieval system),²⁹ SMEPortal (a comprehensive business network managed by SPRING Singapore),³⁰ and TradeNet[®] (an electronic data interchange system that Singapore created to facilitate export and import).³¹

²⁴ *Ibid.* This committee evolved from the Rules Review Committee, which aimed to implement optimal regulation and to keep regulations updated in the changing business environment. Both the Smart Regulation Committee and the Rules Review Committee were formed to support the “Cut Red Tape” initiative in the government.

²⁵ *Third Report of the Estimates Committee (Part 2 of 2011)*, Presentation to Eleventh Parliament, Second Session (March 14, 2011) at 8, online: Parliament of Singapore <[http://www.parliament.gov.sg/lib/sites/default/files/paperpresented/pdf/2011/Parl%20%20of%202011%20-%20Report%20of%20the%20Estimates%20Committee%202011%20-%2011%20Mar%202011\[1\].pdf](http://www.parliament.gov.sg/lib/sites/default/files/paperpresented/pdf/2011/Parl%20%20of%202011%20-%20Report%20of%20the%20Estimates%20Committee%202011%20-%2011%20Mar%202011[1].pdf)>.

²⁶ *Ibid.* at 9.

²⁷ “New chairman for Acra, 3 new board members at Iras” *The Straits Times* (31 August 2010), online: Marshall Cavendish <http://www.bankingandfinance.com.sg/Singlenews.aspx?DirID=109&rec_code=639253>.

²⁸ Interview with a government official who has actively participated in the World Bank’s survey on Doing Business in Singapore (anonymity required).

²⁹ It was initiated by the now-defunct Registry of Companies (“ROC”) of Singapore in 2001. The ROC was the first regulatory agency in the world to offer all its services online. Today, BizFile offers close to 300 e-services and serves as a one-stop facilitator for businesses, substantially minimising the cost and time of starting a business. See ACRA, *e-Guides*, online: ACRA <https://www.bizfile.gov.sg/ngbbizfileinternet/faces/oracle/webcenter/portalapp/pages/EGuides.jspx?_afLoop=26284263628247&_afWindowMode=0&_afWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D26284263628247%26_afrWindowMode%3D0%26_adf.ctrl-state%3D16jib5w5it_4>.

³⁰ See SMEPortal, online: SPRING Singapore <<https://www.smeportal.sg/content/smeportal/en/home.html>>.

³¹ This is a venture in electronic trading implemented in January 1989. It creates a one-stop portal for traders within and outside of Singapore and enables exchanges of trade information electronically. Using the TradeNet System, traders may submit permit applications electronically to government agencies. If

III. A CRITICAL EVALUATION OF THE *PROTECTING MINORITY INVESTORS* INDICATOR

A. *Recent Scholarly Debates Over the Doing Business Index*

As observed by Davis *et al*, efficiency, consistency, transparency, scientific authority and impartiality are the essential virtues of indicators in assisting and guiding decision-making.³² Using the already available and simplified indicators raises the efficiency of decision-making by obviating the need of processing raw data.³³ Also, indicators are reliable inputs as they are supported by unequivocal ordinal data. Furthermore, the consistent application of a criterion across different objects of comparison enhances the scientificity and impartiality of decision-making, thus increasing its legal or moral authority.³⁴

The *Doing Business* index possesses all, if not most, of these virtues. It provides a cost-effective means for users to obtain information about a jurisdiction's business environment and features, by explaining the operation of various legal systems in commercial transactions and exploring how they work in practice using simplified, measurable and comparable indicators.³⁵ The large variety of studies covered in the index provides useful information for policy-makers in respect of future regulatory reforms.

Nevertheless, the *Doing Business* index also faces various criticisms.³⁶ One particular critique is that it sacrifices depth for the breadth of coverage.³⁷ The *Doing Business* reports focus on describing results rather than the analyses used to support them.³⁸ Another critique is that the data are collected from experts who may have no direct experience with the business environment they are evaluating, and thus such assessments may not reflect the real concerns of local investors.³⁹ Also, as some of these assessments rely on the perceptions of business managers, the results are undermined by biases in the survey design, scaling of responses, the lack of a shared reference point, and unrepresentative samples.⁴⁰

the application is approved, a permit message will be returned electronically to the sender. This system substantially reduces the cost and time for trading and expedites the clearance of cargo. See Singapore Customs, *TradeNet*, online: Singapore Customs <<http://www.customs.gov.sg/about-us/national-single-window/tradenet>>.

³² Davis *et al*, *Governance by Indicators*, *supra* note 4 at 16, 17.

³³ *Ibid* at 17.

³⁴ *Ibid*.

³⁵ Kevin E Davis & Michael B Kruse, "Taking The Measure of Law: The Case of The *Doing Business* Project" (2007) 32 *Law & Soc Inquiry* 1095 at 1103 [Davis & Kruse, "Taking The Measure of Law"].

³⁶ See *eg*, Kevin E Davis, Benedict Kingsbury & Sally Engle Merry, "Indicators As A Technology of Global Governance" (2012) 46 *Law & Soc'y Rev* 71 [Davis, Kingsbury & Merry, "Indicators As A Technology of Global Governance"]; Davis & Kruse, "Taking The Measure of Law", *ibid*; Paul Benjamin & Jan Theron, "Costing, Comparing and Competing: The World Bank's Doing Business Survey and the Bench-Marking of Labour Regulation" in Hugh Corder, ed, *Global Administrative Law: Innovation and Development* (Cape Town: Juta, 2009) 204.

³⁷ Davis & Kruse, "Taking The Measure of Law", *supra* note 35 at 1103.

³⁸ *Ibid*.

³⁹ See Davis, Kingsbury & Merry, "Indicators As A Technology of Global Governance", *supra* note 36 at 28.

⁴⁰ See World Bank 2004a at 8-10, cited in Davis & Kruse, "Taking The Measure of Law", *supra* note 35 at 1099.

The third objection is that the choice and number of indicators are limited.⁴¹ As recognised by the *Doing Business* team, the index does not measure all aspects of the business environment that matter to firms and investors. It acknowledges three key limitations of the index: (1) limited in scope; (2) limited to the standardised case scenarios; and (3) limited to the formal sector.⁴² It does not measure areas such as security, macroeconomic stability, market size, the level of skills and the strength of financial systems.⁴³

The fourth objection is that the *Doing Business* index is largely centred on the economic efficiency of legal rules and hence neglects other aspects of business regulations. Economic efficiency is concerned with the procedure, time and costs of doing business. Based on these considerations, the countries are ranked according to certain criteria, such as their capacity to attract foreign investments.⁴⁴ The *Doing Business* index draws mainly on economic analyses and insights gleaned from economic literature.⁴⁵ While economic analysis serves as a useful, objective and inexpensive tool for comparing the laws of different jurisdictions, it reflects only one dimension of the overall business environment of a jurisdiction. Being able to create rules that facilitate interactions in the marketplace more efficiently does not equate to an ideal solution to all problems within a business environment. For example, although Singapore has consistently been ranked highly in the *Doing Business* index, it has had several corporate scandals involving listed companies and even charitable organisations in recent years.⁴⁶ Such scandals demonstrate the failure of corporate governance and investor protection within these organisations. Arguably, the lack of proper internal control and risk management is one of the roots causes. The scandals expose the methodological limitations of the *Doing Business* index.

Besides the general limitations listed above, there are other limitations pertaining to specific indicators. In this article, we will focus on the newly revised *Protecting Minority Investors* indicator. Unlike other indicators which measure mainly the time taken and costs involved to start and operate a business, this indicator measures the strength of minority investor protection by reference to a hypothetical business scenario, which we will elaborate on in the following section. We argue that this scenario fails to capture the essential aspects of investor protection.

⁴¹ See *eg*, Bénédicte Fauvarque-Cosson & Anne-Julie Kerhuel, "Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law" (2009) 57 *Am J Comp L* 811 at 823.

⁴² *Doing Business* Report 2013, *supra* note 5 at 18.

⁴³ *Ibid* at 17, 18.

⁴⁴ See *eg*, Fauvarque-Cosson & Kerhuel, *supra* note 41 at 820.

⁴⁵ See *Doing Business* Report 2013, *supra* note 5 at 15.

⁴⁶ *Eg*, in 2004, a publicly traded company in the Singapore Exchange, China Aviation Oil, collapsed because of a US\$550 million loss in speculative oil trading. In the following years, there are another five corporate scandals in which directors potentially breached their duties owed to companies listed on the Singapore Exchange. These companies were ACCS, Auston International, Citiraya, Daka Designs and Informatics. Another serious corporate scandal is the 2005 National Kidney Foundation Singapore scandal which involved misuse of funding and fabrication of invoices, indicating low levels of transparency and poor internal governance of this foundation. In 2012, Kong Hee, a pastor of Singapore's biggest church, City Harvest Church, and five others were charged with misusing up to S\$50 million of church money to fund the music career of Mr Kong's wife, Sun Ho.

B. Protecting Minority Investors Indicator: The Case of Singapore

1. The New Changes Under Doing Business 2015

The *Protecting Minority Investors* indicator measures the strength of minority shareholder protection against the directors' misuse of corporate assets for personal gain. Before 2015, the indicator comprised three dimensions: (1) transparency of related party transactions (*Extent of Disclosure* index); (2) liability for self-dealing (*Extent of Director Liability* index); and (3) the shareholders' ability to sue officers and directors for misconduct (*Ease of Shareholder Suits* index).⁴⁷ In *Doing Business 2015*, the scope of the indicator is significantly expanded. Three new dimensions are introduced: (1) the *Extent of Shareholder Rights* index; (2) the *Strength of Governance Structure* index; and (3) the *Extent of Corporate Transparency* index. In addition, a legal expenses component is added to the *Ease of Shareholder Suits* index.⁴⁸ We will briefly discuss these changes in turn.

First, *Doing Business 2015* expands the scope of the indicator in measuring the strength of minority shareholder protection by adding shareholder rights in corporate governance into its calculus. The newly added *Extent of Shareholder Rights* index considers the extent to which shareholders have the power to influence important corporate decisions, including the appointment and removal of board members, the issuance of new shares, and the amendment of the company's memorandum and articles of association. In essence, this index considers the amount of power shared between the board and the shareholders (and hence, the minority shareholders) in the process of making decisions that affect the company.⁴⁹

Secondly, *Doing Business 2015* considers the governance safeguards protecting shareholders from undue board control and entrenchment. The *Strength of Governance Structure* index looks at the extent to which the law mandates checks and balances between the different corporate organs, which is assumed to have the effect of minimising agency costs brought about by giving the directors too much power. The issues covered include whether the Chief Executive Officer ("CEO") can be the chairman of the board, the requirements relating to independent directors and whether there are rules relating to cross-shareholding.⁵⁰

Thirdly, the revised indicator also considers corporate transparency in ownership stakes, compensation, audits and financial prospects. The basis for introducing the *Extent of Corporate Transparency* index is that transparency improves governance, thus strengthening minority shareholder protection. It could, perhaps, also be explained on the basis that greater transparency leads to better informed shareholders and thus stronger minority shareholder protection.⁵¹

Fourthly, *Doing Business 2015* adds a new component to the *Ease of Shareholder Suits* index. This new component considers the extent to which the expenses associated with shareholder lawsuits can be recovered from the company or the

⁴⁷ World Bank Group, *Protecting Minority Investors Methodology*, online: The World Bank <<http://www.doingbusiness.org/methodology/protecting-investors>>. Doing Business 2016 implements small updates to the methodology for the protecting minority investors.

⁴⁸ *Doing Business 2015*, *supra* note 3 at 31.

⁴⁹ *Ibid* at "What is Changing in *Doing Business*?".

⁵⁰ *Ibid*.

⁵¹ *Ibid*.

reimbursement of the expenses can be made contingent on a successful outcome. By looking at the distribution of legal expenses, *Doing Business 2015* aims to measure the *real* (rather than *theoretical*) ease of shareholder suits in a particular jurisdiction.⁵²

The ranking on the *Protecting Minority Investors* indicator is based on the distance to frontier score, which measures a country's performance on each indicator against the best practice.⁵³

In order to make the data comparable across different jurisdictions, the *Doing Business* team has created a hypothetical business scenario.⁵⁴ The Buyer is a publicly traded manufacturing company with its own distribution network. Mr James owns 60% of the Buyer's shares and elects 2 directors to the Buyer's 5-member board. He also owns 90% of the Seller, a company that operates a chain of retail hardware stores. The Seller recently closed a large number of its stores. Mr James proposes that the Buyer purchase the Seller's unused fleet of trucks, and the Buyer agrees. The price is equal to 10% of the Buyer's assets and is higher than market value. The Buyer enters into the transaction after obtaining the necessary approvals and making full disclosure.

2. Testing the Accuracy

According to the *Doing Business* reports, Singapore has maintained a high level of protection of investors from 2006 to 2015.⁵⁵ In *Doing Business 2015*, Singapore obtains the full score of 10.0 on the *Extent of Disclosure* index,⁵⁶ which is almost twice the average score of 5.5 in the East Asia & Pacific region and the average score of 6.6 for OECD countries.⁵⁷ It is calculated by adding up the individual scores attached to a particular outcome in each component of the index. In the case of Singapore, its score of 10.0 is derived as follows. The shareholders must approve the transaction and Mr James is not allowed to vote (a full score of 3). Mr James is required to make full disclosure of all material facts pertaining to the transaction (a full score of 2). The Buyer is required to disclose immediately all material information affecting the stock price to the board of directors, including any conflict of interest (a full score of 2). In its annual report, the Buyer must disclose the terms of the transaction and Mr James' ownership in the Buyer and the Seller (a full score of 2). Singapore's company law also requires an external body to review the transaction (a full score of 1).

As for the *Extent of Director Liability* index⁵⁸, Singapore achieves a score of 9.0, higher than the average score of 4.6 in the East Asia & Pacific region and the

⁵² *Ibid.*

⁵³ Starting from *Doing Business 2015*, the ranking is based on the distance to frontier score rather than on the percentile. See *Doing Business 2015*, *supra* note 3 at "What is Changing in *Doing Business*?" at 24, 25.

⁵⁴ *Ibid.*

⁵⁵ It was ranked second on the *Protecting Investors* index in 2012 and 2013.

⁵⁶ The World Bank Group, *Ease of Doing Business in Singapore*, online: The World Bank <<http://www.doingbusiness.org/data/exploreeconomies/singapore/#protecting-investors>>.

⁵⁷ *Ibid.*

⁵⁸ There are seven components in this index. They are: (1) whether shareholder plaintiffs are able to sue directly or derivatively for the damage the transaction causes to the company; (2) whether a shareholder plaintiff is able to hold Mr James liable for the damage the Buyer-Seller transaction causes to the company; (3) whether a shareholder plaintiff is able to hold the approving body (the CEO, members of the board of directors or members of the supervisory board) liable for the damage the transaction causes to the company; (4) whether Mr James pays damages for the harm caused to the company upon

average score of 5.4 for OECD countries.⁵⁹ The score is derived as follows. Minority shareholders can sue directly or derivatively for the damage caused by the transaction to the company (a full score of 1). Shareholders can hold the interested director liable if the transaction is unfair or prejudicial to minority shareholders (a full score of 2).⁶⁰ Shareholders can also hold members of the approving body liable for the damage that the transaction caused to the company if it is unfair or prejudicial to minority shareholders (a full score of 2). Mr James has to pay damages for the harm caused to the company (a full score of 1) and repay profits made from the transaction upon a successful claim by the shareholder plaintiff (a full score of 1). A court can void the transaction upon a successful claim by a shareholder plaintiff when the transaction is negligently concluded (a score of 1 out of a possible full score of 2). Fines and imprisonment can be applied against Mr James (a full score of 1). Adding all these scores in the seven components gives Singapore a score of 9.0 on the index.

The *Ease of Shareholder Suits* index measures the ability of shareholders to sue directly or derivatively.⁶¹ Singapore scores 9.0 in this index, higher than the average score of 6.4 in the East Asia & Pacific region and the average score of 7.2 for OECD countries.⁶² The score is derived as follows. Shareholders owning 10% of the Buyer's shares can inspect transaction documents before filing suit (a full score of 1). The plaintiff can obtain relevant documents⁶³ from the defendant and witnesses during trial (a full score of 3). The plaintiff can request categories of documents from the defendant without identifying specific ones (a full score of 1). The plaintiff can directly question the defendant and witnesses during trial without prior approval (a full score of 2). The standard of proof required for civil suits is lower than that for criminal cases (a full score of 1). Lastly, shareholder plaintiffs can recover their legal expenses from the company if they are successful (a score of 1 out of a possible full score of 2). Adding all these scores in the 6 components gives Singapore a score of 9.0 on the index.

The accuracy of the scores reflected in this index deserves further discussion. Singapore was one of the first Commonwealth countries to introduce a statutory derivative action, indicating its commitment to be at the forefront of the Commonwealth in protecting the interests of minority shareholders.⁶⁴ However, until 30

a successful claim by the shareholder plaintiff; (5) whether Mr James repays profits made from the transaction upon a successful claim by the shareholder plaintiff; (6) whether Mr James is fined and imprisoned or disqualified upon a successful claim by the shareholder plaintiff; and (7) whether a court can void the transaction upon a successful claim by a shareholder plaintiff.

⁵⁹ *Ibid.*

⁶⁰ Pursuant to the changes made under the *Companies (Amendment) Act 2014* (No 36 of 2014), such derivative action can be made by the shareholder even though it is not unfair or prejudicial.

⁶¹ World Bank Group, *Protecting Minority Investors Methodology*, *supra* note 47. It assesses six components regarding the ease of shareholder suits, including, among others, the range of documents available to the shareholder plaintiff from the defendant and witnesses during trial, whether shareholders owning 10% or less of the company's share capital have the right to inspect the transaction documents before filing suit, and whether the plaintiff can obtain categories of relevant documents from the defendant without identifying each document specifically.

⁶² The World Bank Group, *Ease of Doing Business in Singapore*, *supra* note 56.

⁶³ These documents include: (1) information that the defendant has indicated that he intends to rely on for his defence; (2) information that directly proves specific facts in the plaintiff's claim; (3) any information that is relevant to the subject matter of the claim; and (4) any information that may lead to the discovery of relevant information.

⁶⁴ Meng Seng Wee & Dan W Puchniak, "Singapore Derivative Actions: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth" in Dan W Puchniak, Harald Baum &

June 2015 when the *Doing Business 2015* was published, the statutory derivative action is available to shareholders of unlisted companies only.⁶⁵ Section 216A(2) of the then-*Companies Act* did not apply to a company that is listed on the stock exchange in Singapore,⁶⁶ which is not the position in many other jurisdictions.⁶⁷ Also, Singapore judges take a rather conservative approach in their interpretation of section 216A.⁶⁸ However, the *Protecting Minority Investors* indicator is based on the assumptions that the Buyer is a publicly traded company and that shareholders can sue derivatively for the damage that the Buyer-Seller transaction causes to the company.⁶⁹ These assumptions do not accurately reflect the current law and practices in Singapore regarding the statutory derivative action and would therefore mislead users. Admittedly, *Doing Business 2015* is technically correct in concluding that shareholders can bring a derivative action as Singapore still retains the archaic common law derivative action (which applies to listed companies).⁷⁰ However, the existence of the common law derivative action cannot compensate for the lack of the statutory derivative action with respect to listed companies. The former is entrenched with onerous requirements and is rarely used in practice. For a plaintiff to successfully bring a common law derivative action, he must prove that the wrongdoer used his controlling power to prevent an action from being brought against him by the company and that the derivative action is not opposed by a ‘fully informed majority of minority’.

It is relevant in this context to also refer to section 216 of the *Companies Act* under which a minority shareholder who has suffered oppression or unfair prejudice may bring an action against the controllers of the company. The courts are conferred wide discretion under section 216 to craft different types of remedies, including an order to restrain specific types of transactions or even to regulate the conduct of affairs of the company. Unlike section 216A, section 216 has never been limited to unlisted companies. Further, although the basic purpose of section 216 is to provide relief for a wrong suffered by a shareholder, not a wrong suffered by the company, the courts have taken a pragmatic approach. Where oppression or unfair prejudice is found, in addition to granting personal relief, courts have also granted corporate relief by ordering the wrongdoer to pay damages to the company.⁷¹ However, it would be wrong to think that a minority shareholder in a listed company may make use of section 216 to make up for the non-availability of section 216A. First, it is

Michael Ewing-Chow, eds, *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge: Cambridge University Press, 2012) 323 at 347.

⁶⁵ ACRA, *Two-Phase Implementation of Companies (Amendment) Act 2014*, online: ACRA <[https://www.acra.gov.sg/Legislation/Two-Phase_Implementation_of_Companies_\(Amendment\)_Act_2014/](https://www.acra.gov.sg/Legislation/Two-Phase_Implementation_of_Companies_(Amendment)_Act_2014/)>.

⁶⁶ Cap 50, 2006 Rev Ed Sing. See *Companies (Amendment) Act 2014*, *supra* note 60, s 146: The definition of “company” in s 216A(1) has been deleted, the effect of which is that the statutory derivative action is now applicable to Singapore incorporated companies that are listed, whether in Singapore or overseas. Nevertheless, we have to wait and see whether the statutory derivative action will be widely used among listed companies in the future.

⁶⁷ In jurisdictions such as the United States, the United Kingdom, Italy, Japan and China, derivative action is applicable to publicly traded companies.

⁶⁸ Wee & Puchniak, *supra* note 64 at 347.

⁶⁹ *Doing Business* Report 2013, *Economy Profile of Singapore*, *supra* note 5 at 69.

⁷⁰ See eg, *Ting Sing Ning (alias Malcolm Ding) v Ting Chek Swee (alias Ting Chik Sui)* [2008] 1 SLR 197 (CA).

⁷¹ See eg, *Low Peng Boon v Low Janie* [1999] 1 SLR (R) 337 (CA).

extremely difficult for a shareholder in a listed company to prove oppression or unfair prejudice, as shown in *Tan Choon Yong v Goh Jon Keat*.⁷² Secondly, although the scope of remedies under section 216 is very broad, in practice courts have exercised their jurisdiction by structuring a remedy that resolves the differences between the controlling shareholders and the minority shareholders. Therefore, courts almost always confine themselves to two specific remedies: (1) a buyout of the shares of the minority shareholders either by the company or the controlling shareholders; or (2) a winding-up of the company. The rationale of these remedies is to provide an exit opportunity to the minority shareholders so as to bring to an end the disagreements between the shareholders.⁷³ This is similar to the appraisal right available in jurisdictions such as Delaware, except that it is not available as a matter of right and must be ordered by courts upon proof of oppressive conduct by the controlling shareholders.⁷⁴ Since the principal outcome of an oppression action is to grant the minority shareholders an exit opportunity, this remedy is largely confined to situations involving private companies or unlisted public companies. It is not so useful in the context of a public listed company as the minority shareholders do have an exit opportunity through the public market for the company's shares.⁷⁵

3. *Limits in the Scope—Is that All for Minority Investor Protection?*

The expansion in the scope of the *Protecting Minority Investors* indicator is commendable. It addresses the above-mentioned objections to the *Doing Business* index. An expanded scope increases the depth of an indicator. Also, a greater emphasis on the corporate governance aspect of business regulations signifies an obvious shift away from an excessive focus on the economic efficiency of legal rules to a more holistic evaluation of a jurisdiction's business regulations.

Nonetheless, a scrutiny of the research methodologies employed by the World Bank reveals several limits in the scope of the *Protecting Minority Investors* indicator.

(a) *Limited to public companies*: First of all, the scope of the indicator is largely limited to public companies. Only three newly introduced indices within this indicator consider both private and public companies: *Extent of Shareholder Rights* index, *Strength of Governance Structure* index and *Extent of Corporate Transparency* index. The other indices (the *Extent of Disclosure* index, *Extent of Director Liability* index and *Ease of Shareholder Suits* index) are based on the assumption that the Buyer is a company listed on the jurisdiction's most important stock exchange.⁷⁶ This fails to take into account two important business structures: private companies and alternative business vehicles.

⁷² [2009] 3 SLR 840 (HC).

⁷³ Luh Luh Lan & Umakanth Varotttil, "Shareholder Empowerment in Controlled Companies: The Case of Singapore" in Jennifer G Hill & Randall S Thomas, eds, *Research Handbook on Shareholder Power* (Cheltenham: Edward Elgar Publishing, 2015) 572 at 586.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* Nevertheless, it is also noted that trading is often suspended soon after regulators suspect that misconduct has taken place and long before any legal action is brought before the courts.

⁷⁶ If the number of publicly traded companies listed on the stock exchange is less than 10, or if there is no stock exchange in the economy, it is assumed that the Buyer is a large private company with multiple shareholders. See World Bank Group, *Protecting Minority Investors Methodology*, *supra* note 47.

Private companies constitute a significant proportion of companies in Singapore. In Financial Year 2010/2011, there were 28,511 new companies registered in Singapore.⁷⁷ In comparison, as of January 2010, there were only 640 companies listed on the main board of the Singapore Stock Exchange.⁷⁸ The number of listed companies in Singapore is much smaller than that of private companies. The *Doing Business* project also fails to consider other business vehicles, such as non-listed public companies⁷⁹ and exempted private companies (under s 4(1) of the *Companies Act*) (“EPC”), which is a type of private company which has not more than 20 members or is gazetted as such.⁸⁰

Therefore, the *Protecting Minority Investors* indicator should not ignore companies that are not listed on the stock exchange. Moreover, as small private companies often lack a strong impetus to allocate resources to improve their internal control and risk management, there is a greater need for better investor protection. However, we admit that, since private companies are not subject to public disclosure requirements, it is difficult for the World Bank to collect accurate data regarding these companies. Users should thus be informed that a higher ranking merely indicates that the regulations offer stronger investor protection in the context of publicly traded companies only. The same cannot be said of other types of companies.

Moreover, the scope of the indicator seems to be limited to shareholders, which is a narrower group than “investors” used in the label “*Protecting Minority Investors*”. The word “investors” encompasses both shareholders of a company as well as other types of investors pertaining to alternative business vehicles, such as limited and general partners in a limited partnership and members in a non-listed public company. The *Doing Business* team should either expand the scope of the indicator to include such investors, or change the name to “*Protecting Minority Shareholders*” to accurately reflect its present scope.

Furthermore, the *Protecting Minority Investors* indicator does not capture investor protection in other areas. For example, in the realm of securities law, investor protection refers to legal support for investors in the public trading markets by way of strategies that regulate publicly traded companies.⁸¹ These strategies include mandatory disclosure, quality restrictions (such as mandating appointment rights and approval rights for shareholders, providing listing and delisting requirements *etc*)⁸² as well as the enforcement of investor protection (such as private enforcement, public enforcement, gatekeeper enforcement *etc*).⁸³ These are not reflected in the *Protecting Minority Investors* indicator.

⁷⁷ ACRA, *ACRA Annual Report 2010/2011*, at 62, online: ACRA <https://www.acra.gov.sg/uploaded/Files/Content/Publications/ACRA_Annual_Reports/ACRAAnnualReport2010_2011.pdf>.

⁷⁸ SGX, *Singapore Exchange*, under “Market Statistics”, online: SGX <http://www.sgx.com/wps/portal/sgxweb/home/lut/p/a1/04_Sj9CPykyssy0xPLMnMz0vMAfGjzOKNHB1NPAycDSz9wwzMDTxD_Z2Cg8PCDANdjYEKIoEKDHAARwNC-sP1o8BK8JhQkBthkO6oqAgAzDYPQQ!!/dl5/d5/L2dBISEvZ0FBIS9nQSEh/>.

⁷⁹ Under the *Singapore Companies Act*, *supra* note 66, s 4(1), read with the *Companies (Amendment) Act 2014*, *supra* note 60, a “listed” company or corporation is one that has been admitted to the official list of a securities exchange in Singapore, without having been removed from the official list.

⁸⁰ *Singapore Companies Act*, *ibid*, s 4(1).

⁸¹ Reinier Kraakman *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2d ed (New York, Oxford University Press, 2009) at 276.

⁸² *Ibid* at 277-294.

⁸³ *Ibid* at 294-301.

(b) *Limited to self-dealing transactions*: Even in the case of publicly traded companies, the scope of investor protection is much broader than what is measured by the *Protecting Minority Investors* indicator. The methodology behind this indicator is based on an economics article titled “The Law and Economics of Self-dealing”.⁸⁴ While this paper presents an innovative and fascinating measure of investor protection, it focuses on private enforcement mechanisms that govern self-dealing transactions and does not cover other areas of shareholder protection, especially minority shareholder protection. Other areas of shareholder protection not covered include instances where shareholders are excluded from management, where shareholders are deprived of information about the company, and where dominant members clearly prefer their own interests.

(c) *General lack of depth*: In the corporate law context, shareholders are the most common form of investors and there are several governance mechanisms that protect their interests, such as appointment rights, independent directors, decision rights, reward strategy and affiliation rights.⁸⁵ There are also many legal constraints, principally in the form of standards, that protect the interests of minority shareholders, such as the duty of loyalty, the oppression standard and abuse of majority voting.⁸⁶ However, the *Protecting Minority Investors* indicator’s treatment of these mechanisms and constraints is merely cursory.⁸⁷

First, the appointment right, which is the power to select or remove directors or managers, lies at the core of corporate governance.⁸⁸ The appointment rights of shareholders are important for addressing the agency problems between (1) minority shareholders and controlling shareholders; (2) shareholders and managers; and (3) shareholders and employees.⁸⁹ Minority appointment rights are enhanced by either reserving board seats for minority shareholders or over-weighting minority votes in the election of directors.⁹⁰ By ensuring that minority shareholders are able to have one or more representatives on the board, the board would be prevented from becoming the preserve of the controlling shareholders.⁹¹ The minority shareholders would thus have access to central management: they would be able to obtain more information about the company’s business operation and to influence the substantive decisions made by the board.⁹² In addition, there are many other legal devices which are used to dilute the appointment powers of large shareholders so as to protect the interests of minority shareholders, such as a ‘vote capping’ regime and restrictions on the control rights of large shareholders.⁹³ Several American jurisdictions provide that directors and corporate officers may be removed without cause.⁹⁴ In Singapore,

⁸⁴ Simeon Djankov *et al*, “The Law and Economics of Self-dealing” (2008) 88 *Journal of Financial Economics* 430.

⁸⁵ Kraakman *et al*, *supra* note 81 at c 3.

⁸⁶ *Ibid* at 99.

⁸⁷ *Doing Business Report 2012, Economy Profile of Singapore*, *supra* note 5 at 61. It states that “[t]he overall ranking on the strength of investor protection index tells only part of the story.”

⁸⁸ Kraakman *et al*, *supra* note 81 at 42.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* at 90.

⁹¹ Paul Davis, *Introduction to Company Law*, 2d ed (Oxford: Oxford University Press, 2010) at 262 [Davis, *Introduction to Company Law*].

⁹² *Ibid* at 262, 263.

⁹³ Kraakman *et al*, *supra* note 81 at 91.

⁹⁴ See *eg*, New York Business Corporation Law, §706(b) (removal of directors) & §716 (removal of officers).

to prevent shareholders from being denied the power to accept or reject any particular candidate, the law does not allow shareholders of public companies to elect two or more persons as directors in a single resolution.⁹⁵ The *Protecting Minority Investors* indicator does not touch on the legal issue of appointment rights in different jurisdictions.

Second, conferring decisions rights on shareholders is another widely used device to protect the interests of shareholders. Shareholders generally obtain mandatory decision rights in respect of issues involving fundamental corporate changes (eg, mergers, liquidations, and sales of corporate assets) and ratification.⁹⁶ Different jurisdictions provide for different types of decision rights to protect minority shareholders. For example, there are three major types of decision rights under English law: requiring supermajority approval for certain decisions, excluding the majority from voting, and giving decision-making powers to individual shareholders.⁹⁷ It is worth noting that, in order to make the scheme of executive remuneration fairer and more transparent, English law also grants shareholders an advisory vote on individual director's remuneration.⁹⁸ Nevertheless, the *Protecting Minority Investors* indicator does not assess the decision rights of shareholders. It only examines who can approve a related party transaction in the hypothetical business scenario.⁹⁹ Moreover, even if the law grants decision rights to shareholders, it does not mean that shareholders are always in a position to participate in corporate decision-making, as the exercise of decision rights by shareholders are subject to various practical constraints arising from the ownership structure of the firm and the market for corporate control. In particular, in a concentrated shareholding structure, it would be difficult for the minority to resist board proposals being brought to a shareholder vote. Therefore, to provide a comprehensive and accurate evaluation of the strength of investor protection in a jurisdiction, the *Doing Business* team should also collect and analyse information about regulations on decision rights as well as the features of ownership structure in a jurisdiction.

Third, incentives are also important strategies which have been used to reduce agency costs and protect the interests of investors. There are generally two incentive strategies in corporate law: the sharing rule which motivates loyalty by tying the agent's monetary returns to those of the principal,¹⁰⁰ and the trusteeship strategy

⁹⁵ *Companies Act*, *supra* note 66, s 150(1); see also Tan Cheng Han, ed, *Walter Woon on Company Law*, 3d ed (Singapore: Sweet & Maxwell Asia, 2009) at 251.

⁹⁶ Jesse H Choper, John C Coffee, Jr & Ronald J Gilson, *Cases and Materials on Corporations*, 7th ed (New York: Aspen Publishers, 2008) at 553; Robert B Thompson, "Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue" (2000) 62 *Law and Contemp Probs* 215 at 216; Kraakman *et al*, *supra* note 81 at 72.

⁹⁷ See Davis, *Introduction to Company Law*, *supra* note 91 at 241.

⁹⁸ Paul L Davies & Klaus J Hopt, "Corporate Boards in Europe – Accountability and Convergence" (2013) 61 *Am J Comp L* 301 at 363. Shareholders are able to exercise advisory voting on both the overall executive pay policy and the remuneration of individual directors in the United Kingdom. Recently proposals have been made for a three-yearly binding vote on pay policy.

⁹⁹ A score of 0 is assigned if it is the CEO or the managing director alone; score of 1 if the board of directors, the supervisory board or shareholders must vote and Mr James is permitted to vote; score of 2 if the board of directors or the supervisory board must vote and Mr James is not permitted to vote; score of 3 if shareholders must vote and Mr James is not permitted to vote.

¹⁰⁰ Kraakman *et al*, *supra* note 81 at 43.

which seeks to remove conflicts of interest to ensure that the agent will not obtain personal gain from diserving the principal.¹⁰¹

The trusteeship strategy involves placing decisions in the hands of persons not beholden to the majority shareholders.¹⁰² In respect of publicly traded companies, the United States, the United Kingdom, Japan and Singapore usually have only one board of directors (one-tier board system). The board supervises and manages a corporation, either directly or through its committees. In contrast, in a two-tier board system, which is implemented in jurisdictions such as Germany and Austria, monitoring powers can be given to the supervisory board comprising non-executive directors, which then appoints and supervises the management board.¹⁰³ There are some jurisdictions, such as France, Italy and the Netherlands, which give companies the choice between the one-tier and the two-tier form.¹⁰⁴

Nevertheless, the *Protecting Minority Investors* indicator only considers the supervisory board in the two-tier board system.¹⁰⁵ It does not cover jurisdictions with one-tier board systems, or those with both one-tier and two-tier board systems.¹⁰⁶ It also fails to deal with the role and effectiveness of the independent director in the one-tier board system, which serves a similar monitoring function as the supervisory board in the two-tier board system. Moreover, even among jurisdictions with one-tier board systems, the requirement of having independent directors on the board and their effectiveness in monitoring the board also vary widely in practice.¹⁰⁷ For example, while the presence of independent directors on the board has proved to be valuable in maximising shareholder wealth in the United States over the years,¹⁰⁸ it may not work as effectively in those jurisdictions where there are more firms with concentrated ownership structures, such as Singapore,¹⁰⁹ India¹¹⁰ and China.¹¹¹

¹⁰¹ *Ibid* at 43.

¹⁰² Davis, *Introduction to Company Law*, *supra* note 91 at 261.

¹⁰³ Kraakman *et al*, *supra* note 81 at 56.

¹⁰⁴ Davies & Hopt, *supra* note 98 at 315, 316. Italy introduced three choices for companies in 2003: besides a two-tier system, the one-tier arrangement was offered either with the traditional board of internal auditors, or with a mandatory audit committee of the board. Dutch legislation, which was traditionally based on a two-tier system, provided the option of a one-tier system in 2012.

¹⁰⁵ World Bank Group, *Protecting Minority Investors Methodology*, *supra* note 47.

¹⁰⁶ See *supra* note 104.

¹⁰⁷ Kraakman *et al*, *supra* note 81 at 70. The United States has been taking the lead with 81% of independent directors in listed companies. In the United Kingdom, 59% of directors are independent directors in listed companies. Italy and France also have an average of 46% of independent directors in listed companies. See also Tan Lay Hong, Tan Chong Huat & Long Hsueh Ching, *Corporate Governance of Listed Companies in Singapore* (Singapore: Sweet & Maxwell Asia, 2006) at 142. In Singapore, 50% of the Singapore's top 50 Straits Times Indexed companies have at least one-third of their boards comprising independent directors.

¹⁰⁸ See Jeffrey N Gordon, "The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices" (2007) 59 *Stan L Rev* 1465.

¹⁰⁹ See Tan *et al*, *supra* note 6.

¹¹⁰ See Umakanth Varottil, "Evolution and Effectiveness of Independent Directors in Indian Corporate Governance" (2010) 6 *Hastings Business Law Journal* 281. Due to the concentrated ownership structures in Indian companies, it is the minority shareholders who require corporate governance protection from the actions of the controlling shareholders. Thus, board independence does not provide an effective solution to this problem.

¹¹¹ See generally Yuan Zhao, "Independent Directors in China: the Path in which Direction?" (2011) 22 *Int'l Co & Com L Rev* 352. Note the ineffectiveness of independent directors in Chinese listed companies due to the concentrated shareholding structure.

In the recently introduced *Strength of Governance Structure* index, one of the 7 components considers the application of the trusteeship strategy by asking whether independent directors are required to be part of the board. A score of 0 is assigned if the answer is no; 1 if it is yes; and 1.5 if it would also apply if the Buyer were a privately held company. However, the index does not address the diversity of board composition and its effectiveness across different jurisdictions.

Fourth, affiliation rights in the form of mandatory disclosure are also a useful tool to protect shareholders. Corporate law requires directors to disclose certain information to the company,¹¹² while securities law imposes various disclosure obligations on publicly traded companies. Timely disclosure of accurate and material information about the issuers enables investors to assess the risks and rewards of their investment. It also provides the information necessary to protect minority shareholders through voting or litigation.¹¹³ The disclosure regime for publicly traded companies comprises two broad dimensions: (1) the disclosure obligations regarding securities issues and issuers; and (2) the informativeness of disclosure.¹¹⁴ Disclosure generally comes in the form of prospectus disclosure, periodic financial disclosure and continuing disclosure. Besides publicly traded companies, private companies and businesses are also subject to certain disclosure requirements such as the filing of annual returns and the updating of business venues and shareholding information.¹¹⁵ The disclosure of information about a firm's past and current financial positions and its valuation methodologies, as well as audit checks to ensure the accuracy of those information, is essential in enhancing investor protection.¹¹⁶

However, the *Extent of Disclosure* index does not assess the above aspects of disclosure, but merely whether the related party transaction is disclosed to the public and whether the director discloses the conflict of interest to the board. Although mandatory disclosure of related party transactions is a vital legal strategy that guards against expropriation by managers or controlling shareholders and provides potential litigants with information to bring a suit before a court,¹¹⁷ it is just one of the many disclosure obligations of a publicly traded company. Arguably, the score of a jurisdiction under this index does not accurately reflect the level of transparency in that jurisdiction.

As regards the *Extent of Shareholders Rights* index, a dichotomy should be drawn between companies with dispersed shareholding and companies with concentrated shareholding. The former faces the 'vertical' agency problem between managers and shareholders, while the latter face the 'horizontal' agency problem between controlling shareholders and minority shareholders.¹¹⁸

Overall, the *Protecting Minority Investors* indicator measures the powers of the shareholders as a body *vis-à-vis* the powers exercised by the board of directors. However, in countries where concentrated shareholding is common among companies, such as Singapore, 'horizontal' agency problems are more prevalent, and therefore

¹¹² In Singapore, directors' duties of disclosure can be found in ss 156 & 165(1) of the *Companies Act*, *supra* note 66.

¹¹³ *Ibid.*

¹¹⁴ See Varottil, *supra* note 110 at 282.

¹¹⁵ See *eg.*, *Companies Act*, *supra* note 66, s 165.

¹¹⁶ See Varottil, *supra* note 110 at 285, 286.

¹¹⁷ See Kraakman, *supra* note 81 at 49.

¹¹⁸ See Lan & Varottil, *supra* note 73 at 572-574.

it is arguably more useful to compare the power of the minority shareholders against that of the controlling shareholders. This is because “in controlled companies any conferral of greater power to shareholders as a whole without differentiating the types of shareholders would considerably equip the controlling shareholders with greater power at the cost of the minority shareholders”.¹¹⁹ Examples of differentiation mechanisms include the ‘disinterested shareholder vote’ and the ‘majority of the minority vote’, which are required under the SGX’s listing rules for ‘interested person transactions’ involving listed companies.¹²⁰

(d) *Suggestions*: As has been shown above, the *Protecting Minority Investors* indicator is unable to accurately reflect a jurisdiction’s strength in investor protection and quality of corporate governance due to its limited scope. Furthermore, it is nearly impossible to capture such information using one aggregated number due to the complex and evolving nature of business environments. Hence, such an indicator can be misleading to users, especially in the absence of detailed information about the background of the jurisdiction examined. There are two possible ways to solve this problem.

First, the *Doing Business* team should consider excluding the *Protecting Minority Investors* indicator so as to make the report more accurate. What is good corporate governance for one jurisdiction may not be the same for another, given the vast differences in legal systems, political economies and regulatory architecture. As observed by French scholars Claude Ménard and Bertrand du Marais, the *Doing Business* reports do not cover the specificities of legal systems but only rank countries according to a superficial set of indices.¹²¹ They do not measure the real impact of specific legal instruments but simply identify the market power in fixing the legal tools used in business transactions.¹²² As observed by La Porta *et al*, “the nature of investor protection, and more generally of regulation of financial markets, is deeply rooted in the legal structure of each country and in the origin of its laws.”¹²³ Empirical evidence also demonstrates the links between the strength of legal regimes and the quality of corporate governance.¹²⁴

In particular, the level of protection required for investors largely depends on local ownership structures. The dispersed or concentrated nature of shareholding may have different impact on corporate governance, in particular, the role of the board of directors and to whom it is accountable.¹²⁵ For example, in the United Kingdom, due to the prevalence of dispersed shareholding,¹²⁶ the most pressing agency problem

¹¹⁹ *Ibid* at 582.

¹²⁰ *Ibid* at 584.

¹²¹ Claude Ménard & Bertrand du Marais, “Can We Rank Legal Systems According to Their Economic Efficiency?” (2008) 26 Wash UJL & Pol’y 55.

¹²² *Ibid*.

¹²³ Rafael La Porta *et al*, “Investor Protection and Corporate Governance” (2000) 58 The Journal of Financial Economics 3 at 24.

¹²⁴ See *eg*, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, “Corporate Ownership Around the World” (1999) 54 The Journal of Finance 471; La Porta *et al*, “Investor Protection and Corporate Governance”, *ibid*; Rafael La Porta *et al*, “Law and Finance” (1998) 106 The Journal of Political Economy 1113; Rafael La Porta *et al*, “Legal Determinants of External Finance” (1997) 52 The Journal of Finance 1131.

¹²⁵ See Davies & Hopt, *supra* note 98 at 305.

¹²⁶ *Ibid* at 310.

is between the managers and shareholders. Thus, more protection is required for shareholders as a class, and not just solely for the minority shareholders. In contrast, in Singapore, the agency relationship is more problematic between the majority and minority shareholders because concentrated shareholding is common among listed companies.¹²⁷ Arguably, the degree of minority shareholder protection required in Singapore should be higher than that required in the United Kingdom. However, the *Protecting Minority Investors* indicator fails to appreciate such differences and applies the same test in assessing investor protection across different jurisdictions.

Alternatively, since the aim of the *Doing Business* project is to provide an objective basis for encouraging countries to compete towards more efficient regulation,¹²⁸ the variables selected should seek to achieve objectiveness and comprehensiveness. To achieve this, the *Protecting Minority Investors* indicator must include more measurable variables.¹²⁹

First, under the *Extent of Disclosure* index, the disclosure regime should be examined more comprehensively. For example, the index should not merely look at whether disclosure of related party transactions is mandatory, but also the scope of information disclosed by a publicly traded company in its annual report (eg, all material off-balance sheet transactions, arrangements, obligations and other relationships), and the timing and manner in which the reports must be presented (eg, whether the report is presented in a simple and understandable way¹³⁰). In addition, given the importance of the role of the auditor and audit committee in ensuring the accuracy of the financial information disclosed, the qualification of the auditor, as well as the audit committee's composition and authority, should also be examined under the *Extent of Disclosure* index.

Secondly, under the *Extent of Director Liability* index, it is not enough to simply look at the availability of a direct or derivative suit in a jurisdiction. To assess the extent of director liability in a jurisdiction, the index should also examine the number of shareholder derivative actions brought and the liability standards employed (eg, a strict liability or weaker liability standard). In addition, issues such as the level of public enforcement against defaulting directors (eg, whether legal and regulatory actions are brought by market regulators, public prosecutors or stock exchanges) should also be included in the survey.

Further, it should be appreciated that “[w]hile the imposition of stringent fiduciary duties on directors operates as an effective check against self-dealing, its coverage is ultimately limited to directors acting in that capacity and does not encompass controlling shareholders.”¹³¹ For example, under Singapore law, controlling shareholders do not owe any fiduciary duties to the company or minority shareholders, with

¹²⁷ See Tan Lay Hong, *supra* note 6 at 17, 24. Share ownership in the top one hundred listed companies in Singapore is highly concentrated. 0.19% of shareholders own 90.68% of the shares in these one hundred companies and the average median size of the largest shareholder's shareholding is 32.77%.

¹²⁸ *Doing Business* Report 2013, *supra* note 5 at 16.

¹²⁹ World Bank Group, *Protecting Minority Investors Methodology*, *supra* note 47.

¹³⁰ For example, in the United States, §409 of the Securities Exchange Act of 1934 requires companies to disclose material changes to a corporation's financial condition on a rapid and current basis and in plain English. See financial disclosures of the United States in Choper, Coffee & Gilson, *supra* note 96 at 332, 333.

¹³¹ See Lan & Varottil, *supra* note 73 at 584.

very limited exceptions.¹³² This is exacerbated by the prevalence of concentrated shareholding structures among companies in Singapore.¹³³ Therefore, the *Protecting Minority Investors* indicator should attempt to measure the extent of controlling shareholders' liability.

Thirdly, the *Ease of Shareholder Suits* index only evaluates the procedural rights available to the shareholder plaintiff during trial. It is suggested that the index should also cover pre-trial procedural rights (internal remedies), such as the extent to which the shareholder may circumvent the board of directors, the supervisory board, or the body of shareholders to initiate a suit, the circumstances under which a demand must be made to these company organs for them to take action; and the consequences of their decision not to do so. In addition, considering the significant impact of litigation costs (typically comprising lawyers' fees, filing fees and other litigation fees) on the utility of derivative suits, the *Doing Business* team should also include litigation costs as a component of the index. This is to determine whether a shareholder action is prohibitively expensive and therefore futile even if allowed by law.¹³⁴

The costs of litigation in Singapore can be prohibitive. The 'loser pays' principle limits risk-taking on the part of the shareholder plaintiffs, and the plaintiff's bar that is usually incentivised to bring class actions does not exist in Singapore as lawyers are prohibited from charging contingency fees. Hence, the necessary environment for individual or class actions on behalf of shareholders does not exist in the same manner as it does in the United States.¹³⁵ Recently, however, there have been some calls for the government to review the age-old doctrine prohibiting champerty and maintenance to allow greater access to justice for the poor.¹³⁶ If third-party funding of litigation is permitted in Singapore, it remains to be seen whether more shareholders from listed companies will be encouraged to use statutory derivative action to discipline the management and, in turn, the controlling shareholders.¹³⁷

There are other extraneous factors affecting shareholders in deciding whether or not to pursue law suits, which are not considered by the index. Some shareholders—especially in Asia—bring derivative actions for reasons which are non-economical and even irrational.¹³⁸ For example, in Japan and Korea, the dramatic increase in derivative litigation involving listed companies, which occurred over the last two decades, has been significantly driven by non-profit shareholder and social activist organisations.¹³⁹ The calculus of whether to pursue a derivative action is much

¹³² *Ibid* at 585.

¹³³ *Ibid* at 578.

¹³⁴ In the *Doing Business 2015* report, this part is improved: *Allocation of legal expenses*—the extent to which the expenses associated with lawsuits brought by shareholders can be recovered from the company or the payment of the expenses can be made contingent on a successful outcome. See *Doing Business 2015*, *supra* note 3 at 31, 32.

¹³⁵ See Alexander Loke, "Mounting Hurdles in Securities Litigation - Addressing the Funding and Collective Action Issues" (2010) 22 *Sing Ac LJ* 660; Paul Michael Jindra, "Securities Fraud in Singapore: China and the Challenge of Deterrence" (2012) 51 *Colum J Transnat'l L* 120.

¹³⁶ See Andy Ho, "Let David take Goliath in court: Champerty" *The Straits Times* (2 August 2013). See also G K Y Chan, "Re-examining public policy: a case for conditional fees in Singapore?" (2004) 33 *C L World Rev* 130; and Adrian Yeo, "Access to Justice: A Case for Contingency Fees in Singapore" (2004) 16 *Sing Ac LJ* 76.

¹³⁷ See Lan & Varottil, *supra* note 73 at 588.

¹³⁸ See Dan W Puchniak, "The Derivative Action in Asia: A Complex Reality" (2012) 9 *Berkeley Business Law Journal* 1.

¹³⁹ *Ibid* at 18.

more political than economic for such organisations.¹⁴⁰ There is also recent evidence that similar government-funded organisations are developing in Taiwan and India.¹⁴¹ This suggests that in future an even greater portion of derivative litigation in Asia's leading economies will be driven by non-economic motives, further diminishing the predictive and explanatory value of the economically motivated and rational shareholder theory.¹⁴² In China's case, instead of non-economic forces driving otherwise economically irrational derivative actions, it appears that non-economic forces are preventing otherwise economically rational derivative actions from being pursued.¹⁴³ It appears that the government has used its informal control over the judicial system to stifle derivative litigation against large Chinese companies in an effort to block off this avenue for "public voice".¹⁴⁴ An example of irrationally motivated derivative action would be shareholder plaintiffs in Japan pursuing derivative actions based on an inaccurate understanding of their chances of success and prospects for economic gain.¹⁴⁵ The examples here illustrate how protection of minority investors is a context-specific issue which cannot be measured by simplistic indicators.

C. Beyond Rules

The fundamental premise of *Doing Business* is that rules matter. Economic activity, particularly private sector development, benefits from clear and coherent rules.¹⁴⁶ Where such rules are reasonably efficient in design, transparent and accessible to those for whom they are intended and can be implemented at a reasonable cost, they are much more effective in promoting growth and development.¹⁴⁷ The quality of the rules also has a crucial bearing on how societies distribute the benefits and bear the costs of development strategies and policies.¹⁴⁸

However, not only does the text of the rule matter, but whether the rule is adequately enforced in its context also matters. Where good rules are in place, it remains to be seen how effectively these rules would be implemented and how they would ultimately improve the business environment of a jurisdiction. In fact, the *Doing Business* project does address the enforcement of law in its chosen topics (eg, the *Enforcement of Contract* indicator, the *Protecting Minority Investors* indicator and the *Getting Credit* indicator). For instance, the *Enforcement of Contract* indicator measures the efficiency of the judicial system in resolving a commercial dispute. From the data collection process, it further appears that local experts' knowledge of and experience with how certain formal norms are applied and implemented are considered in drafting the reports.¹⁴⁹ The role of enforcement in regulatory intervention is also discussed.¹⁵⁰ However, it seems that substantial emphasis is placed on

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid* at 19.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid* at 20.

¹⁴⁶ *Doing Business* Report 2013, *supra* note 5 at 16.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ See Davis & Kruse, "Taking The Measure of Law", *supra* note 35 at 1100.

¹⁵⁰ *Doing Business* Report 2004, *supra* note 5 at xii. Regulatory intervention is particularly damaging in countries where enforcement is subject to abuse and corruption.

enforcement by courts, and less consideration is given to public enforcement by regulators.

In addition, rules protecting minority investors are derived from different sources, including company, security, bankruptcy, takeover and competition laws, as well as stock exchange regulations and accounting standards.¹⁵¹ In Singapore, while ACRA is responsible for the enforcement of the *Companies Act*, MAS and SGX are responsible for enforcing the securities laws found in the *Securities and Futures Act*¹⁵².¹⁵³ The existence of various rules and their corresponding supervisory agencies contributes towards a “robust public enforcement machinery”,¹⁵⁴ which is not addressed by the index presently.

A responsive and trusted regulatory environment is essential to achieving corporate compliance. Typically, when investors set up firms or engage in new investments, they have to obtain certain rights which are protected through the enforcement of laws and regulations. In Singapore, there are various efforts exemplifying the country’s commitment to improve corporate compliance through public enforcement. Unfortunately, these are not captured in the *Doing Business* reports. For example, the Investigation Department of ACRA oversees compliance and governance matters of registered business entities, such as preventing disqualified directors in non-listed companies from continuing to act as directors and preventing individuals blacklisted by the stock exchange from holding directorships in listed companies.¹⁵⁵ The division investigates into alleged breaches of the various business laws or complaints received from the public regarding corporate matters, such as breach of directors’ duties, breach of accounting standards *etc.*¹⁵⁶ The division also collaborates with other government agencies in disqualifying directors convicted of offences under the *Employment Act*¹⁵⁷ or in disqualifying individuals who register entities when they are not the true owners.¹⁵⁸ ACRA has also set up the Compliance Division to oversee the disclosure of corporate and financial information of businesses.¹⁵⁹ It issues summons and warrants to errant directors or business owners who fail to comply with business laws, such as the *Companies Act* and *Business Registration Act*¹⁶⁰. It also promotes voluntary corporate compliance through public education initiatives and programmes, such as conducting the Directors Proficiency Programme and publishing a handbook for directors.¹⁶¹ However, the extent of regulatory supervision of and compliance by companies are not addressed in the *Doing Business* reports.

¹⁵¹ La Porta *et al*, “Investor Protection and Corporate Governance”, *supra* note 123 at 7.

¹⁵² Cap 289, 2006 Rev Ed Sing.

¹⁵³ See Lan & Varottil, *supra* note 73 at 585.

¹⁵⁴ *Ibid.*

¹⁵⁵ ACRA, *Departments and Divisions*, online: ACRA <https://www.acra.gov.sg/About_Acra/Departments_and_Divisions/>.

¹⁵⁶ Interview with a government official of ACRA (anonymity required).

¹⁵⁷ Cap 91, 2009 Rev Ed Sing.

¹⁵⁸ *Ibid.*

¹⁵⁹ ACRA, *Departments and Divisions*, *supra* note 155.

¹⁶⁰ Cap 32, 2004 Rev Ed Sing.

¹⁶¹ ISCA, Media Release, “Company Directors Go Back to School for Lessons on Directors Duties and Responsibilities” (25 September 2012), online: ISCA <<http://isca.org.sg/the-institute/newsroom/media-releases/2012/september/company-directors-go-back-to-school-for-lessons/>>.

In view of the above, the *Doing Business* project should cover more implementation and enforcement issues such as the following: (1) how government agencies (eg, the companies registry, the credit bureau, the supervisory authority of capital markets and the white-collar crime enforcement agency) and stock exchanges handle corporate complaints, including misgovernance and breaches of business legislations and regulations; and (2) how government agencies work with each other to ensure appropriate enforcement against corporate misconduct (eg, how government agencies deal with cross-agency complaints or misdirected feedback from the public effectively). In Singapore, there is a “No Wrong Door” policy, requiring all public agencies to deal with misdirected feedback or cross-agency issues from the public effectively, so that the public would not be directed from one agency to another to have their queries attended to.¹⁶²

In addition, the *Doing Business* team may consider referring to the World Justice Project¹⁶³ on how to evaluate regulatory enforcement across jurisdictions.¹⁶⁴ It should also consider the following aspects: (1) whether business regulations are effectively enforced; (2) whether business regulations are applied and enforced without improper influence; (3) whether administrative proceedings are conducted without unreasonable delay; and (4) whether due process is upheld in administrative proceedings.

IV. CONCLUSION

The *Doing Business* project has inspired and guided various business regulatory reforms in Singapore. The fact that Singapore consistently ranks the highest on the *Doing Business* index indicates that the Singapore Government has managed to formulate conducive rules and regulations that facilitate the starting and doing of businesses. Nevertheless, while the *Doing Business* report is a useful benchmark for improvement, it measures only one aspect of a good business environment. The success of Singapore in the *Doing Business* index may also be attributed to various others factors, such as a well-established business infrastructure, a well-regulated financial market, a sophisticated legal system, efficient governance, and a diversified and talented business community. Thus, there are several limitations in the scope and research methodology employed by the *Doing Business* team.

First, many important factors in achieving a trusted and conducive business environment are not addressed in the report. For example, several basic governance mechanisms that protect the interests of investors, such as appointment rights and decision rights, are not systematically measured.

Admittedly, it is difficult for a single set of indicators to capture the full range of factors that would affect the quality of a business environment. Concepts such as investor protection and corporate governance are too vast and complicated to be evaluated based on a hypothetical business scenario or by pure quantitative methods.

¹⁶² Singapore Public Services, *No Wrong Door*, online: Public Service Division <http://www.challenge.gov.sg/archives/2004_09/cover_story/cover_story.html>.

¹⁶³ The World Justice Project is an independent, non-profit organisation which develops communities of opportunity and equity by advancing the rule of law worldwide.

¹⁶⁴ See World Justice Project, online: WJP <<http://worldjusticeproject.org/factors/effective-regulatory-enforcement>>.

Thus, the *Protecting Minority Investors* indicator, which is based on a superficial set of indices, can be misleading for users. We thus suggest that the *Doing Business* team remove the *Protecting Minority Investors* indicator or to improve it further so as to make the evaluation of business regulatory environment more accurate.

Furthermore, while the *Doing Business* index measures the economic efficiency of legal rules reasonably well, it should be appreciated that what is efficient in one business environment may not be so in another, and thus by extension, the type of regulatory reform that is suitable can vary substantially across jurisdictions. Designing business regulations is a highly context-specific exercise, and regard should be had to, among other things, the legal system, political economy and regulatory framework of a jurisdiction. For example, the degree of protection necessary for minority investors depends in part on the shareholding structures prevalent in a jurisdiction. It should also be appreciated that efficiency, important as it is, should not be the sole benchmark. The quality of rules matters too, especially in 'soft' areas such as corporate ethics and compliance.

Lastly, while the *Doing Business* report provides a cost-effective means for users to know how an economy ranks relative to others, it should not be blindly adopted. Policy-makers and the business community should exercise caution in attempting to draw conclusions from a jurisdiction's ranking on the *Doing Business* index. Policy-makers should also consider the peculiar and evolving needs of the business community so as to ensure the effectiveness of their policies and regulations.