

SYMPOSIUM ON TRANSNATIONAL FUTURES OF INTERNATIONAL LABOR LAW

INTERNATIONAL LABOR LAW AND ITS OTHERS: GOVERNANCE BY NORM VERSUS GOVERNANCE BY KNOWLEDGE

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Domestic laws are shaped by myriad global governance projects, which may attract the support of different organizations, promote contrasting socioeconomic visions, and operate at diverse levels and scales.¹ Beyond differences in their whos, whats, and wheres, governance projects are also differentiated by their hows: they may embody different ways of imagining relations between order, authority, and legitimacy;² operate through different styles;³ or deploy different technologies.⁴ International legal regimes, which function through a logic of governance that applies norms sanctioned by the political consent of states, have long operated alongside “systems of management and control” drawing their legitimacy from claims of “objective, disinterested scientific knowledge.”⁵

This essay explores how such “governance by knowledge”⁶ interacts with international law’s “governance by norm,”⁷ through a case study of the World Bank’s *Doing Business* project and the International Labour Organization (ILO)’s responses to it. I contend that *Doing Business* ultimately rests on “bad science,”⁸ and thus offers a potent illustration of the power wielded by actors who claim “technical” knowledge. I argue that those who fail to engage with the technicalities of the knowledge claims that ground projects like *Doing Business*, and who instead meet such projects primarily through the idiom of (international) legal normativity, may have already lost the battle for influence.

The *Doing Business* Project

Though *Doing Business* is usually identified with its annual reports, the project’s core activity is the annual production of eleven business regulation indicators for 190 countries. The indicators pose a “snapshot” of regulation on themes ranging from the straightforward, such as access to electricity, to the highly contentious, such as

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¹ [EMPLOYMENT POLICIES AND MULTILEVEL GOVERNANCE](#) (Juan Pablo Landa & Brian Langille eds., 2009); cf. QUINN SLOBODIAN, [GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM](#) (2018).

² ALAIN SUPIOT, [GOVERNANCE BY NUMBERS: THE MAKING OF A LEGAL MODEL OF ALLEGIANCE](#) (Saskia Brown trans., 2017).

³ Fleur Johns, [From Planning to Prototypes: New Ways of Seeing Like a State](#), 82 MOD. L. REV. 833 (2019).

⁴ Kevin E. Davis et al., [Indicators as a Technology of Global Governance](#), 46 L. & SOC. REV. 71 (2012).

⁵ ANTONY ANGHIE, [IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW](#) 264–65 (2005).

⁶ David Kennedy, [The Mystery of Global Governance](#), 34 OHIO N. U. L. REV. 827, 851 (2008); Andrew T.F. Lang, [Legal Regimes and Regimes of Knowledge: Governing Global Services Trade](#) (LSE Law, Society and Economy Working Papers 15/2009).

⁷ Cf. Dimitri Van Den Meerdsche, [International Organizations and the Performativity of Measuring States](#), 15 INT’L ORGS. L. REV. 168 (2018).

⁸ André Broome et al., [Bad Science: International Organizations and the Indirect Power of Global Benchmarking](#), 24 EUR. J. INT’L REL. 514 (2018).

employing workers.⁹ The indicators are based in part on whether national law guarantees specified rights to certain actors and in part on the estimated time, cost, and number of steps involved for a business to conduct a given legal or administrative task.

The project's hallmark is its ranking of countries by a weighted aggregate of these indicators. Updated rankings and scores are disseminated through annual reports, which also describe current methodologies, explore thematic case studies, and elaborate on project rationales. The reports make the tacit message of the rankings explicit: reallocate legal rights and reform legal practices to push each indicator score as high (or in some cases as low) as possible.

The project's influence has been remarkable.¹⁰ National political leaders, including heavyweights in Russia, India, and the United Kingdom, have made the *Doing Business* rankings a key benchmark for reforms.¹¹ More than fifty states have government units mandated to respond to the project.¹² Their efforts have had striking results.¹³ Georgia climbed the ranking from one hundred to eleven between 2004 and 2011.¹⁴ Between 2016 and 2018, China moved from seventy-eight to forty-six, while India jumped up an astonishing fifty-three spots, to fifty-seven.¹⁵

Qualitative studies tracing national reform processes¹⁶ have given the lie to perennial concerns that responses to *Doing Business* are no more than paper-pushing and hot air.¹⁷ Sam Schueth, for example, has closely traced how *Doing Business* drove mid-2000s reforms in Georgia that reshaped not only corporate law and property, customs, and tax administration, but also labor law.¹⁸

Governance by Norm and Governance by Knowledge

How does the governance logic of the *Doing Business* project differ from that of international labor law? *Doing Business* is framed as prescriptive rather than embodying a “normative” obligation with moral or legal force.¹⁹ It purports to offer a technical means to an end desired by a unitary, domestic policy actor, not a norm of conduct

⁹ Amanda Perry-Kessaris, *The Re-Co-Construction of Legitimacy of/Through the Doing Business Indicators*, 13 INT'L J. L. CONTEXT 498, 500–02 (2017).

¹⁰ Rush Doshi et al., *The Power of Ranking: The Ease of Doing Business Indicator and Global Regulatory Behavior*, 73 INT'L ORG. 611, 617 (2019).

¹¹ *Id.* at 620–21.

¹² *Id.* at 622.

¹³ *Id.* at 621–27.

¹⁴ Sam Schueth, *Winning the Rankings Game: The Republic of Georgia, USAID, and the Doing Business Project*, in RANKING THE WORLD 151, 183 (Alexander Cooley & Jack L. Snyder eds., 2015).

¹⁵ *How the Big Emerging Economies Climbed the World Bank Business Ranking*, ECONOMIST (Nov. 3, 2018) [hereinafter *Climbing the Ranking*]; WORLD BANK, *DOING BUSINESS 2017: EQUAL OPPORTUNITY FOR ALL* (2016); WORLD BANK, *TRAINING FOR REFORM: DOING BUSINESS 2019* (2018).

¹⁶ See, e.g., Doshi et al., *supra* note 10, at 633–39; Michal Lyons et al., *Do Micro Enterprises Benefit from the “Doing Business” Reforms? The Case of Street-Vending in Tanzania*, 51 URB. STUD. 1593, 1597 (2014); Benito Arruñada, *How Doing Business Jeopardises Institutional Reform*, 10 EUR. BUS. ORG. L. REV. 555, 562 (2009); Chang-Hsien Tsai, *Regulatory Competition and the World Bank's Doing Business Reports: Taiwan's Liberalization of the Minimum Capital Requirement for Incorporation as an Example*, 13 NAT'L TAIWAN U.L. REV. 239 (2018); Trang Nguyen, Note, *Grading Regulators: The Impact of Global and Local Indicators on Vietnam's Business Governance*, 88 N.Y.U.L. REV. 2254 (2013); Lin Lin & Michael Ewing-Chow, *The Doing Business Index on Minority Investor Protection: The Case of Singapore*, 2016 SINGAPORE J.L. STUD. 46 (2016).

¹⁷ Mary Hallward-Driemeier & Lant Pritchett, *How Business Is Done in the Developing World: Deals Versus Rules*, 29 J. ECON. PERSPECT. 121 (2015); *Climbing the Ranking*, *supra* note 15.

¹⁸ Schueth, *supra* note 14, at 167–71.

¹⁹ Yaroslau Kryvoi, *The World Bank and the ILO: Two Visions of Employment Regulation*, in FIXED-TERM EMPLOYMENT CONTRACTS 47, 48 (Roger Blanpain & Claire Grant eds., 2009).

that balances various social and economic interests.²⁰ Its authority is grounded in the epistemic validity of (quasi) objective data and statistical science, not the legitimacy afforded by an appropriate political process.²¹ As stated in a high-level review that the Bank commissioned in 2008, the project is “anchored in research that links characteristics of a country’s business environment . . . to macroeconomic outcomes.”²² Specifically, the project draws much of its authority from empirical data correlating indicator values with economic benefits, and on (ultimately flawed) statistical methods that exploit differences in national “legal origins” to characterize those correlations as causal.²³

The most palpable contrast between *Doing Business* and international labor law lies in their divergent socio-economic agendas. The *Doing Business* approach to labor markets is consonant with a broader “flexibility” agenda aggressively pursued by the World Bank, the International Monetary Fund, and the Organisation for Economic Co-Operation and Development.²⁴ In line with this understanding of flexibility,²⁵ the project’s Employing Workers indicator embodies a deregulatory approach to labor markets that, in practice, shifts significant power over working conditions to employers.²⁶ In its early years, the indicator was used by the Bank as a template for numerous Bank-sponsored national labor law reforms.²⁷

The labor dimensions of *Doing Business* met substantial challenges, on multiple fronts.²⁸ The project’s entanglements with the broader flexibility agenda make it hard to isolate political responses to the former from broader resistance to the latter.²⁹ Nonetheless, a number of actors expressly targeted the labor dimensions of *Doing Business*, including, notably, the ILO itself.³⁰

While ILO interventions deployed numerous critiques, its approach can be characterized as a synthesis of two stratagems. The scientific stratagem critiqued various “methodological and conceptual problems” with the Employing Workers indicator and its subcomponents.³¹ Those critiques suggested that the indicator did not

²⁰ As shown in the examples of both Georgia and Sénégal, the implied addressees of *Doing Business* may be particularly amenable to “low visibility strategies,” even at the highest levels. Adelle Blackett, *Beyond Standard Setting: A Study of ILO Technical Cooperation on Regional Labor Law Reform in West and Central Africa*, 32 COMP. LAB. L. & POL’Y J. 443, 474–75 (2011).

²¹ Cf. FRANCIS MAUPAIN, *THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY* 7 (2013) (ILO’s authority grounded in tripartite debate).

²² INDEPENDENT EVALUATION GROUP, *DOING BUSINESS: AN INDEPENDENT EVALUATION—TAKING THE MEASURE OF THE WORLD BANK-IFC DOING BUSINESS INDICATORS* xv (2008).

²³ Liam McHugh-Russell, *Doing Business, Legal Origins Theory, and the Politics of “Governance by Knowledge”*, CAN. J. DEV. STUD. (under review).

²⁴ Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT’L L. 43 (2009); Blackett, *supra* note 20, at 464–66; Kerry Rittich, *Core Labor Rights and Labor Market Flexibility: Two Paths Entwined?*, in *LABOR LAW BEYOND BORDERS* (Permanent Court of Arbitration ed., 2003).

²⁵ Cf. Santos, *supra* note 24, at 74–80.

²⁶ *Id.* at 60; Rittich, *supra* note 24, at 174–75.

²⁷ Kryvoi, *supra* note 19, at 48; Peter Bakvis, *The World Bank’s Doing Business Report: A Last Fling for the Washington Consensus?*, 15 TRANSFER 419, 425 (2009).

²⁸ See generally Bakvis, *supra* note 27.

²⁹ See, e.g., the Nepalese case discussed *id.* at 428–29.

³⁰ Int’l Labour Office, *World Bank Doing Business Report: The Employing Workers Indicator*, ILO Governing Body, 300th Session, GB.300/4/1 (2007). The ILO’s approach had tacit assent from the tripartite membership. See *Minutes of the 300th Session of the Governing Body of the International Labour Office*, No. GB.300/PV paras. 109–32 (2007).

³¹ Int’l Labour Office, *supra* note 30, paras. 10(b), 28 (“methodological and technical problems”). The stratagem echoed, and partially relied on, research advancing similar claims. See Sangheon Lee & Deirdre McCann, *Measuring Labour Market Institutions: Conceptual and Methodological Questions on “Working Hours Rigidity”*, in *IN DEFENCE OF LABOUR MARKET INSTITUTIONS* 32 (Janine Berg & David Kucera

adequately reckon with interactions between different labor market rules, appreciate the importance of law in action, or account for the social and economic benefits of labor market institutions alongside their economic costs.

The legal stratagem turned on claims that the reforms promoted by *Doing Business* conflicted with the spirit of international labor law, and the letter of certain ILO Conventions.³² The legal stratagem combined that critique with an appeal to international legal functionalism and interorganizational comity; the watchword was “policy coherence.”³³ Francis Maupain’s reading is paradigmatic. Invoking the concept of international legal fragmentation,³⁴ Maupain characterizes incompatibilities between ILO activities and those of international financial institutions as a matter of reconciling conflicting organizational mandates.³⁵ His analysis interprets the World Bank’s charter as a constitutional text and its approach to labor markets as doctrine.³⁶ His reading of *Doing Business* is thus framed as a case study in the legal subordination of the ILO’s social objectives to the Bank’s economic functions.³⁷

These two stratagems had a number of shortcomings. The issues raised by the scientific stratagem, though crucial for theorizing labor institutions, had little critical purchase on *Doing Business* methods. The *Doing Business* indicators are not based on “assumptions” about the effect of regulations,³⁸ but on causal claims tied to statistical analysis of empirical data. Balancing economic and social ends is incompatible with a methodology concerned with tying particular actions to particular effects, which is likely why the invocation of international labor law standards and their purposes seems so misplaced in the research that grounded the scientific stratagem.³⁹

The legal stratagem, by contrast, did not fully appreciate the strategic context. There is a patent “functional incoherence” between the Employing Workers indicator and international labor law. Yet it is hard to pinpoint why this tension should matter to proponents of *Doing Business*. Unlike the application of trade agreements by a WTO dispute panel, the methodology, scores, and rankings deployed by *Doing Business* are not an exercise in legal interpretation.⁴⁰ The “doctrine” the project promotes is not legally derivable from the World Bank’s mandate. In fact, it is only loosely tied to the Bank’s legally-granted powers.⁴¹ Stated differently, the project does not express a norm that might notionally be integrated into the broader international legal field, but a technical claim about how to achieve an end.⁴²

eds., 2008); Sangheon Lee et al., *The World Bank’s “Employing Workers” Index: Findings and Critiques – A Review of Recent Evidence*, 147 INT’L LAB. REV. 416 (2008); Janine Berg & Sandrine Cazes, *Policymaking Gone Awry: The Labor Market Regulations of the Doing Business Indicators*, 29 COMP. LAB. L. & POL’Y J. 349 (2008). See also Santos, *supra* note 24, at 65–68; Paul Benjamin et al., *The Cost of “Doing Business” and Labour Regulation: The Case of South Africa*, 149 INT’L LAB. REV. 73 (2010).

³² Int’l Labour Office, *supra* note 30, paras. 10(e), 20–27; Kryvoi, *supra* note 19, at 51–53.

³³ Int’l Labour Office, *supra* note 30, paras. 1, 4, 9, 10(e)–(f).

³⁴ See Int’l Law Comm’n, [Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission](#), UN Doc. A/CN.4/L.682 (Apr. 13, 2006).

³⁵ MAUPAIN, *supra* note 21, at 63–65, 67, 71–72.

³⁶ *Id.* at 72–83.

³⁷ *Id.* at 79–80.

³⁸ *Contra* Berg & Cazes, *supra* note 31, at 364–66; Lee et al., *supra* note 31, at 424–26; Lee & McCann, *supra* note 31, at 32, 39, 46–47, 58–59.

³⁹ See, e.g., Berg & Cazes, *supra* note 31, at 350, 353–55; Lee et al., *supra* note 31, at 421; Claude Ménard & Bertrand du Marais, *Can We Rank Legal Systems According to Their Economic Efficiency?*, 26 WASH. U. J.L. & POL’Y 55, 74–75 (2008).

⁴⁰ *Contra* MAUPAIN, *supra* note 21, at 63–64.

⁴¹ *Id.* at 73–76. Maupain’s point, tied to the Articles of Agreement of the International Bank for Reconstruction and Development, apply equally to the Articles of the International Finance Corporation.

⁴² *But see* Int’l Labour Office, *supra* note 30, at 29–31 (tying critiques to World Bank activities that require national responses to *Doing Business* metrics).

The outcome of the ILO's intervention appears to be a good-news story for international "functional coherence." In 2010, the World Bank quarantined the Employing Workers indicator from other parts of the report, and prohibited its use in other Bank activities.⁴³ Although funding provisos by the U.S. Congress were the proximate cause of these changes,⁴⁴ a broader view suggests that the shift resulted from an amalgam of international norms and local activism.⁴⁵

Closer scrutiny reveals unintended, even perverse effects. The formal neutralization of the Employing Workers indicator may have further reduced the visibility of World Bank strategies driving the flexibility agenda.⁴⁶ Moreover, ILO interventions were silent on the most salient fact about *Doing Business* methodology: the fundamental weaknesses in the modes of causal inference that support its policy guidance.⁴⁷ Worse, those interventions were expressed in diplomatic prose that signaled the ILO's approval of the project's overall design and aims.⁴⁸ As a result, the ILO may have ultimately bolstered the project's legitimacy by chasing small changes to what gets measured, rather than fundamentally challenging how the project uses those measurements. Likewise, the ILO's appeals to international legal coherence may have given an air of legal authority to models and standards that are in fact grounded in little more than mechanical objectivity and a rote showing of technical rigor.⁴⁹ No binding norm regulates the relative priority of the international system's social and economic goals. This sometimes produces policy incoherence. But reading every conflict between international institutions as a problem of normative ordering risks lending legal legitimacy to bad science.⁵⁰

Conclusion

Global governance projects depend on different permutations of knowledge, power, and action. Such differences are the key theme of recent scholarship on governance by indicators,⁵¹ of which *Doing Business* is an archetype.⁵² Governance competitors to international law, however, are not limited to projects that rely on the ostensible objectivity of numbers. For example, much of the technical cooperation conducted under the banner of development during the last seventy-five years, including by the ILO,⁵³ has drawn its power more from the epistemic authority of experts than the political legitimacy of its origins. It may be more useful to think in terms of this essay's distinction between governance by norm and governance by knowledge.

The power of *Doing Business* is of continuing concern for those willing to invoke "the spirit of international labor law." For example, the project continues to promote reforms on business registration and property administration that exacerbate the exclusion of informal workers.⁵⁴ For those concerned with the traditional subjects of international labor law, and those who for too long were its "others," there is value in attending carefully to the "hows."

⁴³ Independent Doing Business Report Review Panel, [Independent Panel Review of the Doing Business Report](#) 24-25 (June 2013).

⁴⁴ John Ohnesorge, [Legal Origins and the Tasks of Corporate Law in Economic Development: A Preliminary Exploration](#), B.Y.U.L. REV. 1619, 1626-27 (2009).

⁴⁵ Cf. Julia López López, [Anti-Austerity Activism Strategies: Combining Protest and Litigation in Spain](#), in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW (Adelle Blackett & Anne Trebilcock eds., 2015).

⁴⁶ See *supra*, text at notes 4-26.

⁴⁷ McHugh-Russell, *supra* note 23.

⁴⁸ [Int'l Labour Office](#), *supra* note 30, paras. 5, 8, 32.

⁴⁹ Cf. [Van Den Meerssche](#), *supra* note 7, at 172-75.

⁵⁰ See *supra* note 8.

⁵¹ E.g., [Davis et al.](#), *supra* note 4.

⁵² Kevin E. Davis & Michael B. Kruse, [Taking the Measure of Law: The Case of the Doing Business Project](#), 32 L. & SOC. INQUIRY 1095 (2007).

⁵³ GUY FITZ SINCLAIR, [TO REFORM THE WORLD: INTERNATIONAL ORGANIZATIONS AND THE MAKING OF MODERN STATES](#) 30-31 (2017).

⁵⁴ [Arruñada](#), *supra* note 16; [Lyons et al.](#), *supra* note 16.