Regulatory Responsiveness in India: A normative and empirical framework for assessment

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This paper seeks to measure the extent to which Indian regulators are responsive in the performance of their functions. The paper focuses on one function common to all Indian statutory regulators, namely, regulation making. To measure responsiveness, the paper constructs an index of benchmarks of responsive conduct, with corresponding quantifiable outputs. It empirically measures the responsiveness of the four statutory regulators in India, on this index. The paper finds that there are significant differences among the laws governing Indian regulators in the context of the requirement to be responsive, and that the degree of responsiveness of Indian regulators is directly proportional to the legal requirement for following participatory processes.

The views expressed in the paper are those of the authors. No responsibility for them should be attributed to NIPFP or IGIDR.

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Contents

1 Introduction

The responsiveness of laws and policies to citizens' preferences and conduct has been the central theme of extensive literature focusing on political science and administrative law (Page and Shapiro, 1983). The question of responsiveness to citizens assumes greater importance in the case of unelected, or indirectly accountable agencies such as independent regulatory agencies. Such agencies are under a greater burden to ensure that they act in a fair and transparent manner to ensure that their policies are accepted by people who did not directly elect them, pre-empt regulatory capture and exhibit accountability to the principal which appointed them (Coglianese *et al.*, 2009).

With the advent of privatisation in the late 1990s, India created several arms-length regulatory bodies. Table 1 provides a list of the major regulatory agencies in India today.[1] The Reserve Bank of India, which is also the regulator for large swathes of the financial sector in India, has been in existence since 1934. Most

[1]Regulatory agencies that perform all three functions of the state, i.e. regulation-making, monitoring and adjudication have been included. Pure standard or tariff setting bodies have not been included.

other regulatory agencies started being established in the early 1990s and 2000s. However, India lacks a common administrative law framework that governs the conduct of such agencies, including the extent to which they are required to be *responsive* in their conduct vis-a-vis the regulated and the beneficiaries of regulation.

Table 1: Independent regulatory agencies established under federal laws in India

S. No.	**Regulator**	**Sector**	**Year**
1	Reserve Bank of India	Finance	1934
2	Securities and Exchange Board of India	Finance	1992
3	Telecom Regulatory Authority of India	Infrastructure	1997
4	Tariff Authority for Major Ports	Infrastructure	1997
5	Insurance Regulatory and Development Authority	Finance	1999
6	Competition Commission of India	Competition	2002
7	Central Electricity Regulatory Commission	Infrastructure	2003
8	State Electricity Regulatory Commissions	Infrastructure	2003
9	Pension Fund Regulatory and Development Authority	Finance	2005
10	Food Safety and Standards Authority of India	Health	2006
11	Warehousing Development and Regulatory Authority	Infrastructure	2007
12	Airport Economic Regulatory Authority	Infrastructure	2008
13	Petroleum and Natural Gas Regulatory Board	Infrastructure	2008

Each of these agencies is guided by its own statute which prescribes standards for the manner of their functioning. These standards vary vastly.[2] In the absence

[2] *See* the observations of the Supreme Court of India in COAI v TRAI (yet to be reported), noting that in the absence of the specific statute requiring that a regulator must follow the principles of natural justice while making delegated legislation, the court cannot read such duty into the law, and urging the Parliament to frame a "a legislation along the lines of the U.S.

of common standards governing the conduct of regulatory agencies, one sees wide variance in the extent to which these agencies are responsive in the performance of their functions. Moreover, common standards for measuring the performance of regulators are absent in India.[3]

What does this paper do?

We seek to measure the extent to which Indian regulators are responsive in the performance of their functions. In doing so, we focus on one function common to all Indian statutory regulators - regulation making.

We analyse the responsiveness of regulators on two axes. First, we analyse their responsiveness along a rule-based axis, i.e. we study the extent to which parliamentary legislation requires them to be responsive. Second, we study responsiveness based on outcomes, i.e. the extent to which the processes followed by statutory regulators in India are responsive while making regulations. In order to do so, this paper develops a benchmark for what constitutes *adequately responsive* conduct in the context of the regulation-making functions of a regulator. The baseline is a consolidated index of benchmarks of adequately responsive conduct. We then identify a quantifiable output for each benchmark in the index and assign scores to the quantifiable outputs.

Using these benchmarks and quantifiable outputs, we conduct a comparative case-study of four statutory regulators, two financial sector regulators (Securities and Exchange Board of India (SEBI) and Reserve Bank of India (RBI)) and two infrastructure regulators (Telecom Regulatory Authority of India (TRAI) and Airport Economic Regulatory Authority (AERA)). We measure the extent to which each has been responsive in the performance of its quasi-legislative functions over a given period of time. We measure their performance against the quantifiable outputs and assign scores to their performance.

Administrative Procedure Act (with certain well defined exceptions) by which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and the rule or regulation making power is exercised after due consideration of all stakeholders' submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them."

[3]Financial Sector Legislative Reforms Commission (2013) which contains extensive observations on the performance of the financial sector regulators in India states: "the present system of financial accounting of the regulator is focused primarily on the reporting of expenditures incurred by the regulator under various heads. This, according to the Commission, does not constitute a sufficient test of the fulfilment of regulatory objectives or the assessment of the regulators performance. Therefore, there is need to require regulators to adhere to a more comprehensive system of measuring their performance."

Our analysis reveals three significant findings in relation to the responsiveness of regulatory agencies in India –

1. First, there are significant differences in requirements for responsiveness within the laws establishing independent regulatory agencies.
2. Second, the participatory processes being followed compare generally unfavourable when measured against indices measuring outputs, but there is significant variation within this range.
3. Third, the degree of responsiveness of regulators seems directly proportional to the legal requirement for following participatory processes.

Why is this paper relevant?

The idea of a "responsive" regulatory State was conceived in and much discourse on this subject has been limited to, developed economies (Braithwaite, 2006). Academic literature on regulators in emerging economies has largely focused on the political economy and institutional location of independent regulators as technocratic agencies. For instance, Dubash (2013) examines regulatory agencies in the infrastructure sector in the global south in the context of regulatory reform over the last two decades. Braithwaite (2006) deals with strategies to implement "responsive" regulation in States with weak regulatory capacity.

The literature on Indian regulators has largely focused on the impact of regulatory agencies in specific sectors. For instance, Mukherji (2006) and Mukherji (2009) have focused on the evolution of the private telecommunications industry and its regulator. Similarly, Dixit *et al.* (2007) have focused on developing the indicators for assessing the overall performance of the electricity regulator in India.

This paper departs from the political economy-oriented approach commonly taken towards studying regulators in emerging economies. We develop a framework for empirically analysing the performance of the regulatory function of regulation-making. The mere existence of a public consultation process will not automatically democratise delegated legislation-making. Hence, in this paper, we create a framework for evaluating the qualitative aspects of a consultation process. It is one of the first papers to develop a consolidated index containing indicators of a good legislative consultation process that can be used to quantify the responsiveness of Indian regulators. We also undertake a novel exercise by using these indicators to measure and develop scores measuring the responsiveness of Indian regulators. Our measures provide valuable insights on why one regulator performs better than another. This has direct policy implications for what can be done to improve the

performance of regulatory agencies.

The rest of the paper is organised as follows. Part 2 discusses the concept and features of responsiveness, in the context of law and policy-making. Drawing from this literature, we build a consolidated index of benchmarks of an adequately consultative process and devise quantifiable outputs for each of the benchmarks in the index. Part 3 measures responsivesness of Indian regulators on a rules based axis. Additionally, we measure the responsiveness of specific regulators, SEBI, RBI, TRAI and AERA on an outcomes-based axis. Part 4 concludes.

2 Concept and features of responsiveness

2.1 Meaning of responsiveness

Responsiveness in the context of regulation and governance has generally been conceived so widely that it has not yielded a specific definition. For instance, Selznick.P (1992) has conceived responsiveness as a democratic ideal responding to people's problems, environments and demands. He describes it as involving *outreach and empowerment*. On the other hand, the seminal work of Ayres and Braithwaite (1992) conceives responsiveness as responsiveness to the behaviour of regulated actors. They advocate a flexible approach of restorative strategy for self-enlightened actors and deterrent actions for "deviant" actors. This paper narrows the approach to responsiveness of a regulator in discharging its quasi-legislative functions.

Academic literature focusing on this aspect of responsiveness enumerates the features of responsiveness, instead of focusing on a definition. For instance, Stern (1999) proposes broad measures for evaluating whether regulatory agencies are responsive to stakeholders in their decision making process (Table 2).

Table 2: Summary of best practices for regulatory consultations, Stern (1999)

S. No.	Recommendation
1	Formal consultation exercises
2	Formal or informal hearings
3	Surveys of customer views and priorities
4	Genuine chance of influencing decisions

Dixit *et al.* (2007) provide a more detailed list of benchmarks for measuring the degree of responsiveness of electricity regulators in India (Table 3). The benchmarks suggested by Dixit *et al.* (2007) include issues of internal capacity and accountability in addition to those of consumer-facing processes. For example, their benchmarks include whether the consultation process was documented and whether there is a clearly designated individual or department within the regulatory agency for processing such inputs.

Table 3: Summary of benchmarks developed by Dixit et. al. (2007)

S. No.	**Benchmarks**
1	Information about the public consultation process is circulated prior to the initiation of the consultation itself.
2	Documentation of consultation process
3	Broad distribution of information about process
4	Targeted distribution of information about process
5	Systematic efforts to consult more vulnerable socio-economic groups
6	More than two mechanisms of public participation to get public input into planning
7	Clear time frame for decisions
8	Clear time frame for providing inputs
9	Accountability for inputs
10	All proceedings before the regulatory body are open to the public, and the public has the right to participate.

Coglianese *et al.* (2009) summarise the recommendations of the Task Force on Transparency and Public Participation (2008) established in the United States on the issues of transparency, public participation and strategic management. Given the legislative mandate of public consultation contained in the *Administrative Procedure Act, 1946* in the United States, Coglianese *et al.* (2009) assume the existence of a consultation process. The measures listed by them, therefore, largely dealing with improving the existing process and ensuring its robustness, are listed in Table 4.

Table 4: Summary of processes recommended by Coglianese (2009)

S. No.	**Recommendation**

1	Involvement of the public in early stages of regulation-making (such as by announcing a periodic regulatory agenda in advance)
2	Adoption of pro-active processes to improve public access to agency information i.e. build and publish datasets of information
3	Ensuring that public can monitor information disclosure
4	Encouraging transparent communications with external actors i.e. Informal mechanisms for constant feedback
5	Usage of management based strategies to promote transparency and public participation i.e. Strategic management/ organisation policy for building effective participation mechanisms (policy manual, processes for evaluating performance on transparency and public participation)
6	Creation of regulatory dockets at the moment they begin the development of any new rulemaking
7	Effective management of the release of information to ensure public access e.g. e-rulemaking
8	Promotion of multidirectional flow of information in the comment process (such as providing two rounds of seeking public comments and public hearings.)

Oxford Pro Bono Publico (2011) surveyed the practices prevailing in the European Union and five countries comprising South Africa, Canada, Switzerland, United Kingdom and the United States. The survey concluded with a recommendation to the effect that States must amend their constitutions to provide for effective and meaningful public participation in all forms of lawmaking or frame a law to that end.

Finally, OECD (2014) has issued best practices for regulatory governance, which includes a set of broad indicative benchmarks for a good consultative process (Table 5.) Again, since these are best practices, they are of a broader nature and not as granular as those listed by Coglianese *et al.* (2009).

Table 5: Summary of best practices for regulatory consultations, OECD (2014)

S. No.	**Recommendation**

1	Any proposed measures have well designed policy objectives and are written in a clear and precise manner so that stakeholders are able to provide comprehensive comments; impact assessments are an important part of the consultation process.
2	Outreach during consultation process.
3	Clear, enforceable, measureable, government-wide policy on active stakeholderengagement in developing and reviewing regulations.
4	Sufficient time is allocated for the consultation process, particularly forconsultations on major reforms.
5	Any proposed new regulations are consistent and coherent with the existing regulatory framework.
6	Stakeholders views are actually used to inform decision-making, and not just to justify a decision already taken.

2.2 Building a quantifiable index of responsiveness in regulation making

We have aggregated the features of responsiveness contained across various academic literature and best practices as listed in the preceding paragraphs, and prepared a consolidated index of eighteen benchmarks of an *adequate* consultative process. For each benchmark, we have assigned a concrete output, which we can use to quantify performance of an existing regulator and then assign scores.

This index is provided in Table 6. The benchmarks in the index have been classified under two broad heads:

- Capacity building within the regulator to conduct a consultation exercise; and
- Interface between the regulator and the public during the consultation exercise.

Table 6: Consolidated list of benchmarks/ measures

S. No.	Benchmark/ Measure/ Process	Quantifiable output
	Capacity building within the regulator	

1	Early engagement with stakeholders through information dissemination	Does the regulator periodically publish an annual *regulatory agenda* in advance?
2	Regular publication of relevant information and datasets	Whether the regulator publishes datasets on the pre and post regulation effect on a market?
3	Systems for public monitoring of information disclosure practices	Whether the regulator has an internal whistle blowing mechanism for undisclosed information?
4	Mechanisms for continuous feedback (formal or informal)	Whether the regulator allows for petitioning for changes to existing regulations or for enactment of new regulations?
5	Internal capacity and systems (management tools and processes) for public participation	Whether the regulator has a process manual for conducting a public consultation exercise?
6	Dissemination of information regarding the participatory process	Is the information on the participatory process displayed on the website of the regulator?
7	Dissemination of information regarding the participatory process among targeted groups	Whether the regulator has awareness programmes amongst vulnerable groups and minorities?
8	Build review mechanisms for periodically assessing the quality of the public consultation process	Whether the regulator has a system for conducting periodic surveys and external audits of its consultation processes?
	Conduct of consultation exercise	
9	Publication of high quality explanatory documents and data that allow stakeholders to provide informed comments.	Does the regulator publish explanatory documents such as consultation papers/ draft regulations?
10	Effective outreach and consultation with targeted groups as part of the consultative process	Does the regulator proactively communicate with groups most likely to be affected?

11	Multidirectional flow of information between the regulator and the public and the public inter-se	Does the regulator publish comments recieved before issuing the final regulation? Does the regulator provide time for counter-comments? Does the regulator provide a response to the comments? Does the regulator provide more than one method of receiving feedback?
12	Dissemination of information about time-frame within which decisions will be made, based on consultations	Does the regulator publish a statement of when the decisions will be made, based on the consultative process?
13	Adequate time for submission of comments	Does the regulator give adequate time for submission of comments and counter-comments?
14	Internal processes for identifying who is accountable for running the process for the regulatory agency.	Does the regulator publish the name of the individual-in-charge of the consultation process?
15	Ensuring consistency with primary legal framework	Does the regulator publish the source of the legal power to issue the proposed regulations?

3 Measuring responsiveness of Indian regulators

3.1 Rule-based measures

Steps taken during the late 1980s to deregulate India's command and control structure did not fundamentally alter the administrative structure of the Indian state (Kochanek, 1986). This changed gradually over the 1990s, when a number of new regulatory agencies were established under specific parliamentary legislation. However, there is considerable difference in the internal processes and administrative law applicable to each regulatory agency. Work on regulatory dispersion

explains why these inconsistencies arose, and continue to exist in the absence of an overall administrative law framework. As Dubash (2013), notes, at least in India's electricity sector,

> "*The process through which electricity regulatory agencies entered India was remarkably devoid of reflection on whether and how these bodies would be able to achieve their core design objective of depoliticizing decision-making in the sector.*"

Evidence of this can also be seen in the degree of difference in the primary legislation.

Table 7: Legal requirement for independent regulatory agencies to be responsive

S. No.	**Regulator**	**Legal requirement for consultation**
1	Reserve Bank of India	No*
2	Securities and Exchange Board of India	No*
3	Telecom Regulatory Authority of India	Yes
4	Tariff Authority for Major Ports	No
5	Insurance Regulatory and Development Authority	No*
6	Competition Commission of India	No
7	Central Electricity Regulatory Commission	Yes
8	State Electricity Regulatory Commissions	Yes
9	Pension Fund Regulatory and Development Authority	No*
10	Food Safety and Standards Authority of India	No
11	Warehousing Development and Regulatory Authority	No
12	Airport Economic Regulatory Authority	Yes
13	Petroleum and Natural Gas Regulatory Board	No

* These regulators voluntarily agreed to comply with a Handbook on Governance Enhancing Measures published by the Ministry of Finance.

Table 7 highlights three important findings:

1. Not all laws governing regulators mandate them to follow a consultation process in exercise of their quasi-legislative function.
2. While none of the laws governing financial sector regulators mandate them to be 'responsive', more than half the laws governing infrastructure regulators vaguely mandate 'responsiveness' in their functioning.
3. While parliamentary laws specifically mandate AERA and TRAI to follow consultative processes, the standard imposed by the parliament in both cases is different. For instance, the law governing TRAI merely mandates 'transparency'. While the law governing AERA similarly mandates transparency, it clarifies what is included within the ambit of that term. Given the vague standards mandated by the primary laws, it is unclear what consultative processes are sufficient for meeting the obligation established in the primary law.[4]

Given the lack of responsiveness mandates in the primary law and the wide variance in the mandate amongst primary laws that have it, we find that overall, the Indian legal framework scores low on rules-based measures of responsiveness.

3.2 Outcome-based measures: Case-study of four regulators

To understand the extent of responsiveness of Indian regulators while performing their quasi-legislative functions, we analyse the perfomance of four Indian regulators - SEBI, RBI, TRAI and AERA - for a limited duration. This enabled us to understand the responsiveness of these regulators individually, and compare their relative responsiveness as per the benchmarks devised in section 2.

Data for measuring responsiveness

In the absence of an administrative law in India governing regulators, Indian regulators issue various instruments, all of which have a binding effect on regulated entities and the public taking regulated actions. SEBI exercises its quasi-legislative powers though different kinds of instruments such as regulations, circulars, general orders and guidelines. While regulations made by SEBI are required to be placed before the Parliament, circulars, general orders and guidelines, are not so

[4] 45

required.[6] However, all these instruments are regulatory instruments as they are issued *in rem*.

Similarly, RBI issues several instruments such as regulations, circulars, master circulars and master directions. Also, unlike most other regulators which typically exercise powers under one legislation, RBI exercises its powers to issue these instruments under multiple different legislations such as the Reserve Bank of India Act, 1934 (*RBI Act*), which governs the central bank itself, non-banking financial institutions and some classes of derivatives, the Banking Regulation Act, 1949 (*Banking Regulation Act*), which governs banks, the Foreign Exchange Management Act, 1999 (*FEMA*), and the Payment and Settlements Act, 2007 (*PSS Act*) which governs payment systems.[7] The instruments issued by RBI have one or more of the following objectives:

1. They are intended to bind a class or classes of regulated entities (namely, banks, non-banking financial institutions or persons authorised to deal in foreign exchange) or their officers, either in relation to their internal affairs or their interaction with their consumers.

2. They are intended to bind the public in general in respect of matters regulated by RBI, such as transactions in foreign exchange or in the financial markets that are regulated by RBI, usage of currency notes, etc.

3. They announce auctions of government securities, as RBI is also the public debt manager for the Central and State governments.

4. They announce credit arrangements availed of or advanced by, the Central Government.

Thus, while some of the instruments issued by RBI are regulatory in nature, some are issued by RBI as an agent for the exercise of the executive powers of the Central Government or State Governments. For the purpose of gauging the responsiveness of RBI as a regulator, we have only taken into account regulatory instruments, that is, the instruments issued in rem and referred to in items 1 and 2 above. While the regulations made by RBI under the RBI Act, FEMA and the PSS Act, undergo parliamentary scrutiny, other regulatory instruments which are not

[6]The *Securities Exchange Board of India Act, 1992* requires that all regulations made by SEBI must be laid before both the House of Parliament. The SEBI Act additionally empowers SEBI to *to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.* This wide power enables SEBI to perform some of its quasi-legislative functions through instruments such as circulars.

[7]While TRAI and AERA exercise powers conferred on them under their mother statutes, SEBI exercises powers conferred on it under the SEBI Act, the Securities Contracts Regulation Act, 1957 and the Companies Act, 2013.

termed as 'regulations' do not undergo such scrutiny.

TRAI similarly exercises its quasi-legislative powers through different kinds of instruments such as regulations, orders and directions. While orders are used for setting industry tariffs, regulations and directions are used for non-tariff related matters. Regulations made by TRAI are required to be placed before the Parliament. However, orders and directions are not so required. Regulations and orders are instruments *in rem*. On the other hand, directions may be issued to specific service providers, a class of them or even to an individual service provider.[8] For the purpose of this paper, we have only taken into account regulations, orders and directions issued in rem, that is, to all or a class of service providers.

AERA performs two specific functions in relation to major airports, namely, setting airport-related tariffs and monitoring performance standards specified by the Central Government or any authority authorised by it, for airports. Like TRAI, AERA issues regulations, orders and directions. It performs the tariff-setting function by issuing 'orders'. We have accounted for these tariff-setting orders as regulatory instruments, although they may be applicable to a single airport. This is because the AERA Act requires AERA to conduct public consultations before passing tariff-setting orders. Directions may be issued by AERA to one or more service providers. As in the case of TRAI, directions issued by AERA may, thus be in rem or personam. During the period of study, we came across one direction passed by AERA and it was issued to all service providers. Hence, we have taken this direction into account for the purpose of gauging the responsiveness of AERA. Finally, only regulations issued by AERA are required to be laid before the Parliament.

The multiple instruments issued by the four regulators under study are summarised in Table 8. The instruments highlighted in bold undergo Parliamentary scrutiny, others do not.

Table 8: Kinds of instruments issued by the four regulators *in rem*

SEBI	**Regulations**	Circulars	General orders	Guidelines	Notifications
RBI	**Regulations**	Circulars	Master Directions		
TRAI	**Regulations**	Tariff-setting orders	Directions		

[8]The *Telecom Regulatory Authority of India Act, 1997* requires that all regulations made by TRAI must be laid before both the House of Parliament. The TRAI Act additionally empowers TRAI to issue orders for tariff-setting and directions for the performance of its functions.

AERA	**Regulations**	Tariff-setting orders	Directions

3.2.1 How many legislative instruments underwent legislative scrutiny?

We studied the different kinds of legislative instruments issued by SEBI, RBI, TRAI and AERA for the period beginning January 2014 and ending April 2016. Table 9 contains our findings:

Table 9: Instruments issued by SEBI, RBI, TRAI and AERA (1st January 2014-30th April 2016)

Instrument	**SEBI**	**RBI**	**TRAI**	**AERA**
Regulations	51	48	22	0
Circulars (including Master Circulars and Master Directions)	122	1016	0	0
Orders[9]	1	0	12	69
Directions	0	0	14	1
Guidelines	1	0	0	0
Total	175	1064	48	70

We find that the four regulators studied, issue a larger number of quasi-legislative instruments which do not undergo legislative scrutiny. In percentage terms, while about twenty-nine (29) percent of the total number of legislative instruments issued by SEBI during the study interval underwent Parliamentary scrutiny, about four (4) percent of the total legislative instruments issued by RBI were laid before the Parliament. Among the infrastructure regulators, forty-six (46) percent of the total legislative instruments issued by TRAI during the study interval underwent legislative scrutiny and the corresponding percentage for AERA was 0. Therefore, while TRAI fares relatively better on issuing instruments which undergo legislative scrutiny, less than half of the legislative instruments issued by all regulators

[9]Orders refers to *orders in rem*.

undergo legislative scrutiny.

3.2.2 How many legislative instruments were preceded by a consultation process?

We then studied whether each of the legislative instruments issued by the four regulators underwent a formal public consultation process of some form before their issuance. We find that SEBI held a formal public consultation process for about ten (10) percent of the legislative instruments issued by it. RBI held public consultations for about two (2) percent of the legislative instruments issued by it. TRAI held a formal public consultation process for about fifty-six (56) percent of the total number of legislative instruments issued by it and the corresponding number for AERA was forty-one (41) percent. Table6 summarises our findings:

Table 10: Public consultation for delegated legislation issued by the four regulators (1st January 2014-30th April 2016)

Item	**SEBI**	**RBI**	**TRAI**	**AERA**
No. of instruments issued	175	1064	48	70
No. of instruments preceded by public consultation	18	14	27	29
Percentage	10.28%	1.39%	56.55%	41.42%

3.2.3 Descriptive analysis of the consultative processes followed by the four regulators

To assess the qualitative aspects of the process and identify whether the process led to the outcomes identified in the responsiveness index contained in Table 6, we studied the qualitative aspects of the consultation processes followed by SEBI, RBI, TRAI and AERA.

An overview of the consultative processes followed by RBI and SEBI indicate that while the financial sector regulators follow a similar process, there is considerable variation between the processes followed by them and the infrastructure regulators, namely, TRAI and AERA, and among the infrastructure regulators *inter se*.

The consulative processes followed by SEBI and RBI involve publishing a discussion paper with a fixed time line for submission of public comments. Neither SEBI nor RBI engage in information dissemination exercises when the discussion paper is published or hold oral hearings for public comments. While the consultation papers contain the objective of the proposed regulation and the problem being addressed, the objective is generally worded in general terms such as "in the interest of investors" and to "promote market development" (Pattanaik and Sharma, 2015). They generally present only one solution and do not contain cost-benefit analyses of multiple possible solutions.

During the consultation process, there is no multi-directional flow of information between the public and SEBI or RBI, or amongst the public *inter se*. The comments received from the public in response to the consultation paper issued by SEBI are not published. When the final regulation is issued, it is generally accompanied with a statement that SEBI and RBI have considered the representations received. On an average, while SEBI gives about twenty (20) days for the public to comment on the consultation paper issued by it, RBI gives about thirty (30) days. (See Table 11) There is no information in public domain on the kind of representations that were made, the ones which are accepted or the reasons for rejecting those which are not. Zaveri (2016) notes that a discussion paper issued by SEBI was identical to the text of the final regulations issued on at least two occasions. Pattanaik and Sharma (2015) have a similar finding on the outcome of the consultation exercise. In the case of consultation exercises conducted by SEBI, the time-lag between the date on which the consultation exercise is completed and the date of issuance of the instrument ranges from 55 days to 645 days. The average time-lag is a staggering 250 days. In the case of RBI, the corresponding figures are 24 days to 2232 days and the average time-lag is 658 days. (See Table 12.)

There is no data in public domain on the capacity building, if any, done by SEBI or RBI to internally to strengthen the consultation exercise or place quality controls on the content of the discussion papers.

On the other hand, TRAI and AERA follow a more detailed process of consultations for regulations and orders compared to the two financial sector regulators studied in this paper. However, TRAI does not generally conduct a formal consultation process before issuing directions.[10]

In the case of TRAI, often though not always, the process begins with a high-level discussion paper, which highlights the broad issues for consideration.[11] This is then

[10]We came across a draft direction which was put up for consultation on January 20, 2016. As of the date of this writing, a direction has not been issued pursuant to the draft. We came across only one direction issued by AERA till date.

[11]This is based on an interview with an employee of TRAI.

followed up with a discussion paper that dwells into the details of the proposed regulatory approach. While there is no uniformity in the quality of the consultation paper, the paper is generally structured to include the objective of the proposed intervention, industry practice, developments leading up to the consultation paper and the issues for consultation. Sometimes, the consultation paper also includes data such as global practices in respect of the issues under consideration. While some discussion papers have open-ended questions, others are more exploratory and reflect the regulator's proposed regulatory approach. The discussion papers do not propose multliple options with a cost benefit analysis of each.

In the consultation process followed by TRAI, there is multi-directional flow of information during the consultation process. About twenty one (21) days are given for the first round of comments. In several cases, TRAI has extended the duration for responding to the consultation paper. The comments are put up in public domain as they start flowing in. Approximately seven (7) days are then reserved for allowing the public to offer counter-comments. (See Table 11). The counter-comments are also published. The time-lag between the date of completion of the consultation process and the issuance of the legislative instrument ranges from fourteen to two hundred and forty six days (14 to 246 days). The average time-lag is eighty two (82) days. (See Table 12).

The final regulation or order is accompanied with an explanatory memorandum explaining the public consultation process followed prior to the issuance of the instrument. However, the explanatory memorandum does not give specific reasons for acceptance or rejection of some comments over the others.

In the consultative process followed by AERA, a consultation paper is issued by AERA and written feedback is generally sought on the contents thereof. The consulation paper is generally sparse in details and does not clearly specify desired outcomes or objectives. While this is perhaps due to the fact that the role of the authority is largely that of setting tariffs, the consultation papers are generally lacking in data and comparable or alternative scenarios that can facilitate better engagement. There is no multi-directional flow of information and the inputs received are generally displayed on the website of AERA.

There is no data in public domain on the capacity building, if any, done by TRAI or AERA internally to strengthen the consultation exercise or place quality controls on the content of the discussion papers.

Table 11: Time given for responding to consultation papers (in days)

Regulator	**Minimum**	**Maximum**	**Median**	**Average**
SEBI	7	35	21	20

RBI	7	46	30.5	29.6
TRAI	15	44	29	27.41
AERA	5	44	14	17.72

Table 12: Time-lag between close of consultation and issuance of instrument (in days)

Regulator	**Minimum**	**Maximum**	**Median**	**Average**
SEBI	55	645	160	250
RBI	24	2232	658	1128
TRAI	14	246	58	82.26
AERA	4	1197	218.5	349.75

3.3 Measuring outcomes, assigning scores

On the basis of the index contained in Table 6, we have assigned scores toSEBI and TRAI, depending on whether they have achieved the outputs indicated for each benchmark. Since information relating to the internal capacity building for each of these two regulators is not available in public domain, we have not included scores on the benchmarks relating to internal capacity building by these regulators. Where no data on any other benchmark relating to either regulator is available in public domain, we have assigned a score of 0 to both regulators.

For each output that is a 'yes', we have assigned a score of 1. Where an output has been achieved partially, we have assigned a proportionate score in percentage terms out of a total score of 1. For example, if 56.55% of the legislative instruments issued by TRAI were preceded by public consultation, then on that output, we have assigned a score of 0.57 (after rounding off to the closest whole number) to TRAI. The outputs and scores for each of the four regulators are reflected in Table 13.

Table 13: Outputs and scores for responsiveness of SEBI, RBI, TRAI and AERA (1st January 2014-30th April 2016)

Sr.No.	Output	SEBI	RBI	TRAI	AERA
1.	Does the agency publish explanatory documents? [12]	0.1[13]	0.02[14]	0.57[15]	0.41 [16]
2.	Does the agency proactively communicate with groups most likely to be affected?	0	0	0	0
3.	Does the agency publish comments received before issuing the final regulation?	0	0	1	1
4.	Does the agency provide time for counter-comments?	0	0	1	0
5.	Does the agency provide a response to the comments received?	0	0	0	0
6.	Does the agency provide more than one method of receiving feedback?	0	0	1	0

[12]Explanatory documents refers to discussion papers and/ or draft regulations.
[13]10% of legislative instruments were preceded by explanatory documents.
[14]2.09% of legislative instruments were preceded by explanatory documents.
[15]56.55% of legislative instruments were preceded by explanatory documents.
[16]41.42% of legislative instruments were preceded by explanatory documents.

7.	Does the agency publish a statement of when the decisions will be made based on the consultative process?	0	0	0	0
8.	Does the agency publish the name of the individual in charge of the consultative process?	0	0	0	0
9.	Does the agency publish the source of the legal power to issue the proposed regulation?	1	0	1	1
10.	Does the agency give adequate time for responding to the draft proposed by it?[17]	0[18]	0[19]	0 [20]	0 [21]
	Total	1.1	0.2	4.57	2.41

[17]The pre-legislative consultative policy issued by a Committee of Secretaries of the Central Government requires a minimum of 30 days for responding to a draft published by the regulator. Best practice documents issued by OECD also warrant a time of not less than 30 days. Hence, we used 30 days as a benchmark of *adequate* time.

[18]SEBI allows an average of 20 days for responding.

[19]RBI allows an average time of 29.6 days for responding.

[20]TRAI allows an average of 27.41 days for responding.

[21]AERA allows an average of 17 days for responding.

We find that on a score of 10, while TRAI achieves close to half the outputs, the other regulators lag behind dismally. Again, overall among the regulators compared, the infrastructure regulators fare relatively better than the financial sector regulators.

The legislative frameworks governing the quasi-legislative functions of all the four regulators are similar in that they recognise the power to issue multiple categories of legislative instruments and mandate different standards of accountability for each such instrument. However, while the law governing TRAI and AERA contain a vague mandate of transparency, such a mandate is absent in the law governing SEBI and RBI. It is possible that the vast variation between the degree of responsiveness amongst the two sets of regulators in exercising their quasi-legislative functions, is linked to the presence of the mandate in the law governing one of them and the absence of the law governing another.

4 Conclusion

By measuring the 'responsiveness' of four Indian regulators on a rules and outcomes based axis, this paper makes two specific contributions to the discourse on best practices of regulatory governance issues in emerging economies, and specifically in India.

First, it provides an empirical framework for assessing responsiveness of regulatory agencies. This framework can be scaled for assessing the responsiveness of other regulatory agencies in India and elsewhere. This can feed into an initiative to measure the performance of regulatory agencies by the regulator itself, external audit agencies such as the Comptroller and Auditor General of India and the Government Audit Office in the United Kingdom, the government as the principal and the citizens themselves. Performance evaluation exercises at regular intervals on the basis of such frameworks will, in turn, incentivise regulators to be publish data which the external agencies can rely on when using such assessment frameworks. Where Parliamentary oversight mechanisms are not strong, such evaluations will act as feedback loops and information to them.

Second, the paper demonstrates variance in the responsiveness of regulatory agencies in India, in the absence of uniform standards governing the conduct of Indian regulators. There are two factors which contribute to this variance: the absence or weakness of the laws governing the conduct of regulators, and the weakness of oversight over regulatory agencies. Again, the framework developed in this paper can help plug the second contributing factor.

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