



## FINANCIAL MARKET regulation

### Investors' protection under securities regulation

TUREEN AFROZ

ACCORDING to International Organisation of Securities Commissions (IOSCO), one of the primary objectives of the securities market regulation is the protection of investors. In the 1930s, the regulatory regime of the US securities market heavily advocated 'investor protection' as an objective of its securities regulation. To meet such objective, US regulators relied on the principles of 'market egalitarianism', which would mean that the investors trade in the securities markets on the basis of 'roughly equal information'.

There is no general definition of the 'investor protection' objective of securities regulation. Securities markets are volatile by any means and as such, very much susceptible to fraud. Therefore, the most common definition for 'investor protection' objective asserts that securities regulation must be aimed at the deterrence of fraud on 'small and uninformed investors'.

Apparently there is no problem with such a definition as far as deterrence of fraud is concerned as a regulatory goal. However, it must be noted that such goal is not unique to the securities market regulation. Deterrence of fraud has remained one of the major historical concerns for criminal, contract, tort or corporate law jurisprudence too. What is specific about such goal in the context of securities regulation is that here the target victim group is specifically pre-identified i.e. 'small and uninformed investors'.

There exist a number of regulatory techniques for investors' protection in the securities markets. Some of such most common regulatory techniques are:

#### Mandatory disclosure techniques

These techniques are used to regulate prospectus and other financial documents. It requires that the 'issuers of shares' must make public disclosure of all information useful for evaluating securities so that such information becomes equally available to all investors in the market.

#### Insider trading regulation

This technique of investor protection stipulates that the corporate insiders cannot use information unfairly to gain benefit, if the same is not equally available to all other investors in the market. Therefore, insiders are strictly prohibited to trade on privileged information.

#### Merit regulation

Merit Regulation is a technique of investor protection whereby the regulators would evaluate disclosures by corporations and use their discretion in choosing which firms (or financial products) posed acceptable risks for investors. This is fundamentally different from the disclosure-based regulation, where the responsibility for evaluating corporations and investment risk is left to the investors after an acceptable level of information has been made available to them by the issuer.



#### Consumer protection techniques

This scheme is based upon the moralistic rules that restrict or prohibit securities market transactions where there is a perception of unequal bargaining power. The regulator, under this technique of investor protection, intervenes to protect parties perceived as vulnerable from exploitation by others in a stronger bargaining position. For example, the securities regulations in France are still influenced by the consumer protection principles.

#### Investor compensation schemes

The basic purpose of such schemes is to protect the investors if a financial intermediary (such as bank, broker company or broker-dealer company, asset management company etc.) has no financial capacity to repay or return either the money or the securities belonging to their clients. Such schemes work as kind of insurance mechanism in the securities market. Classic examples of investor compensation schemes are the Deposit Guarantee Fund and the Stock Exchange Guarantee Fund in Portugal. Also, the Directive 97/9/EC of the European Parliament and Council requires that European Union Member States should ensure within their territories an Investor Compensation Scheme.

#### Investor education programs

The purpose of this regulatory technique is to promote public awareness in the securities market. This is based upon the belief that (a) investor education enhances investors' understanding of the role of the regulator; (b) provides investors with the tools to protect themselves against fraud (and other abuses) and to assess the risks associated with particular investments; (c) assists the regulator in the enforcement of the securities laws concerning offerings and sales of securities and maximize the regulators' limited resources. However, there are limits to the efficacy of education as education alone cannot deal with financial fraud and further it cannot be used to lessen the scope of the duties of financial professionals toward consumers.

#### Investor regulation model

This technique of investor protection in the securities market argues that regulatory attention should be focused on investors and not on professional market participants. It suggests that issuers, stock exchanges, broker dealers, investment advisers and other securities professionals should be deregulated and only the investors should be regulated according to their level of needs for protection. To make this need based regulation operative, the investors will be categorized according to their informational possession, investment understanding and skills. This technique also suggests that regulation of any sort is unnecessary for rational investors. Only the semi-rational and irrational investors will be regulated by imposing restriction on their securities market activities.

Finally, one important observation is to be made. As a regulatory objective of the securities regulation the common definition of investors' protection usually leaves out the possibility of protecting large investors (institutional) or wrongly informed investors (small or large) from frauds. After experiencing major financial frauds of the recent years (For example, financial scandals associated with Parmalat meltdown, Enron and Worldcom bankruptcies, Vivendi Universal accounting scandal etc.), it can be strongly claimed that these later group does also require regulatory protection as with 'small and uninformed investors'.

The writer is an Assistant Professor of Law at BRAC University.

## HUMAN RIGHTS analysis

### RIGHT TO WATER IN INTERNATIONAL PERSPECTIVE

# Water water everywhere.....

J. HASAN

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ONE of the few relatively successful social sector achievements in Bangladesh has been good coverage in the access to tubewells for drinking water during the 1970 and early 1980s. However, due to arsenic contamination of ground water during the late 1980s and early 1990s, coverage of safe water dropped to a great extent. Arsenic issue was purely a right issue where the victims were not properly informed of arsenic contamination in time, none was made accountable for the disaster, and there was no transparency and people's participation in taking mitigation measures. Since then, development practitioners and human rights activists in Bangladesh started thinking water as a human right.

Major international human rights instruments, except two, did not include right to water as separate human right. Six human rights treaty bodies of the UN periodically publishes General Comments or general recommendations providing guidelines for state parties on interpretation of specific aspects of human rights treaty. General Comment no. 15 is such a comment on right to water which was adopted by the UN Committee on Economic, Social and Cultural Rights in November 2002. This comment defined right to water under Article 11 (right to adequate standard of living) and 12 (right to health) of the International Covenant on Economic Social and Cultural Rights 1966.

#### Normative framework of right to water

The General Comment affirms that the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use. The elements of right to water are:

**Entitlement** meaning right to a system of water supply and management that provides equality of opportunity for people to enjoy right to water.

**Freedom** meaning right to be free from interference such as arbitrary disconnections or contamination of water supply.

The General Comment states that water should be treated as a



social and cultural good and not primarily as an economic good. Three factors applicable for enjoying the right to water are:

**Availability** meaning each person has the right to a water supply that is sufficient and continuous for personal and domestic uses, such as drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.

**Quality** meaning not only are people entitled to a sufficient and continuous supply of water, but they are also entitled to water of adequate quality.

**Accessibility** meaning water and water service facility must be accessible to everyone. Water must be within safe physical accessibility of every individual, must be economically accessible (affordable) to all, there must not be any discrimination in water services and there must be information accessibility on water issues.

#### General obligation

Article 2 and 3 of the International Covenant on Economic, Social and Cultural Rights has imposed obligation on State Parties for non-discriminatory enjoyment of rights. The same applies to right to water. Article 2 of the Covenant has imposed obligation on State parties to progressively realize the cove-

nant rights. As stated by the General Comment, the obligations are to respect the right to water meaning not to interfere with the enjoyment of right, to protect meaning preventing third party or individual from interfering with the enjoyment of this right and to fulfil meaning allocating sufficient resources for ensuring right to water. States are also obliged to take steps to prevent any kind of discrimination and give special attention to vulnerable groups and people in difficulties in enjoying right to water. The State obligations include to ensure access to minimum essential amount of water, to ensure physical access to water facilities or services, to ensure personal security in getting access to water, to ensure equitable distribution of water and related services, to adopt and implement a national water strategy, to monitor extent of realization or non-realization of right to water and to take measures to prevent, treat and control water-related diseases.

#### Legislative obligation

General Comment has suggested that states are obliged to utilize all appropriate means, including the adoption of legislative measures in the implementation of their Covenant obligations. The guidelines of the General Comment have

suggested three main legislative areas in the implementation of the right to water at the national level:

- The formulation, implementation and monitoring of legislation, strategies and policies;
- The identification and application of suitable, sufficiently disaggregated indicators and benchmarks for monitoring States Parties compliance with their obligations and progress towards the full realisation of the right to water;
- The provision of access to effective judicial or other appropriate remedies at both national and international levels for any persons or groups who have been denied their right to water.

#### Obligations of non-State actors

Non-State actors like UN agencies, bilateral and multilateral development organizations, international trade or financial organisations and non-governmental organisations have important role to play in promoting right to water. The General Comment outlines following obligations of the non-state actors:

- Co-operate effectively with State Parties in relation to the implementation of the right to water
- Incorporate human rights law and principles into both policy and

action; for example, the right to water should be taken into account in any lending policies, structural adjustment programmes or development projects

- Give priority to the most vulnerable or marginalized groups of the population in the provision of aid and the distribution and management of water and water facilities

#### International treaty obligations

The right to water has been explicitly recognised in two of the core international human rights treaties the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. The Convention on the Elimination of All Forms of Discrimination Against Women, 1979, in its Article 14 (2), obliges States to eliminate discrimination against women in rural areas and ensure to such women the right "to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication"

Under Article 24 (2) of the Convention on the Rights of the Child, 1989, States are obliged to take steps to ensure the realisation of a child's right to health and in particular to take appropriate measures: "(c) to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution".

#### National legal regime

Constitutions of a few countries of the world have incorporated right to water as a human right. Section 27(1) of the South African Constitution (1996) has guaranteed citizens right to have access to healthcare which includes food and water. Zambia Constitution (1996) in its Article 112 has imposed responsibility on the State to endeavour to provide clean and safe water. Article 14 of the Constitution of Uganda (1995) has imposed similar obligation on the State to endeavour to fulfil fundamental rights of all Ugandans which include clean and safe water. The Constitution of Gambia (1996), in its Article 216(4) has also imposed

obligation on the State to endeavour to facilitate equal access to clean and safe water. Article 90(1) of the Constitution of Ethiopia (1998) has guaranteed every Ethiopian's entitlement to country's resources including clean water. Interestingly, of the five Constitutions discussed here, two (South Africa and Ethiopia) have incorporated right to water as human right of citizens while three (Gambia, Uganda and Zambia) have incorporated right to water as imposed obligation on respective States.

#### Water and WTO

The World Trade Organization attributes progress in economic growth and the development of international trade to the freeing up of world trade through progressive liberalization. The General Agreement on Trade in Services (GATS) of WTO is the multilateral rules governing international trade in services. GATS defines four ways of trading services. These are cross-border supply (mode 1), consumption abroad (mode 2), commercial presence (mode 3) and presence of natural person (mode 4). The key issues on impact of GATS on service sector of developing countries including water are:

- Opening up water services to GATS will increase levels of private sector involvement (at the expense of public and community-managed services) in spite of growing recognition that private sector involvement does not benefit the poor unless other fundamental issues are addressed.
- The balance of power between rich and poor nations and the bilateral nature of GATS negotiations means that developing countries are under extreme pressure to commit their water services to GATS without any proof that it is in their interests to do so.
- GATS will restrict government's ability to regulate in favour of environmental priorities and needs of the poor.
- The irreversibility of GATS commitments means that countries cannot renegotiate their commitments once entered into.
- There are no guarantees that private companies can be prevented from ultimately acquiring control or ownership of water resources.

Cont...

The writer is a human rights activist.

## UN update

# First session of the human rights council: A step in the right direction

Amnesty International (AI) welcomes the many substantive outcomes of the first session of the new Human Rights Council, meeting in Geneva 19-30 June 2006, which has laid important groundwork for a stronger and more effective United Nations (UN) human rights political body.

AI welcomes the following main achievements of the first session of the Human Rights Council (the Council):

The Council's consensus adoption of the International Convention for the Protection of All Persons from Enforced Disappearance and its decision, by majority vote, to adopt the UN Declaration on the Rights of Indigenous Peoples. The new Convention will fill a major gap in existing

human rights standards, and the Declaration will set human rights standards crucial for the dignity and well-being of the world's indigenous peoples. The Council has referred both instruments for adoption by the General Assembly later this year.

The Council's decision enabling its Special Procedures to continue with the implementation of their mandates for one year, subject to the completion of the review of these independent thematic and country experts. This reflects their importance as the cornerstone of the UN's human rights efforts - "the frontline troops", as noted by Secretary-General Kofi Annan in his address to the Council, "to whom we look to protect human rights and give us early

warning of violations". Amnesty International also welcomes the Council's decision to consider the reports of the Special Procedures at its second session (September 2006) and urges the Council to act promptly and effectively on their recommendations to protect human rights in specific countries.

The Council's decision to create two open-ended Working Groups: the first will develop the modalities and time allocation for the novel mechanism of Universal Periodic Review to monitor the human rights performance of all UN member states. The second will undertake a review of the Special Procedures which Amnesty International expects to strengthen their functioning, including by filling any gaps in

existing mandates. Amnesty International is pleased to note that both processes are required to combine flexibility with transparency and inclusiveness involving the participation of all stakeholders, including non-governmental organizations. Both Working Groups must complete their mandate within one year.

The Council's decision to take a further step towards the creation of a complaints mechanism in the form of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by extending the mandate of the open-ended Working Group to prepare a draft text. The Optional Protocol will be a key mechanism to enhance the effective implementation of all economic, social and

cultural rights.

On the last day of the session, the Council decided to convene a Special Session to consider the situation on human rights in the Occupied Palestinian Territories. The resolution establishing the Human Rights Council stipulated that it may convene in Special Session to consider human rights emergencies with the support of a third of its members. Amnesty International calls on the Council to commit to concrete action to address the serious violations of human rights taking place in the Occupied Palestinian Territories.

AI welcomes the Council's decision to convene a Special Session on human rights in the Occupied Palestinian Territories and calls for concrete action to address the

gross human rights abuses currently taking place there. AI hopes that the Council will find constructive ways of addressing other equally serious human rights situations around the world such as the deteriorating situation in Sudan which has already split over into neighbouring Chad.

AI renews its call on all members of the Council to make every effort to rise above the selective politicised practices of the former UN Commission on Human Rights. The constructive approach demonstrated in connection with standard-setting and institution-building must be carried over to the Council's work on all pressing country situations.

Source: Amnesty International.

