

BROOKINGS

Report

“Notice-and-comment” and business regulation in the developing world: The promises and pitfalls of digital technology

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Summary

There is clear evidence that societies benefit when governments provide citizens with opportunities to provide feedback during the drafting of new regulations. The primary systematic means of such government consultation, known as “notice-and-comment” (N&C), involves posting draft regulations for public comment and has multiple benefits. First, such consultation taps into the wisdom of the crowd to help avoid obvious errors and unintended consequences. Second, and the focus of this discussion, it increases the legitimacy of resulting rules in the eyes of the regulated and their communities, spurring higher and more sustainable rates of compliance. These largely voluntary increases in compliance are particularly crucial in resource-constrained developing countries, where expanding regulatory responsibilities cannot keep pace with industrial growth.

Today, rich countries like the U.S. provide opportunities for N&C through digital platforms, which dramatically decrease costs and increase reach. Some developing countries have begun to follow suit. But there are justifiable concerns as to whether the mechanism that connects N&C to societal benefits such as increased compliance (which we term the procedural justice mechanism) remains viable when consultation moves fully online. Implementation of digital N&C systems in developing countries has also generally been incomplete, which itself may be undermining prospects for achieving desperately-needed societal benefits.

Within this context of dynamic change and urgent need, we advocate for greater dedication of resources towards evaluation and innovation of existing N&C systems. In particular, we call for:

- Rigorous evaluation of the social impact of digital N&C platforms in developing countries to identify whether the benefits of in-person consultation transfer to the digital realm.
- Rigorous research and development of digital N&C system innovations aimed at increasing the participant feelings of engagement and responsiveness believed to be central to achieving societal benefits.
- International commitment to supporting these activities and to basing subsequent support on the evidence that they generate.

The promise of notice-and-comment in developing countries

Rapid industrialization has created jobs and income for millions in the developing world, dramatically reducing levels of abject poverty over the past half century. However, this extraordinary wealth generation and poverty alleviation comes with substantial adverse risks for society and the environment when it occurs—as it usually does—in the absence of an adequate regulatory framework. This point has been repeatedly demonstrated in dramatic fashion by large-scale industrial accidents like the 2013 Rana Plaza collapse in Bangladesh. The pain of such individual catastrophes as well as the more mundane negative externalities of weakly regulated industrial expansion such as environmental pollution inevitably falls disproportionately on the poorest of the poor.

Our exposure to the realities of these tradeoffs come from decades of researching market transition and associated institutional challenges in rapidly growing Southeast Asia. Asia's “miracle” in industrialization and poverty alleviation has made it ground zero for these tradeoffs, with the region's historic growth in industrial activity far outpacing parallel efforts to build regulatory capacity and resources. Two-thirds of the world's approximately

2.8 million annual workplace deaths occur in Asia. On top of it all, public perception is that poorly paid designers and implementers of regulations in developing countries are highly prone to corrupt influence by the rich.

Our Southeast Asian experiences and research have made us strong believers in the potential of N&C systems to improve regulatory compliance in these extraordinarily challenging institutional environments. N&C systems involve government regulatory agencies posting draft versions of regulations for public comment before finalization and implementation. The public posting of drafts for N&C is a core part of the U.S. rulemaking process, and failure to adhere to it created significant headaches for the previous U.S. administration's deregulation agenda. Similar N&C systems are in effect in most other advanced economies and a growing number of developing economies.

The argument for consulting regulated parties when drafting new rules is that doing so will not only contribute to better regulations but also greater legitimacy for the broader regulatory system and thereby higher voluntary compliance. Consultation is understood to translate into higher regulatory legitimacy and compliance through a mechanism that scholars have alternatively termed *procedural justice* and *deliberative democracy* (from here on, we refer to it as the *procedural justice mechanism*)^[1]. Both theories advocate authorities asking for input during the design of new rules, specifically from those people whom the rules are meant to constrain. Doing so increases subsequent compliance by making the regulated feel their hardships have been recognized and appreciate the complexities and tradeoffs that authorities face in protecting public and private interests. At its core, the assumption is that “experienced fairness matters more than expected utilities.”^[2] In other words, people—ranging from the managers of multinationals to the owners of mom and pop shops—*want* to follow broadly legitimate social rules and norms and thereby feel confident that they are acting as good citizens of their communities. Too often, however, government in developing countries is itself not seen as entirely legitimate, and its rules are not seen as entirely in the public interest.

Building on this previous academic work, our 2019 article in the *American Political Science Review* reported on a randomized controlled trial indicating the positive regulatory compliance effects of a pilot N&C initiative in Vietnam—a transition economy that has

experienced three decades of rapid globalization and growth but nowhere near the same evolution of its government's capacity to regulate market activity. As in many developing countries, doubts persist about the public interest orientation of regulators and their rules. This is reflected in over a decade of annual surveys in Vietnam consistently showing half of private company owners agreeing with a statement that the primary goal of government regulations is to facilitate bribe payments to local officials.

Our study was built around a pilot initiative by the Vietnam Chamber of Commerce and Industry, a semi-governmental institution meant to intermediate between government and business interests. The initiative sought to broaden outreach to small and medium-sized enterprises (SMEs) during consultation for a draft regulation meant to protect workers with significant exposure to hazardous chemicals. In particular, a randomly assigned set of relevant private Vietnamese companies were given the chance to provide comments on the draft, which were then passed on to the government's drafting committee. The subsequent actions of these firms were compared to a control group, which was not exposed to the regulation, and a transparency treatment group, which learned about the regulation but was not invited to provide input. While not all consulted firms took advantage of the occasion to offer feedback, firms given the opportunity to comment were 8-10 percent more likely than similar firms not given the opportunity to constructively engage with a set of friendly auditors, who visited factory floors a year later. Consulted firms were also more likely to improve their views of government's regulatory authority and to make concrete safety improvements observable to our auditors.

Previous work on the procedural justice mechanism in psychology^[3], political science^[4], and economics has focused primarily on the relationship between participation and regulatory compliance by individuals. Our work indicates that the mechanism also applies to firms. We find that consultation in the regulatory design process can increase not only the ability of governments in developing countries to produce regulations of reasonable quality but also broader business community respect for government's regulatory authority and, ultimately, regulatory compliance. Importantly, the social benefits of such consultation appear to be highly contingent on the degree to which government is seen as responsive to the feedback it solicits.

All of these findings are heightened for SMEs. SMEs make up the vast majority of firms in all countries, but this is especially true in developing countries. The impact of N&C on these “ordinary firms” behavior in developing countries is also particularly critical because these are the firms that tend to be totally beyond the reach of high-profile global standards initiatives. Furthermore, SMEs generally start with the lowest compliance rates and lowest opinions of government’s regulatory authority. Simply put, SMEs tend to assume the worst of government (e.g. regulation as a vehicle for corruption) and seek to simply minimize all contact with regulators. Through the engagement of N&C, governments can challenge this narrative and emphasize the public interest orientation of their regulatory efforts.

The enhanced compliance and government regulatory legitimacy effects from participation identified in our study actually disappeared for micro-enterprises (fewer than 10 workers) and large firms (more than 1,000 workers). We believe this to be due to regulations’ limited relevance to the operations of the smallest firms and to the largest firms’ pre-existing avenues for directly exercising political influence on the rulemaking and rule-enforcing processes. We also find that women-owned firms start with dimmer views of government and higher resistance to regulation. As such, our research indicates that a key differentiating characteristic of effective consultation is that it reaches out to a broader, more representative group of stakeholders and makes participants feel heard.

Obstacles to notice-and-comment in developing countries

Contrary to what many might expect under their single-party regimes, Vietnam and China have had government consultation as fundamental components of their respective regulatory design systems for decades. While for many this may evoke images of meaningless elections in authoritarian states, there is evidence from both countries that consultation in the banal process of designing practical regulations has frequently been quite consequential. For both ruling communist parties, the rationale for consultation appears to closely parallel those touted by the above-described academic literatures; both aim to increase the legitimacy of and compliance with constraining government regulations. Some country experts have even argued that participation policies have served

a constructive “letting off steam” function that has contributed to unusually high levels of political stability in these single-party-ruled systems. In both countries, however, there unfortunately appears to be a fairly substantial—and potentially widening—gap between formal consultation requirements and those followed in practice, resulting in increasing skepticism about the process.

Even in the case of the specific pilot initiative we evaluated in Vietnam, the rigorously identified societal benefits—which we presented to multiple government audiences—have not resulted in broader application of N&C in the regulatory design process. Through our follow-up engagements with relevant governmental and societal stakeholders, we have come to understand two important shortcomings to this previous pilot work that constrained its real-world applicability. Specifically, these shortcomings involved insufficient attention to:

1. The cost effectiveness of a broad-based N&C approach based on face-to-face engagement; and
2. Government follow-up engagement and responsiveness (or lack thereof) vis-à-vis participants that provided feedback on draft regulations.

With regards to the first of these shortcomings, the N&C initiative that we originally studied in Vietnam relied on consultation through in-person visits to individual firms. Post-study discussions with policymakers made clear that it would be infeasibly costly for a resource-constrained developing country government to mobilize in this way each time a new regulation is drafted. As a result, Vietnam continues to rely primarily on its traditional approach, whereby regulatory design committees combine visits to large, usually foreign or state-owned firms with occasional workshops, which also tend to be biased toward input from larger, more urban firms.

As for the second shortcoming, the study in Vietnam did not address the potential moderating roles of the quality of engagement in the consultation process or the degree of apparent government responsiveness to firms’ feedback. This is an important shortcoming because consultation asks firms to expend time and energy to (1) understand how new

regulations will influence their operations and (2) provide appropriate and constructive comments. If firms feel that their time has not been respected, consultation could lead to perverse effects. Specifically, firms that think their input has been ignored may:

1. Feel the regulation is illegitimate;
2. Be less likely to comply with the regulation; and
3. Be less likely to provide comments on future regulations.

Interestingly, the constructive outcomes of participation in our evaluation of the Vietnam pilot appear to have been concentrated among firms who did not fully take advantage of the opportunity to provide feedback on draft regulation. When consulted, these firms either chose not to provide feedback or submitted responses that were vague or irrelevant. The lack of similar effects for firms that shared more meaningful input potentially points further to some backlash among more substantive commenters about how their contributions were handled.

Digital N&C as a technology solution?

N&C is a process that, in most countries, has primarily moved online. In the U.S., the E-Government Act of 2002 established a requirement for online N&C, and the next year saw the introduction of www.regulations.gov. Nearly two decades later, the U.S. system remains very much a work-in-progress with more than its share of critics and ongoing efforts to facilitate more deliberative user engagement. But there is also no doubt that this digitalization has facilitated dramatic further streamlining and standardization of the solicitation process and helped to more fully guarantee that all in the public have relatively straightforward means for both learning about opportunities to comment on new regulation and actually submitting those comments.

Reliance on digital technology has also spread substantially in more recent years as a cheaper, but still effective, means of addressing a variety of challenges faced by the poor and the more geographically isolated in developing countries. Based on these evolving realities, we see the introduction of digital N&C portals as a promising approach for more realistically and effectively applying N&C practices and achieving the benefits of the procedural justice mechanism in developing countries.

The reasons for optimism are as follows. Moving to online and mobile phone-based consultation should clearly allow lower, more sustainable per-regulation costs. There is also potential for the reach and transparency of digital N&C to far exceed that of traditional in-person consultation—especially with the rapid (though, of course, still far from sufficient) growth in technology access in poor communities around the world. Once built, a digital N&C infrastructure should also make it more cost-effective to introduce and improve initiatives that significantly broaden the reach and subsequent responsiveness of government policymakers' consultation efforts.

At its best, digital N&C holds out the promise of democratizing government consultation, with the biggest benefits going to the least powerful and previously most excluded. Within the business community, SMEs—especially those that are more rural and those owned or managed by women and minorities—should be among the primary beneficiaries of enhanced voice. These are the firms that are least likely to be included in traditional government consultation (e.g. large workshops) or to benefit from the private regulation systems that are increasingly raising standards within global value chains (especially those that connect to wealthier, more progressive consumers and investors). In this way, digital N&C can hopefully serve as an important complement to efforts to improve governance and compliance in global value chains—an area that has understandably received far greater attention and resources.

Additionally, more broadly representative consultation should have wide-ranging spillover benefits. Our research has found that regulatory changes brought about due to SME feedback are viewed more positively by other SMEs than changes due to other actors, even when those other SMEs are unaware of the source of the change. In other words, it does appear that participation leads to substantive legal change that makes acceptance of regulatory constraints more palatable.

The fundamental theory of change for the procedural justice mechanism is that digital N&C portals will provide: 1) enhanced voice for a more representative spectrum of stakeholders in the shaping of their business environment; and 2) downstream benefits to workers, communities, and the natural environment from heightened regulatory compliance.

Fortunately, an increasing number of developing countries are introducing digital N&C systems. Unfortunately, however, commitment to critical follow-through and consistency in implementation is unclear at best. In both China and Vietnam, as noted earlier, there are signs of flagging interest among citizens and businesses in opportunities to provide comments on drafts. Vietnamese government agencies, for example, regularly post draft regulations for comment online on their official websites with little to no public response. In this context, regulators are able to argue (somewhat convincingly) that firms appear to have little interest in the regulatory design process.

Half-hearted governmental N&C efforts risk not only potentially shortchanging societal benefits and wasting scarce resources but also potentially generating a dangerous backlash, whereby popular skepticism about government regulation and its intents is further stoked. This risk is real. Even the World Bank, which has championed participatory governance and partially financed the rollout of N&C systems in countries like Malaysia, Saudi Arabia, Uzbekistan, and Zambia, appears to have recently reduced its support for such initiatives as part of its latest round of organizational restructuring. This organizational shift unfortunately cut short plans for an impact evaluation of Malaysia's digital N&C initiative, which we were involved in supporting. As a result, there remains a lack of concrete evidence demonstrating whether and how digital N&C can be effective in developing countries.

The critical role of rigorous impact evaluation

There is legitimate reason to be concerned that online interaction may not elicit the same feelings and behaviors as in-person interaction and that, therefore, the procedural justice mechanism may not be as effective in the digital realm—even with the best intentions and implementation follow-through. As a result, poorly designed and executed digital N&C portals could be particularly likely to undermine the core goal of increased regulatory compliance through the aforementioned backlash mechanism.

It is also true that cynicism about N&C systems is relatively high, even in advanced economies like the U.S. Some of this is very likely due to the digital context, given that these countries have fully transitioned to reliance on digital platforms. Submitting

comments digitally can quite naturally elicit questions about the degree to which contributions are being seriously considered—or even seen at all—by true decision-makers. Concerns about digital N&C in advanced economies also involve fears about the potential for bad actors to employ bots to overwhelm legitimate input. Certainly, there is danger that less well-resourced developing country systems might be even more vulnerable to such attacks were they to become targets.

From our perspective, the next step is rigorous evaluation of the impact of digital N&C systems in developing countries. The benefits of well-designed experimental impact evaluation are manifold. First and foremost, precisely measuring the returns to policies and the investments put into implementing them allows for evidence-based decision-making about how to use scarce government resources. Second, objective, externally-certified impact evaluation can mobilize support for investment into good policy from the public and from non-governmental sources of funding. Third and perhaps least frequently discussed and appreciated, well-designed impact evaluation facilitates more efficient and effective innovation—especially within the design of policies with clear targets like regulatory compliance.

Critical questions to address through rigorous impact evaluation of digital N&C systems in developing countries include:

1. Can the societal benefits of the procedural justice mechanism be effectively transplanted from in-person consultation to digital platforms?
2. Can quality consultation be improved through enhanced engagement on the site?
3. What is the moderating effect of government responsiveness on the participation-compliance relationship?
4. While our focus to date has been on businesses, does participation through digital N&C portals also positively impact the feelings of other stakeholders, such as labor and communities, about government regulation of business?

Existing N&C platforms provide the infrastructure for experimenting with specific pilot initiatives aimed at addressing these questions. We envision, for example, random assignment of firms targeted by an upcoming draft regulation to an experience where they have the opportunity for limited digital back-and-forth with an advisor aimed at making

their input as clear and relevant for regulators as possible. This would address the complaint we have heard from many regulators that feedback received through N&C is too often not framed in a way that is helpful from a design perspective. Our direct experience with N&C feedback through the pilot initiative in Vietnam provided significant evidence in support of this critique. We see additional value in experimenting with a system that aims to keep participants on the digital platform up-to-date on how their input was received, how it related to the public interest goals of the regulation, and any ways in which it influenced the final regulation. While we believe this system will be vastly cheaper than a non-digital version due to the streamlining of interactions, cost analysis will also need to be a critical part of any impact evaluation.

Conclusion

The promise of E-Governance has engendered significant enthusiasm in policy circles. But as with many popular trends, all too often this enthusiasm has come in fits and starts, with insufficient attention to the careful building of evidence that characterizes high quality research and development in both public and private spheres. The danger now appears to be that initial enthusiasm has already been spent and that anecdotal evidence of failure in flawed first efforts may lead to the conclusion that digital N&C systems do not work in developing countries. But the process followed to date has clearly not been sound. Achieving critically-needed policy innovation is hard and requires careful research and development. Given the wide-ranging societal benefits of economic development in developing economies and the simultaneously devastating tradeoffs to such development, it is now far past time for more careful, systematic approaches to building effective regulatory systems where they are needed most.

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Footnotes

1. 1 Tyler (2006), Fung (2006).
2. 2 Makkai & Braithwaite (1996, p. 83).

3. 3 e.g. Makkai & Braithwaite, (1996); and Sunshine & Tyler (2003)
4. 4 e.g. Fishkin (1991); and Fishkin, He, Luskin, & Siu (2010)