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Analysis of the Nature and Scope of the Security and Exchange Commission of Pakistan (SECP) in the light of IOSCO Principles: A Perspective under International Law

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Abstract

The country's main economic regulatory organization is the Securities and Exchange Commission of Pakistan (SECP). In order to encourage investment, economic progress, and prosperity, it seeks to establish an efficient corporate sector and a capital market founded on good regulatory principles. However, a study has shown that SECP is neither an independent nor accountable organization. To ensure SECP's freedom and independence from governmental policies as well as transparency and accountability, it is important to develop a suitable and appropriate system in accordance with the IOSCO's guiding principles. The report evaluates the accountability, independence, and transparency of SECP in light of IOSCO Principles in order to prevent political influence and other corrupt practices. By strengthening the efficacy and vitality of the current legislation in light of the IOSCO Principles, the regulator can be made more independent and accountable, while carrying out its duties in the capital market. In this study, researcher examines and contrasts the ideas of SECP and IOSCO principles using analytical and descriptive methodologies and also the flaws of the current Pakistani legal system are explored.

Keywords: Securities Regulation, Independence, Accountability, Securities and Exchange Commission of Pakistan (SECP) and International Organization for Securities Commission's (IOSCO) Principles.

Introduction

The Securities and Exchange Commission of Pakistan (SECP) is a regulatory organization that controls securities to safeguard investors' interests in Pakistan. It was established in accordance with the Securities and Exchange Commission of Pakistan Act, 1997. Investor protection, guaranteeing fair, efficient, and transparent markets, and lowering systemic risk are the basic goals of regulators. While risk cannot be completely eliminated, it can be managed better. (A. R. Kemal, 2002).

This Act's main goals were to establish SECP, govern corporate entities, and regulate Pakistan's capital market, granting it administrative autonomy and financial independence to fulfil its legal and statutory obligations. Although, the SECP's initial focus was on the regulation of the capital market and the corporate sector, the scope of its mandate has expanded to encompass the supervision and regulation of insurance firms, non-banking organizations, and private pensions. (Jens Lohrmann and Klaus Harter, 2002)

It is imperative that a regulator be independent in order to build a dynamic regulatory body that promotes the fundamentals of good corporate governance, while safeguarding the interests of investors. The primary function of regulators is to promote innovation throughout the economy, create productivity growth, and safeguard investors through responsive policy measures. (Mian Abid Qayyum, 2013).

According to the "SECP Act, 1997, "the Pakistani government established the Securities and Exchange Commission of Pakistan (SECP) as the primary security regulator to construct the foundations of sound corporate governance. Corporate entities have adopted a variety of rules and regulations under the SECP Amendment Act of 2016 to promote sustainable, even, and long-term economic growth. Corporate secretaries, brokers, chartered accountants, and other service providers were given control over the corporate and financial sectors by SECP. One of its responsibilities as the primary security regulator is to create a climate that is fair, effective, and transparent, based on international legal principles and best practices for the protection of investors and the reduction of systemic risk by assisting Pakistan's financial sector. (Daniela Russo, 2013)

The article evaluates SECP independence, accountability, and transparency in light of the IOSCO Guidelines. The International Organization of Securities Commissions (IOSCO) is a set of organizations that oversees the international securities and futures markets. Although recognizing that strong domestic markets are crucial to the health of a developed domestic economy, IOSCO highlights a few key regulatory concepts. The IOSCO Principles, Part II, Paragraph 6, list the desired qualities of a regulator. (Rasul Bakhsh and Asif Saeed, 2005)

According to the IOSCO Principles, the regulator shall exercise its duties and responsibilities independently of extraneous political or economic factors. Additionally, it is said that a steady source of revenue can enhance the regulator's independence. In terms of accountability, the regulator should be responsible for maintaining the secrecy and commercial sensitivity of any information in its hands, regardless of whether it originates from the government or another external agency. (Jens Lohrmann and Klaus Harter, 2002)

Literature Review

While searching on the topic, the researcher underwent through several writings. These writings prove very beneficial and informative.

The article written by Jay A. Dubow and Anthony said that the objective of this research was to examine instances of SEC accountability that should serve as a warning to investment advisers and other regulated businesses that the SEC is concerned with correct valuation, reporting, and

oversight when it comes to determining the fair value of assets. Because of this, in instances when markets are inactive or if transactions in the market are forced or distressed, advisers must register with the Commission and abide by the Advisers Act as well as SEC rules. If a culture of accountability and review has not been formed, there is a higher possibility of deception or inaccurate evaluations; thus, the SEC plans to scrutinize its investments and methods for conducting assessments more carefully. (Jay A. Dubow and Anthony B, 2013)

Noor-ul-Ain Shabbir discusses "The independence and accountability of SECP in the light of IOSCO principles" in her LL.M thesis that a system for tracking, lowering, and managing systemic risk that is appropriate to the regulator's mission should exist or be supported. SECP deficits is a method to monitor, manage, and mitigate systemic risk. (Shabbir, 2018)

James J. Brummer in his article describes that all pertinent information must be made available to the public. The results of the current study suggest that caution should be exercised: if there is any ambiguity over whether a particular item of information satisfies the standard of reasonable depth, it should be included in the relevant statements, papers, and records. Let the shareholders determine if this information is relevant to their financial interests. (James J. Brummer, 1986)

Is the Securities and Exchange Commission Backing Into Fair Value Accounting? is an excellent work by Abraham M. Stranger in which the author describes its fair value accounting enforcement method and counsels the Commission to adhere to its policy of deferring to the Accounting Principles Board's initial and competent handling of these matters. But the Commission now wants to take the next significant step by proposing that a change of ownership of more than 50% of the shares of a firm, probably including but not limited to a public offering. (Abraham M. Stranger, 1973)

John G. Gillis in this article Securities Law and Regulation: The Spotlight Is on outside Directors, describes that SEC's emphasis on directors' independence. The SEC has stated explicitly that it anticipates changes to corporate boards' organizational and operational practices. Increased board independence (from management) aims to make companies more responsive to shareholders and other public constituencies. According to the report's author, directors cannot properly monitor management accountability or performance unless the board is completely independent of the management. As a result, the CEO must represent the most management on every board of directors, which must include at least a majority of independent directors. The top CEO also should not be the chairman of the board. The author is in favor of a neutral board. (John G. Gillis, 1978)

Alan B. Levenson in his article describes that the public has recently expressed dissatisfaction with the information. It has accessed to regarding securities being traded, and this has led and will continue to lead the Commission to a much greater awareness of the problems in this area and toward administrative, and even proposed legislative solutions to such problems. The commissioner should, therefore, work independently without any political influence and should be accountable as well. (Alan B. Levenson, 1971)

Research Methodology

The research strategy would be analytical and descriptive. The current laws and regulations on independence and accountability of SECP will be analyzed critically. The research will also include law magazines, journals, books, and other such material.

Critical Analysis and Results

The SECP's new law strives to address every fault and flaw in the current law. Also, the legislation complies with local and international regulations for the business sector, such as those set forth by

the International Organization of Securities Commissions (IOSCO). Key flaws in the existing legislation, the SECP Act of 1997, include the SECP's limited financial and administrative independence, the absence of provisions for an acting chairman, the inability to create committees and task forces, and the expansion of the SECP Policy Board's membership. In addition, the SECP lacks proper investigative authority, ex parte stays, effective enforcement powers to request information, and procedures for prosecuting charges and recovering penalties.

The SECP Act, 1997, as amended, includes, among other things, provisions prescribing the time period, i.e., 120 days from the day the office becomes vacant for the nomination of the SECP Chairman and private sector member of the SECP Policy Board. Also, to provide a framework for the creation of an independent audit oversight board to assure the caliber of audits of public interest corporations, as well as an efficient method and self-regulatory organizations (SRO) to ensure compliance with the regulatory regimes of the regulated sectors. The President assented to the SECP (Amendment) Act 2016 (XXXVI of 2016) on August 5, 2016, bringing 31 different revisions. Act XXXVI of 2016 contained amendments relating to independence and accountability.

Securities Act of 2015: Introduction and its Scope

According to the Securities Act of 2015, the Commission has the authority to license securities exchanges, clearing houses, and central depository operations when it is satisfied that the public company has complied with all applicable requirements. It also has the authority to license individuals or entities that carry out security-related activities and to impose any conditions while doing so that it deems appropriate. Moreover, it has the power to revoke and suspend the licenses of clearing houses and securities exchanges.

When the Securities Exchange fails to revise the regulations listed in the notification within the timeframe given, the Commission may do so on its own initiative. It is upto Commission's preference to select or reject the regulations of clearing house as well as their revision.

A securities exchange, clearing house, or central depository may receive broad or detailed written instructions from the Commission. It has the option to determine whether to operate autonomously in an emergency situation or to give instructions to a central depository, clearing house, or stock exchange. The Commission may employ auditors to conduct specific audits of the securities exchanges, clearing houses, central depository, and anyone else subject to securities legislation at its own expense.

The Commission can order listed companies and the securities market, promulgate rules, request specific documents, and check records for compliance with the Act during investigations, inspections, and investigations.

Introduction and Scope of Futures Markets Act, 2016

According to the Futures Markets Act of 2016, public companies are permitted to function as futures exchanges, and the Commission has the authority to suspend or revoke licenses. The Commission may also select auditors, accept or reject rules, and issue written directives. In an emergency, the commission has the option of acting unilaterally or directing the exchange to take the necessary action.

Legal Analysis of Independence and Accountability under IOSCO Principles

The rules and laws governing the securities and exchange system are crucial for maintaining fair markets. The IOSCO Principles state that the regulator must carry out its obligations without regard

to unrelated political or economic circumstances. Furthermore, it is asserted that a consistent source of income helps strengthen the independence of the regulator. In terms of accountability, the regulator should be responsible for maintaining the secrecy and commercial sensitivity of any information in its hands, regardless of whether it originates from the government or another external agency.

A regulator must have the power, an adequate budget, and the capacity to perform its obligations efficiently in accordance with the IOSCO Principles. It has the power to monitor, enforce, inspect, and issue licenses. When performing its tasks, the regulator should adhere to rules that are transparent, easily understood, just, and equitable. While creating policies, the regulator should follow a process that is advantageous to the broader public. The regulator's obligations must be clearly and unequivocally stated. (Sommer Jr, A., 1996)

The employees of the regulator are required to respect the highest professional standards, which include legal requirements for secrecy. The regulator should have, or contribute to developing a mechanism for tracking, lowering, and managing systemic risk in compliance with its mission. The regulator should be involved in or have a procedure for routinely reviewing the boundaries of regulation. Conflicts of interest and incentive misalignment should be avoided, minimized, reported, or otherwise handled according to the regulator. Investor protection and more especially, the avoidance of unethical trading activities are intimately tied to market fairness. Regulation has a responsibility to look for, prevent, and punish market manipulation and other unethical trading behaviors. (James E. Post, 1984)

Market infrastructure, market activity, and pricing data should all be subject to regulation. Such market procedures that ensure a trustworthy process of price development should also be encouraged by regulation. An effective market also requires the timely dissemination of pertinent information, and it is the responsibility of regulators to support market efficiency. (Carvajal, Ana, and Jennifer E. Elliott, 2007)

Regulation should also ensure the highest levels of transparency possible. The controller's support of trading framework administrators, trading regulations, and exchanging guidelines ensures fair marketplaces. Aversion to repulsive exchange practices and speculator insurance is particularly linked to the decency of business sectors. Showcase control and other improper exchange practices should be recognized, prevented, and penalized by the administration. Control should involve ensuring that financial professionals have appropriate access to display locations and market or value information. In a thriving market, the dissemination of important information is practical, widespread, and represented in the value arrangement procedure. Control should increase market competence. (John J. McCall, 2002)

Conclusion

In light of the aforementioned information, it is crucial to recognize that SECP is not a wholly autonomous entity. A regulator must be operationally free of interference from outside political or commercial influences while acting in accordance with the IOSCO Guidelines. By strengthening the efficacy and vitality of the current law in light of the IOSCO Guidelines, the regulator may be made more independent and accountable while carrying out its duties in the capital market.

Regulation of the securities market includes secondary markets, asset management products, public issuers of securities, and market intermediaries. In order to prevent market disruption and boost investor confidence, regulation is intended to address information asymmetries between issuers and investors, clients and financial intermediaries, and counterparties to transactions. It also aims to ensure that trading, clearing, and settlement mechanisms operate smoothly.

The main regulatory organization in Pakistan is the Securities and Exchange Commission of Pakistan. In addition to creating a fair, effective, and transparent regulatory framework and capital market in Pakistan, SECP is working to create an effective corporate sector and capital market that would support rapid economic growth and promote social peace in the nation.

It is important that SECP adhere to all IOSCO guidelines in order to accomplish all of the goals. The legal and regulatory framework has to be strengthened to defend the credibility and integrity of the financial sector. The independence and accountability of SECP as the financial regulator are essential for the effective, stable, and equitable operation of the financial system, along with conformity with the IOSCO principle. Maximum independence should be achieved together with distinct and reliable accountability structures that offer the proper checks and balances. The task of balancing these goals is quite difficult.

In reality, how to maintain their responsibility without damaging their independence, which is believed necessary for the fulfillment of their missions, is one of the most crucial issues at hand. This so-called "independence-accountability conundrum" is a key problem with power allocation and justification of power usage. Thus, it is essential for democracy and good governance to create a regulatory framework that strikes the proper balance between independence and responsibility. A regulator must be operationally free from political and commercial interference, according to the IOSCO Principles. The Act creating the regulating authority must contain a number of provisions that put this idea into practice.

A board's make-up and periods of appointment are important considerations. The Board's capacity to demonstrate independence from economic and political forces will depend on its makeup. The Security and Exchange Policy Board has many members from various government ministries, which helps to guarantee consistency and continuity of decision-making across time and makes it less likely that any one person's opinion would have an impact. A minister is responsible for and controls the actions of a Ministry of Finance official. If there are no clear instructions, the official must act in accordance with what he or she believes to be the minister's likely course of action. The independence of the Commission is unaffected by the fact that a member of the Board is an ex officio member of the Law Division. This could provide useful advantages in terms of legal counsel and knowledge on the drafting of rules or laws.

The State Bank of Pakistan's independence from undue political or commercial influence does not appear to be compromised by the existence of the bank's deputy governor. In reality, combining board participation from different independent agencies that are complementary to one another can help authorities work together more effectively. The Federal Government not only appoints government employees as members, but also people from the private sector, which in turn lessens the role of the government.

The independence of the Commission is unaffected by the inclusion of an ex officio member of the Law Division on the Board. In terms of legal counsel and competence with regard to the creation of rules or legislation, this may have tangible advantages. The position of the State Bank of Pakistan's deputy governor does not appear to jeopardize the institution's independence from undue political or economic interference. In reality, it may be advantageous to link board membership among complementing autonomous agencies in order to promote improved coordination and collaboration between authorities. In addition to choosing government employees as members, the federal government also chooses members from the private sector, which reduces the role of the government. When board members are chosen as a political favor and are expected to retire when governments change colors, a board is unlikely to function independently. Similar to appointment, the ability to fire any member or commissioner likewise rests with the

federal government, and no ministry has the authority to handle it. The law has established certain grounds for their removal or dismissal. They are not subject to removal or dismissal at the whim of anyone. The Commission, Chairman, Commissioners, staff members, and members of the SECP are exempt from any legal action arising from decisions made in good faith that are supported by a guarantee.

If a regulatory body worries that making a judgment against the intentions of the government or any minister would result in budget or compensation cuts, its independence may be jeopardized. Because the Commission has the authority to administer and regulate funds for the performance of its powers and duties, SECP has independence in terms of financial affairs. The fund does not only consist of funds provided by the federal government because, if that were the only source of funding for the Commission, there is a chance that the government might threaten to withhold (or reduce) funding if the Commission were to be deemed to be too strict on financial institutions with political connections.

In order to carry out its responsibilities under this Act or any other laws it administers, the Commission shall have all necessary powers and may also transfer such powers to other Commissioners. It has the authority to create committees to carry out its duties under this Act or any administered legislation, and it can issue any directives, codes, guidelines, circulars, or notifications that are required to carry out the purposes of this Act, the rules and regulations made there under, and any administered legislation. When an offense has been committed, the Commission has the authority to handle the case in line with the Act's and the administered laws' requirements.

The Commission may also ask any other investigative body for help. If it is required during an inquiry, inspection, or investigation, the Commission may ask someone—including a financial institution—to disclose certain documents or information. If a regulated person's business departs from what is outlined in their memorandum and articles of organization, it may be limited. Any record or document kept by a regulated person that is connected to a regulated activity may be examined by the Commission in order to verify compliance with the relevant legislation. Additionally, appeals are forwarded to the Commission's Appellate Bench, which has the power to evaluate an order.

The Commission has the power to cooperate with foreign regulatory agencies and any other international organizations with whom it has agreements or arrangements, but it also has the authority to refuse to do so in the interest of public safety and other interests. The Commission has the power to provide licenses to securities exchanges, clearing houses, and central depository institutions after concluding that a public firm has completed the conditions stated in the relevant provisions. Additionally, it has the power to award permits to people or organizations engaged in security-regulated activities and may impose further restrictions if it so chooses. Additionally, it has the authority to suspend and revoke clearing houses' and securities exchanges' licenses.

The Securities Exchange may be forced by the Commission to make changes on its own initiative if it fails to do so within the allotted time period. According to its own discretion, the Commission may provide or withhold approval for the clearing house's rules or any revisions to them.

A central bank, securities exchange, or clearing house may receive written instructions from the Commission that might be generic or specific in nature. It can choose to act independently in an emergency situation or can direct a central depository, clearinghouse, or stock exchange to take the necessary steps. The Commission also has the power to choose auditors for a particular audit of securities exchanges, clearing houses, central depository institutions, and securities-regulated businesses.

The Commission is empowered to give orders to listed companies and the securities market as it thinks appropriate. The Commission may also promulgate rules to guarantee the administration of this Act and carry out its objectives. At any moment during an inquiry, inspection, or investigation, the Commission may request specific documents or information from a person if it requires them. It has the power to check any record or paper kept by a regulated person relevant to a regulated activity to see if it conforms to the law.

In accordance with the Futures Market Act of 2016, the Commission may license a public firm as a future exchange if it qualifies and may revoke or suspend such a license. Moreover, the Commission has the authority to pay for the appointment of auditors for a specific audit of the futures exchange. The Commission has the authority to independently approve or disapprove any regulations or amendments to the regulations of the futures exchanges and to provide it with written instructions of either a general or specialized nature. In an emergency, the commission has the option of acting on its own or ordering the futures exchange to take the appropriate measures.

The Commission is obligated to provide the Federal Government with information on its functions, as implied by IOSCO standards of accountability. In addition to releasing the report to the public and providing a copy to the Federal Government, the Commission will properly document all of its actions, including the investigation and inquiries.

In addition, the Commission is required to provide the Federal Government with a report on the yearly balance sheet and accounts (revenue and expenditure) through auditors, and the Federal Government may also have the Auditor General of Pakistan audit it. After obtaining a copy of the board's statement of accounts, the Commission's annual report, and the auditor's report, the Federal Government has two months to publish them in the official gazette and present them to both Houses of the Majlis-e-Shoora (Parliament). To carry out its responsibilities, the Commission is authorized to accept financing from national and international organizations, including multilateral organizations. Nevertheless, the federal government must first give its consent. Any fines and penalties that the Commission is able to collect shall be credited in full to the Federal Consolidated Fund.

Every Member, commissioner, or person performing the duties of a commissioner is not entitled to reveal any information that he has access due to his position to anybody other than those to whom it is expressly authorized by law. All members and commissioners are obligated to report any conflicts of interest, while carrying out their duties. All policy decisions and instructions from the Board and the Commission, respectively, must be published in the official gazette and made publicly available by the Board and the Commission. The Board and the Commission may create rules for the subjects listed in Section 20(4), but only with the Federal Government's consent and on the condition that they be published in order to receive public input.

The documents and information provided to the Commission pursuant to this Act, the Ordinance, or any other legislation shall be received, processed, and stored efficiently and promptly by the Commission in the course of carrying out its duties and exercising its responsibilities. The ruling of the Commission or the Appellate Bench of the Commission may also be appealed further to a court of law. Before making or amending any rules under this Act, the Commission must publish a draft of the regulations in the official gazette and post it on its website for a minimum of 14 days for public comment. Every rule of the Commission adopts or modifies must be made public.

It is therefore concluded that SECP is an independent and accountable regulatory body that fulfills its functions as Pakistan's primary security regulator in light of the discussion on the independence and accountability of SECP that was just completed, as well as the provisions of the SECP Act of

1997, the SECP Amendment Act, and the IOSCO Principles. But, if we look further at the study issued by the Asian Development Bank that questions the regulatory independence of the SECP and certain of the present legal requirements, it raises the question of whether the Commission is carrying out its duties in an impartial and open manner.

According to a guideline, the securities regulator should be "operationally independent and responsible in the performance of its tasks and powers." Regarding the independence and accountability of SECP, the current research raises a few difficulties. In accordance with Section 5 of the SECP Act of 1997, "the Commission must consist of such a number of commissioners, including the chairman, as may be established by the Federal Government, but such a number shall not be fewer than five or more than seven." At first, the SECP, led by Muhammad Ali Ghulam, simply had the chairman and two commissioners. This provision limits the authority of commissioners because if there are few chairman appointments, the workload inevitably increases.

Section 16 of the SECP Act of 2016 requires disclosure in the event of a conflict of interest, but it is simpler to judge how well this provision is carried out by examining the actual appointment of former SECP Chairman Muhammad Ali Ghulam by the government on December 24, 2010, which produced a conflict of interest as a result of the regulations that were passed at the time. Eventually, the Federal Board of Revenue punished him for concealing personal interests and failing to submit wealth declarations while he was serving as one of the top regulators in the country.

In light of the aforementioned facts, it is imperative to remember that SECP is not a completely autonomous institution. The IOSCO Guidelines state that in order to effectively exercise its power, a regulator must be free from interference from outside political or economic factors. By strengthening the efficacy and vitality of the current law in light of the IOSCO Guidelines, the regulator may be made more independent and accountable while carrying out its obligations in the capital market.

Recommendations

In the light of above all discussions, researcher would like to make some recommendations as given below:

1. The commissioner and supervisory authority must be free from unjustified political, governmental, and industrial intervention in their continuous operational activities.
2. The funding of the commissioner and the supervisory authority should be structured to provide effective supervision and to prevent any undue intrusion from the political class, the government, or business.
3. The supervisory authority must have proper internal governance procedures in place, including internal audit controls.
4. The institutional connections between the judicial, executive, and supervisory authorities must be fair and distinct.
5. In order for the supervisory authority to operate correctly, in line with its mission, and to achieve its goals, it should have the freedom to distribute its employees and resources as it sees fit.
6. The procedures for selecting and removing the head and other members of the supervisory authority', the governing body must be open and transparent. The grounds for removing a supervisory authority's head from office must be made public.
7. The supervisory authority must operate in a transparent and accountable manner. The supervisory authority must also in practice exercise its authority itself. The supervisory

- authority must perform its functions within the framework of the law; it must not apply its scope for discretion unduly (Rule of Law).
8. It is important that Board members should be appointed on the basis of professional skills and experience and that there should be continuity within Board membership to allow a collective spirit of independence to be engendered.
 9. The supervisory authority has to adopt a clear, transparent and consistent supervisory processes and rules. The procedures should be made available.
 10. The administrative decisions of the supervisory authority must be subject to judicial review. Those directly concerned should have the right to appeal against these decisions.
 11. This approach will be applied to all supervised undertakings equally, though, this can clearly be within the context of a risk-based approach to supervision.
 12. The supervisory authority discloses its objectives and the essence of its functions and activities to the public.
 13. Legal protection to the supervisory authorities and their officers against lawsuits for action taken in good faith, while discharging their duties must be provided and should consult interested parties before introducing new rules.
 14. Number of chairman should be increased so burden of work can be dividing.
 15. The SECP operates independently on a day-to-day basis and has adequate control over its budget.

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