ISSN 1991-8976

RAJSHAHI UNIVERSITY LAW JOURNAL

FACULTY OF LAW
RAJSHAHI UNIVERSITY
2006

ARTICLES

ISSN 1991-8976

Rajshahi University Law Journal

Volume 03 2006

Published by:
Dean
Faculty of Law
Rajshahi University
Rajshahi- 6205
Bangladesh

FACULTY OF LAW

UNIVERSITY OF RAJSHAHI

Rajshahi University Law Journal 2006

Rajshahi University Law Journal
FACULTY OF LAW
UNIVERSITY OF RAJSHAHI

Volume 03 2006

Published by
Dean
Faculty of Law
Rajshahi University
Rajshahi- 6205
Bangladesh

Cover Design & Printed by
B T S Commercial Institute
Benodpur Bazar, Rajshahi

Printed at:
Barendra Printing Press & Packaging
Sapora, Rajshahi

Subscription Rates
For Individuals: **Tk. 100.00 US$ 20** (without postage)
For Organisation: **Tk. 150.00 US$ 30** (without postage)

[Published in December 2006]

Rajshahi University Law Journal 2006

Rajshahi University Law Journal, 2006: 47-70

Hiring and Firing of Securities Regulators in Bangladesh and Australia: A Comparative Review

Dr. S M Solaiman*

A. Introduction

Private sector investment is regarded as a driving force for the rapid development of national economies worldwide. Boosting this investment requires a vibrant capital market, which converts idle private savings into productive investment. A robust capital market entails apt regulation enforced by an efficient regulator. Bangladesh has had its securities market functional for nearly fifty years. Nonetheless, the market remains in its embryonic form or at best in is infancy.[1] The market regulator in cooperation with the successive governments has been unsuccessfully striving to restore public confidence damaged in 1996 following a devastating share scam triggered by some mature market players.[2] The scam wrecked the bottom of the Bangladesh securities market, which had been described by an international commentator as the "Slaughter of the Innocents'.[3] Governmental measures aiming at revamping the market thus far concentrate on investor 'attraction rather than their 'protection' in the marketplace. This may be considered as a 'misplaced emphasis' when numerous recent studies suggest that providing protection to the investor is critical for the development of local securities markets.[4] In an apparent

---

* *Faculty of Law, University of Wollongong, NSW 2522, Australia.*

[1] M A Chowdhury, 'Corporate Governance: Transparent Disclosures to Strengthen Investors' Confidence' *The Financial Express* Dhaka (26 Nov 2002); M O Imam, "Capital Market Development in Bangladesh: Problems and Prospects' (Oct-Dec 2000) *Portfolio* 43 at 46.

[2] For details, see *Enquiry Report on Share Market* (Dhaka: March 1997).

[3] The Bangladesh Stock-market: Slaughter of the Innocents' *The Economist* (7-13 Dec 1996) 90 at 90-91 (1996).

[4] For some those studies, see R La Porta, F Lopez-De-Silanes & A Shleifer, 'What Works in Securities Law' (2006) *Journal of Finance* (forthcoming) <http: //post.economics.harvard.edu/faculty/shleifer/papers.html> (27Nov 2005); R La Porta, F Lopez-De-Silanes, A Shleifer & R Vishny, "Investor Protection and Corporate Valuation" (2002) 57 *Journal of Finance* 1147; A Shleifer & D Wolfenzon, 'Investor Protection and Equity Markets' (2002) 66 *Journal of Financial Economics* 3; F Lopez-De-Silanes, 'The Politics of Legal Reforms' (2002) 2 *Economia* 91; R La Porta, F Lopez-De-Silanes, A Shleifer & R Vishny, 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics* 3; R La Porta, F Lopez-De-Silanes, A Shleifer & R W Vishny, 'Agency Problems and Dividend Policies Around the World' (2000) 55 *Journal*

disregard to the concern for investor protection, the reforms initiated by the government over the past few years focus either on offering pecuniary incentives to investors and issuers alike, or on forcing the quiet savers to be risk takers in the volatile securities market.[5]

The central objective in securities regulation is the protection of investor.[6] Securities regulation involves three main functions. These are: the making of law, the administration of law, and the resolution of disputes between parties regarding securities.[7] The performance of these functions is greatly dependent upon the efficiency securities regulators emanated from education of, training and experience pertinent to securities markets. This article aims to critically examine the composition of the Bangladesh Securities and Exchange Commission (SEC) in comparison with its Australian counterpart, the Australian Securities and Investment Commission (ASIC). In doing so, discussions will concentrate on the qualifications, disqualification's and terminations of the permanent members of these two regulatory bodies with a view to providing suggestions for the improvement of the SEC in the light of the ASIC. A comparison between these two regulators of diverse economies may initially seem to be untenable. But it should be borne in mind that convergence in securities regulation is desirable given the similarity in functions to be performed by the regulators.[8]

---

of Finance 1; R La Porta, F Lopez-De-Silanes, 'Corporate Ownership Around the World' (1999) 54 *Journal of Finance* 471; R La Porta, F Lopez-De-Silanes, A Shleifer, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113; R La Porta, F Lopez-De-Silanes, A Shleifer & R W Vishny, 'Legal Determinants of External Finance' (1997) 52 *Journal of Finance* 1131; A Shleifer & R W Vishny, 'A Survey of Corporate Governance' (1997) 52 *Journal of Finance* 737.

[5] The major reforms accomplished thus far include: offering tax incentives both on investment in, and listing of, companies; cutting interest rates on bank deposits and fixed income saving bonds, closing relatively higher interest bearing savings bonds, whitening black money without question through investment in securities, etc: for details of these reforms, see annual reports of the Bangladesh Securities and Exchange Commission published from 1994 to 2004.

[6] International Organisation of Securities Commissions (IOSCO), *Objectives and Principles of Securities Regulation* (May 2003) at i<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf> (4 Dec 2005).

[7] R Baxt, A Black & P Hanrahan, *Securities and Financial Services Law'* 6th ed, 2003)-Sydney: Butterworths at 5.

[8] See generally, Gillen M & Potter P, 'The Convergence of Securities Laws and Implications for Developing Securities Markets' (1998) 24 *North Carolina Journal of International Law & Commercial Regulation* 83.

B. Introduction to the SEC and Its Present Composition

The SEC is the successor of the Controller of Capital Issues (CCI) established under the *Capital Issues (Continuance a/Control) Act* 1947 (CIA'47). Unlike the present statutory body, the SEC, the CCI was a government official entrusted with the responsibility for regulating the capital market. The CIA'47 vested enormous powers in the government, and the CCI being responsible for the administration of the CIA'47, would apply them to control the market assumingly in a dictating manner. Commenting on the role of the CCI, Mohandas observed that '[t]here was not much room for innovation and the growth of the capital market was very slow" under that regime.[9] He also added that, the Controller wanted more to control the market players than to protect investors, and this attitude rendered the regulation unsuccessful.[10]

Although the Bangladesh securities market commenced operation in 1956, the number of listed companies in 1992 (before the establishment of the SEC) was 149 which issued capital of a total amount of Tk. 6,020.3 million only, and market capitalisation was merely Tk. 12,299 million.[11] Market capitalisation was just 1.15 per cent of GDP in 1992. But this capitalisation increased to 3.57 per cent in 1995 following the replacement of the CCI with the SEC in 1993.[12] Therefore, the market experienced some positive impacts of the existence of the SEC which came into being under the *Securities and Exchange Commission Act* 1993 (SECA'93) with a primary function of protecting investors from market misfeasance.[13] This function corresponds to the essential role of regulators as enshrined in the Principles of Securities Regulation adopted by the International Organisation of Securities Commissions (IOSCO).[14] But it can be generally argued that the efficient performance of regulatory functions requires a meaningful composition of the watchdog.

---

[9] TV Mohandas, 'Capital Market Development: Indian Experience' in the Institute of Cost and Management Accountants of Bangladesh (ICMAB) and Institute of Chartered Accountants of Bangladesh (ICAB), *10th SAFA Conference* (Dhaka, 1995) 57 at 65. It should be noted here that a piece of legislation identical to the CIA'47 was in force in India during that time.

[10] *Ibid.*

[11] SEC, *Annual Report* 1993 -1994, Dhaka [hereinafter SEC (1994)] at 20.

[12] For details of these ratios from 1980 to 1997, see M F Ahmed, *Emerging Stock Market and the Economy: The Case of Bangladesh* (2000) Nagasaki: Nagasaki Daigaku Keizai Gakubu Tonan Ajia Kenkyujo at 184.

[13] *Securities and Exchange Commission Act* 1993 s8.

[14] Principle 3 of the Principles Relating to the Regulator: IOSCO, *Objectives and Principles of Securities Regulation* (May 2003) above n6.

Composition of the SEC

Securities regulation involves knowledge of various disciplines such as law, finance, accounting, and economics. Perhaps this complex fusion of multidisciplinary elements has made securities literature complicated, and therefore cannot be readily understood.[15] Section 5(1) of the SECA '93 provides that the SEC is to be made up of a chairman, four full time members, one member to be nominated by the Ministry of Finance from that Ministry; and one member to be nominated by the Bangladesh Bank from that Bank.[16]

In relation to the qualifications of the chairman and four full-time members, s5(4) of the SEC93 provides that:

> The Chairman and the other full-time members shall be appointed from amongst the persons of capability and standing who have shown capacity in dealing with problems relating to company matters, securities markets or have special knowledge and experience of law, finance, economics, accountancy and such other discipline as, in the opinion of the Government, shall be useful to the Commission.

The above provisions of law look fine, but the practice does not reasonably conform to these requirements. For example, legal knowledge has been recognised as qualification, but one may rationally believe that it had not been seriously taken into account in appointing SEC members[17] to date. This is so because, although the SEC came into being in 1993, the first and the sole member with 'special knowledge and experience of law' commenced working at the SEC in early 2003.[18] Bodies responsible for securities

---

[15] J H Lorie, P Dodd & M H Kimpton, *The Stock Market: Theories and Evidence* (2nd ed 1985) Illinois: Dow Jones -Irwin at viii (foreword). '[T]he law governing [securities] manipulations has become an embarrassment- confusing, contradictory, complex, and unsophisticated': E T McDermott, "Defining Manipulations in Commodities Futures Trading: The Futures "Squeeze" (1979) 74 *North-Western University Law Review* 202 at 205.

[16] Initially, the SECA'93 provided for two full time members under s5(l)(b). The number of full-time member was increased to four in 1997: *Securities and Exchange Commission (Second Amendment) Act\997s2.*

[17] The term 'members' in this article sometimes includes the chairman as well, specifically where the position of chairman is not separately mentioned.

[18] Mr Mohammad Ali Khan, a former judicial officer and a current member of the SEC, took up his position in early 2003: 'New SEC Members Take Over' *The Financial Express*, Dhaka (3 Mar 2003). To the best of the present writer's knowledge, he seems to be the first and so far the sole appointee to the SEC hired from the judiciary. However, it has to be noted that Mr Manir Uddin Ahmad, immediate past chairman of the SEC, had a bachelor degree in law. Basically, he was a commerce graduate (M Com, LLB FCA) and a bureaucrat

regulation usually include law graduates who have practised law, as evident from the compositions of securities watchdogs in many countries including Australia.[19]

Another lack of application of requirements set out in the SECA'93 regarding the qualifications mentioned above is found in relation to the representation of private sector in the SEC. Although the above law does permit appointment of private sector member to the SEC, the regulator has never had a member from amongst the market professionals or entrepreneurs. Practical experience in dealing with securities is considered very useful in working as a securities regulator. Perhaps the best example of the recognition of the importance of such experience is found in the United States Securities and Exchange Commission, which is believed to be the most successful securities regulator in the world. It may be reasonable to say that the 1929 Wall Street disaster gave birth to the US federal securities regulator. Securities and Exchange Commission, established under the *Securities Act* 1933. Whilst the scam severely damaged investor confidence in the operation and regulation of the market. President Roosevelt made Joseph P Kennedy the first chairman of the US-SEC to discipline the scam-torn market. The appointment was opposed by many people due to a serious allegation against Kennedy of being notoriously involved in crushing the market in 1929.[20] In defence, Roosevelt said: 'it takes a thief to catch a thief.[21] Perhaps having due regard to Roosevelt's assertion, private sector

---

'C M Alam New SEC Chairman', *The Financial Express, Dhaka* (28 Aug 2003).

[19] See for the composition of securities regulator in Australia, New Zealand, Canada and Malaysia: Australian Securities Commission, *Annual Report* 1996-97, Sydney at 10-12; ASIC, *Annual Report* 1997-98, Sydney at 9-13 & ASIC, *Annual Report* 1999-00, Sydney at 16. ASIC, *Annual Report* 2000-01, Sydney at 16; ASIC, *Annual Report* 2001-02, Sydney at 16-17; ASIC, *Annual Report* 2002-03, Sydney at 16-17, ASIC, *Annual Report* 2003-04, Sydney at 47-49; Securities Commission, *Annual Report* 2002, Wellington at 4-5; Securities Commission, *Annual Report* 2003, Wellington at 6-7; Securities Commission, *Annual Report* 2004, Wellington at 6; Ontario Securities Commission (OSC), *Annual Report* 2002, Toronto at 2-3; Ontario Securities Commission (OSC), *Annual Report*2003, Toronto at 11; Securities Commission, Annual Report 2001, Kuala Lumpur at xiv-xv.

[20] 'The AFU and Urban Legend Archive Politics: Kennedy Fortune' <http://www.urbanlegends.com/politics/kennedy_fortune.html> (21 Nov 2002). See also M Zahir, *Company and Securities Laws* (2000) Dhaka: University Press Limited at 258.

[21] *Ibid.*

representation in securities regulators has been commonplace.[22] But the SEC in Bangladesh is yet to get a member from this sector.

Apart from those lacks of qualification and representation, the SEC has suffered from being a full body over the past several years. It is unlikely that the SEC had all the four full-time member at any one time. For example, the SEC had its chairman plus one and two members on 30 June 2000 and 30 June 2001 respectively.[23] Again the watchdog was made up of the chairman and a single full-time member in November 2002.[24] However, there had been the chairman and three members in the SEC on 30 June 2003.[25] Although the chairman and a member were changed, the total number of four remains unchanged in 2004.[26] Therefore, no chairman of the SEC could sit with four full-time members as yet. Arguably, more members can provide a synergic benefit, and the SEC specifically needs all members on board, due to a lack of sufficiently experienced persons in this crucial body.

C. Introduction to the ASIC and Its Present Composition

The legal and regulatory regime of securities market has been 'substantially amended and modernised in recent years' in Australia.[27] Currently, the regulation of the securities market falls under the domain of the federal government (Australian Commonwealth Government) As a Commonwealth statutory corporation, the ASIC is responsible for the regulation of the securities market.

Originally, the states and territories, formerly British colonies, had adopted their own corporate law modeled on the English *Companies Act* 1862. Therefore the regulation of securities markets was initially a concern of the respective state and territory governments. Although the Commonwealth came into being in January 1901, securities regulation at state level continued until the establishment of the National Companies and Securities Commission (NCSC) in 1981 under a co-operative scheme adopted by the Commonwealth and the states governments. But it did not last long because of its being 'hopelessly inadequate in dealing with the corporate malfeasance of the late 1980'.[28] Although the NCSC was a Commonwealth body, it did not

---

[22] See the sources included in above n 19.

[23] SEC, *Ammo/Report* 1999-2000 (SEC 2000) at 5 and SEC, *Annual Report* 2000-2001 (SEC 2001) at 5.

[24] SEC, 'About SEC' <http://www.secbd.org/about.html> (28 Nov 2002).

[25] SEC, *Annual Report* 2002-2003, Dhaka (SEC 2003) at 53.

[26] SEC, *Annual Report* 2003-2004, Dhaka (SEC 2004) at 51,

[27] Baxt *et al.* (2003) above n7 at 4.

[28] For details, see R Me Queen, 'An Examination of Australian Corporate Law and Regulation 1901-1961' (1992) *UNSW Law Journal* 1 at 14-15.

have exclusive authority to regulate companies. It was required to share the regulatory powers with the State Corporate Affairs Commissions. Under this arrangement, the NCSC had to delegate some of its crucial responsibilities such as the incorporation of companies, and filing of documents to the respective state corporate regulators.[29] This sharing relationship renders the corporate regulation inefficient mainly because of lack of sufficient authority of the NCSC over the state regulators.[30] Such a dual regulation of corporation was eliminated by replacing the NCSC with the Australian Securities Commission (ASC) in 1991 under the *Australian Securities Commission Act* 1989 (Cth) enacted relying on the new national scheme of 1987. In order to set up a 'one-stop shop', the ASC was made a single regulator, and the state and territory corporate regulators (Corporate Affairs Commissions) ceased to exist with the establishment of this new Commonwealth body.[31] The regulator was renamed as the ASIC in July 1998. The change in its name was necessary following the widening of its functions pursuant to the *Financial System Inquiry Report* 1997. The government enacted law to implement this report and the ASIC was empowered to deal with consumer protection in the financial sector.[32] Presently the ASIC is the national securities regulator and responsible for the administration of the *Corporations Act* 2001 (Cth) which embodies the laws governing securities markets in Australia.

Composition of the ASIC

It must be noted that the previous *Australian Securities Commission Act* 1989 (Cth) was replaced in 2001 with the *Australian Securities and Investment Commission Act* 2001 (Cth) (ASICA'01) and the ASIC continued to exist under s261 of this new legislation.[33] Unlike the SEC in Bangladesh, the composition of the ASIC is flexible. Section 9 of the ASICA'91 provides that the 'ASIC is to consist of not fewer than 3 nor more than *8* members'. However, at least three of these members must be appointed on a full-time basis. In order to avoid any functional problem for any given time due to the vacancy of the position of a full-time member, the ASICA'01 spells out that the ASIC should be able to continue functioning up to three months even if the number of working full-time members becomes below three. It implies that a sudden departure of a full-time member for any reason whatever will

---

[29] P Lipton & A Herzberg, *Understanding Company Law* (2003) Sydney: Law Book Company at 6

[30] Id at 7.

[31] *Ibid.*

[32] See Australian Securities and Investment Commission Act 1989 Pt 2 div 2.

[33] Baxt *et al.* (2003) above n7at 14.

not affect the function of the regulator, and the government will get three months time to look for a competent member. At the same time, it also indicates that the presence of full-time members is important and therefore the government will have to fill in the vacancy within three months. These requirements clearly tempt to suggest that a similar provision requiring the presence of a certain number of full-time members be included in the SECA'93 in order to facilitate efficient working of the securities regulator in Bangladesh. This is particularly important in Bangladesh because, some of the full-time positions remain vacant for quite a long time and the SEC did not have all the positions filled in at any particular time as alluded to earlier.

Regarding qualifications of the chairman and members of the ASIC, the ASICA'01 stipulates that a potential candidate is required to have knowledge or experience in one or more of the specific fields which include: business, administration of companies, financial markets, law, economics and accounting.[34] These qualifications are theoretically similar, though not identical, to those set forth for securities regulators in Bangladesh.[35] But the practice in Australia significantly differs from that in Bangladesh. For example, SEC has never had a lawyer as its chairman; but all of the previous three chairmen of the ASIC were lawyers, and the incumbent fourth chairman is Mr. Jeffrey Lucy who is an accountant.[36] Mr. Lucy, a private sector experienced and reputed accounting professional, commenced as the ASIC chairman in May 2004. Prior to taking up this position, he had been working as the Deputy Chairman of the ASIC.[37] Although the head himself is an accountant, four out of five commissioners are educated and experienced in law.[38] These commissioners are so highly qualified that one of them, Professor Bema Collier, has recently been appointed judge of the Federal Court, the second highest court in Australia.[39] All these tend to argue upon the need for securities regulators who have qualifications in law and experience in dealing with legal matters.

Another important difference is noticed in respect of the determination of the

---

[34] *Australian Securities and Investment Commission Act*2001 s9(4).

[35] For the qualifications of the SEC members, see *Securities and Exchange Commission Act* 1993, s5(4).

[36] M A Adams, *Essential Corporate Law* (2005) Sydney: Cavendish Australia at 10.

[37] ASIC, *Annual Report* 2003-2004, Sydney at 47.

[38] Id at 47-49.

[39] ASIC,' ASIC Commissioner appointed Federal Court Judge' in *Media and Information Releases*<http:/Avww.asic.gov.au/asic/asic_pub.nsf/byheadline/ 05-397+ASIC+Commissioner+appointed+Federal+Court+Judge?open Document>

above qualifications. The Australian law leaves it largely to the 'satisfaction of the Minister concerned'[40] by saying that "[t]he Minister is to nominate a person as a member only if the Minister is satisfied that the person is qualified for appointment by virtue of his or her knowledge of, or experience in, one or more of the [aforementioned] fields...'.[41] Therefore, the person to be nominated for a position of ASIC commissioner need not to publicly show their capability of doing the job. Nonetheless, practical experience in dealing with business given preference to mere higher tertiary qualifications as apparent in the present structure of the ASIC. The ASIC is presently made up of the chairman and five commissioners.[42] The profile of these five distinguished persons (commissioners) demonstrate that three of them are lawyer by profession and they were involved in the affairs of the securities market in one way or another. The remaining two commissioners had been working with the ASIC as executives before being commissioners.[43] Hence, their familiarity with and ability to deal with securities regulation vis-a-vis legal matters became obvious before their appointment as commissioners. On the contrary, s5(4) of the SECA'93 quoted earlier specifically requires that potential nominees for the SEC membership clearly demonstrate their worth for the position.

The SEC has been so far mainly a 'club' of incumbent and/or retired bureaucrats, even though some academics were occasionally included. No person with practical experience in dealing with problems involving companies and their securities has been appointed to the SEC so far as this writer knows. Therefore, the first requirement of "demonstrated ability" appears to have been largely ignored and all the appointments have been made in reliance on the 'alternative' qualifications as articulated in the aforementioned section.

A distinctive qualification has been laid down for securities regulators in Bangladesh. According to s5(6) of the SECA'93, despite being squarely qualified under the abovementioned qualifications, a person will not be eligible to be the chairman or a member of the SEC simply because of

---

(19 Dec 2005).

[40] Until 1996, the Australian Securities Commission (ASC), the predecessor of the ASIC, was responsible to the Attorney-General. Presently the ASIC is responsible to the Federal Treasurer: Lipton et al (2003) above n29 at 17.

[41] *Australian Securities and investment Commission Act* 2001 s9(4).

[42] Two terms - commissioner and member - are used interchangeably in this study as both of them are used in Australian literature on the ASIC.

[43] ASIC (2004) above n38.

his/her attainment at the age of 65 years. Its Australian counterpart does not embrace any qualification based on age. It must be appreciated that Bangladesh lacks sufficient number of people who would be eligible for and willing to joining the SEC. The justification of this assertion may be sought in the situation experienced following the appointment of former SEC chairman Mr. M A Syed as the Chief Election Commissioner in May 2000. Mr. Manir Uddin Ahmad, a SEC member, had to work as acting chairman until July 2000. Eventually Mr. Ahmed was made the full-fledged chairman of the SEC. Assumingly, he was promoted to that position finding no better alternative. Similarly, following the expiry of a 3-year term of Mr. Ahmad on 12 July 2003,[44] the next and present chairman joined the SEC after four months in late October 2003.[45] Dr Mirza Azizul Islam, the incumbent chairman and a retired government official' took the charge on a contract basis effective up to 22 February 2006.[46] These instances coupled with the continued vacancy in the SEC membership evidently demonstrate the paucity of qualified persons for securities regulator in Bangladesh. On the other hand, some other important bodies such as recently formed Anti-Corruption Commission and Bangladesh Law Commission have had their heads who were above 65 years. For example, Mr. Justice Sultan Hossain Khan, the first and current chairman of the Anti-Corruption Commission, commenced last year when he was 'nearly 80 years old.'[47] Further, perhaps Mr. Justice Kemal Uddin Hossain became the chairman of the Bangladesh Law Commission when he was above 70 years old. Recently, life expectancy in Bangladesh has gone up and, as it is publicly known that the retirement age of the judges of the Bangladesh Supreme Court has been increased to 67 years through constitutional amendment. This increase reinforces the argument that laws should be changed in commensurate with the changing needs of the society.

In respect of the term of appointment, the SECA'93 stipulates a period of three years for the chairman and full-time members.[48] However, they may be reappointed for a similar term unless barred under any other provisions such as the age limit.[49] Thus the age limit again prohibits appointment of experienced people.

---

[44] 'C M Alam New SEC Chairman' (2003) above n 18.

[45] 'SEC Gets New Chairman after Four Months- Mirza Azizul to Take Charge' *The New Age*, Dhaka (20 Oct2003).

[46] Ibid

[47] *'Anti-corruption Body Comes into Being-Justice Sultan Made Chairman'* The Daily Star, *Dhaka, 2004.*

[48] *Securities and Exchange Commission Act* 1993, s5(5).

[49] *Securities and Exchange Commission Act* 1993, s5(6).

Regarding the duration of appointment, the Australian law has specified a 'term of at most 5 years' for the members of the AIC.[50] After the expiry of the first term, a member can be reappointed regardless of his/her age. Reappointment mainly depends upon his/her contribution to the role of the ASIC during his/her tenure of office.

Training and practical experience sometiines cannot be substituted by anything else. Such experience in regulating securities markets is crucial as evident from the profiles of Australian securities regulators. An International Organization of Securities Commissions (IOSCO) principle regarding such regulators provides that '[t]he regulator should have adequate powers, proper resources and the capacity to perform its functions and exercise its powers'.[51] It is widely recognised that securities law is one of the most complicated branches of law, understanding of which requires a fair amount of sincere efforts to be invested. Referring to the complexities of securities literature, Malkiel observed that '[b]asically, the security analyst must be a prophet without the benefit of divine inspiration'.[52]

Over the past few years, the performance of the SEC has been severely criticised by several quarters ranging from the Parliamentary Committee to market commentators. For example, the Parliamentary Standing Committee on the Ministry of Finance in a meeting held on 24 December 1998, vehemently criticied the SEC for its 'unnecessary interference with the activities' of the Dhaka Stock Exchange (DSE) and the Chittagong Stock Exchange (CSE) and its failure to restore investor confidence in the market.[53] The foremost duty of a securities regulator is to protect investors in the market. Pointing to the tremendous failure of the SEC in performing that duty, a market commentator described the regulatory measures as making "blunders one after another'.[54]

The SEC in early 2001 had to withdraw its decision for compulsory listing of public companies with paid-up capital of at least Tk50 million amid a strong protest demonstrated by business communities. They termed the SEC move

---

[50] *Australian Securities and Investment Commission Act* 2001 s108.

[51] IOSCO, *Principle of Securities Regulation*, prin 3, above n6.

[52] Securities analysis requires prophetic knowledge without divine blessings. 'Basically, the security analyst must be a prophet without the benefit of divine inspiration'- B G Malkiel, *A Random Walk Down Wall Street* (1990) New York: W W Norton & Company at 121.

[53] See 'SEC under Fire in JS Committee' *The Daily Star*, Dhaka (25 Dec 1998).

[54] A K M S Alam, "Need for Reforms in Bangladesh Stock Market" *The Financial Express*, Dhaka (18 May 2002).

as detrimental to the market, because of the lack of mandatory disclosures and transparency in direct listing.[55]

Another cancellation occurred in relation to a move to hide the poor performance of the market artificially. Following the continued bearish trend in the market, the regulator in November 2001 imposed a new index called "Weighted Average Share Price Index" on both the bourses. This index included only better performing companies and excluded the poor from the indicator of the movement of the market. As a result, the index failed to reflect on the true movement and therefore it misled the investing public about the real market scenario. In view of the widespread criticism of this cosmetic change in the market index for suppressing the fact, the subsequent SEC chairman abolished that index and allowed re-introduction of the All Share/Securities Price Index after three years in October 2004.[56]

A recent case study may be helpful in appreciating the disputes over the regulatory measures taken by the SEC from time to time. This real case will reinforce the need for adequately qualified and experienced persons in the SEC as argued above.

D. Case Study Regarding the Regulatory Weaknesses in Bangladesh

Facts of the Case Study in Brief

The Beximco Group of Companies (Beximco) is the largest industrial conglomerate in the country. It has II companies listed with stock exchanges out of a total of 238 listed companies of the DSE as at June 2002.[57] The market capitalisation of these 11 companies is 25 per cent of the country's capital market[58] The Board of Directors of these companies declared the dividends of all companies on 29 April 2002 without any dates for the next annual general meetings (AGMs) and book closure. Announcements of these dates are required together with the declaration of dividends under a notification issued by the SEC on 10 December 2001 as well as listing rules of the exchanges. Upon receipt of a letter from the Beximco on 30 April 2002 regarding the declaration of dividends, the SEC, in a surprise move, suspended the trading of shares of all of 11 companies until further order. The SEC alleged that the companies gave an incomplete disclosure of price

---

[55] MS Rahman, 'Listing PLCs with Stock Exchange Not Mandatory' *The Daily Star*, Dhaka (31 Jan 2001).

[56] I Ahmed, 'DSE to Reintroduce All Share Price Index' *The New Age*, Dhaka (22 Oct 2004).

[57] SEC, *Annual Report* 2001-2002, Dhaka at 14.

[58] 'Legal Steps Initiated: SEC Action Illegal-Says Beximco' *The New Nation*, Dhaka (3 May 2002).

sensitive information since they did not declare the dates for AGMs and book closure together with the announcement of dividends. Thus, the mere announcement of dividends without these dates is a violation of the SEC rule.[59] The SEC requested the companies to explain the reasons for noncompliance with the requirements by morning on 2 May 2002 at its office.[60] This is the most conspicuous incident in this market after the 1996 scam.[61]

Reaction of the Suspended Companies

The representatives of the companies immediately kept silent and only informed the press media that they would explain their position to the SEC.[62] However, their explanations appeared to be unconvincing to the regulator. Responding to the request of the SEC, these representatives met the SEC as scheduled with a legal notice, instead of explaining the reasons for the alleged noncompliance. The legal notice raised the question of the authority of the SEC to promulgate the rule under which the regulator suspended the trading of the companies' shares. The notice clearly mentioned the fact that the rule was invalid. The legal notice addressed to the chairman of the SEC requested the SEC to delete the provision of its notifications relating to this suspension. It also required the SEC to report its (SECs) compliance with the Beximco's notice by 10 am of 8 May 2002.[63] The legal notice stated that the Beximco would take the SEC to the court if it failed to comply with the notice. It also urged the SEC chairman would realise how serious illegalities the regulator had committed and also what damage had been caused to the investors and the market.[64] The notice further requested the SEC to work independently, not be directed by any other authority.[65] The companies did not however provide any explanation as to why they have not announced the dates.

---

[59] 'SEC Suspends Trading of Shares of 11 Beximco Group' *The Independent,* Dhaka (1 May 2002); "Share Trading of 11 Beximco Companies Suspended' *The New Nation,* Dhaka (1 May 2002).

[60] K Rahman, 'Trading of 11 Companies of Beximco Suspended in the Share Market' *The Janakantha,* Dhaka (1 May 2002)

[61] *Ibid.*

[62] *Ibid.*

[63] "Beximco Companies Serve Legal Notice on SEC Challenging Its Action' *The Independent^* Dhaka (3 May 2002).

[64] *Ibid.*

[65] It is worth noting that Mr Salman F Rahman, the Vice-President of the Beximco Group, contested the October 2001 national electio.ı with the ticket of the opposition party to the parliament. "Any otner authority' may have meant the government.

Response of the SEC to the Press and the Companies

Defending its action against the Beximco, the SEC argued that it had taken the decision in an emergency meeting in the greater interest of the people, investors and share transactions.[66] It was reported that the SEC took the decision to prevent another market crash following the lower dividends of these companies. It was also claimed that the directors declared nearly half of their previous year's dividends/the intention being that they would buy shares in their own names if the prices declined sharply.[67]

Despite the legal notice, the SEC decided on 5 May 2002 to continue the suspension until the companies declared the dates for AGMs and book closure. However, the SEC did not mention in this decision about the violation of its notification concerning the requirements for which the SEC ordered this suspension. Instead, the SEC decision referred to the fulfillment of the listing rules of the stock exchanges under which the same dates are required. The SEC advised the exchanges to restore the suspended trading as soon as that dates were declared.[68] In view of this decision of the SEC, some analysts became skeptical about the legality of the SEC action.[69] However, the SEC formally replied to the Beximco legal notice by claiming that its action was lawful.[70] The weakness of the regulator is clearly evident in this case - in its silence about the original claim of violation of its notification. Market commentators strongly entice overall role of the SEC in the given case by characterising the regulator as inefficient, incompetent, and harmful to investors as well as the market.[71]

---

[66] 'Share Trading of 11 Beximco Companies Suspended' (2002) above n59. The SEC chairman also defended the commission's position in an interview with the BBC (Bengali) at the night session of 30 April 2002.

[67] 'Trading of 11 Companies of Beximco Group in Share Market Suspended' *The Prothom Alo*, Dhaka (1 May 2002) & 'Legal Steps Initiated: SEC Action Illegal-Says Beximco' (2002) above n58.

[68] See 'SEC Sticks to Its Gun; Suspension of Share Trading Not Withdrawn' *The Independent*, Dhaka (6 May 2002); 'SEC talks Tough on Beximco Conditionalities' *The New Nation*, Dhaka (6 May 2002)

[69] 'Though the SEC claimed the move proper, timely and legal, it has now authorised the bourses to withdraw the suspensions if the companies announce the AGM and book-closure dates': AIMS, 'SEC in Beximco Straightjacket *Weekly Market Review* (4 May 2002) at 1.

[70] 'SEC Defends Suspension of Share Trading of Beximco Companies' *The Bangladesh Observer*, Dhaka (7 May 2002).

[71] For details, see M R Ban, 'A View of the SEC's Move' *The Financial Express*, Dhaka (17 May 2002).

Reaction of the Market

The share market reacted promptly by recording a sharp fall.[72] The market continued to experience a declining trend subsequent to the SEC action and announcement of the above-mentioned dividends, although analysts and the SEC alike believed that the fundamentals of the companies were still good enough for dividends in higher rates than the declared ones. More specifically, the Investment Corporation of Bangladesh (ICB) and AIMS of Bangladesh (the country's single asset management company and private mutual funds issuer), requested the Beximco to revise the proposed dividends. Taking the fundamentals of the companies into account, the ICB and AIMS were unwilling to welcome these lower dividends which were reduced by exactly 100 per cent from those of the previous year.[73] The market reacted to the declaration of dividends and ignored the economic fundamentals of the companies.

Reaction of the Stock Exchanges

The DSE, in its initial response, expressed its inability to execute the SEC order. The DSE however later complied with the SEC order.[74] The CSE complied with the SEC order without any express unwillingness to do it. Both of the exchanges favoured the immediate withdrawal of the suspension.[75] The exchanges did not take any action against the companies for the alleged violation of their listing rules.

Reaction of the General Shareholders .

The small investors and stockbrokers were perturbed by the SEC order.[76] They blamed the SEC for the arbitrary use of the rule under which the regulator had taken this action. They observed the action as discriminatory practice against the Beximco. This is so because, the regulator did nothing when some other companies committed the same wrong prior to the Beximco. Thus they explicitly accused the SEC for a double standard while

---

[72] Rahman (2002) above n60.

[73] The average proposed dividend rate of this group for 2001 is 6.5 per cent whereas it was 12.5 per cent in 2000. For details, see R M Chowdhury, 'ICB Urges Beximco Group to Revise Proposed Dividends' *The Financial Express*, Dhaka (16 May 2002).

[74] 'SEC Suspends Trading of Shares of 11 Beximco Group5 (2002) above n59.

[75] 'Beximco Companies Serve Legal Notice on SEC Challenging Its Action' (2002) above n63; K Rahman, 'Suspension of 11 Beximco Companies Withdrawn;*The Janakantha*, Dhaka (5 May 2002),

[76] 'SEC Suspends Trading of Shares of 11 Beximco Group' (2002) above n59.

dealing with the Beximco.[77]

A large number of investors considered suspension as illegal and staged a demonstration against the SEC and demanded immediate withdrawal of the suspension order.[78] They also submitted a memorandum to the SEC chairman for such withdrawal.[79] Notably, the investors did not blame the companies for their failure to announce the above-mentioned dates, instead they showed their agitation against the SEC. The role of the investors implies the lack of their confidence in the regulator.[80]

Role of the Institutional Investors

The SEC met with the institutional investors on 4 May 2002 (suspension took place on 30 April). Six institutional investors attended the meeting and they expressed their concern and frustration at the market situation created after the suspension of trading of 11 Beximco companies. They also advised the SEC to withdraw the order immediately in the interest of investors as well as the market.[81] The most noticeable point is that only six out of **few** hundreds institutional investors (although small) attended the meeting in response to the SEC request for solving a major urgency in the market and that they did not favour the SEC decision in question.

Role of the Issuers Association

The Bangladesh Association of Publicly Listed Companies (BAPLC), described the SEC action as illegal and as unfriendly to the market.[82] In an emergency meeting on 4 May 2002, the executive committee of the BAPLC unanimously accused the SEC for violating its own regulations and blamed the SEC for its unilateral action. The meeting observed that the dates for AGMs and book

---

[77] *Ibid*. For example, this source listed some companies, which have earlier declared dividends without the dates for AGMs and or book closure. These are: Bangladesh Lamps, Social Investment Bank, AB Bank, Islami Bank, HR Textile, UCBL, Water Chemicals.

[78] 'Beximco Companies Serve Legal Notice on SEC Challenging Its Action' (2002) above n63.

[79] "Small Investors For Resumption of Beximco Share Trading' *The Independent*, Dhaka (5 May 2002).

[80] Investment Corporation of Bangladesh (ICB-the state-owned largest investor in Bangladesh), SABINCO, Green Delta Insurance, Delta Life Insurance, Pragati General Insurance, and Asset & Investment Management Services (AIMS).

[81] AIMS (2002) above n69; 'SEC Term for Beximco1 *The New Nation*, Dhaka, (5 May 2002).

closure were not price sensitive information. They urged for the immediate withdrawal of the suspension order.[83] However, they said nothing against the companies. Their expressed anger was directed at the regulator alone.

Resumption of Trading and Suit **Against** the SEC

Finally, the exchanges resumed the trading of suspended shares on 6 May 2002 following the announcement of the dates for AGMs and book closure by the respective companies. However, the Beximco filed a writ petition with *the* High **Court** Division of the Supreme Court of Bangladesh against the SEC. In this petition, the Beximco challenged the legality of the suspension order as well as the SEC notification[84] which the companies have allegedly violated. The court issued a rule on 11 May 2002 upon the SEC, and directed the regulator to show cause as to why the impugned order and notification should not be declared to have been made illegally and without lawful authority.[85] Nonetheless, the SEC did not sue the companies for the alleged violation and for their role in damaging investor confidence.

The aforementioned case clearly expounds the regulatory weaknesses which contributed to damaging investor confidence in the market further.

Taking all these factors into account, it is submitted that the age limit be omitted from this legislation empowering the authority concerned for the appointment of people who would be best capable of serving the SEC. If this omission appears to be unacceptable for any reason whatsoever, the age limit may be increased to 75 years. This flexibility is critical for choosing the right persons to oversee the securities market to keep it on the right track.

E. Disqualification's and Terminations of the Members of the SEC and the ASIC

Apart from the prescription for qualifications of the SEC members, the SECA'93 includes some specific disqualifications making some individuals ineligible for such an exalted membership. Section 6 of the SECA'93 proscribes the appointment of certain persons to the SEC. These persons who are disqualified for the position of chairman or members of the SEC are: present or past insolvent or bankrupt, persons of unsound mind, and persons

[82] AIMS *ibid.*

[83] "Listed Companies Urge SEC to Lift Suspension of Share Trading of Beximco Companies" *The Independent*, Dhaka (5 May 2002).

[84] Notification No. SEC/CMRRCD/2002-14/24/Admin/03-03 dated 10 December 2001

[85] For details, *see* 'Beximco Sues SEC, HC Issues Rule' *The Independent*, Dhaka (12 May 2002).

convicted of moral turpitude. This section also sets down that the chairman or a member of the SEC may be terminated if the government deems his/her continuation in office detrimental to the public interest because of abusing his/her position. This terminating provision also applies to the person who 'is appointed a director or official of a company or any other organization registered with the Commission'.[86] However no punitive measures can be taken against the chairman or a full-time member in question under this section, without giving him/her a reasonable opportunity to be heard in compliance with the principle of natural justice.[87]

There are some similarities and dissimilarities between the SECA'93 and the ASICA'01 with regard to disqualification's and terminations discussed above. Unlike the SECA'93, the ASICA'01 does not contain any provisions stipulating disqualifications of the potential members of the ASIC. It is not clear why such provisions are absent in the legislation. However, one may assume that the principles of democracy and accountability as practised in Australia may work as more effective barrier to hiring undeserving persons for the ASIC than the legislative disqualifications can do in Bangladesh. Perhaps for this reason, the inclusion of such prohibition was not considered essential in Australian context. For example, recently Mr Robert Gerard, a well-known industrialist, was made director of the Reserve Bank of Australia, the central bank. The appointment generated a heated debate in the Federal Parliament due to some allegations of tax evasion and huge political donations against Mr Gerard. The government including the Treasurer who is the responsible Minister, and the Prime Minister wholeheartedly supported the fairness of his appointment in response to the objection raised by its opponents. Nonetheless, Mr. Gerard resigned from the position by saying that '[e]ven though I have done nothing wrong and broken no law, the accusations made against me by the media have seriously affected my health,... And (the accusations) have brought unwanted attention to the Board of the Reserve Bank of Australia'.[88] It should be noted that no guilt was proved or judgment was awarded against him in relation to those allegations until his resignation.[89] Thus it can be argued that the persons disqualified under Bangladeshi law may not be chosen in Australia for such a high profile job.

As regards the termination of existing members, both similarities and

---

[86] Securities and Exchange Commission Act 1993 s6(l).

[87] *Securities and Exchange Commission Act* 1993 s6(2).

[88] 'Whiff of scandal in the Reserve Bank boardroom' *The Courier Mail*, Sydney (19 Dec 2005).

[89] *Ibid*.

differences are apparent in these two jurisdictions. In correspondence with s6 of the SECA'93 discussed above, s111 of the ASICA'01 provides that:

(I) The Governor-General may terminate a member's appointment because of misbehaviour, or the physical *or* mental incapacity, of the member or if the member:

(a) becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or assigns remuneration or property for their benefit; or

(b) is a full-time member and engages without the Ministers consent in paid employment outside the duties of the members office; or

(c) is a full-time member and is absent from duty, except on leave of absence, *for* 14 consecutive days, or for 28 days in any period of 12 months;... or

(e) without reasonable excuse, contravenes section 123, subsection 124(2), (4) or (6) or section 125.[90]

The above provisions show that the common objections are directed basically at bankruptcy and insanity. The ASICA'01 allows employment of members external to the ASIC subject to Minister's consent. But it does not specifically include the directorship or executive position of a company.

Conversely, the SECA'93 debars a member from taking up a position of director or executive of a company or any other organisation registered with the SEC. Unlike the Australian law, this prohibition is absolute and not subject to the Minister's consent With regard to the companies included in this section, the SECA'93 should make it clear whether those entities refer to publicly listed ones only. This is because, a private company director or official may not have any conflict of interest with the job of the SEC member, but they can bring some valuable experience to the SEC. Therefore, members may be allowed to work for private companies without hindering or undermining his/her job as a regulator. Indeed, such a position can be accepted only with the consent of the Finance Minister, the Minister responsible for the market, as is the case in Australia.

Unlike Bangladeshi law, the Australian provisions are in favour of accountability of ASIC members. For example, under sl11(I)(c) of the ASICA'01, members are obliged to be present in the office regularly and not to be absent without leave. An ASIC member may be terminated on the ground of unauthorised absence. This is a very sound provision and deserved to be included in the SECA'93 as a ground for termination of

---

90 Provision regarding the termination of part-time members have been omitted assuming that those are not important in Bangladesh.

membership of the SEC. It should be borne in mind that strict discipline must be observed by those who are responsible for disciplining the securities market. This is a market where only one certainty exists: the movement of the stock market is certain.[91] This is so because, a sudden authorised disclosure or unauthorised leakage of material information regarding a listed company to the market may entail an urgent regulatory decision in order to maintain market stability. It would be difficult for the Commission to make a prudent decision if members are not available. Given the nature of the job of the watchdog, members should make themselves available always except for valid reasons. This recommendation may seem to contradict the previous suggestion for allowing the members to be associated with companies in order to gather business experience. As added earlier, a member of the SEC should only be allowed to work with a company on a part-time basis and that member really needs some business experience. However under no circumstances, the Minister should permit a trade-off between the responsibility as a member of the SEC and that assumed as a part-timer at a company.

Another important provision is contained in s111(l)(e) of the ASICA'01[92] It intends to make sure that members disclose any potential conflict of interest in relation to a matter to be dealt with by the ASIC. In order to make an independent judgment, it is a principle of natural justice that 'one cannot be judge of his/her own cause'. In Bangladesh, a member of the SEC may have direct or indirect interest in a matter brought to the SEC for decision. This would be more relevant than ever before when some members would be appointed from private sector and some of them would be allowed to serve a company on a part-time basis as recommended earlier. Honesty should be a holy grail for any independent regulator. It is alarming to notice that an investigation carried out by a governmental agency reportedly discovered involvement of a SEC member in assisting the foreign investors in the event of the share scam 1996,[93] which ravaged the bottom of the Bangladesh stock

---

[91] S Shah, 'What Goes up Must Come Down' *The Weekly Holiday*, Dhaka (8 Nov 2002)

[92] Section 11 l(l)(e) permits termination of a member for a contravention of sl23, sl24 or sl25 of the ASICA'01. The obligations imposed on ASIC members under these sections in order to avoid termination are as follows: sl23- Members to disclose certain interests to Minister; sl24 - Members to disclose certain interests to Chairperson; and sl25 - Notification of interests to ASIC. All these requirement aims to avoid any conflict of interest between the ASIC members and the parties to a disputes to be decided by the ASIC.

[93] For further detail of this investigation, see 'Foreign Investors Went Away with Profits of 5 Hundred Crore Taka' *Shilpabazar* (16-31 Dec 1996) Dhaka at 27.

market. Emphasising the need for honesty, Black argues that corruption by securities regulators critically inhibits the development of a strong securities market.[94] He also adds that corruption in the securities watchdog will invite dishonest people to take up the job, whilst the honest people will give up and stay away.[95] Failure in making timely and complete disclosure of member's interest in any matter to be decided by the SEC should demand termination of the member concerned. This would be a viable mechanism for maintaining transparency in the functions of the SEC. Therefore, this provision should also be included in the SECA'93.

Noticeably, there are two disqualifying issues which are present in the SECA'93 but absent from the ASICA'01. These are: the conviction of criminal offence involving moral turpitude and the abuse of his/her (chairman or member) position in the SEC that entails termination in the public interest. Presence of these two provisions in Bangladeshi law is strongly supportable owing to a serious lack of effective public, scrutiny and instance of resultant resignation of any incumbents even if one's role is widely criticised. Unlike Australian experience referred to earlier in respect of the central bank, it is very unusual to hear in Bangladesh that an incumbent 'officer' has tendered his/her resignation paying heed to public criticism with a view to protecting the reputation of the institution concerned. In relation to reforms in securities law, Steinberg asserts that each market 'should adhere to an approach compatible with its own culture and reflective of the costs and efficiencies implicated'.[96] Given the significant difference in terms, of governance and culture between Bangladesh and Australia, these two provisions should continue to exist in Bangladesh in the interest of investors and the public m general.

It should be noted that the provisions discussed above (disqualifications and terminations) are applicable in Bangladesh for dual purposes such as to disqualify an aspirant to be the chairman or a full-time member of the SEC, and to terminate the existing chairman or members from their office. But in Australia, those are applicable only to the termination of the chairman or members of the ASIC. Their application in Bangladesh in relation to disqualifications of the SEC chairman or its members are justifiable given the cultural diversity mentioned above.

---

[94] B S Black, The Legal and Institutional Preconditions for Strong Securities Markets' (2001) 4S *UCLA Law Review* 781 at 790.

[95] Id at 840.

[96] M I Steinberg. *International Securities Law: A Contemporary and Comparative Analysis* (1999) The Hague: Kluwer Law International at 255.

F. Conclusions

Whilst a tough securities regulator is the only viable protector of investors in the absence of an effective judiciary,[97] the Bangladesh securities market has been described as an "orphan" by pointing to the manifested failure of the SEC in protecting the investing public.[98] This *failure* can be attributed to several weaknesses persisting in the present SEC. As revealed from the foregoing discussions, the regulatory body is made up of mainly present and former bureaucrats, whereas its Australian counterpart consists of people who are experienced in dealing with the legal and administrative affairs of corporations. Suggestions are furnished that the SEC should include some members from two different categories: law graduates and experienced in legal practice, and private sector market participants. The existing law permits appointment of people with these qualifications. The SEC is a quasi-judicial body" and therefore the nature of their job specifically requires knowledge of law.[99] In support of these qualifications, Black observes that specialisation is required to deal with complex securities cases.[100] Davis argues that the importance of administrative authorities vested in a regulatory body lies in the accumulated expertise of its members.[101]

The presence of all members in their office is extremely significant, because the SEC may have to make a crucial decision depending on the volatility of the market triggered by its unscrupulous players. Admittedly, it is almost impossible to eliminate malfeasance from the market due to the fact that 'problems at which modern securities regulation is directed are as old as the cupidity of sellers and the gullibility of buyers'[102] as observed by Louis Loss, the intellectual father of securities law in the United States.[103] Incidentally,

---

[97] S Johnson, "Coase and the Reforms of Securities Market5 (2002) 16 *International Economic Journal* at 1 at 3.

[98] M Hossain, 'Getting Back Investors' Confidence' *The Financial Express*, Dhaka (27 May 2002).

[99] F Bari, 'SEC Not Accountable' *The Daily Inqilab*, Dhaka (19 May 2003).

[100] B Black, The Legal and Institutional Preconditions for Strong Stock Markets: The Nontriviality of Securities Law' in Organisation for Economic Cooperation and Development (OECD), *Corporate Governance in Asia: A Comparative Perspective* (2001) Paris; OECD at 64; Black above n94 at 790.

[101] T A Davis, 'A New Model of Securities Law Enforcement' (2002) 32 *Cumberl and Law Review* 69 at 129.

[102] L Loss, *Fundamentals of Securities Regulation* (2nd 1988) Boston: Little, Brown and Company at 1.

[103] *Harvard University Gazette*, "Louis Loss, Emeritus Law Professor, Securities Law' <http://www.news.harvard.edu/gazette/1998/01,15/LouisLossEmerit.

the SEC might not have all its full-time members at any one time since its inception in 1993. Conversely, the ASIC had always its three full-time members ever since its establishment in 1991.[104]

The age limit of 65 years entrenched in the SECA'93 are considered to be a potential bar to hiring competent people for the SEC. This prohibition has been critically examined making reference to the scarcity of qualified people, recent increase in life expectancy, increase in the retirement age of Supreme Court Judges, appointments of older people to some other important commissions in Bangladesh; and the relevant laws in Australia. It is recommended that either the age limit be omitted or be increased to 75 leaving more discretion to the appointing authority to find more competent people than those who could have been hired within the purview of the present prohibition.

Some similarities and differences are found in relation to disqualifications and terminations of the chairmen and members of the two regulatory bodies at hand. Unlike Bangladeshi law, the Australian equivalent does not set out any disqualifications to be taken into account before offering an appointment to the ASIC. Nonetheless, the disqualifications currently embodied in the SECA'93 are argued to be justified given the diversity between these two jurisdictions in governance and cultural perspectives.

In respect of the termination of office of the chairmen and members of these two commissions, some suggestions have been made in order to achieve improvement in the position of the Bangladeshi regulator. For example, it is recommended that the SEC members be allowed to work on a part-time basis for companies so that they can apply their practical knowledge while performing their duties at the SEC. However, they must obtain prior approval from the Finance Minister who will consider any potential detrimental effect on the overall performance of the SEC before granting the permission. The Minister must prudently make a balance sheet of costs and benefits of such an approval. This approval would also help get dignified people from private sector to work for the SEC despite an unattractive salary package being offered by the government. Mention may be made here that previously an attempt to appoint the fifth chairman[105] went in vain owing to a low

---

html> (21 Dec 2005).

[104] Baxt *et al.* (2003) above n7 at 14. This source mentions that the ASIC was established in 1990, but it was actually established in 1991: ASIC, About ASIC<http://www.asic.gov.au/asic/asic.nsf/byheadlineAbout+ASIC?opendocument> (24 Dec 2005).

[105] Present chairman Dr A B Mirza Azizul Islam is the fifth chairman. Previous four

compensation package.[106] As a mechanism for guarding the guardians, a member associated with a listed company must not be present in making any important decision by the SEC in relation to that company. The purpose is simply to avoid conflict of interest.

The SECA'93 is almost silent about the accountability of its chairman and members unlike its Australian counterpart. It is submitted that provisions should be inserted in the SECA'93 to ensure accountability of the SEC members. The chairman or a member will have to disclose his/her interest in any matter pending for SEC decisions. Failure to make such disclosure in a timely manner should warrant termination of his/her office, as is the law in Australia.

The regulation of a securities market aims to prevent any distortion of the integrity of the market from happening, which may unfairly disadvantage some market players over the others.[107] In other words, securities regulation exists to protect interest of both investors and companies, two major participants in the market, which channels the surplus of the former into the productive undertakings of the latter.[108] Honesty and efficiency of participants in the securities market is vital for raising funds from the public to finance firms.[109] It is the responsibility of the regulator to ensure a fair play between various market players by preventing their dishonesty and cupidity. This is indeed a difficult job, and this difficulty calls for efficient regulation of the market by prudent regulators. Regulatory failure in developing the Bangladesh securities market is clearly evident from its prolonged poor performance, and reforms in the composition of the SEC is long over due to rejuvenate the ailing securities market in Bangladesh.

---

chairmen are: Mr Sultanuzzaman Khan, Mr Harunur Rashid, Mr MA Syed and Mr Manir Uddin Ahmad: 'C M Alam New SEC Chairman' (2003) above n 18.

106 Mr C M Alam, a chartered account and MD of a company refused to take up the chairmanship of the SEC due to a 'low compensation package': 'C M Alam New SEC Chairman' (2003) above n18; A Kibria, 'Mirza Aziz New Chief of SEC7 'The New Age, Dhaka (15 Oct 2003).

107 R Tomasic, J Jackson & R Woellner, *Corporations Law: Principles, Policy and Process* (4th ed, 2002) Sydney: Butterworths at 887.

108 Baxt *et al.* (2003) above n7at3.

109 *Ibid.*