Research program

"Economic Attractiveness of the Law"

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Methodological limits of "Doing Business" reports

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The methods used to construct indicators supposed to measure the quality of Legal systems and Institutions often meet with criticism[1]. A large number of authors already have formulated critical analyses of certain indicators measuring the quality of Institutions or Law (See for example, among others: Grégoir et Maurel [2003]; Hatem [2004]; Kaufmann, Kraay et Zoido [1999]; Kaufmann, Kraay, and Mastruzzi [2005]). The indicator "Ease of doing business" published in *Doing Business* reports (IFC (World Bank) 2004 and 2005) [2] already has been subject for heavy criticism made by a certain number of legal experts (Association Henri Capitant [2006]; Canivet, Frison-Roche, Klein [2005], Kessedjian [2005]; Rouvillois [2005]) and economists (notably Ménard and du Marais [2006])[3].

The present study is to complete those works. We will point out that the *Doing Business* methodology combines several weaknesses. The two major limits – the recourse to purely hypothetical cases and the technique of encoding law in binary variables – however, appear too difficult to remove without profoundly calling into question all measurings undertaken in *Doing Business* reports. We argue that these methodological problems suggest, as a minimum, than one greatly differentiates when considering the statements and recommendations expressed in *Doing Business* reports.

This study is based on a very detailed analysis of the methodology of *Doing Business* reports, and in particular on a thorough analysis of the questionnaires used in drawing up the 2006 report. In the framework of the working group "Test of the reliability of summary indicators tracking the attractiveness of the law (SFI - World Bank Group)" organised by the research program on "the Economic Attractiveness of the Law", these questionnaires were subject to discussion sessions with numerous legal practitioners, from both, the private and the public sector. These works also benefited from the expertise of the services of the Ministry of Justice and the DGTPE (*General Management of the Treasury and Economic Policies*) of the

[1] The author would like to thank: Olivia Franco, teaching assistant at Université Paris 10 Nanterre for her help and documentary research, C. Ménard for his vital support in conceptualising this analysis and, for their precious comments: L. Brunin, J. Ould-Aoudia, A. Piquemal and H. Spamman.
[2] References to these reports refer here to their English version.
[3] The analytical method in this paper owes a lot to Ménard and du Marais (2006).

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Economics, Finance and Industry Ministry (see in appendix the list of participants in these working meetings).

The object of this paper is to present the conclusions of those works. It starts by recalling the theoretical and historical genesis of *Doing Business* reports (Section I), before presenting their method (Section II). Section III includes a double questioning of the results of *Doing Business* work in general. First, the latter stand in opposition to two objectively observed realities – the growing harmonisation of substantive law and observations made from certain national statistics. Second, this section critically analyses the weak explanatory power of the summary index on the "ease of doing business" as will be shown by the assessments made by Mr. Blanchet (2006), that are presented in detail in the second part of this publication. Section IV then carries out a thorough analysis of the *measurement method* implemented by *Doing Business*, step by step, according to the process generally observed in this type of measurement campaign. In this respect, very detailed comments made by the working group on the drafting and the construction of *Doing Business* questionnaires could be constructively used to improve them. Section V presents a critical analysis of the *object of this measurement*. Section VI concludes with proposals for new research methods that could lead to improvements in comparative measuring of the economic effects of Law.

1 Introduction: historic and theoretical genesis of Doing Business reports

1.1 Historic genesis

The question of the impact of the Law, in particular Business Law, on growth and on economy in general, has provoked heated debates for decades among academics but also among political decision-makers and more specifically within development agencies.

Concerning development agencies, their disillusion on the effects of structural adjustment policies, has fuelled their growing interest in the question during the 1980s. After the debt crisis of the 1980s, development agencies were interested in the implementation of structural macro-economic reforms. Nevertheless, very soon the reform of Institutions, and in particular

their legal framework, was regarded as a necessary complement, a condition for success, in order to facilitate the implementation of structural adjustment policies. This was particularly the case when direct foreign private investments exceeded the amount of public aid. The question was then to know how developing countries could attract foreign investment without having institutions capable of providing investors with guarantees. The focus then turned, from the beginning of the 1990s, to institutional reforms and, in particular, of the legal environment, through a "legal reform process".

1.2 Theoretical genesis

Of course, this "development law" approached was preliminarily introduced by works carried out by theoreticians, a point often neglected by development agencies' staff (and sometimes also researchers).

It is impossible to discuss the impact of Law on the economy without mentioning the vital contribution made by Ronald Coase (1991 Nobel Prize in economics). In his still praised 1960 article (Coase, 1960), he indicates that in the absence of transaction costs, institutions, such as legal systems, were of little importance: optimum solutions could be achieved by agents whatever the institutions. However, in a system where there are positive transaction costs, institutions have a decisive role to play, in that they model the form and cost of exchanges. In this context, the impact of legal systems could no longer be ignored. Adopting this measure as a starting point, although more interested in political than legal systems, Douglass North (1993 Nobel Prize in economics) developed an analysis based on the decisive role of institutions over time to explain development and growth (North, 1990).

It is all the more interesting to recall this intellectual genesis as the theoretical referees for DB reports – the LLSV [4] team – claim being the successors of R. Coase and, to a lesser extent, of D. North. However. DB reports follow a widely more simplistic approach to law, largely opposed to the findings of the Neo-Institutional Economy School (NIE) founded by R. Coase and D. North (see Ménard and Shirley, in particular chapter III).

[4] For R. La Porta, F. Lopez-de-Silanes, A. Shleifer and R. W. Vishny.

It is nevertheless a practitioner and intellectual student of Coase – Hernando de Soto (1989) – who has made the most significant contributions for the change of attitudes of development agencies. Having examined the time and cost necessary to set up a business in a poor neighbourhood of Lima (Peru), he measured the effect of the absence of an adequate legal framework on transactions. According to de Soto, the parties then are compelled to revert to the informal sector. In fact, he demonstrated that: (i) poor sectors of society are stuck within the informal sector as formal law is too complicated and cumbersome; (ii) informality leads to a loss of social well-being, preventing the "dead capital" of poor people from producing investment returns and from acting as a guarantee to obtain credit. Better protection of property rights and a simplified legal system would enable this "dead capital" to lead to a lever effect and thus strengthen growth and development.

The works of H. de Soto, only recently accessible in France, have had a considerable international impact on aid and development policies. However, exciting and seductive as it may appear, it completely ignores questions of the *type and implementation* of the legal framework to ensure protection of property rights (Sgard, 2005; du Marais, 2006).

It should however be emphasised that, if *Doing Business* reports were inspired by the analytical model of Hernando de Soto and benefit from the technical advice of same, their authors also notably go beyond his method. As we will see in the following section, these reports favour the standardised collection of data in the largest number of countries and the use of the base which results from this. On the contrary, de Soto carried out full-scale experiments – creating a real business in Peru, for example – in order to calculate the time and the number of procedures necessary[5].

These ideas have merged with others in the analytical framework developed by La Porta, Lopez de Silanes, Shleifer and Vishny ("LLSV") at the end of the 1990s. In several articles, they established a link between the legal framework, more specifically the level of protection accorded to investors depending on their affiliation with a specific legal regime and the

[5] See Doing Business 2005, p. 14.

development of financial markets (see La Porta et al., 1997; 1998; 1999). At this time, these authors envisaged this relationship being extrapolated to growth and development: see La Porta et al. (1998, p. 1152), although they later nuanced their proposals: Glaeser et al. (2004). Some institutions, among them the World Bank, have taken up these ideas and transformed what was originally a mere attempt to establish a correlation of normative indicators. Our aim is to criticise the method used as the basis for these ideas.

2 From correlations to causality: the *Doing Business* methodology and the development of the "ease of doing business" index.

Initially, the original articles of LLSV were aimed at determining whether there was a correlation between the legal framework of a given country and the development of its financial system. It was assumed that: (a) there was a performance test that could define a "good" financial market – based on the American model, - (b) long-term financial markets command growth. This model was progressively extended to a more general theory on the development of markets, to become what has been called "New Comparative Economics" (Djankov et al, 2003), which inspired the normative approach of *Doing Business*. We will examine how this passage from a wide, essentially inductive framework to a series of normative proposals relating to the legal framework took place, insisting particularly on this second dimension.

Initial LLSV research progressively led to the development of instruments destined to establish a hierarchy of relative efficiency of different systems, in particular different legal systems or "legal origins" (Glaeser & Shleifer, 2002). This transformation was highlighted in a series of World Bank, *Doing Business* reports. Its successive reports seek to design a sophisticated instrument allowing to measure the complete performance of different legal systems of different States. These reports' ambition clearly consists in obtaining – starting from LLSV research – normative proposals in order to define a performance test to compare and evaluate legal systems throughout the world, and draw up recommendations on the policies to follow.

2.1 "Doing Business": *the analytical framework*

The research program and policy objectives illustrated through "*Doing Business"* reports are presented in the 2004 *Doing Business* report. Although the terminology of subsequent reports

(2005 and 2006) are more nuanced and refined, these reports all derive from the initial framework and should thus be read in the light of the 2004 report[6].

The program defined by the World Bank through these reports is unambiguous: it aims at drawing up recommendations helping to attain a development level identical to that of developed nations, and to encourage growth. To achieve this goal, it is useful establish a standardisation of Law after having defined the best legal practice: "One size can fit all" (*Doing Business* 2004, p. XVII). The analytical framework can be broken down into three main arguments (*Doing Business* 2004, "Overview" and chapter 7).

1. In continuity with the theory of property rights as reformulated by de Soto, the reduction of informality should pass through the definition and implementation of property rights. In fact, individuals who work in the informal sector cannot increase their assets; furthermore, informality increases transaction costs as it generates a significant amount of uncertainty between parties.
2. *A fortiori*, the importance of informality where rights of ownership are not assured is an obstacle to two micro-economic components which are essential for growth: a) the creation and development of companies at a local level[7], and b) the capacity to attract foreign investment, an aspect of little importance to de Soto, but which results quite naturally from the LLSV approach. When local financial markets are underdeveloped, the capacity to attract foreign investment becomes a strategic factor.
3. Most of the time, informality results from an excessively complicated legal framework and/or which has too many barriers to the starting of a business. Consequently, legal systems must be restructured in order to attract foreign investment, in particular in underdeveloped countries in which financial markets are non-existent or largely under-sized. The new legal system must have two main characteristics. Firstly, it should seek to facilitate business: it is aimed at the creation of businesses, in particular so as to attract foreign investors. Secondly, it should be extremely simple and involve the lowest possible transaction costs. These two characteristics enable the formulation

[6] This analysis is based on the English versions of reports for 2004, 2005 and 2006.
[7] This is the official aim of *Doing Business* reports, whence the presentation of numerous anecdotes. See the stories of Teuku, Ina, Ali, Timnit, etc.: *Doing Business 2004*, p. XI.

of an essential proposal: legal systems must be assessed and categorised according to their capacity to minimise the time taken to create a company, maximise the implementation of property rights and minimise the costs necessary for these results. The search for the best legal system following these criteria is thus empirical, explaining the importance of the methodology adopted to measure and compare the performance of different legal systems.

2.2 The "Doing Business" methodology and the construction of a universal and summarised index of "ease of doing business".

" *Doing Business*" reports base the assessment of the "quality" of a legal system on the quantification of the quality of several procedures. Five procedures were assessed in the initial report (2004)[8], 10 in 2006[9]. These procedures were selected according to their assumed impact on the business climate (i.e. enforcing contracts is vital for the development of transactions) or on macro-economic aggregates (i.e. information available on potential debtors is capital for creditors, as such information makes it possible to increase credit, investments and eventually GDP[10]).

Each procedure is described by an indicator grouping together several sub-indicators, constructed following a "time and motion" type approach to make a comparison with the method Taylor used to raise productivity in the manufacturing industries [11]. To establish these indicators, the *Doing Business* team refers to a hypothetical case study for each item. This case study is treated "as if" each indicator were capturing the normal representation of the relationship between entrepreneurs and the legal system of a country to carry out standardised operations necessary for the daily operations of an average company: recovering an unpaid cheque, building a warehouse, etc.

[8] "Starting a Business" "Hiring and firing workers"; "Getting credit";"Enforcing Contracts"; " Closing a Business"
[9] In 2005, the following procedures were added: "Registering property"; "Protecting investors"; then in 2006: "Dealing with licenses"; "Paying taxes"; "Trading across borders".
[10] This last point is now the object of consensus among economists: see for example the work of J. Stiglitz (1988, 1991).
[11] The French version of the 2005 report uses the English term "time and motion".

Detailed questionnaires, often exceeding more than ten pages are then sent to legal experts (most commonly lawyers, more rarely judges or agents from the authority responsible for regulations in the sector) and local business persons. The people consulted must calculate the number of steps, time and the cost estimated for each procedure relating to each case. They also respond to questions on the occurrence of specific instruments in the national legal framework. They also respond to certain questions aimed at formulating an opinion or a value judgement.

Data are thus collected on a case-by-case basis for each of the ten case studies chosen. Legal procedures are represented by histograms. These data are then grouped into partial indicators[12] or sub-indicators in order to calculate a range of ten indicators. The specifications for indicators used are included in table no. 1 (see appendix).

The last stage involves drawing up the general ranking of each country according to the capacity of the national legal system to "ease doing business"[13]. Countries are first of all classified for each of the 10 indicators - representing each of the ten procedures – via the arithmetic average of its categorisations for partial indicators. Then *Doing Business* reports establish the average, again arithmetic, for the 10 indicators to get a general table classifying countries. *Doing Business* 2006 is the first report to draw up a general ranking for 155 countries from Fiji to the United States.

The data base established for *Doing Business* has some very attractive characteristics. Firstly, it includes a significant amount of data, often collected directly for the requirements of the survey, concerning 10 different procedures in 155 countries, and with the help of several partial indicators, accounting for several thousand observations. Secondly, the indicators chosen are easy to use and disseminate. Finally, relevant data and indicators are summarised in a general global ranking which can easily be made public in large circulation newspapers.

The composite index measuring the "ease of doing business" published by the International Financial Society, a member of the World Bank Group, is not the only index available to

[12] 37 sub-indicators in total in the Doing Business 2006.
[13] Building then an " Ease of doing business" composite index.

assess the "quality" of the legal framework or institutions. However to our knowledge, it is the first time that an international public organization has published such a rating. Furthermore, and although this is not official policy, this table is also used by project managers in the World Bank to determine the conditionality imposed on borrowing countries (Bakvis, 2006) . The impact of *Doing Business* is therefore far from being negligible, not only from an academic point of view but above all for policy-makers and development agencies throughout the world.

In summary, we can state that *Doing Business* reports establish positive indicators to draw normative conclusions on what is/should be a "good" legal framework", that is to say a system minimising transaction time and costs, encouraging foreign investment and growth.

3 The results: questions and poor explanatory aspects of *Doing Business indicators*

3.1 A few enigmas

3.1.1 The difficulty of understanding regional groupings

3.1.1.1 Disparate results for European countries

The official presentation of "ease of doing business" in the 2006 report bared a certain number of very surprising results. Firstly, one might be surprised by the wide range of rankings obtained by EU countries, whether before or after accession (see table 3 in appendix)[14].

In fact, there is a significant disparity of results among EU member states followed in the Doing Business database: The scores for the 15 for the general indicator varies from 8th (Denmark) to 80th (Greece). This disparity is even greater for partial rankings by item: from 2nd (Lithuania) to 144th (France) for the sub-indicator "registering property" or from 15th (Great Britain) to 150th (Spain) for the sub-indicator "hiring". One can deduct from this disparity that there is still much to do in terms of harmonising law if an element was not very disconcerting. This disparity was particularly surprising for sub-indicators where European harmonisation has been in place for some time now, and exhaustively so, for example with external trade (from 1st for Denmark to 90th for Italy). It is therefore also necessary to check whether the source of this disparity is not the result of a factor other than Law, but rather due to the method of constructing the ranking. We will argue that this is the effect, on the one hand, of the difficulty of understanding the Law of regional entities and, on the other hand, errors in designing the questionnaire, that have given rise to errors in responses (see below for the sub-indicator "trading across borders").

[14] It can be observed that this disparity does not significantly increase between the ranking of 15 EU members states in the database and that containing the new accession states. These are spread between 15th (Lithuania) and 63rd position (Slovenia).

3.1.1.2 The apparent absence of the effect of international agreements on the ranking

Although to a lesser extent, the same question can be asked when looking at all country rankings for sub-indicators where international law imposes minimum standards, for example in Labour Law. In this respect, the recommendations of *Doing Business* might also be surprising: reports implicitly recommend removing Labour Law protection established by the minimum standards of the ILO (notably concerning female workers and working hour limits). However, these standards are applied even by countries considered the best performers by *Doing Business*, showing that they are not necessarily a handicap. Furthermore, these standards are considered a useful tool to ensure equitable international competition and generate positive external effects.

Aware of the limits of their reasoning and apparently sensitive to criticisms of certain shareholders in the Bank, the authors of the report modified their viewpoint in the 2006 edition. They inserted a reference to the ILO, but mentioning only in a footnote – elliptic and without references – the positive effects of international ILO standards on productivity (*Doing Business* 2006, p. 26).

3.1.2 The great difference between the figures evaluated ex-ante and the results observed

One also observes significant differences between the physical magnitudes calculated in the *Doing Business* database and the reality recorded in official statistics.

Official statistics relating to Law are, it is true, few in number; those concerning the legal framework are even less common. A positive effect of *Doing Business* reports therefore is the encouragement to improve legal and judicial statistics. However, for the few figures available, some discrepancies – high variations from one year to another – are confusing.

For instance, concerning the United Kingdom and the item "Enforcing contracts", the indicator for the duration of the procedure almost **tripled** between *Doing Business* 2004 and 2005. It went up from 101 to 288 days without one really knowing why.

Above all, none of these figures correspond to reality, as recorded by official statistics in the British "Department of Constitutional Affairs" (Haravon, 2005). In fact, the efficiency of British jurisdiction has improved consistently compared to previous years, following the report by Lord Woolf "Access to Justice" (1996). However, the performance of British courts is still largely below the expectations of the *Doing Business* team. The average duration of court proceedings for example fell by 41% between 2003 and 2004, falling from 1,148 days to 679 days before the Queen's Bench Division and from 413 to 371 days before County Courts.

This comparison also introduces one of the most interesting questions resulting from *Doing Business* reports: that of the relative absence of official comparable legal statistics, at least between the major countries in the OECD. Ideally, *Doing Business* reports should at least compare their own indicators to these statistics and question the reasons for divergence.

3.2 The "ease of doing business" index: a limited contribution to explaining economic performance

The result of *Doing Business* works is quite deceptive, in reality.

The explanatory power of databases is not zero, but it seems weak and its results are not always consistent with the analytical framework contained in the approach of the report authors. Here, our argument relies on some exploratory tests (Blanchet, 2005), that are based mainly on data from the 2005 report, for consistency with tests carried out by S. Djankov et al. (2005). However, this analysis as a whole is confirmed by the results in the 2006 report (Blanchet, 2006).

If one accepts that the basic assumptions of *Doing Business*, as well as calculations carried out, are accurate, then it is legitimate to expect a marked correlation between an "effective

legal framework" in the sense of *Doing Business* reports and variables for macro-economic reports, such as GDP growth, which is the main objective of the *Doing Business* reports, or the growth in foreign direct investment (FDI). Even if the maximisation of inward flow of FDI is not explicitly the main objective of *Doing Business* reports, it is one of its underlying objectives.

The *Doing Business* report for 2005 identifies the "good students" in reform, according to their "ease of doing business", deducted from the average of seven indicators (10 in the 2006 report). However, evaluation of correlations with results variables give mixed results (see table 2 in appendix)

The study first tested the effects of the "ease of doing business" index on GDP, FDI rates, public and private investment (GFCF) and the human development indicator (HDI or IDH) of the UNDP, with the sole control variable being the level of GDP per person.

The results from this first test were:

- that figures in the *Doing Business* database allow, at the best, no comment on the link between the "quality" of the legal system - as calculated by the *Doing Business* team – and the attraction of FDI: the co-efficient of the global index is not significant and the equation has almost no explanatory power (R2: 0.055 for 2005);
- that there is effectively an impact of "quality of law" (as interpreted by the authors of the report) on GDP growth for the period analysed, an effect identical to that found by Djankov et al. (2005) but with poor explanatory powers.

For greater clarity, the same study tried to determine whether results could be improved by testing separately the effects of different components of the index, namely indicators relating to the seven areas of Law, which were assessed in the 2005 report. Such a test is consistent with the spirit of the 2005 report, which mainly insisted on separate classifications according to these seven sub-areas rather than classification according to the global index.

This attempt provides no new elements. The explanatory power of the different equations (in particular for the two most important key variables, GDP and FDI) has improved but remains weak[15]. Co-efficients rarely mean much: put another way, one does not know whether the "quality" of Law in the sub-area in question has any effect on GDP or FDI. Certain co-efficients (although one should be cautious of reaching hasty conclusions as they lack meaning) even go in the opposite direction to the theory put forward by *Doing Business*.

In fact, the only relatively strong correlation resulting from this work is a correlation with the human development index. The *Doing Business* index on the other hand revealed no effect of the law on FDI and barely an impact on GDP growth.

Surely robust, these tests nevertheless remain too simplistic. In particular the FDI variable is in itself quite ambiguous. Its variations are difficult to explain and depend on variables of physical and human capital rather than institutional variables. Also, FDI correlates better with institutions when you use gravitational models (Benassy-Queré, 2005). However, the same tests carried out with supplementary control variables do not give any more satisfactory results, notably when it comes to comparing *Doing Business* indicators with FDI[16].

In other words, the sophisticated calculations of the *Doing Business* team give the composite "ease of doing business" indicator, following the macro-economic aggregate which seeks to explain variations, either a weaker semantic power or no meaning.

It is worth determining the causes of these results, which appear quite deceptive, especially bearing in mind the methods implemented[17]. The rest of this study will seek to identify whether they are the direct consequence of the methodology used by *Doing Business* in the construction of indicators and the more general choice of its objectives. If these results are

[15]The R^2 determination coefficient which measures the quality of the adjustments of estimates in the regression equation is still well below 0.05 for 2005 for FDI, 0.1229 for GDP.
[16] This is not unexpected: the adding of control variables in a regression most commonly has the effect of reducing the apparent explanatory power of "variables of interest" (which translated the phenomenon in which one seeks to identify the effect on a target aggregate), rather than the reverse.
[17] For the 2006 DB report, in direct costs and according to the list of contributions attached as appendices to the report: 18 full-time specialists, 5 part-time specialists, 5 people assigned to typing and graphic design, the assistance of several large international firms such as *Price Waterhouse Coopers*, the *Bolloré* Group, etc.

brought about by structural weaknesses in the method used by *Doing Business*, the improvements that one may expect from punctual corrections to data on a country or an indicator are limited.

However, despite all the precautions apparently taken, this paper shall point out imperfections the *Doing Business* methodology suffers from in all its stades – from the construction of questionnaires to the actual object of the study. In the following, we will proceed sequentially, analysing each stage for the ten indicators, leading to the definitive publication of a summary ranking. This study assembles both, critiques by legal experts, those formulated from a statistical point of view and, to a lesser extent, from the point of view of the economic analysis, which underlies the construction of certain indicators[18]. These limits can, in practice, be resumed on the basis of two questions: **how** to measure and **what** to measure?

[18] In particular the indicator "getting credit" was the subject of a specific economic debate in a specific report of the research programme on "the economic attraction of the law, "information systems on solvency: theoretical and comparative analysis"

4 How to measure? Technical remarks on DB methods

It is possible to identify several levels of limits to the methodology pursued by the *Doing Business* team, that are inherent to this type of works[19]:

- at the stage of using questionnaires and drawing up the questions (paragraph 4.1);
- at the stage of choosing the method of the case study and their construction to enable a comparison of national results (paragraph 4.2);
- finally, at the administration stage of the questionnaire and the stage of processing responses (paragraph 4.3);
- All these difficulties with interpretation lead to serious doubts as to the possibility of getting a rigorous encoding of responses, and consequently, a satisfactory specification of the variables that comprise the sub-indicators (4.4).

4.1 Questionnaires: a risky method

Generally, the questionnaire method still seems to bear risks. This is particularly the case when they are used to evaluate Law. The authors of *Doing Business* reports were obviously aware of this as they have outlined in detail all limits of this approach[20] in the first report 2004. Unlike official statistics, which only need to record a quantitative observation, a questionnaire concerns the *perception* of the respondent. Therefore, one may not deny a certain degree of subjectivity. This being said, in the absence of statistics, the questionnaire method is often the only method to use to understand a phenomenon. Also, the conception of a questionnaire – its vocabulary and language – as well as its construction sequence and the relevance of questions – are also determinant elements in ensuring the validity of data collected

[19] Each type of criticism is present for each sub-indicator, in the order in which they are included in the 2006 report.
[20] See the paragraph "Other Indicators in a Crowded Field", Doing Business 2004, p. 7s.

However, on the one hand, questionnaires from the *Doing Business* team do not escape from these difficulties, and it is not easy to satisfy the precautions taken by the DB team in order to remedy them. Above all, on the other hand, the lack of rigour, even sometimes objectivity, in the formulation and construction of questionnaires is rather a result of poor specification of the variables constituting the sub-indicators.

4.1.1 Language and translation problems

As they are mainly addressed to Legal experts in developing countries, most *Doing Business* questionnaires were initially only available in English and only the most recent reports have been translated into French. Without passing judgements on the quality of the data collected by this other legal indicator and institutions based on a questionnaire, we can note that the World Economic Forum (WEF)[21] issues its questionnaires in several languages.

However, this linguistic bias is reduced in relation to law. In fact, translation is not in itself a guarantee of a correct understanding of legal texts. A good translation must generally be conducted by two experts: a translator and a bilingual specialist in both Legal systems.

4.1.2 The choice of vocabulary and drafting questions

4.1.2.1 General comments: errors resulting from the vocabulary in questionnaires leads to the exclusion of two indicators out of ten

Beyond the bias inherent to legal translation that are apparent in *Doing Business* questionnaires, it is important to understand certain difficulties concerning the terms used, given an ambiguous legal context, even for informed legal experts…

In the first place, an English speaker can still be surprised by archaic, little used or ambiguous terms to designate certain legal concepts [22]. Above all, the choice of terms often lacks

[21] www.weforum.org
[22] Thus, the term of "Foreclosure" is often used in the same questionnaire in the general sense of "collective procedure" or "liquidation" but also to express a specific procedure inspired by *Common Law* and which enables a creditor who holds a guarantee to obtain the forced sale of the property.

precision, meaning that recipients of questionnaires, in good faith, can give significantly different responses to questions, or with differences of scope without a common yardstick.

Secondly, the handling of concomitant procedures by questionnaires, and therefore by their recipients, is not uniform and is therefore not always very clear. Indeed, the deadlines set by certain countries show that the use of responses leads to the addition of concomitant procedures while other respondents indicated without doubt that deadlines should not be added. This is particularly notable for the indicator "trading across borders", as the comparison between EU countries is facilitated by the harmonisation of Law and procedures.

Finally, in third place, these semantic ambiguities have even more impact when affecting the definition of the measurement unit.

The working group could observe that these problems in drafting questions concern all ten questionnaires. For this reason alone, they need to reject at least two of the ten indicators given the erroneous interpretation of the respondents, the definition of the measurement unit "registering property" and "trading across borders").

4.1.2.2 Comments for each indicator

4.1.2.2.1 The "Creating a business" indicator

The indicator referring to the starting of a business seeks to measure the number of procedures, the time taken, the cost and the capital necessary to create a company.

Firstly, the definition itself of the measurement unit for evaluation is not clear. In fact, the definition of "procedures" has evolved since 2005. Then it involved necessary or "required" procedures. Following the initial definition, around 50 days were required to create a company in France. In the questionnaire for the 2006 report, procedures referred to the "formalities that an entrepreneur is officially required to carry out before and after setting up a

company with a view to its operation". The new definition is not accompanied by a modification of results in France[23].

However, it did not appear that the attention of respondents, often the same for different years, has been drawn to these changes, although the 2006 and 2007 questionnaires are presented as updates of the 2005 questionnaire.

Secondly, the question concerning the role of the courts in the company registration procedure is ambiguous: "are Courts involved". Does this refer to a constitutive jurisdictional decision or a mere administrative procedure? This distinction is of double importance.

In fact, there are three types of possible control on the starting of a business: an *a posteriori* control by the courts (this is the case in Canada), an *a priori* control by professionals (especially in Belgium and Italy, but also in Spain where control is only carried out by notaries public), and finally an *a priori* control carried out by a court (the legal decision is in that case constitutive; this is the case with Slovakia).

However, on the one hand, appendices summarising the responses collected by the *Doing Business* team for the previous year contain indices which lead one to think that errors could have arisen when processing data. Thus, 2005 appendices for France indicate "RCS in Tribunal de Commerce". However, the RCS "Companies register" is held by the *clerk* of the court, regardless of the jurisdiction. On the other hand, comments in the report are highly critical towards the intervention of a jurisdictional decision[24].

In summary, there is a fear that some of the most solid instructions from *Doing Business* reports (removing the intervention of jurisdictions) are founded on ambiguous questionnaires.

4.1.2.2.2 The "Obtaining a licence" indicator

[23] Namely for Doing Business 2005 and 2006: 7 procedures and 8 days. Doing Business 2004 indicated 10 procedures and 53 days, because it included an obligation to notarise acts. This error was rectified as of 2005, but this change was indicated by the authors of the report as the effect of a reform. (Doing Business 2005, p. 17).
[24] See Doing Business 2005, p. 21, 22 et Doing Business 2006, p. 12.

The questionnaire is lax concerning the purpose of the study, and the expressions used can lead to confusion, in particular in the English version of the questionnaire.

The French version thus clearly distinguishes between, on the one hand, the procedure necessary to obtain authorisation to carry out a business for the entrepreneur ("construction company licence" and, on the other hand, the building permit "procedures necessary to build". In fact, in France only the second is necessary. The entrepreneur only needs to provide evidence of having accomplished the procedures necessary for creating his company (in particular registration in the professional register, etc.). These are deemed to have already been carried out, according to the case study attached to the questionnaire.

The English version does not have this clarity. In fact it uses the terms of "Construction licence" which should be distinguished from "Permit to Build". The questionnaire also uses the expression "licences and permits necessary … to build". In this latter case, there is room for doubt as to what is being assessed, which could affect the quality of responses.

Secondly, the definition of the measurement unit itself for the evaluation is open to interpretation. The procedure is defined by *Doing Business* as "all procedures required in law or practice". This latitude of interpretation can lead to a significant divergence of responses. This is in particular the case for France in relation to the scope - and thus the cost - of the task entrusted to the architect (see below).

4.1.2.2.3 The "Hiring and firing" indicator

The problems of comprehension of this indicator can lead to difficulties due to the definition of the object of the evaluation rather than semantic problems. There is however a bias in the conception of certain questions.

The control of firing according to *Doing Business* is the result of the Anglo-Saxon list concept, a legacy of Roman law, and which gives a limitative list of the reasons for firing (in effect the question is asked: *"Does the law establish a public policy of list of " fair grounds*

for dismissal?". In France, this question is meaningless, and neither would it have a negative response. There is not such a list in France, but a general concept of "real and serious cause", which controls firing. Furthermore there is no country in which firing is carried out for no reason, whether to protect the parties against possible discrimination (U.S. Law) or against application of the contract against "good faith" (in Civil Law countries).

4.1.2.2.4 The "Registering property" indicator

This is without doubt one of the indicators in which semantic ambiguities have had the greatest influence.

The definition of the unit of measurement is again ambiguous to the extent that the thing calculated - the number of "procedures" - is open to misapprehension. The procedure is defined as the moment from which on "the contract has been signed and money paid" **The attention of recipients was only drawn to this definition following the questionnaire used for the 2006 report**.

Thus, most respondents who know "Latin Law" – as opposed to U.S. Law, simple certification of the signature – have misunderstood the purpose of the whole questionnaire – this only refers to the question of *registering property*. It seems that French respondents, indeed those from Latin Law countries, understood the procedure as a whole, beginning *from the promise of sale:* the time taken is thus considerably extended.

Thus one may explain the largely aberrant results in this indicator for countries with a Civil Law background.

If the results of *Doing Business* are more or less in line with the observations of practitioners in relation to the number of procedures, *the time* necessary shows considerable discrepancies. Thus the Union internationale du notariat latin (UINL) carried out a consistency test with the figures of *Doing Business* on a sample of 23 of its member countries[25].

[25] See: Conseil supérieur du notariat, *Analysis of responses from UINL member notaries public to the Doing Business questionnaire*, 2005, Miméo.

The results in terms of *numbers of procedures* is only consistent +/- 20% for 3 countries out of 23 and the difference exceeds +/- 50% for 5 countries out of 23 questioned. *The gap is more than double* for 11 countries out of 23 questioned, between the time calculated by *Doing Business* and that calculated by the UINL. There were a large number of aberrant discrepancies: for example in Belgium; 132 days for *Doing Business* compared to 15 for Belgian notaries public; in Romania, 170 (*Doing Business*) compared to 15 (Romanian notaries public) and in the other way: in Mexico, 74 (*Doing Business*) compared to 200 (Mexican notaries public), Cameroon, 93 days (*Doing Business*) compared to 150 (Cameroon notaries public).

Concerned with the ambiguities in the questionnaire, the respondents have undoubtedly described their real practices and therefore *all* operations involving a notary public, from the promise to sell to issuing a certificate, and not just the administrative and final phase of *the registration*.

For France likewise, the error is substantial. It is ranked 144th for this indicator in the *Doing Business* 2006 report , with 9 procedures and 183 days, with a cost of 6.5% of the value of the property. However, exhaustive statistics from French authorities responsible for registration (Direction Générale des Impôts) indicate, for that phase the questionnaire, a **period of 10 days**.

If one considers the scope of these divergences in absolute values, even with a limited sample of UINL members (23/71 member countries) and bearing in mind the low amount of sub-indicators (3), which comprise this indicator and its method of construction (average of rankings resulting from the 3 sub-indicators), **this simple error of comprehension may seriously affect this indicator as a whole** and the summary indicator[26].

Finally, although less important, a certain amount of bias in translation have caused the respondents to respond in error. Thus the English term of "execution" does not mean

[26] This would be even more pronounced if the error rate identified in this sample was repeated in all UINL countries, which would require a broader consistency test to be carried out.

enforcement but signature; a "notary public" does not refer to a notary public in the French sense of the term. Some concepts cannot be translated at all as they have no equivalent in French Law, indeed any countries based on Civil Law (for example “Private Title Insurance Companies”).

4.1.2.2.5 The "Getting credit" indicator

Several problems of vocabulary and translation appear when reading the questionnaire relating to this indicator, without mentioning problems affecting the structure of the questionnaire itself and therefore the indicator[27].

For the two relevant sub-indicators "strength of legal rights" and "depth of credit information", these problems are related mainly to the fact that the concepts being dealt with cannot be translated in many Continental Law countries as they do not have an equivalent. Thus *Security Rights* and *Floating Charges* in the questionnaire "legal rights of borrowers" are unknown in several jurisdictions, in particular in French Law. This is not a real handicap as the recipient may, in completely good faith, give several rigorous responses to the same question.[28]

The two other questionnaires refer to the concepts of *Public Credit Registries* and *Private Credit Bureaus*, which have a very restrictive definition. There is no equivalent of these institutions, leading to a positive assessment of information and a bias in the results of questionnaires.

4.1.2.2.6 The "Protecting investors" indicator

The difficulties in responding to the questionnaire on this indicator result not from the vocabulary of questions rather than from the design of the questionnaire (see below).

However, it can be noted that the vocabulary of questions can also give rise to certain difficulties of comprehension. Thus, in the section in the questionnaire "Shareholder's

[27] See below as well as the specific study carried out for Economic Attraction of the Law: A. Dorbec, *Indicator on solvency information* [provisional title].
[28] For example, question 2-2 b which refers to the scope of application of floating or enterprise charge securities, the French recipient may: not respond (because the terms are unknown), respond negatively (these securities do not exist *stricto sensu*) or positively (referring to share pledges).

redress"[29], several questions on the "standard of evidence" applicable do not have any meaning in Civil Law. The result is that responses to this type of question do not appear to be integrated into the sub-indicator calculation.

4.1.2.2.7 The "Payment of taxes" indicator

Here we in absolute values encounter pure Anglo-Saxon concepts without a French equivalent, such as for example the "cost of goods sold".

4.1.2.2.8 The "Trading across borders" indicator

This is another indicator where semantic ambiguities have had a significant influence. In the first place, a problem of comprehension of the general object of the questionnaire, and therefore the measurement unit of the indicator occurs in the same way as for the "registering property" indicator (see above).

First, the indicator is based on the number of "signatures" necessary to import or export goods. If it is said that an electronic signature is as valid as a "paper" signature, the status of the document (which is one of the other measurement units) in electronic format is not specified. According to professionals in the sector, undoubtedly some respondents using highly computerised procedures have not accounted for all these electronic documents, thus modifying the ranking of other countries.

Second, the number of documents taken into account during cross border trading (import then export) constitutes one of the three sub-indicators (with the number of signatures and the time taken). However, uncounted documents are defined as "*typically required*". This expression could be interpreted as including **all possible documents** and not those strictly obligatory (in which case the term *mandatory* should be used). It is clear that all respondents did not understand that the exercise required from them the mention of "only" obligatory documents.

[29] Which is probably used in the construction of the "Shareholder suits index" indicator, for which France obtains 5/10.

As a consequence, this error conditions their response as to the number of documents but also the time taken, as they have included stages which were not strictly obligatory.

This explains the large difference between results for France (export: 7 documents, 22 days; import: 13 documents and 23 days), which is ranked 44th compared with its European counterparts (see in appendix the distribution of European countries in this indicator). This is very surprising for an area, which has been subject to harmonisation of Laws and procedures at a Community level.

However, according to the General Customs Management, the real figure concerning the number of documents legally required in France is 4, a figure which also comprises the maximum number of documents required in most countries of the European Union. For France, for example, this correction brought the times of 22 and 23 days respectively down to 6 to 7 days approx, for both import and export.

Such an error, which is undoubtedly repeated in other countries, has a significant effect on the validity of this indicator as a whole.

4.1.2.2.9 The "Enforcing contracts" indicator.

The criticism here relates more to the case study (See below).

4.1.2.2.10 The "Closing a business" indicator

The term "*Bankruptcy* " is commonly used in the same questionnaire relating to the "closing a business" indicator, in the general sense of "collective procedures" but also to refers any of the specific phases of liquidation or receivership, making the questionnaire difficult to understand, even for an EnglishLegal expert…

4.1.3 The construction of questionnaires

4.1.3.1 General comments

If the questionnaire is intelligible to its recipients, it should also be relevant and enable an objective accounting of the reality it is supposed to describe. The formulation of the question can have an impact on the response. However, this risk is multiplied by two factors.

Firstly, most questionnaires are based on a case study which is, on examination, an important factor for bias (see infra paragraph 42). Only one questionnaire in 10 (concerning "getting credit") is not based on a case study.

Secondly, the formulation of questions, their articulation, often seems to induce systematic bias in responses and/or the use made by the indicator. In this respect, the person reading questionnaires may be surprised by their length – often several pages and dozens, indeed hundreds of questions for the indicator on tax or on the registering of property.

A priori, there is nothing surprising in this: the time spent on completing such a questionnaire can be an excuse to collect a lot of information for different studies and thus feed several databases. However, there is room for surprise here due to two phenomena. On the one hand, it is sometimes difficult for the observer to identify in the questionnaires the questions which alone are directly useful for calculating the indicator, and therefore reconstitute the indicator[30] *a posteriori*. On the other hand, an often significant amount of questions surprisingly are not used for the construction of sub-indicators, even though the responses can be of use in completing the parameters included in the latter, and give them greater significance [31]. This criticism may be added to that discussed below on the object measured.

Thirdly, the definition of the unit of measurement, even when clear, also introduces a bias between countries when the questionnaire is only interested in "officially required" procedures (which is not always clear, as we have seen above). An identical procedure, vital in doing business, will only be counted in countries where it is legally obligatory. As for example, to create a company, it is universally necessary to open a bank account. This

[30] The same applies if you look on the *Doing Business* web site at files per country and sub-indicator.
[31] Indeed further reflects the diversity of legal systems and their effect on transactions, in particular in relation to countries with a tradition of codified law: see below in this paragraph on the indicator "registering property".

measure is only, however, counted as a "procedure" in countries where it is "mandatory". In reality, therefore, this procedure should be neutralised in countries where it is obligatory. Likewise, it may seem clearly preferable to have recourse to an architect to build building of importance, as described in the indicator "dealing with licences", even though this is not necessarily a legal obligation in all countries.

4.1.3.2 Comments by indicator

4.1.3.2.1 The "Dealing with licences" indicator

As general remark, the whole first part of the questionnaire lacks relevance with regard to French Law. In fact the profession of Civil Engineer is not regulated and therefore no licence is necessary.

The 185 days (more than six months) also appear surprising. In fact the case study concerns a construction without specific limitations in terms of environment, protection of sites and heritage and therefore without the intervention of authorities with specific responsibility for enforcing these specific legislations – Chief Government Architect for France, etc. After examination by the working group, the period should be understood as ranging from two and two and a half months (60 to 75 days).

Secondly, the vocabulary of the case study and the questionnaire is ambiguous in relation to the scope of the task of the architect, which could directly influence the response about the cost of the procedure as a whole.

In fact, the cost referred to in the indicator concerns only fees associated with completing the procedures[32]. Also, in this case study, part of the work of the architect is deemed to have already been carried out (the company has architectural designs, a preliminary study and a plan of the plot). Also, the obligatory task of the architect is limited to the realisation of a layout plan which must be authorised by the architect. This obligatory task in no case involves the supervision of work. However, question B.2, which concerns construction cost, could lead

[32] Doing Business 2006, p. 80.

to confusion and lead respondents to answer having reference to the complete assignment including supervision of work. This would explain the cost indicated for France (around 10% of the total construction) without a common measurement with these assumptions and the fact that the issuance of the construction licence is free of charge.

This could involve an error in interpretation which affects the results of the questionnaire structurally for the cost calculated by the indicator "dealing with licences.

4.1.3.2.2 The "Hiring and Firing" indicator

The complexity of Labour Law sources (Contract Law in general, fundamental liberties, jurisprudence rules, the role of collective agreements) is largely abated, despite several references in some questions. The latter invite to respond to other questions based on the mere base of domestic legislation. This difficulty is an obstacle in countries where labour law is above all governed by collective agreements (such as Germany).

The concept of "Labour" is very ambiguous, and even disconnected from reality, in particular for countries outside the OECD[33]. In fact, what is being assessed is the situation of a full-time employee, employed without interruption for 20 years. In developing countries as much as developed countries, concepts of employment and working hours are transformed by the development of part time labour, temp workers, fixed-length contracts, multiple activities, etc. It is thus lesser the working hours that matter, but rather the leisure-time. The construction of the questionnaire does not make it possible to take into account the way in which Labour Law adapts to the flexibility of production rhythms, which is precisely one of the objectives sought over the last few decades in Labour Law developments in developed countries such as France.

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4.1.3.2.3 The "Registering property" indicator

[33] To the question "What is the maximum number of hours in an (sic) normal workweek ?", a French respondent can respond with a huge range of correct answers bearing in mind the limits established by law, for example taking into account the "fixed day" device.

As seen above, this questionnaire suffered above all from a lack of clarity in defining the unit of measurement.

4.1.3.2.4 The "Getting credit" indicator

Questionnaires relating to the two sub-indicators "*Public registry coverage*" and "*Private bureau coverage*" use a very restrictive definition of resources for information on solvency (definition of *Public Credit Registries* and *Private Credit Bureaus)* indicating that in France, there is no equivalent to *Private Credit Bureaus*. The fact of not collecting any "positive" information on potential debtors (volume of assets, amount of remuneration, etc.), as done by "*Credit Bureaus*" in the U.S. gives France – bearing in mind the definition of the field – a rank "zero". This is not a matter of vocabulary or translation, but of partiality in the design of the questionnaire, as this definition completely guides the responses. Without replicating here the specific study carried out by A. Dorbec (2006) on the indicator "Getting credit" for the "Economic Attractiveness of the Law" program and published in the second part of this works, one may refer to the fact that France is thus ranked 113th out of 155 (Legal Rights of borrowers and lenders (0-100): 3; the information index in credit matters (0-6): 2; Cover of the public register (number of borrowers for 100 adults): 1.8; and especially cover of the private register (number of borrowers for 100 adults): 0.0).

In these last two sub-indicators tracking the cover rate of information registers, public or private, the denominators of coverage rates are surprising, because they refer to the total adult population. Of course, one can understand difficulties in finding reliable statistics in developing countries for business people. Furthermore, the individual company is a particularly widespread form, especially in developing countries. However there are doubts as to their relevance, as the ratio should refer to the total group *in businesses*.

However, the solvency information market is highly competitive, given the existence of other institutions. There are indeed numerous financial databases for which French operators are second in the world!

Bearing in mind this bias, which affects 50% of the sub-indicators comprising this indicator, there is room to doubt that the ranking deriving from it is reliable.

4.1.3.2.5 The "Protecting investors" indicator

This is undoubtedly one of the questionnaires in where construction has bared the greatest risks of leading to errors, both at the level of the responses as well as its encoding (see on this last point paragraph 4.4 below). This is apparent at several levels.

In relation to the construction of a questionnaire, some questions clearly show a bias in favour of the Anglo-Saxon system. This can be seen in particular in questions relating to procedural rules applicable to the action of shareholders against management bodies of the company ("scope of discovery "questions)[34]. These explicitly refer to elements from U.S. jurisdictional procedure (and British to a lesser extent), which do not have their equivalent in Continental Law.

More open to criticism, the construction itself of the questionnaire *prevents rigorous and exhaustive completion*. This is due at least to the fact that the inferences between certain sequences of questions are not taken into account, while, because of the peculiarities of substantive Law, responses to some questions are conditioned on the previous responses. This is particularly the case when there are several actions possible.

This is especially noticeable when it comes to the shareholders' interest in the liability of the managing bodies (Question Shareholder redress[35]). The method of redress chosen by shareholders will directly condition its effect in terms of reparations or damages and sanctions against managers. However, in France, this case study could give rise to at least three different types of action: a criminal action on the grounds of abuse of social well-being; a

[34] Useful probably in the construction of the sub-indicator "*Shareholder suits index"* for which France obtained 5/10.
[35] This part of the question seems to condition the sub-indicator "Extent of director liability index", which Counts for 1/3 and for which France got a score of 1/10.

civil action on breach of management and finally a cancellation action on the grounds of oppression of minorities[36].

However, if the questionnaire first asked the respondent to list the different legal options possible, it did not, as a next step, indicate to what type of legal recourse the other questions concerning the procedure or the efficacy of sanctions referred to. Properly speaking, it should either be possible to respond in three different ways to questions, leading to three different codes, or the questionnaire should impose a type of action. This second solution would require the authors of the questionnaire to first identify the different solutions available in different national Legal systems which, which is exactly what *Doing Business* avoids in principle.

[36] Action in relation to disregarding provisions relating to "regulated agreements" is by its nature limited due to specifications of the case study..

4.1.3.2.6 The "Paying taxes" indicator

A certain number of questions on the adversarial phase and recovery, which in France offer a large amount of guarantees to tax payers, are not used in the indicators.

Furthermore, an assimilation is made between the VAT (a rational and modern tax, but which assumes good accounting) and the turnover tax, a tax which is economically inefficient but easy to administer.

4.1.3.2.7 The "Trading across borders" indicator

Concerning the time necessary to export, all documents are generally obtained through simultaneous procedures, a fact that does not come out clearly. Above all, the construction of questionnaires does not take into account the destination of goods. This leads to a lack of consistency in results. For trade with the U.S., for example, and for the delivery of the same documents (3 documents), the only document which might lead to delay being the customs document (the others being drawn up in the US), the time is two days when exporting from U.S. to Germany, but – according to professionals participating in the working group – nine days when exporting to France.

It must also be added that there exist harmonised customs documents within the European community framework. More generally, the questionnaire omits the existence of regional customs unions.

4.1.3.2.8 The "Enforcing contracts" indicator

The group mainly formulated criticisms as to the case study.

4.1.3.2.9 The "Closing a business" indicator

As with other indicators, drafting difficulties with questions mean that they can be responded to, in all good faith, in totally opposite ways.

4.2 Very specific case studies

4.2.1 General comments on the hypothetical case studies

For each indicator, the hypothetical case studies should, according to authors of *Doing Business* reports, make international comparison more simple and give their demonstration the appearance of universality.

However, this method is based in the first place on the erroneous assumption that, in all countries, the same legal instruments are used to resolve identical problems.

Comparative law shows, on the other hand, that the important thing is to study the sequence followed by different legal cultures to achieve a comparable result. Statistical rigour is also an issue. In order for the summary indicator – which will be the result – to be statistically significant in terms of the *global* capacity of the Legal system to encourage business development, these case studies should rather be aimed at reflecting the most commonly used practices in each country (modal case) that deal with a specific operation. These cases should therefore be different for each country to also enable the testing of local legal practices alongside the theoretical model drawn up by the authors of *Doing Business*.

On the other hand, the approach followed by *Doing Business* leads to two types of error, which can be categorised as legal "parallax errors". The first, at a level inherent to domestic Law, lies in the risk of concentrating the analysis on a specific legal tool which does not take into account the most common local practices or even general practice, due to the case study proposed. It may happen that, by chance, the case study corresponds to a residual, even unknown practice. On the other hand, it can refer to a legal instrument which is subject to a specific optimisation procedure, but which does not give a realistic image of the general reality that the questionnaire is supposed to reflect. The situation of French Law, with respect to the case study used for enforcing contracts until the 2006 *Doing Business* report, is significant. Focusing on the recovery of an unpaid cheque, the case study in France corresponds to a specific instrument, involving bailiffs, which is particularly effective. Some

advertent observers have asked whether the result of this assessment reflects the reality of the Legal and judicial system in this matter: Canivet (2005).

The second source of errors is at the level of comparisons between countries. By orienting the search for information towards a too precise case defined *a priori*, the *Doing Business* report disregards "functional equivalents" [37] developed by the local legal system and which may correctly be deemed highly effective.

Secondly, most cases express systematic bias in favour of a precise legal solution. The construction of these indicators clearly shows that *Doing Business* only measures the discrepancy compared to a given model, sometimes geographically identifiable, but mostly totally abstract. However, we will see below that some theories that could underlie this abstract model are the object of debate and not unanimously approved within the scientific community.

As these case studies condition the responses to questionnaires, **all responses are intrinsically biased, by the indicator they originate from and finally the entire summary indicator, as this is the means of ranking the 10 indicators. The "hiring and firing" indicator" is most illustrative of this problem, casting doubt on its statistically meaningful nature.**

4.2.2 Comments by indicator

4.2.2.1 The "Creating a company" indicator

The case study reveals certain surprises when compared to practice. In order to neutralise differences between countries, the company to be created is a Ltd. (or the most common form of limited companies [38]). Until *Doing Business* 2006, share capital was equivalent to 10 times per capita revenue. For France, this represents the equivalent (2005) of € 263,319, already very high for this type of status. However, the 2006 questionnaire made a distinction, of

[37] To use the term suggested by H. Spammann.
[38] This is one of the very rare cases where questionnaires are interested in the most common form of the object they are supposedly evaluating, leaving respondents to identify this "modal" form (see below).

particular interest in a large amount of developing countries[39], between procedures applicable to companies held entirely by nationals and those held mainly by foreigners. However, this still envisaged a Ltd. company, but with share capital of 200 times per capita revenue. For France, the example therefore referred to a Ltd. company with fully paid up capital of (2005 value) € 5,266,200. While this amount undoubtedly has little impact on responses, it is clearly totally unrealistic.

4.2.2.2 The "Dealing with licences" indicator

The case study presents several surprising, even paradoxical, elements. In particular it refers to an industrial building (warehouse) with two storeys and a relatively large surface (1300.6 sq.m). The problem derives from the fact that it is located in the most populated city in the country (thus Paris for France) (p. 4 of the questionnaire) while also being located in an "industrial area close to a city" and without immediate neighbours (p. 14).

These two types of conditions appear contradictory. They are not relevant in the case of the main European cities, especially Paris, where inner city building is very dense. Also, these conditions seem largely unrealistic, as real estate prices, in a large amount of capital cities, are prohibitive for this type of city centre building.

Finally, and above all, the way of resolving this contradiction could influence responses to certain questions, in particular the time taken to obtain building permits. Whatever the assumptions used to "neutralise" the influence of legislation of the protection of sites, classified facilities, etc., this time can vary considerably if we look at a construction within a capital city or its industrial suburbs. The same applies if, according to common sense, the respondent uses the second case. The assumptions of the case study most commonly imply that the land is located in an industrial area already fit for the purpose[40].

[39] But does not appear to have been repeated in the 2007 questionnaire.
[40] For this reason, the period of 6 months indicated in France for connections to water and electricity networks is absurd, whether in an industrial suburb or within Paris itself...

4.2.2.3 The "Hiring and Firing" indicator

The most illustrative example of the biases that might derive from the construction of the case study is surely that relating to Labour Law ("hiring and firing"). There are several surprises here, French Law being, in a general matter, heavily stigmatised.

The case study relates to a male worker, belonging to the dominant race and religion (…). Married to a woman who does not work, father of two children, and having worked for 20 years full time as an employee in a company with 200 employees.

These conditions attest that the scope of application has little to do with the reality it is meant to assess, especially in developing countries. It excludes independent enterprise, widespread in these countries where salaried workers are in the minority. The description of the family of the employee, which is clearly aimed at neutralising – but is this a valid international comparison? – the effects of national legislation on family contributions, does not correspond to the reality of numerous developing countries or even developed countries where it is now normal for women to work.

He works in manufacturing. However, this disregards over 60% of the active population of developed countries, which work in services, precisely the sector in which applicable Labour Law is the most varied and where the rhythm of work (working hours, seasonality) is without doubt the least standardised.

However, there is a more serious problem. The delicate precision of race and religion has the effect of omitting all legislations protecting against any discrimination and therefore litigation and related actions. If the United States is ranked by *Doing Business* on the sixth position for this indicator, one of the biggest fears for an American employer however is a claim for discrimination. Can one thus assert that it is so easy to fire in the United States?

4.2.2.4 The "Getting credit" indicator

One of the four sub-indicators "strength of legal rights of borrowers" is based on a case study. Although this is not necessarily determinant as to the reliability of this sub-indicator, it can be noted that the case is not representative. It concerns the hypothesis of a purchase of equipment for the sum of USD 283,500, although this type of equipment is generally leased and is not subject to such investments. Besides, leasing-of-equipment interestingly is analysed for another indicator, relating to "Creating a company".

4.2.2.5 The "Protecting investors" indicator

We will only mention the relative inconsistency of the presumption that the transaction envisaged in this case study relates to the normal activity of a buyer company: the purchase, by an agricultural and foodstuffs company, of a fleet of trucks. Undoubtedly, this mention was conceived with the aim of clarifying that the act in question is not, *ab initio*, an abnormal management act.

4.2.2.6 The "Paying taxes" indicator

The case study has the following biases:

- It counts only charges but not tax benefits that the company profits from (and which has only been running for 2 years). The case therefore disadvantages systems with a lot of exemptions;
- The sale of land after 2 years is not consistent with this case study and disadvantages certain countries which distinguish between short- and long-term capital gains, or which reserve a specific regime for corporate capital gains (the case of France where capital gains are taxed as income tax).

4.2.2.7 The "Trading across borders" indicator

The operation used for this case study seems relatively suitable for effectively neutralising divergent legislation in relation to the goods which are the object of the trade and which may belong to three categories, at the choice of respondents. On the other hand, the case only designates – alternative – criteria in order to identify the port in which the loading and unloading will take place, in other words where most customs formalities will be completed[41]. However, for landlocked countries (a large amount of the ranked countries), this information is determinant, whilst the import port can vary depending on the category of goods envisaged for this case study.

4.2.2.8 The "Enforcing contracts" indicator

Until the 2007 questionnaire, the case study used for the enforcement of contracts was conceived following the legal procedure for recovery of a cheque without provision (using the same approach as Djankov, La Porta, Lopez de Silanes, Shleifer, 2002). However, this example is of little relevance in numerous countries where the fact of not honouring a cheque is an imprisonable offence: this is particularly so in Australia. Consequently, the time and cost for recovery of an unpaid cheque has no relation to the efficacy of enforcing contracts: a criminal penalty may be sufficiently dissuasive (or not), even if it co-exists with more serious methods of enforcement. Debtors will thus prefer to use other methods to avoid their creditors.

4.2.2.9 The "Closing a business" indicator

The evaluation of legislation on company failure is based on the case study of a hotel managed by the company "Mirage" belonging to a Mr. Wonder, who runs the goodwill and is the owner of the building. In relation to this case study, there are two equally important comments to make.

[41] The closest port *or* the most commonly used port by companies in the town with the most inhabitants in the ranked country.

Firstly, and quite unexpectedly, the case study refers to one of the most tragic failures in Australia's recent history: the collapse in 1988 of the Quintex Group, in particular its investment in a hotel complex referred to as "Mirage"... [42]

More seriously, in France, such a case is very rare, because adopting the legal form of a non-trading real estate investment company rather leads to limitation of risks in case of failure. This contradiction points out the limits of the case study method, when the latter is not orientated at the most common national legal practices.

4.2.2.10 Conclusion on case studies

These examples underline the risk of using case studies which have little in common with local practices. This risk exists at two levels of the analysis: statistical and legal. From a statistical point of view, the authors of the report did not indicate how these case studies were selected: the method, the mode (the most frequent case in absolute value) or minimum (marginal cases) practices they are supposed to assess. However, this position leads to widely differing interpretations from a statistical point of view. A rigorous statistical work would imply basing the case study on a modal case typical of local practice.

From a legal point of view, the fact of using a case study does not make it possible to report on the diversity of solutions permitted by each national Legal system. Thus, *Doing Business* is limited to assessing the gap that separates case studies, which reflect an idealised legal status – or perhaps the Legal system that the authors are to – and the legal system of each country.

The reasons for such diversity should perhaps be sought, and the *Doing Business* underlines this, in phenomena opposed to stable economic growth: the legacy of Legal traditions, pure opportunism, predatory behaviour, etc. However, in several ways this diversity is a way of effectively dealing with the specific social and economic aspects of each country.

[42] See: R. Grenning, " Smiling Villain", *http://thecouriermail.com.au/extras/oq/book10skase.html (visité 5-05-06)* and C. A. Hoyte, *An Australian Mirage*, PhD thesis, Griffith University, 2005, 435 p.

Finally, the real problem – as all comparative law specialists have realized for years now – is to identify the different ways in which a question can be dealt with by different legal systems in different countries (we will look at this question later on).

4.3 Administration of questionnaires

4.3.1 The quality of the sample group

The combination of a partnership with an international network of law firms (Lex Mundi) on the one hand with, questionnaires based on very simple "case studies", on the other hand, was supposed to ensure both, ease of comparison of results and maximum proximity with real business life. Paradoxically, there is room to doubt this. Errors are even more possible as some questionnaires contain qualitative questions and involve value judgements. Thus, without contesting the individual professional value of each respondent, it should be observed that the administration of questionnaires is also open to criticism in several areas[43].

Firstly, the recipients are a heterogeneous group. Although mainly legal experts, it should be noted that for certain indicators or certain countries, the list of recipients includes professionals from different sectors (architects, customs agents, etc.) and members of the authorities. Their presence could be a useful complement to the legal experts questioned. However, these additions are not systematic: the sample questioned is not homogenous among all countries.

In second place, the lists of legal experts who receive questionnaires shows that they are generally members of international firms, normally general lawyers and involved more in consultancy that day to day proceedings and cases, which are the main object of this evaluation. However, errors are more likely in that some questionnaires contain qualitative questions and value judgements.

This presumption of error is compounded when one observes that the list of recipients of questionnaires shows a low proportion of members of organisations uniting members of a specific legal branch, with the absence of legal professionals other than lawyers, even if they are organised in a professional society. Thus, out of a sample of 23 member countries of the Union Internationale du Notariat Latin (UINL), where there is an organised notary public

[43] These comments apply to the list of recipients attached to successive Doing Business reports. It should however be borne in mind that some recipients did not wish to be included.

profession, only two names were recognised by their professional authority for the indicator "creation of companies", and three for the indicator "registering property"[44].

Finally, when it comes to giving questionnaires a qualitative dimension, we were surprised about the very low importance given to magistrates in the sample of recipients, despite them being perfectly placed to judge the implementation of Law.

The sample questioned therefore is not, from a point of view of skills, representative of the object that *Doing Business* wishes to measure – the legal acts of the day-to-day life of companies.

In third place, it is even more disturbing that the number of recipients by country and by indicator has been reduced (from two to no more than half a dozen maximum per indicator for France). It is true that the methodological notes indicate that the *Doing Business* carries out verifications based on surveys[45]. However, the rules for resolving any conflicts are not mentioned.

However, fourthly, the identity of some recipients may give rise to questions. In the absence of an exhaustive verification, we will look only at the two following examples.

On the one part, from a functional viewpoint, for the 2006 report some national authorities of legal professions questioned by the UINL could not identify the professionals listed as recipients of questionnaires for their country [46].

On the other, the list of recipients in France for the 2006 questionnaire "Dealing with a licence" shows several surprises: two of the four recipients are listed as belonging to the Ministry of Social Affairs, Work and Solidarity, including one which does not appear

[44] See: Conseil supérieur du notariat, as mentioned before
[45]" Multiple interactions with local respondents to clarify potential misinterpretations of question interactions", DB 2006, p. 77.
[46] This point seems to have been rectified for 2007.

necessarily responsible for planning Law[47]. This is undoubtedly a typing error, but means that the questionnaire was only filled in by two recipients [48].

These criticisms show that the authors of reports have not made available the resources to carry out a statistically significant study. Also they indicate themselves that the quality and representative nature of the sample are not important[49]. However, it is more worrying that they aim to make objective comments and not mere indications of the perceptions of a clearly designated group in the report, which, by the way, would therefore need to be homogenous. Also, we will see below that there is a false sense of security from a literal reading of texts.

4.3.2 Accounting of results

Also, in published data, we did not find any indication as to how missing data were processed. If these were included with " … ", their statistical processing for the construction of the general indicator was not specified. However, it is very different to assign to a country, where data are not available, the ranking "0" (which is an excellent ranking) or the ranking 155 or an average ranking. Bearing in mind the construction of the summary indicator, even the neutralisation in each partial rankings of countries with missing data does not make it possible to calculate the summary indicator. Undoubtedly, this has occurred for several small developing States, which are missing some data, receiving good general marks.

4.4 Coding: the great difficulty of precisely specifying relevant legal variables

Assuming that questionnaires were drafted in such a way as to minimise subjectivity and difficulties of comprehension on the part of recipients, so that the case study is both, relevant

[47] The DAGEMO (General Administration of Service Modernisation Management)
[48] Including a British architect established in France, surely able to understand the questionnaire, but in relation to whom it should be asked whether his practice in rural Normandy is not behind a serious error in calculating time taken to install networks, meaning that said indicator is irrelevant for France.
[49] "Having representative samples of respondents is not an issue, as the texts of the relevant laws and regulations are collected and answers checked for accuracy": DB 2006, p. 77.

in the country in question and corresponds to the most common case, and finally that the sample of respondents is relevant and representative, a new difficulty appears in the interpretation of their response, especially in the *coding of responses*[50].

This is where one may observe one of the most important limits of *Doing Business*,which depends concurrently on the quantification method and on the quantified object: Law. This limit is in fact inherent to the method prepared by LLSV to law.

Three of the ten indicators [51] are constructed on the basis of eight "sub-indicators" (see table in appendix 4), which themselves represent in total 22% of the final ranking. Depending either on responses to the questionnaire or the textual analysis of the law [52], they record the presence or nature of provisions in the national Law they are assessing in order – according to the authors of *Doing Business* – to establish the economic efficacy of Law. This is recorded by coding, most commonly 0 or 1 (the provision is included in national law), but also occasionally following a broader ranking system.

First, we should remark immediately that the aim of these types of sub-indicators evidently is to evaluate the gap between national Law and the optimum theoretical Legal structure according to the DB team. Through construction, they are therefore most likely to show a structural bias, as opposed to certain sub-indicators which merely give a result (see below).

This bias may be in favour of a Legal system, for example the American accusatory system. Thus, for the sub-indicator "shareholder suits index", itself counting for 1/3 of the indicator "protecting investors", one of the variables is identified by the following code: "Plaintiff can request categories of documents from the defendant without identifying specific ones (0=no, 1=yes)". This question refers explicitly to the American procedure of "discovery". In this context, practice tends toward "boilerplate discovery": the lawyer proceeds by document type,

[50] See for the indicator "Anti director's right index " from LLSV 1998 and 2005, the rigorous analysis carried out by H. Spammam, who the authors wish to thank for pointing this out - Spamann 2006).
[51] "Hiring and firing";"Getting credit"; "protecting investors" (in full)
[52] the protocol of using either questionnaires or textual analysis, or a proportion of both s not specified in the technical appendices of Doing Business reports, except by the mention that questionnaires may be supplementary (see above). This would however be an important parameter in identifying potential bias in interpreting the nature of the law.

requiring the production of documents within a very wide field and which are practically unidentified. This practice significantly increases costs without obtaining interesting results, and numerous American commentators have complained about it: Olson (1991).

This bias, however – undoubtedly the most common one – could also be theoretical, referring clearly to an assumed economic model, which is not necessarily an object of a scientific consensus (see below). This is the case, for example, with questions that are used in the construction of the sub-indicator "Strength of legal index rights" which is one quarter of the "getting credit" indicator.

Beyond the bias that questions might induce in favour of one specific Legal model, the difficulty of the coding method implemented since the beginning of the LLSV works results from its application to Law. The qualification the authors attributed to the responses or textual analyses can cover several realities, which, indeed, correspond to opposed realities – a problem that economists describe using the concept of "specification of variables".

This method is both, easy to use and effective in quantifying physical or material data ("Do you have a car?" Yes/No, etc.). As was demonstrated by H. Spammam, Law is particularly unsuited to this type of analysis, which would require a considerable amount of work in identifying sub-cases that might arise, or different legal methods used to respond to an identical question. Coding in effect means carrying out a true "assessment", in other words, going back to Legal doctrine; looking at specific provisions or a given situation, in an abstract and predefined category. This category can result from a range – or all – of substantive Law sources: legislation, regulations, professional texts (soft law, codes of conduct, etc.); jurisprudence, even academic doctrine, habit or equity.

Unlike in legal assessment-operations, the authors of *Doing Business* have made an interesting attempt for an "economic ranking of Law" following categories of economic behaviour predefined by their analytical model. For example, for the indicator "protecting investors", see Djankov La Porta and Shleifer. (2005).

However, as to the first point concerning the Legal sources used, the *Doing Business* method is not very precise in identifying the tools used to make this assessment[53].

Above all, as H. Spammam showed for another indicator introduced by the LLSV school, one may fear that variables are too non-specific. The recoding of responses according to this new "assessment" method, more rigorous and detailed, gives very different results to those of LLSV, both from a point of view of the performance of each country, as well as of the meaning of the new recoded indicator.

The same type of analysis can here be applied to identify the required transformations of *Doing Business* questionnaires and their interpretation in order to obtain a more rigorous coding. To use this criticism constructively, one may ask whether it is possible to carry out a full "recoding" for all 155 countries of all "occurrence" sub-indicators". However, these attempts of recoding do not guarantee the reliability of results. Basically it is clear that it is necessary to improve the method, starting with the conception of the questionnaires.

It is thus necessary to first draw up a type of protocol for assessing Law, specifying at least the following points at several levels:

- The nature of the Legal sources included in the evaluation;
- The assessment (0, 1 or "data unavailable"?) of provisions that go beyond mandatory public provisions, such as those which, without explicitly permitting a behaviour, are optional and leave open the option of recourse to subsidiary Legal sources (in particular articles of association or internal company rules). Resolving this question thus involves detailing all sub-indicators depending on the nature of the provision which leads to the economic behaviour subject to evaluation[54];
- The appraisal of the force of non-legislative sources, from jurisprudence (for example: from what level, indeed what repetition is jurisprudence deemed to impose the

[53] The 2006 report mentions only: company law, civil procedure codes and stock market regulations: "The data come from a survey of corporate lawyers and are based on company laws, codes of civil procedure and securities regulations." (DB 2006, p. 84).
[54] This preliminary specification work is similar, but following a different approach, that of comparative law experts who, starting from the substantive law question to be resolved , are interested in the different ways of achieving this. see *infra.*

measure in question?) or doctrine (majority decision? That distributed in the most authoritative legal reviews?);

- The appraisal of the reality of the implementation of these provisions (should one code differently a country in which the provision exists but is never used for an extra-judicial reason and a country in which there is no such text?)[55].

As underlined by H. Spamann, the choices made within the context of this protocol should rigorously follow the pursued objective, that is to say correspond to the hypotheses it seeks to reflect.

It must be admitted that it is far from being impossible to thusly improve *Doing Business* methodology. In practice, this would nevertheless require the establishment of such a protocol, which does not seem to exist at the present moment, and then to almost completely remake the study, with an in-depth restructuring of questionnaires and interpretation methods…

These observed difficulties of variable specifications are the basis for the criticisms made of *Doing Business* when it comes to defining the object measured, and which are often made by Legal experts.

5 What to measure? Limits on the object evaluated by Doing Business

Doing Business reports deal with a challenge that is both, exciting and vital in terms of economic development: measuring the efficacy of Law. It is therefore necessary that the object of the measurings are both, relevant and rigorously and objectively defined.

Here also it is possible to make criticisms of the methodology adopted by *Doing Business* at all stages, even though giving rise to interesting problems of method or analysis.

[55] This point gives a technical illustration of the discussion below on the field of law which is evaluated.

5.1 The object of the evaluation: the construction of indicators

5.1.1 Indicators which create a confusion between data of different types

Once the data has been correctly collected and rigorously coded, it is still necessary to construct relevant and coherent indicators in order to correctly describe the phenomenon it seeks to measure.

When analysing a phenomenon, economists generally distinguish the ex-ante analysis (for example the anticipated variation of a certain macro-economic aggregate according to the theoretical model proposed), from the ex-post observation (for example the variation observed in such a variable and its impact on the aggregate analysed). In general, the two approaches must be combined, the second phase allowing the empirical test of the validity of hypothesis formulated in the first phase.

In terms of the evaluation of the efficiency of Law, this distinction is even more important. The ex-ante evaluation of the efficiency of Law is particularly related to measuring transaction costs that a Legal system might impose on commercial transactions. Ex-post evaluation is interested in the real effects of law, bearing in mind, in particular, the real conditions for implementing Law: the execution of their obligations by the parties, litigation, etc.

From the perspective of this distinction, *Doing Business* reports are ambiguous. On the one hand, the quasi-taylorian calculation of time and cost is an ex-ante evaluation method. On the other, the interest in the litigious execution of contracts refers more to an ex-post approach.

However, the construction of the 10 Doing Business indicators is itself open to criticism to the extent that they often combine several types of information which are not comparable and may therefore not be added. This confusion may be perceived at three levels.

As argued above in the analysis of questionnaires, some indicators combine objective data with perceptive data.

Also, some contain two types: structural data and result data. This is the case with the indicator "Getting credit".

It adds:

- Elements expressing structural data: sub-indicators "Strength of legal index" and "Depth of credit information" including only occurrence indicators of certain legal concepts;
- Elements of result: the rate of coverage of the adult population by private or public financial information offices.

The same remark can be applied to the item "Enforcing contracts", which contains one structural element (the number of procedures) and at least one result-based element: the cost, which includes legal fees when a lawyer is mandatory or merely usual. The indicator for time is likewise ambiguous and can be considered as an indicator of results.

However, the combination of these types of elements in no way makes it possible to draw any conclusions in respect of the object of the evaluation, in particular the theoretical model proposed [56].

5.1.2 Paradoxically, the calculation of procedures does not take into account to degree of complexity

Adding together all procedures, they are assigned the same "weighting" in terms of complexity, without time or cost necessarily being a corrective in this matter. For example,

[56] As an example, let's assume that for "getting credit", we have two countries A and B. The first, country A, has the ideal legal framework according to the underlying theoretical model of the authors of DB: it is no. 1/155 for the two sub-indicators "strength of legal index" and "depth of credit information". For reasons outside the legal system (for example under-development of means of communication, an underdeveloped banking system, etc.), it is last for the two sub-indicators referring to coverage of the adult population by credit registries. Its overall ranking for the indicator is therefore average: 77/155. Let's assume that country B is in exactly the opposite situation: absence of required elements in its formal legal framework (and therefore 155/155 for the first two sub-indicators), but total coverage of the population by credit registries (1/155). The two countries will be equally placed.

the item "Creating a company" accounts, in the case of Germany, in the same way for an address declaration and the use of a notarised act.

5.2 The object of the evaluation: the nature of the law

5.2.1 Law or a legal patchwork?

The general ranking is based on the addition of ten indicators, the choice of which should normally be the result of a rational approach, connected with the objective of the composite indicator: understanding the capacity of the legal system to encourage the business climate. For most of the indicators, the reports explain what economic relationships a specific indicator is supposed to capture, as described in the background papers. However, very little is indicated as to the relevance of the selection of the 10 indicators. The sample of indicators then appears rather as the juxtaposition of ten partial analyses of the same legal system.

Of course, to carry on such an ambitious project as the appraisal of the quality of Law necessarily involves arbitrary choices. Such program may in fact only develop by stages, and even the construction of such a huge database is an extensive job. Either the choice of indicators made by the *Doing Business* authors derives from such technical limitations in data collection and the results of the analysis should thus be published with great *humility*. However, we have seen to what extent the conclusions of the reports were normative. Or the first ten indicators should be chosen as the most significant to capture the daily operation of a business in order for the composite index to be significant. In this respect, one can doubt, for instance, that the "Protecting investors" indicator captures an aspect of the daily operation relevant for an average business in all 155 countries under review.

However, if indicators should base a judgement on the "quality" of Law, they should in the first place give an image of the applicable legal system.

5.2.2 Law or administrative procedures?

As we mentioned above, the "time and motion" method of *Doing Business* mainly involves calculating the time and cost of the different stages necessary to carry out a given economic transaction. In reality, *Doing Business* examines rather *administrative procedures* imposed by a legal framework on business people. For the 2005 report, seven partial indicators were drawn up following this "Time and motion" method counting for 28% of the final mark. In 2006 they counted for 46% of the final ranking.

This is hardly surprising, given that *Doing Business* investigates the forms of regulation that encourage economic growth and those that hinder it (DB 2006, p. I). Here, one is confronted to the ambiguity of the term "regulation" in English. It includes both the rules applicable to companies and the process by which the authorities apply these rules.

This point has been subject to particular criticism by French Legal experts, in particular when the first report, that designated more specifically the influence of the origins of the legal system, was released. To a certain extent, these criticisms are a proof that it is difficult to judge the quality of Law alongside administrative hassles that might be imposed by nitpicking bureaucracy: Tavernier (2005)

However, we need to look at this critique again and underline the limits to analysing these indicators of the complexity of Legal procedures (or, when favourable, and for some of them, "productivity of the legal system") regardless of the substantive law implemented.

On the one hand, certain purely administrative procedures can correct imperfections in substantive Law, enabling a better application of same.
On the other, some procedures have their own in intrinsic efficacy, which can also be used by economic analysis tools[57].

5.2.3 Law in books or its application? *De jure* vs. *de facto*

Doing Business reports refer above all to the evaluation of texts, and only marginally take into account its application by jurisprudence.

Doing Business reports evaluate Law as it is written in texts, and not as it is applied, with more or less zeal and spontaneity by the main players, be they responsible for respecting it or applying it.

[57] Thus, the publication procedure in legal gazettes relating to company creation, often criticised by Doing Business reports is a factor behind reducing the asymmetrical nature of information among economic agents.

Doing Business deems that implementation mechanisms are common to all types of contracts, and all commercial transactions. Thus it only looks at litigation on two occasions: mainly, through the item "enforcing contracts" which covers this entire aspect of the Legal system; and, more marginally, through the item "protecting investors" – to the extent that the characteristics of the litigation relating to minority rights are integrated into the indicator (cf. table 1).

In relation to the indicator "Enforcing contracts", the *Doing Business* report proceeds as if the efficacy of the litigious procedure could be fully assessed through procedures applicable to a single type of economic operation: the recovery of an unpaid cheque.

In relation to the indicator "Dealing with licences", nothing is said in relation to appeals against rejection of building permits. However, in this respect, the existence of an administrative jurisdiction, with summary jurisdiction procedures, enables the investor who is the victim of an arbitrary administrative decision to enforce his rights, rapidly.

However, the observation on Legal frameworks, in particular commercial and business Law, shows that the more sophisticated the framework, the more specific the implementation mechanisms [58]. To a certain extent, this diversity of implementation mechanisms may also be the cause of inefficacy and could comprise a valid reason for seeking informality. However, this aspect is in no way considered by *Doing Business*, which thus ignores a large part of its own subject.

Also, *Doing Business* expresses a paradoxical bias in favour of Law from legislative or regulatory sources, however judged more difficult to adapt to than contracts or jurisprudence. The questionnaire relating to Labour Law is a particularly good illustration of this bias. The first question, on updates ("has there been a change in the labour law or related legislation") is of little relevance as it seems to refer only to the modification of texts. However, what it looks at, is not so much the modification of texts than practices and the interpretation of the text by

[58] In this respect, France finds itself in a rather flattering position in relation to this item, precisely due to the existence of a specific and speedy procedure, via the intervention of a bailiff.

the players concerned. Also, the concept of Legal "reform" should not be considered as a reflexive, incremental process, but as a stochastic, discontinuous mechanism.

5.2.4 Law or its real practice?

Time and motion type methodology (time and motion) seeks to report on the practice of Law, i.e. the way in which jurisprudence or Law is interpreted, the probability and effects of conflicts of Law, or the attitude adopted by economic agents faced with this complexity in order to speed up their transactions.

In avoiding this aspect, reports did not deal with the important question of the predictability of law, in particular litigation, a dimension that could be unfavourable to Common Law systems, and even more so to countries which use a *jury* in civil and commercial litigation. This is definitively the whole problem of *legal security* which has remained unobserved.

5.2.5 Law or its effects?

Finally, as the "Time and motion" approach mainly evaluates the productivity of a Legal system, it ignores the effects of Law, in particularly all positive external effects that are produced by norms and their implementation mechanisms. Law in general, including implementation procedures, in DB reports is never presented as what is was originally conceived for: reducing uncertainty, conflicts, etc. In particular, and this is surprising for works produced by economists, the extent to which certain Legal instruments favour competition is not taken into account.

5.2.5.1 Theoretical assumptions that lead to debate

On numerous occasions, the authors of *Doing Business* base their method, but also their recommendations, on a unilateral presentation of debates on economic theory.

On solvency information regimes ("Getting credit" indicator), the economic model underlying three of the four sub-indicators including this indicator is based on the idea that "positive" solvency information is more favourable to the development of credit. The same applies to comments on the report. However, this assumption is in no way uncontested by economists, as shown by the report drawn up by the "Economic Attractiveness of Law" program by A. Dorbec (Dorbec, 2006).

Likewise, concerning the "hiring and firing" indicator, the problem of firing without reason for example is ambiguous. The underlying assumption of *Doing Business* reports here favours flexibility, which is understood to be brought about by the possibility of firing without reason. If a positive effect on the financial position of companies may be obtained on the short term (in terms of speed, deadlines, number of procedures), this is not necessarily the case on the long term. The question is extensively discussed within the economic community. This discussion must integrate the negative effects of too much turnover on the quality of manpower, social conflicts, etc. The debate has largely ignored the fact that certain procedures implemented by protective Labour Law systems may have beneficial effects, in particular on productivity. Only one footnote on page 6, p. 26 of the 2006 report mentioned this point[59].

Also, the complex relationship between procedural ease of firing and possible rate of litigation potentially generated by a dismissal is not taken into account.

[59]" ILO (various years). Economic studies show that the presence of such fundamental rights improves productivity."

6 Conclusions: rank or measure?

At first sight, *Doing Business* seems to be undertaking a difficult job: ranking Legal traditions (*Doing Business* 2004) and States according to the "efficacy" of the economic and legal environment (*Doing Business* 2005 and in particular 2006).

As we have discussed elsewhere[60], *Doing Business* reports have the merit of drawing attention to two questions that are fundamental to economic development in all areas: on the one hand the effect of Law – and more generally Institutions - on economic growth; on the other, the fact that Law and regulation, like all public policy instruments, should give rise to an evaluation that also takes into account their economic effects.

Concerning the first issue, one needs to note that economists, but also legal experts, did not wait for the team of M. Klein and A. Shleifer to identify the link between Institutions and economic growth (it suffices to observe the extraordinary development of "Law and economics" and "Neo-institutional economy" schools of thought existing since the mid 1960s).

Also, all methodological criticisms developed subsequently show that this evaluation work must be carried out seriously and not *a priori*. Of course, error corrections, when brought to their attention, are, according to authors of databases, immediately distributed on the *Doing Business* website, as is usual for corrections of official statistics and macro-economic aggregates. However, one should keep in mind that these are reports: the *Doing Business* work relies as much – or even more – on comments as on figures supplied. On the other hand, the 2005 and 2006 reports were presented as an *update* of previous reports for the indicators already present: literary developments continued to be based on previous questionnaires and the general ranking does not seem to have been permanently modified, beyond error corrections. In any case, these corrections have not been accompanied by publicity equivalent to that for the initial ranking.

[60] See C. Ménard and B. du Marais, *mentioned article*

In summary, *Doing Business* reports show that it is easier, although also more superficial and finally very debatable, to rank countries – if not Legal systems – according to an ordinal base than to measure the partial effects of specific Legal instruments before comparing these effects on an international basis. This is the last part of the "Economic Attractiveness of Law" program.

The interest in the debate launched by the work of LLSV and *Doing Business* reports is obviously related to the future development of social sciences. These developments should operate in several directions:

- Fine tuning, alongside the scientific community, of a rigorous methodology, clearly presenting protocols for technical options accepted; to develop Comparative Law databases, with the aim of enabling a quantified international comparison of characteristics or effects, of implemented Legal instruments. At least, such a protocol should make it possible to improve existing databases. Nevertheless, there is room for doubt that, bearing in mind the intrinsic limits exposed in this study, it will be easy to improve the quality of the *Doing Business* database without redoing a questionnaire campaign in depth;
- On the longer term, the development on an international level of common statistical standards, which differentiates indicators based on observed phenomena and not on responses to questionnaires. Only these statistics will enable a homogenous observation of certain phenomena linked to the operation of Law;
- In any case, develop the comparative analysis of relations between Law and economy proceeding rather via monographs identifying the partial effects of Legal instruments implemented in each legal culture, and then comparing these effects on an international basis. This is the method developed by the "Economic Attractiveness of Law" programme;
- Finally, analyse in-depth and rigorously the question of "Legal origins" that was initially at the centre of the *Doing Business* project. For this, it is also necessary to support a real research program without any political or ideological assumptions, which would study identifying the impact of social and cultural details in interactions

between Law and economy, bearing in mind, for example, the specific details of the Arab-Muslim, Russian, African or, as did the "Economic Attractiveness of Law" program, Chinese legal and institutional culture. [61].

[61] See the upcoming study on "Processes on the choice of the applicable legal system: determinants, choice criteria, transition costs, etc.: the case of property law in China".

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8 Appendices

Appendix 1: List of participants in the working group

[To be completed]

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Appendix 2: Doing Business 2006 ranking according to the summary indicator of "ease of doing business"

[See file DBRankingsByItem(Ct'd)Excel.xls]

Appendix 3: Ranking of the 25 EU countries according to the summary indicator of "ease of doing business" and partial indicators

[See file ClassementUE25.xls]

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Appendix 4: Table: specifications of Doing Business Report indicators

[See file TableIndexConstructionDB20065-05-06.xls]

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Appendix 5: Explanatory power of the "ease of doing business" summary indicator

[See file TableExplanatoryPower.xls

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