The Doing Business Indicators In Minority Investor Protection: The Case Of Singapore

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[June 2014]

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THE DOING BUSINESS INDICATORS IN MINORITY INVESTOR PROTECTION: THE CASE OF SINGAPORE

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ABSTRACT

The World Bank’s Ease of Doing Business index has significantly impacted regulations and policies regarding corporate matters around the world, and yet there has been scant academic attempt examining the use and implication of the Doing Business indicators, especially in the area of investor protection, 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 the index to Protecting Minority Investors index in Doing Business 2015. Using Singapore as a case study, we argue that, notwithstanding the positive changes brought in the latest round of changes, the variables and components chosen in the index essentially fail to capture salient features of minority protection. We argue that minority protection is an area which 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 for improvements of the Protecting Minority Investors index.

Keywords: Minority Shareholder Protection, Singapore, Index, Doing Business

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I. INTRODUCTION

The World Bank’s Doing Business project, launched in 2002, is an important project that measures the regulations applying to domestic companies throughout their life cycle.¹ By comparing the business regulations and the strengths of their enforcement across 189 economies in the annual Doing Business report, the project provides support to different government entities in designing and implementing reforms that create a sound and efficient regulatory environment for businesses.² More recently, in Doing Business 2015, a number of Doing Business indicators were changed to enhance the focus of indicator sets that used to primarily measure the efficiency of a transaction or service to also cover aspects of the quality of that service, and to measure not only some aspects of the quality of regulation, but also recent good practices in the areas covered.³ In particular, the name of the “protecting investors” indicator set has also been changed in 2015 to “protecting minority investors” to better reflect its scope, which has been expanded.

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 indicators, 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 index from a legal perspective and to discuss whether it captures the major areas of minority shareholder protection and accurately reflects the law and practice. In particular, this article will look at Singapore as a

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³ Doing Business 2015, at 24, including revision of the calculation of the ease of doing business ranking, expansion of the sample of cities covered in large economies and a broadening of the scope of indicator sets.
case study in examining the newly revised *Protecting Minority Investors* index. Singapore is an excellent case study for this purpose as it has, for a very long time, enjoyed the distinction of being the world’s easiest place for starting and doing business. As of June 2015, Singapore has retained its top position for the eighth year running on the World Bank’s *Ease of Doing Business* index. Also, the fact that the vast majority of listed companies in Singapore have a highly concentrated block shareholding structure further highlights the importance of minority protection in the context of Singapore.

The remainder of this article will proceed as follows. Part II examines how Singapore uses the *Doing Business* indicators in guiding its business law reform and in maintaining and improving its top ranking on the *Ease of Doing Business* index. Part III critically evaluates the research methodologies employed by *Doing Business* and points out the limitations of the *Protecting Minority Investors* index. It also provides specific suggestions for improvements of the index. Part IV draws a conclusion and provides roadmaps for future reform.

II. HOW DOES SINGAPORE USE THE DOING BUSINESS INDICATORS

As observed by Davis *et al*, the use of indicators as a tool of global governance can be expected to affect decision-making by governing entities. In fact, *Doing Business* has inspired more than 270 business regulatory reforms since 2003. Policy-makers who are responsible for formulating rules and regulations of businesses have been particularly interested in *Doing Business*, as it helps them in identifying the best-performing jurisdiction or competitive jurisdictions on an individual indicator.

Singapore has been consistently ranked amongst the top for its efficient government and legal system, its high quality of the judiciary and the consistency of its application of law on

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7 Davis *et al*, *Governance by Indicators*, supra note 4, at 15-16.
various international indicators. Business policies and decision-making in Singapore are in some way influenced by various kinds of indicators. In particular, Doing Business has largely motivated policy-makers to modernize its business legislation and policies. Since 2002, the Singapore government has participated in the global survey of doing business conducted by the World Bank. A number of government agencies are involved in this project, including, inter alia, 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. In particular, ACRA is a key government agency involved in the Doing Business project and has contributed significantly to Singapore’s rankings for the indicator of Starting a Business. ACRA has the mission of making Singapore the best place to do business, being the central agency to regularly review and refine business legislation to ensure that they are on par with global best practices, and makes recommendations to the government on matters relating to the registration and regulation of business entities.

A. Approaches Taken by Singapore

While the details of the process may vary periodically, in general, the procedure for government agencies to apply the Doing Business indicators in Singapore is as follows. First, the Ministry of Trade and Industry would lead a coordinated reform effort by bringing together other government agencies (typically statutory boards) to study the Doing Business report and discuss how to improve the ease of doing business domestically. Specifically, the Doing Business indicators are used as a benchmarking tool in evaluating the
country’s performance on different aspects of the business regulatory environment and in stimulating policy debate and dialogue for future reforms.  

The implementation role is normally assigned to different 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 monitoring and implementing the Starting a Business indicator. Similarly, the Inland Revenue Authority of Singapore, which is a government agency administering the payment of taxes, is responsible for the indicator of Paying Taxes. The Insolvency and Public Trustee’s Office, which administers the affairs of individual and corporate insolvencies, is in charge of the indicator of Resolving Insolvency. As to the indicator of Trading Across Borders, the Singapore Customs plays a major role in its implementation. In the meantime, a close cooperation among government agencies is always required to enable overall improvement of the country’s ranking on a specific indicator, as well as its performance in the Ease of Doing Business index. For instance, both the Land Transport Authority and the Inland Revenue Authority of Singapore have worked jointly on the indicator of Paying Taxes. 

The ministries and statutory boards involved in the Doing Business project would then conduct thorough analyses on their respective indicators, as well as comparative studies on the performance of various jurisdictions on specific indicators. Specifically, the government agencies involved would study Singapore’s ranking on each indicator and identify potential areas that may require better implementation or regulatory reforms. Thereafter, the government agencies would submit proposals internally for further action. As observed by an official involved in the Doing Business project, comparative studies of various sorts of regulations on business activities help them identify the underlying institutional and regulatory problems within their agencies, and it is a useful routine exercise for their organization.

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18 Id.
19 Interview with a government official who has actively participated in the World Bank’s survey on Doing Business in Singapore (anatomy required).
20 Id.
21 Id.
22 Id.
B. Other Initiatives within the Government

Apart from the ministries and statutory boards that are involved in the study and implementation of the Doing Business indicators, there are other internal committees within the Singapore government that also make efforts to evaluate and improve business conditions in Singapore. The Smart Regulation Committee is a typical example. This committee was set up by the Singapore government in 2005 as part of the government’s effort in changing the mindset of agencies - from a regulator and controller to a facilitator. 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.” In recent years, hundreds of Smart Regulation initiatives have been completed by different government agencies and many of these have helped promote a more business-friendly environment of Singapore.

In addition, many statutory boards also set up various internal committees to fulfill their missions. For instance, the Business Facilitation Advisory Committee was set up by ACRA to advise the organization on matters relating to starting and doing business in Singapore, with the aim of improving existing procedures and processes. 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.

Over the years, in order to improve its business regulatory environment, Singapore has put

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24 Id. This committee evolved from the Rules Review Committee, which aimed to produce 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.
26 Id, at 9.
28 Interview with a government official who has actively participated in the World Bank’s survey on Doing Business in Singapore (anatomy required).
in substantial resources to improve its performance in Doing Business. Significantly, the indicators attract serious attention of government officials and business leaders, leading to a substantial number of policy dialogues and regulatory reforms. In various business law reforms, the Doing Business indicators are used as “guideposts” (together with other sources) in decision-making. Singapore’s experience in using Doing Business in business law reform would provide useful guidance for other jurisdictions in future law reforms. In fact, before the Doing Business project was launched, Singapore had already been very proactive in reducing cost and complexity of business regulation. Singapore’s most notable regulatory improvements include the online-registration system, BizFile (an innovative online filing and information retrieval system)\(^{29}\); the Online Business Licensing Service, EnterpriseOne” (a comprehensive business network managed by SPRING Singapore)\(^{30}\); and the electronic data interchange system of export and import, the TradeNet system (an electronic data interchange system that Singapore made in facilitating export and import).\(^{31}\)

III. A CRITICAL EVALUATION OF THE PROTECTING MINORITY INVESTORS INDICATORS

A. Recent Scholarly Debates Over the Doing Business Indicators

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 processes by decision-makers.\(^{32}\) Using the already available and simplified indicators would reduce the burden of processing information in the course of decision-making.\(^{33}\) This is especially so since there is a “seemingly instinctive human predisposition that favors

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\(^{29}\) It was initiated by the then Registry of Companies (“ROC”) of Singapore in 2001. The then ROC was the first regulatory agencies 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 up a business. See Guide to Bizfile, http://www.acra.gov.sg/Quick+Links/Guide_to_Bizfile/About+BizFile.htm.


\(^{31}\) This is a venture in electronic trading implemented in January 1989. It allows for a one-stop portal for traders to/from Singapore, and enables exchange of trade message and information electronically. Under the TradeNet System, the trading community is given the means of submitting permit applications electronically to the government bodies for processing. If the permit application is approved, a permit message will be returned electronically to the sender. This system substantially reduces the cost and time for trade and expedites the clearance of the cargo. See Singapore Customs, An Overview of TradeNet, http://www.customs.gov.sg/leftNav/trad/TradeNet/An+Overview+of+TradeNet.htm.

\(^{32}\) Davis et al, Governance by Indicators, supra note 4, at 16-17.

\(^{33}\) Id, at 17.
summary measures over more complex data processing, as they reduce cognitive transaction costs by providing a ready-made means of comparison". The unequivocal ordinal data makes indicators reliable inputs. Consistency is also likely to increase the legal or moral authority of decision-making in some contexts.

The *Ease of Doing Business* index possesses all or most of these elements. It has received numerous accolades internationally. One particular virtue is that it provides a cost-effective means for users to obtain information about an economy’s business environment and business features. Specifically, it explains the features of various legal systems in private business transactions and explores how they work in practice with simplified, measurable and comparable indicators. The large variety of studies covered in the index provides useful information for policy-makers on future regulatory reforms.

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

The third objection is that the choice and the number of indicators are limited and a

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35 Id.
39 Id.
40 See Davis *et al*, *Indicators As A Technology of Global Governance*, supra note 37, at 28.
particular legal system should not be assessed with pure mathematical methods and a “one size fits all” approach. As admitted by the World Bank group, the Doing Business project does not measure all aspects of the business environment that matter to firms and investors. It acknowledges three key limitations to the indicators: (1) limited in scope, (2) limited to the standardized case scenarios, and (3) limited to the formal sector. In particular, they do not measure areas such as security, macroeconomic stability, market size, the level of skills and the strength of financial systems. This is probably inevitable due to how the indicator was constructed.

The fourth objection is that the Doing Business project is largely centred on the economic efficiency of legal rules and hence neglects other key components of business regulations. Economic efficiency of rules mainly measures the procedure, time and costs of doing a business, which then establishes the ranking of these countries according to certain variables, particularly their capacity to attract foreign investments. The design of the Doing Business index primarily draws on economic analyses and insights gleaned from economic literature. While a focus on economic efficiency and the use of measurable economic methodologies serve as a useful, objective and inexpensive tool for comparing laws in different jurisdictions, it is submitted that economic efficiency of doing business is only one dimension of the overall business environment of a business 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 been ranked highly over the years in the Doing Business indicators, reflecting an excellent regulatory environment in the starting and operation of a local firm, it has had several corporate scandals involving listed companies and even charitable organisations in recent years. Lessons from these scandals indicate failures in corporate

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44 Id. at 17-18.
45 See e.g., supra note 42, at 820.
47 For example, in 2004, a publicly traded company in the Singapore Exchange, China Aviation Oil (CAO), collapsed because of a US$550 million loss in speculative oil trading. In the following years, there are five other 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 governance scandal is the 2005 National Kidney Foundation Singapore (“NKF”) scandal that involved misuse of funding and fabrication of
governance and investor protection within these organizations. Arguably, the lack of proper internal control and risk management is one of the roots of these problems. It may well be that other jurisdictions have worse scandals, but the Singapore scandals do highlight the methodological limitations of Doing Business.

Based on the case study of Singapore, we argue that there are a few more methodological concerns regarding Doing Business, besides the limitations listed above. In particular, we have shown/will show that a number of the variables used are vulnerable and we have chosen to focus on the limitations in the indicator of Protecting Minority Investors. On the one hand, it is beyond the scope of this article to examine every indicator in Doing Business. On the other hand, unlike other indicators which mainly measure the time and costs of starting and operating a business, the Protecting Minority Investors index does not make specific measurement of the time and costs of the procedures involved in a business transaction. It is, however, based on a hypothetical business assumption, which we argue fails to capture essential information of investor protection that it purports to capture. We elaborate on these areas in the following sections.

### B. Protecting Minority Investors Indicators: The Case of Singapore

#### 1. The New Changes under Doing Business 2015

The Protecting Minority Investors indicators measure the strength of minority shareholder protection against directors’ misuse of corporate assets for personal gain. Before 2015, the indicators comprised 3 dimensions: (1) transparency of related-party transactions (extent of disclosure index), (2) liability for self-dealing (extent of director liability index), and (3) shareholders’ ability to sue officers and directors for misconduct (ease of shareholder suits index). In Doing Business 2015, the scope of the indicator sets is significantly expanded. In particular, four key changes were made in Doing Business 2015: the introduction of the extent of shareholder rights index, the introduction of the strength of governance structure index, the introduction of the extent of corporate transparency index, and the addition of invoices, indicating low levels of transparency and poor internal governance in 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.

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the legal expenses component to the ease of shareholder suits index.\textsuperscript{49} We will, in turn, discuss briefly these changes.

First, \textit{Doing Business 2015} expands the indicator in measuring the strength of minority shareholder protection by adding shareholder rights in corporate governance into its calculus. Specifically, the newly added “extent of shareholder rights” index considers the extent to which shareholders may 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 how much power is shared by the board to the shareholders (and hence, minority shareholders) in the decision-making process which affects the company.

Secondly, \textit{Doing Business 2015} also considers the governance safeguards protecting shareholders from undue board control and entrenchment in measuring the strength of minority shareholder protection. This so-called strength of governance structure index looks at the extent to which the law mandates separation between the different corporate organs, which is assumed to have the effect of minimizing the potential agency costs. The issues covered include whether the CEO can be the chairman of the board, the requirement relating to independent directors and whether there are rules relating to cross-shareholding.

Thirdly, the revised index considers corporate transparency on ownership stakes, compensation, audits and financial prospects in measuring the strength of minority shareholder protection. The logic behind the addition of the strength of governance structure index is that transparency improves governance and lowers the cost of investment in capital markets. The improvement in governance as a result of greater transparency is therefore assumed to strengthen minority shareholder protection. Perhaps, the addition could also be explained on the basis that transparency leads to better informed minority shareholders and therefore strengthens the minority shareholder protection.

\textsuperscript{49} Doing Business 2015 on “What is Changing”, at 31.
Fourthly, *Doing Business 2015* adds a new component to the ease of shareholder suits index, viz. whether shareholder plaintiffs can recover their legal expenses from the company. This new component considers 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. By looking at the distribution of the legal expenses, *Doing Business 2015* aims to measure the real (rather than the theoretical) ease of shareholder suits in a particular jurisdiction.

The ranking on the strength of *Protecting Minority Investors* is based on the distance to frontier score. The distance to frontier score measures a country’s performance on each indicator against the best practice.\(^{50}\)

In order to make the data comparable across jurisdictions, the World Bank researchers made several assumptions about the business transaction.\(^{51}\) The Buyer is a publicly traded corporation listed on the Singapore Exchange. It is a manufacturing company and has its own distribution network. The Buyer has a board of directors and a chief executive officer (“CEO”) who may legally act on behalf of the Buyer where permitted. Mr. James owns 60% of the Buyer’s shares and has elected 2 directors to the Buyer’s 5-member board. Mr. James 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 to expand the Buyer’s distribution of its food products, a proposal to which the Buyer agrees. The price is equal to 10% of the Buyer’s assets and is higher than the market value. The proposed transaction is part of the company’s ordinary course of business and is not outside the authority of the company. The Buyer enters into the transaction after obtaining all the necessary approvals and making all required disclosure (*i.e.* the transaction is not fraudulent).

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\(^{50}\) Beginning with *Doing Business 2015*, the ranking is based on the distance to frontier score rather than on the percentile. See World Bank, *Doing Business 2015*, What is Changing, pg 24-25.

\(^{51}\) *Id.*
2. **Testing the Accuracy**

According to the *Doing Business* reports, Singapore has maintained a high level of protection of investors over time from 2006 to 2015.\(^52\) In *Doing Business 2015*, Singapore gains a full score of 10.0 on the *Extent of Disclosure* index,\(^53\) almost double of the average score of 5.5 in the East Asia & Pacific region and the score of 6.6 for the OECD countries.\(^54\) The calculation is made as follows: the shareholders must approve the transaction and Mr. James is not allowed to vote (a score of 3). Mr. James is required to make full disclosure of all material facts pertaining to the transaction (a score of 2). The Buyer is required to disclose immediately all material information affecting the stock price to the board of directors, including the conflict of interest (a score of 2). In its annual report, the Buyer must also disclose the terms of the transaction and Mr. James’ ownership in the Buyer and the Seller (a score of 2). Singapore Company Laws also require an external body to review the transaction (a score of 1).

As to the *Extent of Director Liability* index,\(^55\) Singapore scores 9.0, higher than the average score of 4.6 in the East Asia & Pacific region and the score of 5.4 for the OECD countries in Year 2015.\(^56\) The calculation is made as follows: assuming that all required approvals are obtained, all required disclosures are made, and the transaction causes damage to the Buyer, minority shareholders can sue directly or derivatively for the damage caused by the transaction to the company (a score of 1). Shareholders can hold the interested director, Mr. James, liable if the transaction is unfair or prejudicial to minority shareholders (a score of 2).\(^57\) Shareholders can also hold members of the approving body liable for the damage that the Buyer-Seller transaction caused to the company if the transaction is unfair or prejudicial.

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\(^{52}\) It stands at No. 2 on the *Protecting Investors* index repeatedly in 2012 and 2013.


\(^{54}\) Id.

\(^{55}\) There are seven components in this index. They are: (1) whether a shareholder plaintiff is able to hold Mr. James liable for the damage the Buyer-Seller transaction causes to the company; (2) whether a shareholder plaintiff is able to hold the approving body (the CEO or the members of the board of directors) liable for the damage the transaction causes to the company; (3) whether a court can void the transaction upon a successful claim by a shareholder plaintiff; (4) whether Mr. James pays damages for the harm caused to the company upon 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 both fines and imprisonment can be applied against Mr. James; (7) whether shareholder plaintiffs are able to sue directly or derivatively for the damage the transaction causes to the company.

\(^{56}\) Id.

\(^{57}\) Pursuant to the changes made under the Companies (Amendment) Act, such derivative action can be made by the shareholder even though it is not unfair or prejudicial.
to minority shareholders (a score of 2). Mr. James has to pay damages for the harm caused to the company (a score of 1) and to repay profits made from the transaction upon a successful claim by the shareholder plaintiff (a 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). Fines and imprisonment can be applied against Mr. James (a score of 1). Adding all these scores in the seven components gives Singapore a score of 9 on the index.

The *Ease of Shareholder Suits* index measures the ability of shareholders to sue directly or derivatively.\(^5\) Singapore scored 9.0 in this index, higher than the average score of 6.4 in the East Asia & Pacific region and the score of 7.2 for the OECD countries.\(^5\) Under the assumptions made, shareholders owning 10% of the Buyer’s shares can inspect transaction documents before filing suit (a score of 1). The plaintiff can obtain relevant documents\(^6\) from the defendant and witnesses during trial (a score of 3). The plaintiff can request categories of documents from the defendant without identifying specific ones (a score of 1). The plaintiff can directly question the defendant and witnesses during trial without prior approval (a score of 2). The level of proof required for civil suits is lower than that for criminal cases (a score of 1). Lastly, shareholder plaintiffs can recover their legal expenses from the company if they are successful (a score of 1). 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.\(^6\) However, the current Singapore Companies Act limits the availability of the statutory derivative action to unlisted companies only, though this will

\(^5\) [*Supra* note 48. It assesses six components regarding the use 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.]

\(^6\) [*Supra* note 53.]

\(^6\) These documents include: (1) information that the defendant has indicated that he intends to rely on for his defense; (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.

change as of July 2015. The statutory derivative action under section 216A(2) of the Companies Act does not apply to a company that is listed on the stock exchange in Singapore, which is not the position in many other jurisdictions. Also, Singapore judges take a rather conservative approach in their interpretation of the statutory derivative action. Thus, there is no statutory derivative action against directors in listed companies in practice at present. However, the Protecting Minority Investors index is based on the assumption that the Buyer is a publicly traded company and it concludes that shareholders can sue derivatively for the damage that the Buyer-Seller transaction causes to the company. This statement does not accurately reflect the current law and practices of Singapore regarding statutory derivative action and it would mislead users who attempt to draw an inference regarding shareholder litigation from the rankings of Ease of Shareholder Suits. Admittedly, Doing Business 2015 is technically correct in concluding that shareholders can make such derivative action as Singapore still retains the archaic common law derivative action (which is applicable with respect to listed company). The existence of the common law derivative action may be the basis in which Doing Business 2015 puts forth the answer with respect to the question of whether “shareholders can sue directly or derivatively for the damage caused by the Buyer-Seller transaction to the company”. The existence of common law derivative action, however, does not truly rectify the inapplicability of the statutory derivative action with respect to listed companies. The former is entrenched with onerous requirements and is indeed very rarely used in practice. For a plaintiff to successfully bring a common law derivative action, he must prove that the wrongdoer used their controlling power to prevent an action from being brought against them by the company and that the derivative action is not opposed by a “fully informed majority of

63 Companies (Amendment) Act s 146: 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 future.
64 In jurisdictions such as the United States, the United Kingdom, Italy, Japan and China, derivative action is applicable to publicly traded companies.
65 Supra note 61, at 347.
66 It should also be noted that only one reported case on section 216 of the Companies Act has involved a publicly traded company and in that instance the court held that there was no exercise of dominant power sufficient to trigger the section. See Tong Keng Meng v Inno-Pacific Holdings Ltd and another [2001] 3 SLR(R) 311; [2001] SGHC 294.
68 See for example, Ting Sing Ning (alias Malcolm Ding) v Ting Chek Swee (alias Ting Chik Sui) and Others, [2008] 1 SLR 197; [2007] SGCA 49
While one of the indicators under the *Extent of Director Liability* index assesses whether the shareholders can sue directly or derivatively, it would be ideal to consider the effectiveness of the remedies available from taking legal action. Where available, an oppression action could result in a variety of remedies being granted to plaintiff shareholders, as 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. However, in practice, courts exercise their jurisdiction in an oppression action to structure a remedy that puts to rest the matters giving rise to the differences between the controlling shareholders and the minority shareholders. In that sense, 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 essence 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.69 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 the court upon demonstration of oppressive conduct by the controlling shareholders.70 Since the principal outcome of an oppression action is to grant the minority shareholders an exit opportunity, the relevance of this remedy is largely confined to private companies or unlisted public companies. The utility of this remedy breaks down in the context of a public listed company as the minority shareholders do have an exit opportunity through the market that exists for the company’s shares.71 Nonetheless, in granting such a relief, the court can also grant other reliefs, for example, that the wrongdoer compensates the company for the damage it has suffered, which was what happened in Low Peng Boon v Janie Low.72 In addition, the date against which the shares are to be valued can be tweaked to take into account the damage suffered by the company as a result of the wrongdoer’s action. Also, a bigger problem for the shareholder is that it is very hard for him to prove

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70 *Id.*
71 *Id.* 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 court.
oppression, which was shown in Tan Choon Yong v Goh Joh Kea and Others and Other Suits.\(^7^3\)

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

The 2015 expansion of the *Protecting Minority Investors* indictors is admittedly commendable. It addresses the above-mentioned first and fourth objections to the *Doing Business* indicators. An expansion of the indicators signifies increased depth in its indicators, and an increased emphasis on the corporate governance aspect of business regulations signifies an obvious shift away from an excessive focus on 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 that there are still several methodological limits in the scope of the *Protecting Minority Investors* index.

i. Limitation to Public Companies

First of all, *Doing Business* claims that this indicator measures the strength of minority shareholder protections against directors’ misuse of corporate assets for personal gain. However, only three recently introduced indices within this indicator set consider both the private and public corporation: extent of shareholder rights index, strength of governance structure index, and extent of corporate transparency index. The others (extent of disclosure index, extent of director liability index, and ease of shareholder suits index) are measured based on the business assumption that the buyer is a corporation listed on the economy’s most important stock exchange.\(^7^4\) This analysis fails to take account of two important business structures: private companies and alternative business vehicles.

Private companies constitute a significant part of a country’s economy. The creation and expansion of smaller enterprises and innovative start-ups are an essential drive for a sustainable economy. In Singapore, there were 28,511 new companies registered in the

\(^7^3\) [2009] 3 SLR 840.

\(^7^4\) If the number of publicly traded companies listed on that 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 *supra* note 48.
Financial Year 2010/2011. Nevertheless, as of January 2010, there were only 640 companies listed on the main board of the Singapore Stock Exchange. The number of listed companies in Singapore is much smaller than the number of private companies. Moreover, there are a few non-listed public companies in Singapore. These public companies are not listed on the stock exchange, such as the companies limited by guarantee and the companies limited by shares, which are incorporated as public companies without stock exchange listing. There are also exempted private companies (EPC), which is a type of private company which has at most 20 shareholders, or a company as gazetted as an EPC. However, the Doing Business project does not account for these companies.

In addition, statistics show that 99% of enterprises in Singapore are small and medium enterprises (“SMEs”).

Therefore, the Protecting Minority Investors index should not ignore companies that are not listed on the stock exchange. In particular, as smaller companies may not have a strong impetus to allocate resources to improve their internal control and risk management, there is a greater demand for better protection of investors in small firms. We admit that, since private companies are not subject to public disclosure requirements, it is difficult for the World Bank to collect and compile measurable and accurate data from these companies. As the Protecting Investors index is highly aggregated, readers should be informed that a higher ranking on the index merely indicates that the regulations offer stronger investor protection against self-dealing in the areas measured and in publicly traded companies only. It does not and is unable to test the general level of investor protection of corporations in practice.

Moreover, the context of the Doing Business indicators is only limited to shareholders, which is a narrower group than the term “Protecting Minority Investors” suggests. The use

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77 Under the Singapore Companies Act, section 4 (1), read with the Companies (Amendment) Act 2014, 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.
79 Singapore Companies Act, Section 4(1).
81 For the (1) extent of shareholder rights index, (2) strength of governance structure index, and (3) extent of corporate transparency index, the score is affected by whether the same applies if the Buyer were a privately held company. So these observations may only apply to some of the indices.
of the term “investors” suggests that it encompasses both shareholders of a company and other types of investors using other business vehicles (e.g. limited partners and general partners in a limited partnership, partners in a limited liability partnership, and members in a non-listed public company). More crucially, with the rise of limited partnerships as a form of business vehicle for foreign investors, it would be useful for the Doing Business project to include indicators relating to the strength of a jurisdiction’s protection of limited partners. Alternatively, Doing Business should change the name of the indicators to “Protecting Minority Shareholders” so as to reflect exactly what it measures.

Furthermore, in the realm of securities law, “investor protection” denotes legal support for investors in the public trading markets through committing publicly traded companies to different strategies. These strategies include mandatory disclosure by publicly traded companies, quality restrictions on publicly traded companies (e.g. mandating appointment rights and approval rights for shareholders, providing listing and delisting requirements for companies, etc) as well as enforcement of investor protection (e.g. private enforcement, public enforcement, gatekeeper enforcement and informativeness of financial reports). Nevertheless, the Protecting Minority Investors index fails to examine the systemic market law that falls within the above categories.

ii. Limitation to a Self-dealing scenario

Even in the case of publicly traded companies, the scope and extent of the law of investor protection is much broader than what is measured in the Protecting Investors index. The methodology of the index is developed based on an economics article titled “The Law and Economics of Self-dealing”. While this paper presents an innovative and fascinating measure of investor protection, it mainly focuses on private enforcement mechanisms that govern a specific self-dealing transaction and it fails to cover many core areas of shareholder protection, especially minority shareholder protection. Examples of other areas of shareholder protection include instances where shareholders are excluded from

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83 Id. at 277-294.
84 Id. at 294-301.
management, where shareholders are deprived of information about the company, and where dominant members clearly prefer their own interests.

iii. General lack of depth with the existing *Protecting Minority Investors* index

In corporate law context, shareholders are the most common investors and there are basic governance rules that protect the interests of shareholders as a class, such as the appointment rights of shareholders, the independent directors, the decision rights, the reward strategy and affiliation rights.\(^\text{86}\) There are also many important legal constraints that are widely used to protect the interests of minority shareholders – principally in the form of standards, such as the duty of loyalty, the oppression standard and abuse of majority voting.\(^\text{87}\) However, the *Protecting Minority Investors* index has not measured these aspects in great detail and its coverage is merely brief, if not under-inclusive.\(^\text{88}\)

First, the power to select or remove directors or other managers - the appointment right – is at the core of corporate governance.\(^\text{89}\) The appointment rights of shareholders are important for addressing the agency problems of (1) minority shareholders in relation to controlling shareholders; (2) shareholders in relation to managers; and (3) company employees in relation to the shareholder class as a whole.\(^\text{90}\) Minority appointment rights are enhanced by either reserving board seats for minority shareholders or over-weighting minority votes in the election of directors.\(^\text{91}\) By ensuring that minority shareholders are able to have one or more representatives on the board, the board would be prevented from becoming the expression of the controlling shareholders.\(^\text{92}\) The minority shareholders would thus have access to centralized management: they would have access to more information about the company’s business operation and would be able to influence the substantive decisions taken by the board.\(^\text{93}\) 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

\(^{86}\) *Supra* note *supra* note 82, at Chapter 3.

\(^{87}\) *Id.* at 99.

\(^{88}\) Doing Business Report 2012, Economy Profile of Singapore, at 61. It states that “[t]he overall ranking on the strength of investor protection index tells only part of the story.”

\(^{89}\) *supra* note 82, at 42.

\(^{90}\) *Id.*

\(^{91}\) *Id.*, at 90.

\(^{92}\) Paul Davis, Introduction to Company Law (2010), at 262.

\(^{93}\) *Id.*, at 262- 63.
of small shareholders, such as “vote capping” regime and a ceiling on the control rights of large shareholders.\textsuperscript{94} Several American jurisdictions provide that directors and corporate officers may be removed without cause.\textsuperscript{95} In Singapore, to prevent shareholders from being denied the ability to accept or reject any particular candidate, the law does not allow shareholders in public companies to elect two or more persons as directors in a single resolution.\textsuperscript{96} However, the \textit{Protecting Minority Investors} index does not deal with the legal issue of appointment rights in different jurisdictions.

Second, decisions rights for shareholders are another widely used strategy to protect the interests of shareholders as a class. Shareholders generally obtain mandatory decision rights in issues such as fundamental corporate changes (e.g. mergers, liquidations, and sales of corporate assets) and ratification.\textsuperscript{97} Different jurisdictions provide different types of decision rights to protect minority shareholders. For example, English law provides three major types of decision rights: requiring supermajority approval for certain decisions, excluding the majority from voting, and giving decisions to individual shareholders.\textsuperscript{98} It is worth noting that, in order to make the design of executive remuneration fairer and more transparent, English law also grants shareholders an advisory vote on individual director’s remuneration.\textsuperscript{99} Nevertheless, the \textit{Protecting Minority Investors} index does not measure the decision rights of shareholders. It only examines who can approve a related party transaction in the business assumption.\textsuperscript{100} Moreover, even if the law provides decision rights to shareholders, it does not mean that shareholders are always in a position to participate in corporate decisions, as whether and how shareholders can exercise these decision rights are subject to various practical factors such as the ownership structure of the

\textsuperscript{94} \textit{Supra} note 82, at 91
\textsuperscript{95} See N.Y. Bus. Corp. Law, section 706(b) (removal of directors) & section 716 (removal of officers)
\textsuperscript{96} Companies Act of Singapore, section 150 (1); see also Tan Cheng Han ed, Walter Woon on Company Law, 14-15 (2009), at 251.
\textsuperscript{98} \textit{Supra} note 93, at 241.
\textsuperscript{99} Paul L. Davies & Klaus J. Hopt, \textit{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.
\textsuperscript{100} A score of 0 is assigned if it is the Chief Executive Officer 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.
firm and the market for corporate control. Specifically, 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, Doing Business should also collect and analyze detailed information about regulations on decision rights as well as the features of ownership structure of a jurisdiction.

Third, incentive strategies that come in the form of trusteeship and reward are also important legal strategies which have been used to reduce agency costs and protect the interests of investors. There are generally two reward mechanisms in corporate law: the sharing rule that motivates loyalty by tying the agent’s monetary returns to those of the principal,\(^\text{101}\) and the trusteeship strategy that seeks to remove conflicts of interest to ensure that an agent will not obtain personal gain from disservice of her principal.\(^\text{102}\)

The trusteeship strategy involves placing the decision in the hands of persons not beholden to the majority shareholder.\(^\text{103}\) As far as publicly traded companies are concerned, the United States, the United Kingdom, Japan and Singapore usually have only one board of directors (one-tier board system). The board exercises the legal power to supervise and manage 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 of non-executive directors, which then appoints and supervises management boards.\(^\text{104}\) Meanwhile, there are some jurisdictions, such as France, Italy and the Netherlands that give companies the choice between the one-tier and the two-tier form.\(^\text{105}\)

Nevertheless, the business assumption made in the Protecting Minority Investors index only mentions the supervisory board in the two-tier system.\(^\text{106}\) It does not cover jurisdictions

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\(^\text{101}\) Reinier Kraakman \textit{et al}, \textit{supra} note 82, at 43.

\(^\text{102}\) \textit{Id}, at 43.

\(^\text{103}\) \textit{Supra} note 93, at 261.

\(^\text{104}\) Reinier Kraakman \textit{et al}, \textit{supra} note 82, at 56.

\(^\text{105}\) \textit{Supra} note 99, at 315 - 316. Italy introduced three choices for companies in 2003: besides a two-tier system, the single tier arrangement was offered either with the traditional board of internal auditors or without it but 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 board in 2012.

\(^\text{106}\) \textit{Supra} note 48.
with one-tier board systems, or those jurisdictions that have both one-tier board system and two-tier board system. It also fails to deal with the role and effectiveness of the independent director in the one-tier board system, which serves an important monitoring function as the supervisory board in the two-tier board system. Moreover, even among jurisdictions with one-tier systems, the requirement of having independent directors on the board and their effectiveness in monitoring also vary widely in practice. For example, the idea of having independent directors as trustees of the firm has proved to be valuable in maximizing shareholder wealth in the United States over the years, while it may not work as effectively in those jurisdictions where there are more concentrated ownership structures, such as Singapore, India and China.

In the recently introduced Strength of Governance Structure index, one of the 7 components considers the presence of trusteeship strategy by looking at whether independent directors are required in the board. For each component of the strength of governance structure index, 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 not listed on any stock exchange. However, the business assumption made by Doing Business fails to address the diversity of the board composition and their effectiveness among jurisdictions, either in law or in practice.

Fourth, affiliation rights in the form of mandatory disclosure are key issues in shareholder protection as well. Corporate law requires directors to disclose certain information to the company. Securities law imposes various disclosure obligations on publicly traded companies. Disclosure of accurate and timely material information on the issuers enables

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107 See supra note 105.
108 Reinier Kraakman et al, supra note 82, at 70. The United States has been taking the lead with 81% independent directors in listed companies. In the United Kingdom, 59% of directors are independent directors in the boards of listed companies. Italy and France also have an average of 46% of independent directors in listed companies. See also Tan Lay Hong et al, Corporate Governance of Listed Companies in Singapore (2006), 142. In Singapore, 50% of the Singapore’s top 50 Straits Times Indexed companies have at least one-third of the board being independent directors.
110 Supra note 6.
111 See Umakanth Varottil, Evolution and Effectiveness of Independent Directors in Indian Corporate Governance (2010) 6 Hastings Bus. L.J. 281. Due to the concentrated ownership structures in Indian companies, it is the minority shareholders who require the protection of corporate governance norms from actions of the controlling shareholders. Thus, board independence does not provide an effective solution to this problem.
112 See generally Yuan Zhao, Independent Directors in China: the Path in which Direction? (2011) 22(11) I.C.C.L.R., 352. Note the ineffectiveness of independent directors in Chinese listed companies due to the concentrated shareholding structure.
113 In Singapore, directors’ duties of disclosure can be found in sections 156 & 165(1) of the Singapore Companies Act.
investors to assess the risks and rewards of their investment. It also provides the information necessary to protect minority shareholders through voting or litigation.\textsuperscript{114} The disclosure regime for publicly traded companies includes two broad dimensions: (1) the disclosure obligations regarding securities issues and issuers, and (2) the informativeness of their disclosure requirements.\textsuperscript{115} Disclosure generally comes in the form of prospectus disclosure, periodic financial disclosure and continuing disclosure. Besides publicly traded corporations, private companies and businesses are also subject to certain disclosure requirements such as the filling of annual returns, updating of business venues and updating of shareholding information.\textsuperscript{116} Meanwhile, the provision of information about a firm’s past and current financial position and its accompanying valuation methodologies, as well as the auditors that help to assist in assuring the quality of the disclosure, is essential in enhancing investor protection.\textsuperscript{117} Also, “while there are stringent disclosure requirements that impose an obligation on the companies to notify shareholders of decisions to be taken at meetings, there is considerable scope for improvement in the quantity and quality of information disclosed to shareholders as well as in the enforcement of disclosure obligations (Tjio 2009).”\textsuperscript{118} However, this is not measured by the index. In India, any such information disparity is corrected through intermediaries such as proxy advisory firms. Such a market for proxy advisory firms is nascent, if not non-existent, in the Singapore markets.\textsuperscript{119}

However, the \textit{Extent of Disclosure} index does not measure the above areas, but merely measures whether the related party transaction is disclosed to the public and whether the director discloses the conflicts of interests in the related party transaction 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,\textsuperscript{120} it is just one of the many disclosure obligations of a publicly traded corporation. Arguably, the score of a jurisdiction reflected in this index does not accurately represent the general level of transparency in a jurisdiction.

\begin{thebibliography}{99}
\bibitem{114} \textit{Id.}
\bibitem{115} \textit{Id.} at 282.
\bibitem{116} E.g. Singapore Companies Act, section 165.
\bibitem{117} See \textit{id.} at 285-86.
\bibitem{118} \textit{Supra} note 70, at 20,
\bibitem{119} \textit{Id.}
\bibitem{120} See \textit{supra} note 82, at 49.
\end{thebibliography}
As to the *Extent of Shareholders Rights* index, a dichotomy is drawn between companies with dispersed shareholding that face the “vertical” agency problem between the managers and shareholders, and companies with concentrated shareholding with “horizontal” agency problems between the controlling shareholders and minority shareholders. ¹²¹

The current *Doing Business* indicators measure the general power of the shareholders as a body, in contrast to the powers exercised by the other organ (board of directors). However, in countries where there is concentrated shareholding, such as Singapore, “horizontal” agency problems are more relevant, and therefore it is arguably more useful to measure the power of the minority shareholders against that of the controlling shareholders. “It is paradoxical that 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.” ¹²² An example is the “disinterested shareholder vote” or “majority of the minority vote” that is required under the SGX’s listing rules for “interested person transactions” involving listed companies. ¹²³

### 4. Suggestions

As has been shown in the earlier discussion, the *Protecting Investors* index seems unable to accurately reflect a jurisdiction’s strength in investor protection and quality of corporate governance due to its narrow coverage. There are many other areas with regard to corporate governance and investor protection not measured by *Doing Business*, such as balance of powers, monitoring by shareholders, internal control procedures and auditor independency. (Under the *Extent of Corporate Transparency* index, one of the components is whether the Buyer must have its annual financial statements audited by an external auditor. Under the *Strength of Governance Structure* index, one of the components is whether the Buyer must have a separate audit committee.) ¹²⁴ Arguably, it is nearly impossible for one aggregated number to describe and capture such a complicated and

¹²¹ *Supra* note 70, at 1-2
¹²² *Supra* note 70, at 21
¹²³ *Supra* note 70, at 23-24
¹²⁴ C.f. Strength of governance structure index – e.g. whether the CEO is barred from being the chair of the board of directors, whether the board of directors must include independent board members, etc.
Moreover, as a jurisdiction’s business environment is exceedingly complex, providing a summary of investor protection by using a simple variable can be highly misleading to users of the indicators, especially those without detailed information about the background of the jurisdiction. There are two ways to solve this problem.

First of all, *Doing Business* may consider excluding the *Protecting Minority Investors* index so as to make the report more accurate. In fact, what is good governance for one jurisdiction may not be good or effective for another, given the vast jurisdictional differences in legal system, political economy 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 set of superficial indices. They do not measure the real impact of specific legal instruments but simply identify the market power in fixing the legal tools used in making business transactions. 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.” Empirical evidence also proves the links between the quality of legal regimes, the nature of national capital markets and corporate governance systems.

In particular, the level of protection needed for investors is largely subject to local ownership structures. The dispersed or concentrated nature of the shareholder body may have different impact on a governance system, particularly on what the board of directors does and to whom it is accountable. For example, in the United Kingdom where there is a prevalence of dispersed shareholding, the most pressing agency problem exists between the managers and shareholders as a class. Thus more protection is required for shareholders as a class, rather than for the minority shareholders solely. In Singapore where there is a

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126 Id.
127 Supra note 155, at 24.
129 See supra note 105, at 305.
130 See supra note 105, at 310.
more concentrated shareholding in listed companies, the agency relationship is more problematic between the majority and minority shareholders. Arguably, the level required for minority protection in Singapore should be generally higher than that in the United Kingdom. Nevertheless, the Protecting Minority Investors index fails to address the diversity of this issue and applies the same standard in assessing investor protection among different jurisdictions.

Alternatively, since the initial goal of Doing Business is to provide an objective basis for improving the regulatory environment for businesses and “encouraging countries to compete towards more efficient regulation”, the variables selected in the report must seek to achieve objectiveness and comprehensiveness. To achieve this, the Protecting Minority Investors index must include more measurable variables.

Firstly, as to the Extent of Disclosure index, it is suggested that it should examine the disclosure system more comprehensively. For example, the index should not simply look at whether disclosure of related party transactions is required, but also survey what information must be disclosed by a publicly traded corporation in an annual report (e.g. all material off-balance sheet transactions, arrangements, obligations and other relationships), when it must be disclosed and in what manner the financial reports must be presented (e.g. whether the report is presented in a simple and understandable way). In addition, given the importance of the independence of the auditor and audit committee in ensuring accurate disclosure of financial reports and corporation, the requirement of qualification or disqualification of an auditor, as well as the audit committee’s composition and authority, should also be covered by the Protecting Minority Investors index.

Secondly, with regards to the Extent of Director Liability index, simply assessing the

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131 See 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 100 Listed Companies (2011), online: http://docs.business.auckland.ac.nz/Doc/exploring-the-question-of-ownership-from-control.pdf, 17 & 24. Share ownership in the top one hundred listed companies in Singapore is highly concentrated. 0.19% of the total number 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%.


133 Supra note 48.

134 For example, in the United States, section 409 of the Securities Exchange Act requires companies to disclose material changes of a corporation’s financial condition on a rapid and current basis and in plain English. See financial disclosures of the United States in Choper et al, Cases and Materials on Corporations, supra note 97, at 332 - 333.
availability of direct or derivative suit in a jurisdiction is not enough. To assess the overall level of director liability in a jurisdiction, the index should also examine the number of shareholder derivative actions brought and the different liability standards employed to prove director liability (e.g. strict liability or weaker liability standard). In addition, issues such as how to measure the levels of public enforcement against default directors (i.e. legal and regulatory actions brought by market regulators or public prosecutors or stock exchanges) must also be included in the survey.

The general principles of corporate law in Singapore impose restrictions on self-dealing transactions. “While 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.”135 Under Singapore law, controlling shareholders do not generally owe fiduciary duties either to the company or to the minority shareholders. There are some exceptions to this rule, but those are very limited.136

However, the Protecting Minority Investors index does not measure the liability of controlling shareholders who are not directors. Given that Singapore shows a trend of concentrated shareholding with either families or the state being controlling shareholders in such companies137, the extent of liability of controlling shareholders becomes pertinent.

Thirdly, the Ease of Shareholder Suits index merely evaluates several procedural rights available to the shareholder plaintiff during trial, and does not look into other important elements in relation to the ease of shareholder suit before trial. It is suggested that the index should also cover pre-trial procedures (exhaustion of internal remedies), such as the extent to which the plaintiff shareholder may circumvent the board or directors, the supervisory board, or the body of shareholders to initiate the suit before trial; the circumstances under which a demand must be made to take action; and the consequences of a decision by the board or directors, the supervisory board, or the body of shareholders not to take action. In addition, considering the great impact of litigation costs (typically

135 Supra note 70, at 25.
136 Supra note 70, at 25-26.
137 Supra note 70, at 13.
comprising lawyers’ fees, filing fees and other litigation fees) on the utility of derivative
suits, the World Bank team may also include the amount of litigation costs as a component
in the index. This is to determine whether filing a shareholder action is prohibitively
expensive and therefore impracticable even if allowed by law.\textsuperscript{138}

In the context of Singapore, the costs of litigation are prohibitive in nature; the “loser pays”
principle applies to limit risk-taking on the part of the plaintiff shareholders, and the plaintiff
bar that is usually incentivized to bring class actions does not exist in Singapore as lawyers
are prevented from charging contingency fees due to the prohibition against champerty.
Hence, the necessary environment for individual or class actions on behalf of shareholders
has not existed in the same manner as it does in the United States (Loke 2010, Jindra
2012).\textsuperscript{139} Recently, there have been some calls for the government to review the age-old
document prohibiting champerty and maintenance to allow greater access to justice for the
poor (Ho 2013).\textsuperscript{140} 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 utilize
statutory derivative action to discipline the management and, in turn, the controlling
shareholders.\textsuperscript{141}

Significantly, there are other extraneous factors affecting shareholders in deciding whether
or not to pursue law suits, which are not considered or examined by the index. According to
Puchniak, shareholders – especially in Asia – bring derivative actions for reasons which are
non-economical and even irrational.\textsuperscript{142} 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

\textsuperscript{138} 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, at pp 31-32.

\textsuperscript{139} Alexander Loke, “Mounting Hurdles in Securities Litigation - Addressing the Funding and Collective Action Issues”

\textsuperscript{140} A. Ho, “Let David take Goliath in court: champerty”, Straits Times, 2 August 2013. See also, G. K. Y. Chan, “Re-
examining public policy: a case for conditional fees in Singapore?” Common Law World Review, 33(2) (2004), 130-59 and

\textsuperscript{141} Supra note 70, at 32

(2012)
organizations. The calculus of whether to pursue a derivative action is much more political than economic for such organizations. There is also recent evidence that similar government-funded organizations are developing in Taiwan and India. 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. 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. It appears that the government has used its informal control over the judicial system to stifle derivative litigation against the directors of large Chinese companies in an effort to block off this avenue for "public voice." 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. The examples here illustrate very clearly how protection of minority investors is a very context-specific issue which cannot be measured in an almost overly-simplistic calculus.

C. Beyond Rules

The foundation of Doing Business is the notion that rules matter. According to the project, economic activity, particularly private sector development, benefits from clear and coherent rules. 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. The quality of the rules also has a crucial bearing on how societies distribute the benefits and bear the costs of

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143 Id. at 18.
144 Id.
145 Id.
146 Id.
147 Supra note 142, at 19.
148 Id.
149 Id. at 20.
151 Id.
development strategies and policies.\textsuperscript{152}

It is argued that not only does the text matter to a business environment, but whether the rule is enforced adequately 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 within a region. In fact, the \textit{Doing Business} project does address the enforcement of law in its chosen topics (e.g. the \textit{Enforcement of Contract} index, the \textit{Protecting Minority Investors} index and the \textit{Getting Credit} index). For instance, the \textit{Enforcement of Contract} index specifically measures the efficiency of the judicial system in resolving a commercial dispute. The process of data collection of the \textit{Doing Business} project also reveals that local experts’ knowledge of and experience with how certain formal norms are applied and implemented are examined and considered in the drafting of the reports.\textsuperscript{153} The role of enforcement in regulatory intervention is also discussed in the reports.\textsuperscript{154} However, it seems that substantial emphasis is placed on the 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.\textsuperscript{155} In the Singapore context, 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.\textsuperscript{156} All these government bodies go towards the inquiry of whether there is the “existence of a robust public enforcement machinery”,\textsuperscript{157} which is not addressed by the index presently.

In Corporate Governance in the Common-Law World, Bruner discusses the distinction between functionalism and contextualism as comparative study methodology. Functionalism assumes the “mono-functionality” of regulatory institutions in order to render them amenable to comparison with purported functional equivalents in other

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\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} See \textit{Davis & Kruse, Taking The Measure of Law: The Case of The Doing Business Project}, supra note 36, at 1100.
\item \textsuperscript{154} \textit{Doing Business Report 2004}, at xii. Regulatory intervention is particularly damaging in countries where its enforcement is subject to abuse and corruption.
\item \textsuperscript{155} Rafael La Porta \textit{et al.}, \textit{Investor Protection and Corporate Governance}, 58 J. Fin. Econ. 3 (2000), at 7.
\item \textsuperscript{156} \textit{Supra} note 70, at 26-27.
\item \textsuperscript{157} \textit{Supra} note 70, at 27.
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countries. However, Bruner argues that an issue addressed by one body of law in Country A might be addressed in Country B by structures that fall entirely outside the formal legal system. The leading functionalism scholars, Konrad Zweigert and Hein Kötz, themselves note that “often a solution is provided by custom or social practice and has never become specifically legal in form”. Bruner further cites Caroline Bradley, who explains that a given country’s perception of the problem it faces, as well as the regulatory responses fashioned to address them, will invariably be “interlinked” with the prevailing “social, economic, and political structures” – the context in (and through) which the legal system takes shape. In the context of Singapore, government bodies such as ACRA may be responsible as regulators rather than the courts. Specifically, the extent of corporate compliance of business entities and the extent of regulatory investigation into alleged breaches of laws by business entities are not addressed in Doing Business.

Corporate compliance is essential in achieving a responsive and trusted regulatory environment for an economy. Typically, when investors set up firms or engage in new investments, they have to obtain certain rights that are protected through the enforcement of regulations and laws. In the context of Singapore, there are many efforts exemplifying the country’s commitment in improving corporate compliance through public enforcement. Unfortunately, these areas are not measured in Doing Business. For example, the Governance Surveillance Division 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 stock exchange blacklisted persons from holding directorships in listed companies.158 The division investigates alleged breaches of the various business laws or complaints received from the public regarding various business issues, such as breach of directors’ duties, breach of accounting standards, etc.159 The division also collaborates with other government agencies in disqualifying directors convicted of the Employment Act offences or in disqualifying individuals who register entities when they are not the true owners.160

ACRA has also set up the Enforcement Division to oversee disclosure of corporate and

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158 Overview of Divisions and Departments of ACRA, available at http://www.acra.gov.sg/About_ACRA/Our+Divisions+and+Departments.htm
159 Interview with a government official of ACRA (anatomy required).
160 Id.
financial information of businesses.\textsuperscript{161} It typically issues summons and warrants to errant directors or business owners who fail to comply with business legislation, such as the Companies Act and Business Registration Act. It also promotes voluntary corporate compliance through public education initiatives and programmes, such as conducting the Directors’ Proficiency Training for new directors and publishing the directors’ handbook.\textsuperscript{162}

In view of the above, it is suggested that the Doing Business project should cover more enforcement issues and survey how well business regulations are implemented across jurisdictions. The comparison can comprise the adherence to due process and implementation of law in areas of doing business. Areas to be considered include: (1) how the government agencies (especially the companies registry, the credit bureau, the supervisory authority of capital market, the while-collar crime enforcement agency, etc) and Singapore Exchange handle all forms of business complaints, including governance-related matters and breaches under business legislation and regulations; and (2) how different government agencies work with each other to ensure appropriate enforcement when steps are taken against the offenders of corporate governance (e.g. 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.\textsuperscript{163}

In addition, Doing Business may consider referring to the World Justice Project\textsuperscript{164} on how they measure regulatory enforcement across jurisdictions.\textsuperscript{165} It is suggested that Doing Business should consider measuring 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

\textsuperscript{161} Supra note 158.


\textsuperscript{164} The World Justice Project is an independent, non-profit organization which develops communities of opportunity and equity by advancing the rule of law worldwide.

\textsuperscript{165} See World Justice Project, available at http://worldjusticeproject.org/factors/effective-regulatory-enforcement
unreasonable delay; and (4) whether due process is respected in administrative proceedings.

IV. CONCLUSION

The case study of Singapore shows that the Doing Business project has informed and inspired various business regulatory reforms in Singapore. The fact that Singapore consistently ranks the highest on the Ease of Doing Business index indicates that the Singapore government has managed to formulate conducive rules and regulations that facilitate starting and doing business. Nevertheless, while the Doing Business report is a useful benchmark for self-reflection, it provides only one metric of a good business environment. The success of Singapore in the Ease of Doing Business index may also be attributed to various factors, including, inter alia, a well-established business infrastructure, a well-regulated financial market, a sophisticated legal system, efficient governance, and a diversified and talented business community. We also argue that, while efficiency creates a competitive edge for an economy, it should not be the overriding principle in the policy-making process of a nation, as there are considerable informational disadvantages within the Doing Business report. For indicators relating to efficiency, Doing Business does well, and what is measured gets attention and gets done. Nevertheless, there are several limitations in the scope of content and research methodologies employed by Doing Business.

First of all, many important areas in achieving a trusted and conducive business environment are not addressed in Doing Business. In particular, several basic governance rules that protect the interests of investors, such as appointment rights and decision rights, are not systematically measured. Also, 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. Even for the chosen areas in the Doing Business project, it is challenging to evaluate how the law actually applies in practice. Typically, the essential areas in achieving a responsive business environment, such as investor protection and corporate governance, are too comprehensive and complicated to be evaluated based on a unified business assumption or by pure quantitative methods. Thus, a simple variable of investor protection would create an illusion for investors, as it treats some of the many pieces of information that are relevant for investor protection as an overall assessment of a country’s level of investor protection. We
thus suggest that the Doing Business project consider taking out the indicator of Protecting Minority Investors so as to make the evaluation of business regulatory environment more accurate.

Moreover, the Doing Business project measures mainly efficiency and we admit that the quantitative indicators help to reflect the level of efficiency in the selected areas of doing business. However, the type of regulatory reform that is needed or suitable in a business environment can vary substantially across jurisdictions. Meanwhile, the best or most efficient rules of doing business vary with the context for which they are to be used, as business performance is highly context-specific. It is subject to the specific nature of the business, legal infrastructure, corporate structure and economy of a country, and many other associated political-economic elements of a society. In particular, the level of protections required for investors is largely subject to the specific ownership structures in different capital markets. Therefore, improving economic efficacy in doing business is not necessarily an ideal solution for problems within a business environment, especially in dealing with corporate mismanagement and improving corporate ethics.

Lastly, the Doing Business report provides a cost-effective means for consumers of the indicators to understand where an economy stands in the aggregate rankings. However, these indicators should not be overused as a universal standard of quality for all aspects of a business environment. Policy-makers and business communities should exercise caution in attempting to draw inferences from a jurisdiction’s ranking on the Doing Business indicators. Policy-makers should also consider the peculiar needs of their business communities, in order to make the business regulations work feasibly in the specific context, and adapt their economy to the changing business climate and increasing globalization.