



REVIEW OF COMMERCIAL LAWS OF BANGLADESH

**Design Phase of the proposed
Bangladesh Private Sector Development Support Project
Components 5.1.1 and 5.1.2**

PRODUCED FOR JICA

BY

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The responsibility for opinions expressed in this report rests solely with its author, and this document does not constitute an endorsement by JICA Bangladesh Office of the opinions expressed in them.

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CONTENTS

EXECUTIVE SUMMARY	I-XXV
I. INTRODUCTION	1
II. ANALYSIS OF LAWS	3
FISCAL LAWS	3
Income Tax Ordinance 1984	3
Value Added Tax Act 1991	6
Stamp Act 1899	7
Foreign Exchange Regulation Act 1947 and Guidelines	8
REGULATORY LAWS	12
Companies Act 1994	12
Securities and Exchange Commission Act 1993	16
SEC, the Institution	17
Securities and Exchange Ordinance 1969	17
Bank Company Act 1991	21
Financial Institutions Act 1993	24
Insurance Act 1938	27
Insurance Corporations Act 1973	27
Money Loan Court Act 2003	29
Customs Act 1969	30
Imports and Exports (Control) Act 1950	30
Customs Duties	30
Duty Drawback	32
Customs Procedures	35
Bonded Warehouse Licensing Procedures	35
Customs Department	36
Dhaka Municipal Corporation Ordinance 1983	37
Bangladesh Standards and Testing Institution Ordinance 1985	38

Bangladesh Telecommunications Act 2001	39
Bangladesh Energy Regulatory Commission Act 2002	39

PROPERTY LAWS 41

Transfer of Property Act 1882	41
State Acquisition and Tenancy Act 1950	41
Registration Act 1908	41
Patent and Design Act 1911	42
Trade Marks Act 1940	42
Copyright Act 2000	42

ENVIRONMENTAL LAWS 44

Environmental Policy 1992	44
Environmental Conservation Act 1995	45
Environmental Conservation Rules 1997	45
Factories Act 1965	47

PROCEDURAL LAWS 48

Code of Civil Procedure 1908	48
Specific Relief Act 1877	48
Penal Code 1860	48
Arbitration Act 2001	48
Bankruptcy Act 1997	48

COMMERCIAL LAWS 49

Negotiable Instruments Act 1881	49
Contract Act 1872	49
Foreign Private Investment (Promotion and Protection) Act 1980	50
Board of Investment Act 1989	51
Bangladesh Export Processing Zones Authority Act 1980	54

LABOUR/EMPLOYMENT LAWS 54

The Employment of Labor (Standing Order) Act 1965	54
Industrial Relations Ordinance 1969	56
Minimum Wages Ordinance 1961	56
Maternity Benefits Act 1939	57
Shops and Establishment Act 1965	57
Gratuity	57

III. ASSESSMENT OF THE LEGISLATIVE AND REGULATORY PROCESS 59

Republic	59
Constitution	59
Executive	59
Legislature	59

Judiciary	60
Legal Enforcement of Rights	60
Functionality of the Court System for Commercial Matters	61
Legislative Process	61
Law Reform Commission	63
 IV. CONCLUSION AND RECOMMENDATIONS	 64
 CONCLUSION	 64
 RECOMMENDATIONS	 64
Short Term	64
Medium Term	65
Long Term	66
 ANNEXURES AND APPENDICES	
Annexure 1: Terms of Reference	I
Annexure 2: List of Laws Relating to Commercial Activities in Bangladesh	VII
Annexure 3: List of Major Laws Reviewed	XI
Annexure 4: Customs Procedures	XIII
Annexure 5: Summaries of Laws Reviewed	XIX
Appendix 1: Registration, Licenses, Consents and Permits which may be required and the relevant authority	XLVIII
Appendix 2: Summary of Major Taxes and Fees Applicable to a Company Limited by Shares but not publicly listed with a stock exchange	LII

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EXECUTIVE SUMMARY

Introduction

This report is intended to provide input into the proposed Private Sector Development Support Project (PSDSP) in Bangladesh, proposed to be carried out by the World Bank and funded and supported by a group of development partners, known as the Development Partners Support Group (DPSG). The DPSG is made up of FIAS, SEDF, the World Bank, the United Kingdom's Department for International Development (DFID), the European Union (EU), Japan (JICA and JBIC), the Canadian International Development Agency (CIDA), and the Asian Development Bank (ADB). JICA has been involved with the DPSG since the outset and is supporting this particular component of the PSDSP design phase.

The scope of the Report, as stated in the terms of reference (TOR) is as below:

1. An audit and analysis of all major laws and regulations that impinge on commercial relations and private investment in Bangladesh; and
2. A review of the legal and regulatory formulation process in Bangladesh. The review will examine the current process of legal and regulatory formulation and make recommendations for improvement.

A comprehensive list of the laws of Bangladesh is available in a publication entitled the Encyclopedic Compendium of the Laws of Bangladesh, published by the Bangladesh Legal Aid and Services Trust, in 2002. Annexure 2 to this Report contains a list of the laws which may have an impact on private sector commercial activities. Annexure 3 contains a short-list of laws drawn from the list at Annexure 2, which are the laws having the most immediate impact on Foreign Direct Investment (FDI) in Bangladesh. These statutes have been classified along the following broad headings: (i) fiscal laws, (ii) regulatory laws, (iii) property laws, (iv) environmental laws, (v) commercial laws, (vi) procedural laws, and (vii) labour and employment laws. There are overlaps in each sector, i.e. certain laws may contain procedural as well as substantive legal provisions.

A review of the main objects of each such law has been done, and an attempt made to identify the specific provisions which may become, or in fact are, stumbling blocks to private investment. At an intermediate stage, upon discussion with the donors' representatives, it was decided that an in-depth study of even the short-listed statutes

would not be possible in the time-frame for the study. It was decided that the attempt would be to highlight major issues, and in some cases issues which may not appear to be major, but have been practically found to be causing difficulties for investors. The intention is to highlight issues and chart a way for more in-depth work on the legal and regulatory framework.

The statute books have been the primary source material for the studies, together with published and unpublished papers on the regulatory framework of Bangladesh. Offices of the National Board of Revenue, Customs Bond Commissionerate, Duty Drawback Office, Dhaka City Corporation, Bangladesh Standards and Testing Institution and the Securities and Exchange Commission were visited to find out details of procedures, and assess the ease of obtaining the required information. Practitioners at the Registrar of Joint Stock Companies and the Trade Marks Registry were consulted, and senior (former) judicial officers, lawyers and civil servants interviewed, as were other stakeholders.

In respect of subordinate legislation in the form of Rules and Regulations, these have only been referred where necessary in the context of discussing the parent statute.

Under an SEDF sponsored project, a compilation of all the forms for application for licenses, permits, approvals, certifications have been made, together with step-by step descriptions of the processes and documentation required to obtain these, and as such these are not duplicated in this Report.

ANALYSIS OF LAWS

(I) FISCAL LAWS

The Income Tax Ordinance 1984 (ITO) and the Value Added Tax Act 1991 (VAT Act) are the two principle revenue laws, in addition to the Customs Act, which are of substantial relevance and importance to the private sector. The following general comment may be made in relation to both these laws.

Tax administration is complex and time-consuming with uncertain results and added costs. Too much discretion is left at the hands of the junior personnel in assessing income and accepting or disallowing figures provided in tax returns, leading to non-transparent practices. Similarly, the VAT Act is a complicated piece of legislation, and procedures for obtaining registration there under, maintaining that mandated records, and actually calculating and paying VAT are complicated and time-consuming with substantial added costs.

Income Tax Ordinance 1984

The Income Tax Ordinance, 1984 (ITO) provides for the assessment and levy of tax on income.

The procedure for filing income tax returns is time consuming, long-drawn out and complicated for assessee; an extra legal fee is often charged even for accepting the return as filed, particularly on the last day for filing returns every year. The power to require the assessee to produce any documents regarding accounts leads to the DCT

requesting various unnecessary documents leading to a prolonged investigation of the returns.

Under Section 83 of the ITO the DCT may also require the assessee to appear and produce any evidence in support of the return. This again allows the DCT the discretionary power to request for any information he may deem necessary. In practice the DCT does not record the evidences that are produced before him by the assesses. Where the DCT feels that the assessee has failed to produce all required documents he is empowered to use his best judgment to determine the income tax payable which leads to arbitrary decisions, DCTs often making assessments on surmise and conjecture, leading to prolonged litigation. Finalization of an assessment, if challenged, takes up to an average of 4-5 years if the assessee or the DCT chooses to file a reference before the High Court Division. On the other side of the coin, inefficient and improper record-keeping by assesseees also complicates the process of assessment. Both these issues lead to lack of transparency in assessments and the opportunity for rent-seeking behavior and tax avoidance.

Section 83A of the ITO makes provisions for self assessment by an assessee. It further provides that twenty per cent of such returns may be referred to the DCT for audit and the DCT will only refrain from auditing such referred return if they show at least 15% higher income from the preceding year. Unrealistic and burdensome requirements mean that for a substantial number of companies the provisions of self assessment is rendered meaningless because it is difficult to fulfill the selection requirements for self assessment. The introduction of a simple and less burdensome system for self-assessment of taxes may be effective in removing these bottlenecks and enhancing revenue collection. At the same time, it would remove the one on one relationship between assessor and assessee, which would also be conducive to transparency. Rigorous random audits with exemplary penalties for offenders may be introduced for greater accountability. Computerized record-keeping could also facilitate monitoring of revenue practices.

Section 144 of the ITO provides that the Government may enter into an agreement with the Government of any other country for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income leviable under the ITO and under the corresponding law in force in that country. Difficulties arise in the application of Double Taxation Treaties (DTT) and implementing provisions made for these, in that often DCTs fail to apply the provisions of the DTT to the exclusion of the provisions of the ITO, which is what is supposed to be done. Difficulties also arise in attribution of income to the operations carried out in Bangladesh, where the operations of an assessee are carried out both within and without Bangladesh.

Value Added Tax Act, 1991

Under the provisions of the VAT Act, VAT is payable at a rate of 15% on any imported goods by the importer, on goods produced in Bangladesh by manufacturers, on services provided by the service provider and in other cases by the distributor. The VATable value of a good or service is usually fixed by the National Board of Revenue by notification. Most manufacturing enterprises with an annual turnover of over \$26,000 are expected to pay VAT at 15 percent but collection is not uniform. Small and cottage industries (SCI) are exempted from VAT, which discourages such enterprises from increasing employment and turnover which would put them in an SME category and attract VAT. Registration requirements under the VAT Act are unnecessarily burdensome and may be easily simplified.

The requirements of record-keeping under the VAT Act, as well as the calculations to be made for payment of VAT and obtaining refunds are equally complex and time-

consuming. There are at least 34 different forms prescribed under the VAT Act, of differing degrees of complexity. There is a tendency by the VAT officials to force services into descriptions which may not be applicable and thus make them VATable. There are also difficulties in classification of something as a good or a service. The following general recommendations may be made:

- i) extending VAT to the retail level and expanding them to cover most services and also the small producers and traders now subject to turnover tax instead; and
- ii) radically improving the accounting and monitoring mechanisms for crediting VAT paid at previous production stages, and for exempting or rebating VAT on exports.

Stamp Act, 1899

As far as foreign investors and commercial transactions are concerned, two issues arise fairly often, and should be addressed expeditiously. Section 17 of the Act provides that all instruments chargeable with duty and executed by any person in Bangladesh shall be stamped before or at the time of execution. By Section 11(e), instruments of transfer by endorsement of shares in any incorporated company or other body corporate may be stamped with adhesive stamps. The rate of duty is 1.5% ad valorem on the value of the consideration. The actual amount of duty payable on the acquisition of shares of substantial value would be quite high. Adhesive stamps are available in the highest denomination of Tk.50.00, which results in a very high number of stamps for substantial transactions, creating severe logistical problems. Section 18 of the Act provides that every instrument chargeable with duty and executed only out of Bangladesh, not being a bill of exchange or a promissory note, may be stamped within three months after it has been first received in Bangladesh. Quite often, the person authorized by the Government as the stamping authority for such documents refuses to accept evidence of the date of first receipt of the instrument in Bangladesh, but takes the date of execution of the instrument to be the date of first receipt in Bangladesh. These issues may be addressed simply by making Rules under the relevant laws.

Foreign Exchange Regulation Act, 1947 and Guidelines

The Foreign Exchange Regulation Act, 1947 (FERA) regulates certain payments and dealings in foreign exchange and securities and import and export of currency and bullion. The Guidelines for Foreign Exchange Transactions (Guidelines) has been published by the Bangladesh Bank for the stated purpose of summarizing the instructions issued under the FERA as well as the prudential instructions issued by Bangladesh Bank as of 30 September 1996) to be followed by authorized dealers in foreign currency (AD) in their day-to-day foreign exchange transactions. The Guidelines are “to be read in conjunction with other instructions, subsequent amendments and modifications issued from time to time. It may be noted right away that these “other instructions, subsequent amendments and modifications issued from time to time” are not generally available to members of the public. Bangladesh Bank as the central bank deals with banks and not individuals, It therefore makes these instructions, amendments and modifications, usually made through circulars, available only to banks. Only recently have these begun to be put on the Bangladesh Bank website, but even there, because of software problems, the circulars in Bangla are often not retrievable.

The FERA provides that no person shall, except with the general or special permission of the Bangladesh Bank, take or send any security to any place outside Bangladesh, transfer any security or create or transfer any interest in security to or in favour of a person resident outside Bangladesh. In this context, security is defined as, among others, shares and debentures. Chapter 14 of the Guidelines elaborates on these provisions, and records the general permission of the Bangladesh Bank for the issue and transfer of shares in favour of non-residents against foreign investment in Bangladesh, brought in through the banking channels in freely convertible foreign currency, subject to further permission of the BOI/Securities and Exchange Commission. Transfer of Bangladeshi shares and securities from one non-resident holder to another non-resident also does not require prior Bangladesh Bank permission. The two issues which arise here are that, (a) nominee shareholding by foreign shareholders is precluded because nominee shareholders should not be required to send the purchase price through the banking channels in their own names, as the payment should be made by their principals, and (b) although ultimately a pledge of shares by a non-resident in favour of a non-resident, once exercised would require the pledged shares to be transferred to a non-resident, such a pledge cannot be made without Bangladesh Bank's permission, due to the absence of specific language to address the matter. In recent large acquisition transactions, particularly in the telecoms sector, these issues have come to the fore.

Another major issue which has been arising recently has been with reference to Section 18A of the FERA, and are of particular relevance to certain types of foreign investors. Section 18A requires that no person (i.e. individual, firm, business organisation or concern whether incorporated or not) shall act as or accept an appointment to act as an agent in trading or commercial transactions or as a technical or management adviser or any other employee in Bangladesh, of a person resident in Bangladesh but not a citizen of Bangladesh, or of a company (other than a banking company) not incorporated under any law in force in Bangladesh.

The word agent not being defined in the FERA, the definition in the Contract Act, 1872, or the ordinary dictionary sense of the word is used. In these circumstances, even wholly owned subsidiaries of foreign companies incorporated in Bangladesh are having to apply for permission as an agent. Freight forwarders in Bangladesh are having to apply for this permission as they are seen as acting as agents of their resident or non-foreign clients even when working as independent contractors. This is a strained interpretation of the agency relationship. Also, for various internal and unspecified reasons, this Section 18A permission is in practice being indefinitely delayed by Bangladesh Bank.

Experience shows that financial and commercial transactions have moved far ahead since the time of the enactment of the FERA. The FERA having been enacted almost 6 decades ago, it is clearly not always in synch with modern financial and commercial needs. Gaps are being filled by using the "general or special" permission provisions in the statute. One other problem is that in the case of queries arising, Bangladesh Bank does not give authoritative explanations, but decides matters on a case to case basis.

REGULATORY LAWS

Companies Act 1994

The Companies Act 1994 (CA, Act) governs companies from birth to death, i.e. from incorporation up to and including winding up and dissolution. A company may be incorporated by complying with the requirements of the Act in respect of registration. The Act provides for continuing compliance requirements regarding the holding of board and shareholder meetings, filing of annual and other periodic and occasional returns regarding directors, special and extraordinary resolutions, transfer of shares, maintenance of books, accounts and registers, the issue of capital, and many other matters. It also establishes the office of the Registrar of Joint Stock Companies and Firms ("RJSC" or "Registrar"), and provides for the powers and responsibilities of the Registrar.

While the requirements for registration of a company are not very onerous, no comprehensive guideline is available for persons wishing to form a company, setting out all the requisite information, forms, formats, and the costs involved, although the fee schedule is well set and available from the RJSC. Unlike in India, where more than thirty sets of rules and regulations have been issued to supplement, explain and facilitate the application of the bare provisions of the Companies Act there, no such rules have been promulgated here. The RJSC should be required to provide the forms, electronically and on paper, together with guidelines on how to complete them. The RJSC should also be required to accept the filing of forms on the internet, as and when electronic payment becomes practicable.

The CA provides for mortgages and charges on a company's property to be registered in a register of mortgages and charges maintained by the company and also requires these to be filed with the RJSC. There is no provision in the law for recording pledges of a company's shares made by a shareholder, which is a very common form of security given for financing in Bangladesh. The CA prescribes penalties for delays and failures in complying with numerous requirements. The penalties are often not substantial enough to act as a deterrent, and are seldom imposed by either the RJSC or the Government, as the case may be. These penalties should be rationalized and uniformly applied.

For various matters, including condonation of delay in holding annual general meetings, applications to the High Court Division of the Supreme Court is required, with extensive procedures of advertisement, objections, and fines. The processes are time-consuming, expensive and of dubious value. In the matter of delay in holding meetings or filing certain returns, or amendment/correction of errors in returns, applications are seldom contested and/or turned down by the Court. The RJSC has certain powers of condonation already, which may be enhanced, and the powers in this regard currently given to the Court may be given to the RJSC.

Recommendations in relation to enhancement of the RJSC's powers should only be effectuated after a comprehensive upgrading of the RJSC's capacity, which is noted by all concerned as being seriously deficient at present. RJSC as an institution is in need of extensive reform. It consists of just over 50 staff members, including the Registrar, deputy and assistant registrars, and staff who vet and compare documents for filing and providing certified copies. At present, about 250 to 300 companies apply for registration every month. All filing and record-keeping is done by hand. There is a rudimentary computer system. The company files are maintained in a record room where files are taken out of and returned to shelves manually, which often results in files getting lost. There is not much security, and files may conceivably be tampered with without much

difficulty. None of the staff members of RJSC are trained in company law. Allegations of obstructionism, incompetence and corruption abound.

There is also confusion and lack of clarity as to what the role of the RJSC is in administering the relevant provisions of the CA. The High Court Division in a recent decision has accepted that the role of the RJSC in relation to the filing of returns is that of a filing house. The role of the “RJSC” as a filing authority and a register for public notice should be clarified and the powers currently exercised by the RJSC (often not sanctioned by the Act) to “accept” documents for filing should be restricted to the bare minimum. The RJSC should be required to file documents as they are presented, as long as the prescribed particulars are there, without being given the authority to go behind the documents, since the filings are there to put the public on notice and inquiry of certain facts and events. It should also be required to follow the provisions of the CA in relation to giving certified copies of documents filed with it to anyone making payment of the required fees.

Securities and Exchange Commission Act 1993

Securities and Exchange Ordinance 1969

The Securities and Exchange Commission (SEC) formed under the Securities and Exchange Commission Act 1993 (SECA) regulates the issuance of securities in Bangladesh under the provisions of the SECA and the Securities and Exchange Ordinance 1969 (SEO). ADB’s Capital Market Development Program is addressing the development of the capital market and issues relating to these laws, and as such these are not addressed in detail here.

Securities and Exchange Commission Act 1993

The SECA 1993 provides that the Commission is responsible for assuring the proper issuance of securities, protection of the rights of the investors and the development and regulation of capital and securities market. In pursuance of these goals, the SEC is empowered to take any or all of the following measures, among others:

- regulation of stock exchanges and the securities market;
- regulation of stock-brokers, bankers to an issue, issue managers and trustees, underwriters, registrars, portfolio managers, investment advisers and other intermediaries related to the securities market;
- registration, regulation and management of mutual funds and similar joint investment arrangements;
- prevention of fraudulent and corrupt trading in securities;
- provision of training in investment and the securities market;
- prevention of insider trading;
- acquiring shares or stocks of a company or taking control, and “takeover and regulation of companies”;
- Inspection, investigation, audit, obtaining information from issuers of securities, stock exchanges and other similar self-regulatory organizations; et cetera.

Under the SECA 1993, the Government reserves the power to give directions in writing to the Commission in furtherance of the Act, which it must abide by.

Section 24 gives the power to the Government to frame Rules for the purposes of the SECA 1993. Section 25 provides the power for the SEC to promulgate regulations for the purposes of the SECA 1993, with the prior permission of the Government. Such regulations cannot be inconsistent with the provisions of the SECA 1993 or of any Rules framed thereunder.

The SEC came into being in 1993 under the provisions of the SECA 1993. Initially, it had provision for a Chairman, two full time members, and two part time members. Later, the law was amended to provide for four full time members. Right from the beginning, the SEC suffered from a lack of an adequate number of staff properly trained in capital market affairs. That lack still continues. The SEC does not have a full time Corporate Accountant in place. The Chairman and members have not been from a capital market background.

Securities and Exchange Ordinance 1969

Securities and Exchange Ordinance 1969 (hereinafter referred to as the “SEO 1969” or the “Ordinance”) provides the basic set of laws governing the capital market. SEO 1969 gives the SEC control over the issue of capital by companies in Bangladesh. No company incorporated in Bangladesh shall, except with the consent of the SEC make an issue of capital outside Bangladesh. Further no company, whether incorporated in Bangladesh or not, shall, except with the consent of the SEC make an issue of capital In Bangladesh, make any public offer of securities for sale, or renew or postpone the maturity or repayment of any security maturing for payment in Bangladesh. SEC has, however, granted all private companies whose total capital at any given time after making an issue of capital does not exceed Taka One Crore, exemption from Section 2(A) pertaining to the issue of capital.

The SEO 1969 has been amended several times recently to give the SEC more and more apparently unfettered rights to issue directions to capital market stakeholders. Two of the important provisions in this respect are Sections 2CC and 20 A. By using these provisions, the SEC is creating inroads into the company law regime contained in the Companies Act, 1994, and that too by orders under these sections. An anomalous and undesirable situation is being created whereby a regulatory agency is in effect amending the provisions of an Act of Parliament, without any further reference to the legislature, and often in knee-jerk reactions to emergent situations in the capital markets. Directions issued by the SEC recently have appeared to be targeted to specific companies, or in instant reaction to extreme situations, without bearing in mind the overall impact of the provisions.

The SEC has been given, by an amendment to the SEO in 1997, enormous powers to impose at any time any terms and conditions upon any issuer of securities in Bangladesh, which terms and conditions would supersede any provision of law, contract, memorandum and articles of association applicable to the issuer. This power provided by Section 2CC of the SEO is too wide in scope and is used by the Securities and Exchange Commission to impose post facto, unreasonable obligations.

If one looks back at the institutional strength, or rather the lack thereof, of the SEC, the dangers of giving such wide powers to it become immediately apparent. The SEC, rather than assisting stakeholders in improving their record-keeping and other compliance measures (which is what Bangladesh Bank, commendably, does with banks), uses minor lapses to impose punitive measures. This has not been conducive to creating a

healthy interrelation and any measure of predictability between the regulator and the regulated.

It is undeniable that the SEC's interventions have forced listed companies to be much more regular in holding annual general meetings, declaring dividends, and disseminating price sensitive information. It is also undeniable that the weak self-governance of the stock exchanges in relation to their members, brokers and listed companies has often forced the hands of the SEC, or provided the handle for acting in a high-handed manner.

The debt market in Bangladesh is in its infancy. The existing laws do not recognize the numerous kinds of securities available in the financial market and therefore there is no defined rules and regulation specific to the numerous security instruments. Accordingly, the issuance of security instruments occur by convoluted interpretations to bring such instruments within the ambit of the existing laws, rules and regulations. It is recommended that detailed specific statutory provisions be formulated to facilitate and provide for the issuing of debt instruments.

Bank Company Act 1993

The Bank Company Act 1991 (BCA) governs the formation of banks and their regulation by the Bangladesh Bank. It defines banking business. In terms of dealing with private investors, this law itself does not have a direct impact, as much as the rules, regulations and circulars issued by the Bangladesh Bank in respect of lending limits, security for loans and treatment of overdue loans, among others, do.

In reviewing the law and discussions with stakeholders, no immediate issues arose in respect of its specific provisions, which are not seen to have any direct impact inhibiting the inflow of FDI or the growth of SMEs. However, the following were highlighted as potential areas for support in providing better financing opportunities:

- i) escrow accounts,
- ii) risk treatment of segregated assets in relation to asset-backed instruments.

Two other issues may be touched upon. One is the requirement of prior permission of the lending bank before any change can be made in the board of directors of a borrower. This appears to militate against the concept of corporate liability, and implies a reliance on the bankability of personalities involved in a business operation, rather than the bankability of a project, which may in turn lead to less efficient due diligence and risk assessment practices. It also prevents shareholders of a company from exercising their basic right to remove a non-performing director. The other issue relates to the Credit Information Bureau of the Bangladesh Bank. Complaints have been received that the records kept therein are not up to date, the persons whose names are in the database are not informed of such inclusion until an application for a loan or other facilities to a bank is rejected on that ground, and it is difficult to rectify mistaken inclusion of names into the list. These matters ought to be reviewed and necessary amendments made to the relevant rules to address these issues. The process should be both more transparent and more accountable.

Financial Institutions Act 1993

The Financial Institutions Act 1993 (FIA) was introduced, among others, to facilitate lease financing of equipment and machineries, and has served the purpose well. However, due to its hurried introduction, a major anomaly lies in inconsistent definitions of “lease” in different statutes. A leasing company is defined in the FIA to be a company which as its business or part of its business provides financing for leases or itself leases out machineries and equipment. The Bangla word “ijara” used in this definition translates to “lease” in English but has not been defined separately in the FIA.

The term “lease” in the FIA is used in relation to movable property whereas the definitions of “lease” in the Transfer of Property (TP) Act 1882, Registration Act 1908 and Stamp Act 1899 relate to immovable property. The inconsistencies need to be addressed.

Insurance Act 1938

Insurance Corporations Act 1973

The insurance industry is regulated under the provisions of the Insurance Act, 1938, by the Chief Controller of Insurance, acting under the purview of the Ministry of Commerce. The Insurance Act, read with the Insurance Rules promulgated thereunder provides extensively for various aspects of insurance companies, and regulations of the insurance business. However, without going into the provisions themselves, it may be said that the insurance sector is plagued by many inefficiencies, which the Department of Insurance is unable to address.

The Insurance Corporations Act 1973 set up two state-owned insurance corporations, namely Jiban Bima Corporation (dealing with life insurance), and Shadharan Bima Corporation (“SBC” - dealing with general insurance). Until the mid-1980s, by mandate of this law, only these two corporations were permitted to transact insurance business. By a process of liberalization, today there are 37 general insurance companies and 14 life insurance companies.

However, Section 23 of the Insurance Corporation Act, 1973 provides that fifty per cent of all insurance business relating to any public property or to any risk or liability appertaining to any public property shall be placed with the Sadharan Bima Corporation and the remaining fifty per cent of such business may be placed either with that Corporation or with any other insurer in Bangladesh.

Section 23A of the Act further provides regarding re-insurance, that every insurer registered and carrying on insurance business in Bangladesh shall re-insure, on generally acceptable terms and conditions, such portion of his insurance business as he cannot retain on his own account. Fifty per cent of the re-insurable general insurance business shall be re-insured with the Sadharan Bima Corporation and the remaining fifty per cent of such business may be re-insured either with that Corporation or with any other insurer whether in or outside Bangladesh. The whole or any portion of the re-insurable life insurance business may be re-insured with any insurer outside Bangladesh.

It may therefore be seen that by law the state-owned general insurance corporation has been given a substantial protection in terms of market share. It is arguable that this has prevented the insurance market from achieving depth. For many years, discussions have been ongoing on the policy front to open up the insurance market to direct foreign

investment and competition, but in the absence of an effective regulatory framework, this has not taken place and is not likely to take place in the near future.

Customs Act, 1969

Imports and Exports (Control) Act 1950

The Customs Act 1969 and the Import and Export (Control) Act 1969 are of cardinal importance to private sector investment. The Customs Act 1969 sets out the goods which are to be dutiable and the rate at which the duty is chargeable, provides for the procedures for import and export of goods, and the collection of duties thereon. It provides for the valuation of goods for the purpose of assessment of duties, import, export and warehousing of goods under bond, and penalties for breach of these provisions.

Customs Duties

In general, no import duty is charged on the import of capital machinery and spares up to 10% of the value of such capital machinery, if these are for 100% export oriented industries. Neither is VAT payable on these. Import duty at 7.5% ad valorem is payable on other capital machinery.

The major issue in relation to customs as identified by practitioners has been the fixation of the assessable value of goods for the levy of customs duty. Section 25 of the Act provides that whenever customs duty is leviable on any goods by reference to their value, among others, the actual price or the nearest ascertainable equivalent of such price, at which such goods are ordinarily sold, or offered to for sale, under fully competitive conditions, shall be the value for assessment of customs duty. The Act authorizes the Government to make rules to determine the price in respect of imported goods. Further, notwithstanding anything else contained in this section, the Government may fix, for the purpose of levying customs duties, tariff values or minimum values for any goods imported or exported as chargeable with customs duty ad valorem.

One of the major problems with the law is the continuous process of amending the rates of customs duty set under the annual budget, through the use of Statutory Regulatory Orders (SROs) passed by the relevant ministry. Importers of commodities, raw materials, equipment, machinery etc. who contract to import goods taking into account a certain rate of customs duty may be subjected to increases made after the letters of credit are opened and the goods shipped, through changes in these rates, as the rates prevailing at the time of submission of the bills of entry prevail. This can seriously upset the cost-benefit analysis, pricing and financing structures of businesses. Since this is a part of the fiscal management of the Government, and many issues can have an impact upon the decision-making process in this regard, many such changes to the duty structure have been challenged in court on allegations of non-transparent decision-making for collateral purposes, involving high costs to the importer and loss or delay in revenue collection. More certainty and transparency in the decision-making process could minimize these costs.

Duty Drawback

The Customs Act, 1969 in Chapter VI provides for the drawback of customs duty on the export of imported goods, and more importantly, on goods used in the manufacture of

goods which are exported. However, reportedly, since the promulgation of the Value Added Tax Act, 1991 (VAT Act), drawback is claimed on inputs under Section 13 of the latter, and the provisions of the Customs Act, 1969 are no longer in use, although they have not been repealed.

Section 13 of the VAT Act provides that, notwithstanding anything contained in Chapter VI of the Customs Act, 1969, any person will be entitled to draw back value added tax, supplementary duty, import duty, excise duty, and all other kinds of duty and tax (except advance income tax and supplementary duty on inputs notified by the Government in the Gazette) on inputs used in the manufacture or production of exported goods or services or goods and services deemed to be exported. The drawback must be claimed within 6 months of the date of export (the date of export is the date on which the bill of export for the goods or services concerned is handed over to the relevant officer under Section 131 of the Customs Act, 1969). It is further provided that the National Board of Revenue (NBR) may permit an exporter to claim drawback on the actual rate of the taxes etc. paid on the inputs (based on the bills of entry) or on a flat-rate based on the input-output co-efficient of the product exported. Rule 29 of the VAT Rules 1991 contain detailed provisions on the procedures for obtaining duty drawback.

The information required for duty drawback is not readily available to an exporter, because as is usual for almost all regulators in Bangladesh, there is no public information desk or office at either the NBR or the DDO. Various middlemen are available to assist in obtaining the information and accessing the officials concerned. However, once reached, the officials are helpful.

Customs Procedures

The Import and Export (Control) Act 1950 permits the Government to publish rules concerning import and export of goods in Bangladesh. The Import and Export Manual sets out the rules and procedures that need to be followed for import and export of goods. These rules are comprehensive and set out the procedures for obtaining import-export licenses, suspension and cancellation of licenses. However, this Manual is not available generally and government officials as well as entrepreneurs are unaware of their rights, duties and liabilities and the manner in which the customs regime should be administered. As a result most work carried out is based on 'traditional practices' which is time consuming. The processes, like in any other field, are said to be non-transparent. Publicizing the rules and simplifying the processes would be of enormous assistance in reducing costs for both exporters and importers.

Customs and port procedures are a significant problem for firms that export and import. Customs clearance for an export takes approximately nine days, while import clearance takes twelve days. The number of forms and procedures required for shipment either by seaport or airport illustrates the difficulties faced in completing customs formalities. In order to berth at the Chittagong port, incoming and out going vessels have to fill out a total of 40 forms, whereas modern ports around the world require only seven forms. For instance, in the case of Penang Port I in Malaysia, a ship is required to submit only eight forms. In airport customs in Bangladesh, at present, an importer, exporter or cargo and freight agent must obtain 43 permissions to release consignments. It takes up to twelve days to clear a shipment through customs and exporting a shipment can take up to nine days.

A table provided by a PSI agent is annexed to this report as Annexure 4 showing the different steps required for clearance of goods through Customs and the possible delays and opportunities for rent-seeking.

Bonded Warehouse Licensing Procedures

Private warehouses are licensed under the provisions of Section 13 of the Customs Act, 1969. At any warehousing station, the Commissioner of Customs (Bond) or any other Commissioner of Customs authorized by the NBR may license private warehouses wherein dutiable goods imported by or on behalf of the licensee, or any other imported goods in respect of which facilities for deposit in a public warehouse are not available, may be deposited. Such a license may be cancelled by one month's notice in writing, or if the licensee contravenes any provision of the Customs Act or breaches any condition of the license. Such warehouses are required to comply with the provisions of Chapter XI of the Customs Act, 1969.

Recently, inquiries have been made by contract-logistics suppliers as to the possibility of providing bonded warehouse services in the private sector to third parties, for example, garments manufacturers, who otherwise have to have private warehouse facilities of their own. The problems with individual units having to have their own warehousing facilities are, among others, space constraints and the cost and logistical difficulties of maintaining such facilities, and lack of proper facilities for buyers to inspect and accept or reject finished goods prior to shipment, knowing that goods are not being switched after quality inspections have been carried out at the manufacturer's premises.

Bangladesh Standards and Testing Institution Ordinance 1985

The Bangladesh Standards and Testing Institutions Ordinance 1985 (BSTI Ordinance 1985) sets up the Bangladesh Standards and Testing Institution (BSTI), which is the agency responsible for setting standards for selected consumer goods produced in Bangladesh. The BSTI ordinance makes it mandatory to register the specifications of products which are brought under the control of the BSTI and makes it necessary for entrepreneurs to register with the BSTI if dealing in these products. BSTI appears to have very little capacity in testing products and enforcing its standards. Recently, BSTI has been more pro-active in such enforcement but due to the lack of proper investigation and failure to follow due process, most of its actions have been challenged in Court and stayed.

Bangladesh Telecommunications Act 2001

Bangladesh Energy Regulatory Commission Act 2002

In 2001 the Bangladesh Telecommunications Act, 2001 (BTA) was promulgated, to set up the Bangladesh Telecommunications Regulatory Authority (BTRA) and provide for independent regulation of the telecommunications sector.

Right at the outset, there was difficulty in making the new law effective. The BTA provided that it would come into force on such date as the Government may by notification in the official Gazette, appoint. The Government by notification in the Gazette appointed 8 July 2001 as the date for the BTA to come into force. Thereafter, as the BTRC could not be formed because the required 5 commissioners could not be appointed in time, another Gazette notification was issued on 9 August 2001, effective

retrospectively from 12 July 2001, canceling the earlier notification and appointing 31 January 2002 as the date of coming into force of the law. In the meantime, confusion abounded as to who had the authority in the interim to take any regulatory steps in the sector, whether the Government acting through MOPT continued to be the regulator in the interim period, what would happen to actions taken by the MOPT between 8 July and 12 July, and 8 July and 9 August 2001, etc. The BTA has not repealed the Telegraph Act 1885 or the Wireless Telegraphy Act 1933, thereby failing to consolidate all such matters in one body of law, leaving further scope for confusion and dual authority.

The BTRC was hurriedly staffed with former civil servants and former senior BTTB staff, thus in many ways negating at the outset the impetus towards an independent commission. The BTA provides for certain activities to be the preserve of the BTRC, for example licensing, and for policy matters to remain within the purview of the Government. This has resulted in some confusion as to the pace of deregulation of the industry. In other cases, for example the issuance of satellite television licenses, BTRC and the Government have each been saying that the other is the authority for granting licenses (in the aftermath of the celebrated ETV case). Although the BTA itself spells out in broad categories the objectives and responsibilities of the BTRC, in the last two and a half years the BTRC has not yet framed the necessary detailed rules, regulations and guidelines for putting into place and carrying out those tasks in a transparent and objective manner, nor has it set up the essential spectrum management committee as specifically mandated by the BTA.

Similarly, in 2003, the Energy Regulatory Commission Act (ERCA) was enacted, for the stated objective - "to make provisions for the establishment of an independent and impartial regulatory commission to create an atmosphere conducive to private investment in the generation of electricity, and transmission, transportation and marketing of gas resources and petroleum products, to ensure transparency in the management, operation and tariff determination in these sectors, to protect consumers' interest and to promote the creation of a competitive market". The Commission is not yet fully established or functional. After repeated attempts to find members and a Chairman, first the members were appointed. Thereafter a search committee was formed to find a Chairman, which ultimately received and reviewed the qualifications of three proposed candidates from a shortlist, and found all three to be unqualified for the job. Nevertheless, one of those candidates has been appointed by the Government as Chairman in the absence of alternatives. While all this was going on, there was confusion as to who would continue to issue licenses under the relevant laws, the Power Cell of the Ministry of Energy, or the ERCA.

PROPERTY LAWS

Transfer of Property Act, 1882

State Acquisition and Tenancy Act, 1950

Acquisition and Requisition of Immovable Property Ordinance, 1982

Registration Act, 1908

The Transfer of Property Act, 1882 ("TPA"), the State Acquisition and Tenancy Act ("SATA"), 1950 and the Acquisition and Requisition of Immovable Property Ordinance ("ARIPO"), 1982 are the principal laws relating to land in Bangladesh. Although the

Registration Act, 1908 is a procedural law, it is referred to in this section of the Report as registration of land related transactions is a major function under this Act.

The principal difficulties investors, and particularly foreign investors face in dealing with land in Bangladesh are that (a) it is difficult to establish the chain of title to land; (b) conducting land registry searches are extremely time-consuming and difficult, and often the records are not available; and (c) registration of title or other rights to land is costly and time-consuming.

A vast amount of land in Bangladesh is subject to dispute or some cloud on the basis of title to land and possession, inheritance, land transactions, adverse possession, oral gifts, diluvium and subsequent re-formation, registration procedures, encroachment, improper maintenance of records, and the absence of an effective land policy.

There are three official sources of land records, which are the registers kept under the deeds registration system provided for by the Registration Act, the Record of Rights maintained under the provision of the SATA, and the publication of khatians (land records for the purpose of collection of rent rather than for establishing title) under the settlement and revisional settlement operations under Part V of the SATA. Land records are maintained by the sub-registrars' offices under the Registration Act and Ministry of Law, as well as by the Assistant Commissioner (Lands) under the Ministry of Land. There is no single central registry which tracks title and changes in title as well as encumbrances on land. Land records held in different offices are not updated contemporaneously or even within a reasonable period of time.

The registration of a person as the registered owner of an interest in land is open to challenge in the civil courts, even if that person takes the interest in good faith, without notice of prior interests and for valuable consideration. Since mortgage of land is often a major security required by financiers, the absence of clearly defined systems for registration and search of title often causes delay and in some cases insurmountable obstacles to obtaining finance.

Patent and Design Act, 1911
Trade Marks Act, 1940
Copyright Act 2000

The Trade Marks Act 1940, Patents and Designs Act 1911, and the Copyright Act 2000 are there to protect intellectual property in Bangladesh. The Copyright Ordinance 1962 has been repealed and re-enacted in 2000 to incorporate provisions bringing it into line with the requirements of TRIPS. It is noted that weak administration and enforcement under these laws are a serious obstacle to the transfer of technology to Bangladesh.

The new copyright legislation provides for comprehensive protection for copyright for sixty years. The Act makes the initial steps towards providing copyright protection for computer programs but fails to appreciate the enormity of computer technology. The recently enacted Act has dealt with certain aspects of the Information Technology revolution by including 'computer program' as a property that may be protected but does not expressly or adequately tackle other emerging dimensions of computer and information technology that bring to fore the problems of copyright infringement and issues of jurisdiction. Until this inadequacy is remedied it appears that, at least in the

short run attempts to 'shoehorn' or 'forcibly fit' internet related conduct into the existing legal framework will have to continue.

The trademarks, patents and designs registration regimes are not suited to many of the new innovations in trade and commerce and products, and are particularly unsuited to electronic commerce. Trademarks are only registrable in relation to goods; service marks are not registrable. The processes of registration need to be streamlined, and the process speeded-up. Currently, registration of a trademark may take up to 5-7 years. Once a registration is obtained enforcement provisions regarding punishment of infringement are weak and non-preventative. In the case of infringement, Injunctions may be obtained against offending products, but these are difficult to enforce. Piracy of a design is punishable by a fine of Tk.500.00 only, or damages to be claimed and awarded, which is a long and costly procedure in suit in the civil courts.

The offices of the Registrar of Trade Marks, Patents and Designs, and the Copyrights Registry lack the capacity to administer the laws and tackle the issues emerging in today's much faster moving world of commerce and technology. They do not have the requisite expertise, personnel or technological resources to provide a fast, efficient and transparent system of registration, protection and enforcement of these rights.

ENVIRONMENTAL LAWS

Environmental Policy 1992

Environmental Conservation Act 1995

Environmental Conservation Rules 1997

Factories Act 1965

The objectives of the Environmental Policy 1992 are to maintain ecological balance and overall development through protection and improvement of the Environment and to protect the country against natural disasters, identify and regulate activities which pollute and degrade the Environment.

The policies for the realization of the overall objectives of this Environment Policy are provided for 15 different sectors. The relevant sectors for power plants are the Industry and energy and Fuel sectors and the policies for there are listed in the Report.

Pursuant to the Environment Policy 1992 the Government has published the Environment Action Plan 1992 and has enacted the Environment Conservation Act 1995. Under the Environment Action Plan the Department of Industry is introduce pollution control measures and identify existing and potential polluters.

Under Section 12 of the Environment Conservation Act 1995 (ECA 1995) no industrial unit or project can be established or undertaken without obtaining environmental clearance from Department of Environment (DOE). Accordingly, APCL would have to obtain an environmental clearance certificate from the DOE.

The Environmental Conservation Rules 1997 (“ECR 1997”) categorises all the projects in 4 divisions namely (a) Green, (b) Orange A (c) Orange B and (c) Red.

Power plants have been listed under the Red category and thus APCL would have to comply with all rules relating to the Red category specified in the Environmental Conservation Rules 1977. For proposed industrial units and projects under this category firstly a Location Clearance Certificate and thereafter an Environmental Clearance Certificate is given. However, the Director General of the DOE may, if he feels it proper, grant an Environmental Clearance Certificate without first giving the Location Clearance Certificate. The sponsor of an industrial unit is required to apply to the Divisional Officer with the requisite fees as specified in Schedule 13 of the Rules. (Rule 7 ((2), (3), (4))

The Factories Act 1965 provides for the control of the internal environment of factories or industries. Effective arrangements shall be made in every factory for the disposal of wastes and effluent due to the manufacturing process carried on therein. The Government also prescribes a standard of adequate ventilation and reasonable temperature for any factory or class or description of factories or parts.

Three major issues have been identified by environmental law practitioners in the above statutory scheme. First, a lot of laws directly concerning ‘environmental material’ i.e. in relation to forests, water, hills etc. were enacted at a time when environmental concerns were not at the forefront of decision-making, and also for purposes of generating revenue or allocating resources (e.g. the Forest Act, 1927). Second, the agencies which have control of these resources do not coordinate well with the agencies of government charged with protecting the environment. Third, public participation in environmental issue-related decision-making processes is not mandated by statute. Zoning requirements are not strictly enforced, or in many cases industrial units were set up in areas far enough from locality, but the expansion of human habitat has meant that these are surrounded by residential areas (this is true, for example, of the Tejgaon Industrial Area of Dhaka).

PROCEDURAL LAWS

Code of Civil Procedure, 1908

Specific Relief Act, 1877

Penal Code, 1860

Arbitration Act, 2001

Bankruptcy Act, 1997

These laws as they now stand are neutral in effect in relation to the growth and development of the private sector, save that the Arbitration Act 2001 has made progress towards non-judicial dispute resolution being made easier, but the administration of the Code of Civil Procedure and the Specific Relief Act through the civil courts system requires to be made much more efficient, transparent and certain. Judicial reform is being undertaken as part of the World Bank funded project and will address these issues.

COMMERCIAL LAWS

Negotiable Instruments Act 1881

Contract Act, 1872

The Contract Act, 1872 was enacted with the view to "...define and amend certain parts of the law relating to contracts...". It does not specify a number of rights and duties, which the law protects or enforces. It rather consists of a number of limiting principles, subject to which the parties may create right and duties for themselves, which the law will uphold. In a sense, the parties to a contract make the law for themselves. So long as they do not infringe some legal provision, they remain at liberty to make what rules they like regarding the subject matter of their agreement, and the law protects the parties in respect of their mutual determinations. Therefore, in its application, it is neutral of effect in terms of commercial transactions, and a detailed discussion of its provisions is not required for this Report.

The Negotiable Instrument Act, 1881 defines and deals with negotiable instrument, which are a mainstay of commercial transactions. Negotiable instruments, as defined under the Act, include promissory notes, bills of exchange and cheques. The legal interpretations and practices in relation to negotiable instruments is quite well-settled, and in line with established international documentary credit practices. However, the principal difficulties arise in dispute resolution in relation to negotiable instruments by reason of the fact that inexperienced bankers often do not follow the requirements, among others, for keeping the instruments valid through non-expiry, notifying and presenting documents in due time and by the correct procedure, and judges of the subordinate courts with jurisdiction over such disputes who are not at all well versed in documentary credit concepts and practices.

Foreign Private Investment (Promotion and Protection) Act, 1980

The policy framework for foreign investment in Bangladesh is based on the Foreign Private Investment (Promotion and Protection) Act, 1980 which provides for:

Non-discriminatory treatment between foreign and local investment.

Protection of foreign investment from expropriation by the state.

Ensured repatriation of proceeds from sale of shares and profit.

For foreign investment, there is no limitation pertaining to equity participation, i.e. 100 percent foreign equity is allowed. Foreign entrepreneurs enjoy the same advantages as domestic entrepreneurs in respect to tax holiday, payment of royalty, technical know-how fees etc. Full repatriation of capital invested from foreign sources is allowed. Similarly, profits and dividend accruing to foreign investment may be transferred in full. If foreign investors reinvest their repatriable dividends and or retained earnings, those are treated as new investment. Foreigners employed in Bangladesh are entitled to remit up to 50 percent of their salary and enjoy facilities for full repatriation of their savings and retirement benefits.

Board of Investment Act 1989

The Board of Investment Act 1989 provides for the establishment of a board to encourage investment in the private sector and to provide necessary facilities and assistance in the establishment of industries. The Board of Investment (BOI) has been established under the Act. It consists of the Prime Minister as Chairman (or a person nominated by the Prime Minister from among the minister-members of the Board), the Ministers for Industry, Finance, Power/Fuel/Mineral Resources, Commerce, Textiles, and Planning, the Governor of Bangladesh Bank, Secretaries of Industries, Finance and Internal Resources Divisions, President of the FBCCI, President of the Bangladesh Chamber of Industries and the Chairman of the Executive Council of the BOI.

Among the functions of the BOI are:

- providing all kinds of facilities for the investment of local and foreign capital for rapid industrialization in the private sector;
- implementation of Government policy relating to investment of capital in industries in the private sector;
- approval and registration of all industrial projects in the private sector involving local and foreign capital;
- creation of infrastructural facilities for industries in the private sector;
- determination of terms and conditions for employment of foreign officers, experts and other employees necessary for industries in the private sector;
- providing necessary assistance in the financing of important new industries in the private sector;
- collection, compilation, analysis and dissemination of all kinds of industrial data and establishment of a data bank for this purpose; and
- doing such other acts and things as may be necessary for the performance of its functions.

Under the provisions of the Foreign Exchange Regulation Act, 1947, (the FERA) read with paragraph 1 of Chapter 23 of the Guidelines for Foreign Exchange Transactions issued by the Bangladesh Bank, industrial enterprises in the private sector may, without prior approval from the Bangladesh Bank or BOI, enter into supplier's credit and other foreign currency loan contracts with lenders abroad if the effective rate of interest does not exceed LIBOR + 4%, repayment period is not less than 7 years, and down payment is not more than 10%. These loan agreements, however, need to be registered with BOI. In other case, the Guidelines provides that foreign loans not conforming with these general guidelines may also be contracted with prior BOI approval. It may be noted that the substantive provision of Section 4 of the FERA provides for the special or general permission the Bangladesh Bank, and not BOI. The BOI Act also does not specifically mandate such prior approval in the sense of not registering a project if it does not agree with the terms and conditions for such a loan. Also, there is no provision for such approval being required for subsequent loans.

What happens in practice is that BOI requires the filing of loan agreements for prior approval in all cases of foreign borrowings, within or without the parameters specified in the Guidelines. There being the usual shortage of manpower, and particularly manpower with the required expertise to meaningfully review the loan documents, and in the

absence of regular meetings of the Executive Council, a bottleneck is created and delays result in approval being granted. There are no published guidelines upon which approval may be given or refused, and no time frame for consideration of such proposed loan agreements.

The Bangladesh Bank committee has also been interventionist in the approval of foreign loans. One local investor had a foreign partner willing to invest in a textile sector project under government-announced terms and conditions. However, when the committee suggested new terms and conditions in the loan agreement, the foreign investor immediately withdrew his offer. This combination of approval difficulties and delays make the financial side of an investment difficult to complete.

Another matter of immediate concern to investors is the authority of BOI to provide work permits to foreign employees. The rules in this regard are opaque, and there is a circularity with the visa requirements enforced by the Ministry of Home Affairs. A foreigner cannot get an employment visa prior to arrival in Bangladesh without a work permit, and often cannot get a work permit without an employment visa. While the Bangladesh Investment Handbook published by the BOI lists the broad guidelines for expatriate employment prescribed by the Government, there is no easily available documented procedure for such application and guidelines for the terms and conditions for such employment which are considered by BOI in making the decision to grant or refuse a work permit. There is also no timeframe for the BOI to make the decision.

LABOUR/EMPLOYMENT LAWS

The Employment of Labor (Standing Order) Act 1965

Industrial Relations Ordinance 1969

Minimum Wages Ordinance 1961

Maternity Benefits Act 1939

Shops and Establishment Act 1965

The structure of employment related laws is well established in Bangladesh. However, it is often difficult to classify an employee in accordance with this criteria as either a worker or a non-worker. The recent trend has been, in white-collar industries, for any employee to claim to be a worker for the purposes of taking recourse to the various beneficial provisions of these laws, in particular for filing suit in the Labour Courts. In order to avoid application of these laws, employers are resorting to contractual employment for limited durations, subject to renewal of contract on satisfactory performance.

Trade disputes are often not resolved in accordance with the provisions of the IRO 1969, with neither the employees nor the employers following the provisions for due notice and discussions prior to striking work or declaring lock-outs. The extreme politicisation of trade union activities in most industries is a matter of concern. Recently, trade union activities have been permitted in EPZs as a result primarily of US interest in this regard.

Assessment of the Legislative and Regulatory Process

Parliamentary legislation – Acts (and Ordinances)

Subordinate legislation – Rule making powers

Executive decisions – Government policies and guidelines

The Constitution of Bangladesh guarantees certain fundamental rights to citizens of the Republic. All citizens are equal before law and are entitled to equal protection of law. To enjoy the protection of the law, and to be treated in accordance with law is the inalienable right of every citizen, and every other person for the time being within Bangladesh. No action detrimental to the life, liberty, body, reputation or property of any person is to be taken.

The legislative powers of the Republic are vested in Parliament. Bills are presented to Parliament for making laws. When a bill is passed, it is presented to the President for assent. When the President has assented or is deemed to have assented to a bill passed by Parliament it becomes law and is called an Act of Parliament. No tax may be levied or collected except by or under the authority of an Act of Parliament. At any time when Parliament stands dissolved or is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate Ordinances, which has force of law as an Act of Parliament. An Ordinance must be laid before Parliament at its first meeting following the promulgation of the Ordinance.

The Constitution provides that there is a Supreme Court of Bangladesh comprising the Appellate Division and the High Court Division. The Chief Justice of Bangladesh and the other Judges are independent in the exercise of their judicial functions. The Chief Justice and other Judges are appointed by the President.

The High Court Division has original, appellate and other jurisdictions, powers and functions as are or may be conferred on it by the Constitution or any other law. In particular, the High Court Division has what is in common parlance known as the “writ jurisdiction”, for issuing writs in the nature of habeas corpus, mandamus, certiorari and quo warrant. It has extensive powers of judicial review over administrative actions.

In addition to the Supreme Court, there are subordinate courts which are established by law (rather than directly under the constitution). The subordinate courts are the courts of the District Judge, Additional District Judge, Joint District Judge and Assistant District Judges.

The Code of Civil Procedure, 1908 prescribes that the subordinate courts which are courts of civil judicature have jurisdiction to try all suits of a civil nature except suits of which their cognizance is either expressly or impliedly barred. It provides for three kinds of jurisdiction for the subordinate courts: pecuniary, territorial and jurisdiction over subject-matter. A suit in which the right to property or to an office is contested is a suit of a civil nature. The court of first instance is usually the court of the Joint District Judge, which has unlimited pecuniary jurisdiction. Every suit is required to be instituted in the court of the lowest grade competent to try it.

Prior to becoming a Joint District Judge some 10 years or so after joining the judicial service, the judicial officer concerned deals primarily with “civil matters”, i.e. real property and family dispute related matters. The legal curriculum at university does not place an emphasis on commercial, corporate or fiscal laws. Therefore, at the time a judge of the subordinate courts begins to hear commercial matters, he would have had very little opportunity to be exposed to such matters or to have received training in the related laws. Commercial concepts become difficult to explain, particularly those relating to

international trade and finance. Similarly, lawyers appearing in the subordinate courts do not have much experience in commercial matters. This results in delays, as well as decisions being rendered on an unsound legal basis.

Legislative Process

Legislation is the business of Parliament. Usually, the line ministry concerned (as found in the Rules of Business of the Government ("RBG")) proposes a new law or amendments to the existing law. The RBG provides that the Ministry of Law, Justice and Parliamentary Affairs ("Ministry of Law") shall be consulted on all proposals for legislation, and that all laws on subjects allocated to each ministry shall be a part of its business. The ministry concerned may itself prepare a draft of the statutory enactment required, or request the Ministry of Law to prepare the relevant draft. At the drafting stage, detailed file notes are usually made explaining the need for the law or the amendment and the purposes to be served by it. There is no formal requirement for public consultation or setting up of committees of experts for proposing legislation or reviewing drafts. After internal review (and very seldom is there public review of draft statutes, or public consultation prior to drafting, or even informal consultation. However, sometimes, vested interests do get involved in promulgation of a law, or more often in the issuance of subordinate legislation) the draft is placed before the Cabinet Committee of Ministers, together with the relevant Summary. Once the Cabinet approves the draft, it is placed before Parliament through the Ministry of Law, together with a brief one or two paragraph statement of purpose, for a first reading, and then sent to the Parliamentary committee concerned for further review. It is then placed before Parliament for second and third readings and then voted upon. Once it receives the affirmative vote of Parliament, it is sent to the President for signature, whereupon it becomes law.

Acts of Parliament and Ordinances may provide the power for the Government or the agency in charge of administering the laws to make rules for carrying out the purposes of the Acts/Ordinances. The rule-making powers may be limited to certain parts of an enactment, or be general in nature. The enactments often provide for the implementing agencies to make regulations, usually when licensing or other similar authority is given in the parent Act. There are usually no well-defined procedures of consultation prior to making rules, and in particular, regulations.

There is no coordinating body for laws, and it is up to the Ministry of Law as to how far all other laws are reviewed to assess the effect any legislative enactment or amendment may have. While in some cases line ministries will take the assistance of outside experts in drafting or reviewing laws, this is rare. However, recently, the Securities and Exchange Commission has been one regulatory institution which has circulated to stakeholders certain draft rules and regulations, as well as circulars, for comments prior to enactment.

In relation to fiscal laws, particularly customs-related laws, statutory regulatory orders (SROs) are used abundantly to deviate from the parameters set in many particulars in parent laws, especially in the setting of rates for duties and taxes. In the mid-1990s a Law Reform Commission was formed, but it has not taken on the function of a central clearing house for legislation.

Law Reform Commission

By the Law Reform Commission Act, 1996, a permanent Law Reform Commission was set up, with the mandate to, among others, review the relevant laws and propose amendments or new laws in order to expedite dispute resolution at various levels of civil and criminal courts; make recommendations for the modernization of the judicial system; and specifically with a view to attracting local and foreign investment and bearing in mind the requirements of an open-market economy, recommend amendments or new laws in order to create a competitive environment in industry and commerce, recommend amendments to laws relating to copyright, trade marks, patents, arbitration, contract, registration and other such matters, and review the need for setting up separate commercial and financial courts. Additionally, it is mandated to review and resolve conflicts of laws in the same sphere by proposing consolidating legislation where a multiplicity of laws exists.

It appears that the Commission, like many other such institutions in the country, has never been fully operationalized by access to adequate financial and human resources. In the almost 10 years of its existence, the Commission has proposed amendments to a handful of laws, such as the Arbitration Act, 2001 and Admiralty Act, 2000, and proposed new laws for i-commerce, and freedom of information. Although it has the statutory mandate to act as a clearing house of laws on its own account, it is not taking on that role.

Mandatory procedures should be set up, based on best practices in other countries with parliamentary legislative systems, for the publication of white papers and meaningful consultation with citizens, prior to enactment of legislation. This is an activity where the Commission could play a significant part.

Conclusion

The broad brush review above of some of the major commercial laws of Bangladesh shows that there are laws in existence which cover, in some way or other, almost every facet of commercial operations in Bangladesh. The perceived pervasive lack of confidence in the legal framework stems from it not necessarily being clearly determinative of rights and obligations of entrepreneurs in terms of certainty in interpretation and application of legal instruments and principals. This is the result not necessarily just of the specific provisions of law, but of –

- weaknesses in the judicial system in dealing with commercial issues;
- lack of knowledge of the law, brought about in large measure through the lack of access to legal instruments;
- lack of understanding of the law, on the part both of the administrators of the law, and the entrepreneurs together with their professional advisers;
- discretion inherent in laws in the absence, among others, of a strong framework of rules and regulations making the interpretation and application thereof inconsistent and uncertain;
- a business-unfriendly attitude on the part of government and regulatory body officials in the interpretation and application of laws;
- lack of transparency and accountability on the part of government and independent regulators in their decision-making roles.

There are legal provisions which need to be updated to become relevant to modern day financial and commercial transactions, such as the FERA. There are laws which need to be more specific and reduce administrative discretion, such as the Income Tax Ordinance and the Customs Acts. There needs to be greater participation and accountability in the formulation of subordinate legislation. Very importantly, there needs to be unrestricted and easy public access to legal instruments, and provisions to obtain authoritative opinions quickly from regulators, even prior to entering into regulated transactions. Time limits need to be provided, with “default clauses”, whereby unless a decision is positively refused within a certain time, it will be deemed to have been given in favour of the applicant at the expiry of a certain time-limit.

Recommendations

In light of the above, the following recommendations may be made:

Short Term

In the short term, the specific legal provisions, and practices of regulators such as the RJSC identified above, which are obstructing foreign direct investment, may be dealt with by suitable amendment and practice directions. Examples are:

- i) The provisions in the Income Tax Ordinance relating to self-assessment may be simplified, particularly the requirement for an increase over the previous year's declared income be deleted.
- ii) Rules may be framed under the Stamp Duties (Additional Modes of Payment) Ordinance, 1974 to provide for the payment of stamp duty on share transfer instruments by bank draft, pay order or means other than adhesive stamps.
- iii) The requirement for submission of loan documentation to the BOI may be removed.
- iv) Clear instructions, co-ordinated between BOI, Ministry of Home Affairs, and Ministry of Foreign Affairs, may be issued by the Government in relation to the issuance of e-visas and work permits.
- v) RJSC's recent practice of asking for joint venture agreements for incorporation of a company and powers of attorney for conducting corporate searches may be stopped by instruction of the Government, as being unsupported by the law.

One very important step may be taken in the short term, and then consolidated over the medium term, which is to make legal instruments easily and publicly available. The Government may by executive order require each ministry, agency, and department to compulsorily maintain a library of all legislative instruments and provide copies to members of the public, if required on payment of the cost of reproduction or purchase. This should be done at least prospectively, immediately in the short term.

Medium Term

In the medium term, the priority should be two-fold:

the capacity of all the regulatory agencies to deliver their mandated tasks must be increased, through provision of necessary and adequate technical and human resources, continuous training of personnel, establishment of dedicated cadres, and changing of the mind-set from at worst obstruction and at best indifference to positive facilitation; the laws discussed above, in particular the fiscal and regulatory laws, should be addressed to make administration of these laws transparent, simple and uniform, through amendments where necessary, or through operationalization of the built in safeguards, such as random audits in income tax and customs, and the removal of the discretion of officials to pick and choose whom to target for purposes other than those envisaged in the laws themselves.

In support of the above, and in continuation of the steps taken in the short term to bridge the information gap, publication of all statutory instruments promptly on an official website should be arranged. In effect, the official Gazette should not only be printed, all such instruments should be uploaded instantaneously, and publication of any such instrument on the website should be deemed to provide notice to all Government functionaries dealing with the issues contained therein of the content and effectiveness of the instrument. This would stop, for example, a commissioner of customs saying to an importer that although the NBR has issued an order, he had not “officially” received the order and instructions to implement it.

As a matter of policy, all processes for disposing of applications for licenses, permits, authorizations, clearances etc. should be made time-bound, and in the absence of reasons given in writing within a particular period, such an application should be deemed to have been approved in favour of the applicant. The human interface between Government/regulatory agencies and clients should be reduced as much as possible, with more and more regulatory functions being automated.

Serious consideration should be given to the setting up of separate commercial courts with judges specially trained in

Long Term

Over the longer term, the process of legislation should be made more transparent and participatory in terms of public consultation. It should be made more effective by providing for adequate expert input at the conceptual and drafting stage.

A permanent and continuing process of review of laws in a holistic manner should be put in place, in light of government policy and public feedback. Strengthening of the Law Reform Commission and enabling it to perform its mandated tasks would go a long way towards addressing these issues.

I. INTRODUCTION

1. This report is intended to provide input into the proposed Private Sector Development Support Project (PSDSP) in Bangladesh, proposed to be carried out by the World Bank and funded and supported by a group of development partners, known as the Development Partners Support Group (DPSG). The DPSG is made up of FIAS, SEDF, the World Bank, the United Kingdom's Department for International Development (DFID), the European Union (EU), Japan (JICA and JBIC), the Canadian International Development Agency (CIDA), and the Asian Development Bank (ADB). JICA has been involved with the DPSG since the outset and is supporting this particular component of the PSDSP design phase.

2. The scope of the Report, as stated in the terms of reference¹ (TOR) is as below:

- i) An audit and analysis of all major laws and regulations that impinge on commercial relations and private investment in Bangladesh; and
- ii) A review of the legal and regulatory formulation process in Bangladesh. The review will examine the current process of legal and regulatory formulation and make recommendations for improvement.

3. A comprehensive list of the laws of Bangladesh is available in a publication entitled the Encyclopedic Compendium of the Laws of Bangladesh, published by the Bangladesh Legal Aid and Services Trust, in 2002. As required by the TOR, a list was prepared of the laws which may have an impact on private sector commercial activities². Thereafter, the list was narrowed down to the major statutes which have an immediate impact on the private sector, consciously focusing on laws affecting corporate entities engaged in commercial activities in Bangladesh, particularly SMEs, with a view to identifying deterrents to local investment and particularly foreign direct investment³. These statutes have thereafter been classified along the following broad headings: (i) fiscal laws, (ii) regulatory laws, (iii) property laws, (iv) environmental laws, (v) commercial laws, (vi) procedural laws, and (vii) labour and employment laws. Obviously, there are overlaps in each sector, i.e. certain laws may contain procedural as well as substantive legal provisions.

4. A review of the main objects of each such law has been done, and an attempt made to identify the specific provisions which may become, or in fact are, stumbling blocks to private investment. At an intermediate stage, upon discussion with the donors' representatives, it was decided that an in-depth study of even the short-listed statutes would not be possible in the time-frame for the study. It was decided that the attempt would be to highlight major issues, and in some cases issues which may not appear to be major, but have been practically found to be causing difficulties for investors. The intention is to highlight issues and chart a way for more in-depth work on the legal and regulatory framework.

¹ The Terms of Reference is attached hereto as Annexure 1.

² The list is attached hereto as Annexure 2.

³ The short-list of laws is attached hereto as Annexure 3.

5. The statute books have been the primary source material for the studies, together with published and unpublished papers on the regulatory framework of Bangladesh. Offices of the National Board of Revenue, Customs Bond Commissionerate, Duty Drawback Office, Dhaka City Corporation, Bangladesh Standards and Testing Institution and the Securities and Exchange Commission were visited to find out details of procedures, and assess the ease of obtaining the required information. Practitioners at the Registrar of Joint Stock Companies and the Trade Marks Registry were consulted, and senior (former) judicial officers, lawyers and civil servants interviewed, as were other stakeholders. In respect of subordinate legislation in the form of Rules and Regulations, these have only been referred where necessary in the context of discussing the parent statute.

6. Under an SEDF sponsored project⁴, a compilation of all the forms for application for licenses, permits, approvals, certifications have been made, together with step-by-step descriptions of the processes and documentation required to obtain these, and as such these are not duplicated in this Report.

⁴ Entrepreneurs' Guide to Regulatory Processes in Bangladesh, BEI-SEDF SME Advisory Service, February 2004.

II. ANALYSIS OF LAWS

FISCAL LAWS

1. The Income Tax Ordinance 1984 (ITO) and the Value Added Tax Act 1991 (VAT Act) are the two principle revenue laws, in addition to the Customs Act, which are of substantial relevance and importance to the private sector. The following general comments may be made in relation to both these laws.

2. Taxation policy is a significant deterrent to the entry of enterprises into the formal stream. Corporate income tax is at the rate of 30% for publicly traded companies, and 35% for private and non-publicly traded public companies, against a rate of 25% for individuals in the highest tax bracket. There is also a tax of 15% on dividend income from unlisted companies. This is seen to be in the nature of a double-dip into an enterprise's income, although legally it is not double-taxation. There is therefore no visible tax benefit to be obtained from incorporating an enterprise. The introduction of self-assessment of sales and income tax may lead to a reduction in discretion by removing the one-to-one relationship in tax administration. Although the ITO provides for self assessment, there are anomalies in the legal provisions relation to accretion of wealth which discourages self-assessment of taxes.

3. Tax administration is complex and time-consuming with uncertain results and added costs. Too much discretion is left at the hands of the junior personnel in assessing income and accepting or disallowing figures provided in tax returns, leading to non-transparent practices. Similarly, the VAT Act is a complicated piece of legislation, and procedures for obtaining registration there under, maintaining that mandated records, and actually calculating and paying VAT are complicated and time-consuming with substantial added costs.

Income Tax Ordinance 1984

4. The Income Tax Ordinance, 1984 (ITO) provides for the assessment and levy of tax on income. Under Section 2(7) of the ITO an assessee includes every person in respect of whom any proceeding under this Ordinance has been taken for the assessment of his income, any person whose income exceeds the maximum amount which is not chargeable to tax or if he was assessed to tax for any one of the three years immediately preceding that income year, every person who desires to be assessed and submits his return of income and every person who is deemed to be an assessee or an assessee in default under any provisions of this Ordinance. A person includes, under Section 2 (46) of the ITO, an individual, a firm, an association of persons, a local authority, a company and every other artificial juridical person. Under these provisions, even a person who has a negative income (loss) or no income due to cessation of business activities is required to file a return.

5. Under Section 8 of the ITO all income deemed to be accrued or arise in Bangladesh is subject to income tax. Section 44 of the ITO 1984 provides for exemptions and allowances applicable to certain income. Heads of income which are exempted from income tax are laid out in Schedule 6 of the ITO 1984. In order to facilitate new methods of financing through securitization of assets, the Government has exempted from taxation any income of a special purpose vehicle (SPV) registered either in the form of a trust or a non-profit company for the sole purpose of asset and/or mortgage securitization. Further exemption may be provided on interest income for the holder of debt securities issued by a SPV registered either in the form of a trust or a non-profit company for the sole purpose of asset and/or mortgage securitization. Further incentives may be introduced in the form of exemption of capital gain tax from sale/transfer of privately placed securities instruments issued by the SPV.

6. The procedure for filing income tax returns is time consuming, long-drawn out and complicated for assessee; an extra legal fee is often charged even for accepting the return as filed, particularly on the last day for filing returns every year. Under Section 75 of the ITO all assessee are required to file returns by a specified date. Following such filing if the Deputy Commissioner of Taxes (the officer primarily charged with assessing income to tax) finds any errors or omissions he may require the assessee to file a revised return and following that at a later date may require the assessee to produce any accounts and documentation and statements of assets and liabilities in support of the return. The power to require the assessee to produce any documents regarding accounts leads to the DCT requesting various unnecessary documents leading to a prolonged investigation of the returns.

7. Under Section 83 of the ITO the DCT may also require the assessee to appear and produce any evidence in support of the return. This again allows the DCT the discretionary power to request for any information he may deem necessary. In practice the DCT does not record the evidences that are produced before him by the assessee. Moreover, under Section 84 of the ITO where the DCT feels that the assessee has failed to produce all required documents he is empowered to use his best judgment to determine the income tax payable which leads to arbitrary decisions, DCTs often making assessments on surmise and conjecture, leading to prolonged litigation. Finalization of an assessment, if challenged, takes up to an average of 4-5 years if the assessee or the DCT chooses to file a reference before the High Court Division. On the other side of the coin, inefficient and improper record-keeping by assessee also complicates the process of assessment. Both these issues lead to lack of transparency in assessments and the opportunity for rent-seeking behavior and tax avoidance.

8. The DCT is also empowered, under Section 93 of the ITO, to serve a notice for assessment in case of an income escaping assessment. The problem here is that such power under this Section allows the DCT to serve a notice for the assessment year within a period of five years from the end of assessment year for which the assessment is to be made. As a result even after an assessment for a particular year is completed the assessee is not certain that the process is finally concluded.

9. In instances where the assessee satisfies the DCT that a refund is appropriate he shall be entitled to such refund, and in case of delays in refund interest payable on

that amount. However, in practice obtaining refunds is a difficult and time-consuming process requiring numerous approvals.

10. Orders of the DCT are appealable to the Appellate Commissioner whose decisions may be appealed to the Appellate Tribunal. Any assessee aggrieved by the decision of the Appellate Tribunal may refer the matter to the Supreme Court for answering questions of law. It may be noted that the review process in every stage is time consuming and tax cases have been known to take as long as 32 years from start to finish, although the average is 4-5 years. A review of the procedures and strict enforcement of time limits would be beneficial to both assesseees and the revenue.

11. Section 83A of the ITO makes provisions for self assessment by an assessee. It further provides that twenty per cent of such returns may be referred to the DCT for audit and the DCT will only refrain from auditing such referred return if they show at least 15% higher income from the preceding year. Moreover, in the case of private limited companies the DCT will only refrain from auditing the returns filed by such companies if their income is at least 10% higher than the last assessed income and has also increased by at least a further sum of 10% for each preceding assessment year in respect of which the assessment is pending. Even if any private limited companies fulfill these requirements the returns will have to be accompanied by a copy of the accounts of the company audited by a chartered accountant, the tax payable under the return shall be highest of taxes computed in the manner specified in Section 83AA of the ITO and shall be paid on or before the return is filed and such return will not result in a refund.

12. These unrealistic and burdensome requirements mean that for a substantial number of companies the provisions of self assessment is rendered meaningless because it is difficult to fulfill the selection requirements for self assessment. The introduction of a simple and less burdensome system for self-assessment of taxes may be effective in removing these bottlenecks and enhancing revenue collection. At the same time, it would remove the one on one relationship between assessor and assessee, which would also be conducive to transparency. Rigorous random audits with exemplary penalties for offenders may be introduced for greater accountability. Computerized record-keeping could also facilitate monitoring of revenue practices⁵.

13. Section 144 of the ITO provides that the Government may enter into an agreement with the Government of any other country for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income leviable under the ITO and under the corresponding law in force in that country. The provisions of such an agreement shall have effect over any other law for the time being in force, including the ITO, in the matters, among others, of relief from tax payable under the ITO, determination of income accruing or arising, or deemed to be accruing or arising to non-residents from sources within Bangladesh, and determination of the income attributable to operations carried on within or outside Bangladesh. The Government of Bangladesh has entered into such so-called Double Taxation Treaties with more than 20 countries, and treaties are under negotiation with a further more than 20 countries.

⁵ A DFID funded project is ongoing at the NBR, entitled Revenue Administration Reforms Project, for simplification of tax administration.

14. Difficulties arise in the application of Double Taxation Treaties (DTT) and implementing provisions made for these, in that often DCTs fail to apply the provisions of the DTT to the exclusion of the provisions of the ITO, which is what is supposed to be done. For example, these DTTs do not provide for withholding tax in relation to any assessee entitled to the benefit of a DTT. However, DCTs apply the relevant provisions of the ITO in respect of withholding tax to such assessees⁶. Difficulties also arise in attribution of income to the operations carried out in Bangladesh, where the operations of an assessee are carried out both within and without Bangladesh.

Value Added Tax Act 1991

15. Under the provisions of the VAT Act, VAT is payable at a rate of 15% on any imported goods by the importer, on goods produced in Bangladesh by manufacturers, on services provided by the service provider and in other cases by the distributor. The VATable value of a good or service is usually fixed by the National Board of Revenue by notification. Most manufacturing enterprises with an annual turnover of over \$26,000 are expected to pay VAT at 15 percent but collection is not uniform⁷. Small and cottage industries (SCI) are exempted from VAT, which discourages such enterprises from increasing employment and turnover which would put them in an SME category and attract VAT. Alternatively, the exemption and its replacement by turnover tax without documenting specific transactions makes the SCI firms appear less competitive suppliers of inputs to other firms which need VAT certificates for inputs to reduce their own output VAT liabilities.⁸

16. All distributors, service providers, importer, exporters must register with the VAT authority under the VAT Act. The requirement for a person carrying on such business in two or more places to be required to obtain a VAT registration for each place although the same company is carrying out the business, as is the case at present, with a limited exception, is unnecessary and burdensome⁹. The process of registration is complex, and as with other registration processes, there is no easily accessible checklist of documents and information required for such registration. There have been allegations of deliberate refusal to register persons with a view to putting them on the wrong foot legally. The requirements of record-keeping under the VAT Act, as well as the calculations to be made for payment of VAT and obtaining refunds are equally complex and time-consuming. There are at least 34 different forms prescribed under the VAT Act,

⁶ Currently, litigation is ongoing in the High Court Division of the Supreme Court in relation to a French company.

⁷ Smaller registered businesses pay an annual turnover rate of 4 percent. The wide gap between the VAT rate and annual turnover rate promotes several predictable behaviors. Firms tend to claim they are very small, often involving opaque interfacing with tax authorities. Businesses widely allege that VAT officials harassing them for unofficial fees in addition to the VAT payments, thereby making the tax burden grossly excessive. Evasion of VAT is, therefore, practiced often with alleged insider collusion.

⁸ This is adopted from the ADB Report entitled "BANGLADESH: STRATEGIC ISSUES AND POTENTIAL RESPONSE INITIATIVES IN THE SME SECTOR: SMALL AND MEDIUM ENTERPRISE DEVELOPMENT AND EXPORT EXPANSION"

⁹ A few goods and services have been brought within the purview of "central registration" subject to various terms and conditions.

of differing degrees of complexity. There is a tendency by the VAT officials to force services into descriptions which may not be applicable and thus make them VATable. There are also difficulties in classification of something as a good or a service, for example, biscuits purchased from a bakery may be classified as goods, whereas sweetmeats purchased from a sweet shop would be subjected to VAT as a service. Currently, numerous litigations are pending in the High Court Division on grounds of misapplication of the VAT laws, as many provisions are capable of different interpretations, among other weaknesses. Simplification of the law and procedures and training of VAT officials and entrepreneurs alike in their application should be undertaken urgently.

17. There is a provision in the VAT Act for imposition of supplementary duty on goods. Originally, there were three specific grounds on which such supplementary duty could be imposed, i.e. where the goods were socially undesirable, luxury items or non-essential. An amendment was introduced in 1999 including an additional ground, that of reasonableness of such imposition in the public interest. There being no guidelines as to considerations of public interest, this provision has been, and is capable of being, used to impose supplementary duties on goods without apparent justification, and is wide in its scope; as such it may be considered for amendment¹⁰.

18. The VAT calculation process with the process of calculating the 'primary' duty and the supplementary duty often leads to miscalculation and thus appeals against VAT assessment is common. Any order by the VAT commissioner is appealable at the VAT Appellate Tribunal whose decision is again appealable at the Supreme Court. Again, the VAT appeal process is time consuming and thus hinders smooth running of business. As with income tax administration, simplification of VAT administration would be helpful.

19. The following general recommendations may be made:

- i) extending the VAT and SD to the retail level and expanding them to cover most services and also the small producers and traders now subject to turnover tax instead; and
- ii) radically improving the accounting and monitoring mechanisms for crediting VAT paid at previous production stages, and for exempting or rebating VAT on exports¹¹.

Stamp Act 1899

20. The Stamp Act, 1899 provides for the stamping of deeds and documents, for the purposes of generating revenue for the exchequer. It extends to the whole of Bangladesh, and lists in its Schedule I all the instruments executed in Bangladesh, as well as instruments executed out of Bangladesh relating to any property situated, or to

¹⁰ For example, cold rolled coils imported to make corrugated iron sheets, an essential ingredient for low cost housing (roofing material), was subjected to supplementary duty on the public interest ground, and courts refused to go into the question of whether there was any public interest involved, on the basis that the legislature had the right to delegate the determination of public interest to the revenue.

¹¹ The procedures relating to duty drawback under the VAT Act have been addressed in the section on Customs Act, 1969.

any matter or thing done or to be done in Bangladesh and is received in Bangladesh, which are chargeable with duty, together with the amount or rate of duty payable. Instruments not duly stamped are not admissible in evidence, and may not be acted upon, registered, or authenticated by any person having the authority to receive evidence or any public officer, and may be impounded in production to such person.

21. As far as foreign investors and commercial transactions are concerned, two issues arise fairly often, and should be addressed expeditiously. Section 17 of the Act provides that all instruments chargeable with duty and executed by any person in Bangladesh shall be stamped before or at the time of execution. By Section 11(e), instruments of transfer by endorsement of shares in any incorporated company or other body corporate may be stamped with adhesive stamps. The rate of duty is 1.5% *ad valorem* on the value of the consideration. The actual amount of duty payable on the acquisition of shares of substantial value would be quite high. Adhesive stamps are available in the highest denomination of Tk.50.00, which results in a very high number of stamps for substantial transactions, creating severe logistical problems¹². This is particularly troublesome when contracts are closed overseas, and require properly stamped instruments of transfer of shares to be delivered at closing. By a set of Rules issued under the Stamp Duties (Additional Modes of Payment) Ordinance, 1974, the Government provided for the payment of stamp duty of more than 1200 takas in respect of documents registrable under the Registration Act, 1908, through pay orders, rather than writing out the entire document on non-judicial stamp paper. Such a provision could helpfully be made for share transfer stamps.

22. Section 18 of the Act provides that every instrument chargeable with duty and executed only out of Bangladesh, not being a bill of exchange or a promissory note, may be stamped within three months after it has been first received in Bangladesh. Quite often, the person authorized by the Government as the stamping authority for such documents refuses to accept evidence of the date of first receipt of the instrument in Bangladesh, but takes the date of execution of the instrument to be the date of first receipt in Bangladesh. This is palpably absurd, but causes practical difficulties in many cases. Provision should be made for evidence of first receipt of an instrument to be accepted by the stamping authority.

Foreign Exchange Regulation Act 1947 and Guidelines

23. The Foreign Exchange Regulation Act, 1947 (FERA) regulates certain payments and dealings in foreign exchange and securities and import and export of currency and bullion. The Guidelines for Foreign Exchange Transactions (Guidelines) has been published by the Bangladesh Bank for the stated purpose of summarizing the instructions issued under the FERA as well as the prudential instructions issued by Bangladesh Bank 9as of 30 September 1996) to be followed by authorized dealers in foreign currency (AD) in their day-to day foreign exchange transactions. The Guidelines are “to be read in conjunction with other instructions, subsequent amendments and modifications issued from time to time. It may be noted right away that these “other instructions, subsequent amendments and modifications issued from time to time’ are not generally available to members of the public. Bangladesh Bank as the central bank

¹² On a share transfer consideration of US\$1 million at a notional exchange rate of USD1=Tk.65, the number of stamps required would be 19,500.

deals with banks and not individuals, It therefore makes these instructions, amendments and modifications, usually made through circulars, available only to banks. Only recently have these begun to be put on the Bangladesh Bank website, but even there, because of software problems, the circulars in Bangla are often not retrievable.

24. The FERA provides in Section 4(1) that except with the previous general or special permission of the Bangladesh Bank, no person other than an authorized dealer shall in Bangladesh and no person resident in Bangladesh other than an authorized dealer shall outside Bangladesh, but or borrow from, or sell or lend to, or exchange with, any person not being an authorized dealers, any foreign exchange. Among others, it also provides that where any foreign exchange is acquired by any person other than an authorized dealer for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or, as the case may be, the conditions cannot be complied with, the said person shall without delay sell the foreign exchange to an authorised dealer.

25. No person who has a right to receive any foreign exchange or to receive from a person resident outside Bangladesh a payment in Taka shall, except with the general or special permission of the Bangladesh Bank, do or refrain from doing any act with intent to delay the receipt by him of the whole or part of that foreign exchange is delayed, or that the foreign exchange or payment ceases in whole or in part to be receivable by him.

26. The FERA also provides that no person in or resident in Bangladesh may, without the general or special permission of the Bangladesh Bank, inter alia make any payment to or for the credit of any person resident outside Bangladesh, draw, issue or negotiate any bill of exchange or promissory note, or acknowledge any debt, so that a right to receive a payment is created or transferred in favour of any person resident outside Bangladesh. These provisions are of interest to importers of goods into Bangladesh. General or special permission, and detailed provisions in relation to letters of credit and other such forms of payments are given in the Guidelines. In general, these provisions have been applied without any legal difficulties arising,, and the procedures are well-settled and in line with international documentary credit practices. Administrative difficulties may arise from the failure of importers to provide the relevant documentation, or occasionally from the refusal of Bangladesh Bank to allow special permission in light of foreign exchange shortages in the exchequer.

27. The FERA provides that no person shall, except with the general or special permission of the Bangladesh Bank, take or send any security to any place outside Bangladesh, transfer any security or create or transfer any interest in security to or in favour of a person resident outside Bangladesh. In this context, security is defined as, among others, shares and debentures. Chapter 14 of the Guidelines elaborates on these provisions, and records the general permission of the Bangladesh Bank for the issue and transfer of shares in favour of non-residents against foreign investment in Bangladesh, brought in through the banking channels in freely convertible foreign currency, subject to further permission of the BOI/Securities and Exchange Commission¹³. Transfer of Bangladeshi shares and securities from one non-resident holder to another non-resident also does not require prior Bangladesh Bank permission. The two issues which arise here are that, (a) nominee shareholding by foreign

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The reference is to the Controller of Capital Issues, which has been replaced by the SEC.

shareholders is precluded¹⁴ because nominee shareholders should not be required to send the purchase price through the banking channels in their own names, as the payment should be made by their principals, and (b) although ultimately a pledge of shares by a non-resident in favour of a non-resident, once exercised would require the pledged shares to be transferred to a non-resident, such a pledge cannot be made without Bangladesh Bank's permission, due to the absence of specific language to address the matter. In recent large acquisition transactions, particularly in the telecoms sector, these issues have come to the fore.

28. In relation to the physical movement of securities to and from Bangladesh, at a time when 100% foreign ownership of companies is legally permitted, it is anomalous and serves no evident purpose in requiring a foreign shareholder to obtain permission from Bangladesh Bank to take share certificates outside Bangladesh, or to leave them with an authorised depository¹⁵ in Bangladesh.

29. Another major issue which has been arising recently has been with reference to Section 18A of the FERA, and are of particular relevance to certain types of foreign investors. Section 18A requires that no person (i.e. individual, firm, business organisation or concern whether incorporated or not) shall act as or accept an appointment to act as an agent in trading or commercial transactions or as a technical or management adviser or any other employee in Bangladesh, of a person resident in Bangladesh but not a citizen of Bangladesh, or of a company (other than a bank company) not incorporated under any law in force in Bangladesh.

30. The word agent not being defined in the FERA, the definition in the Contract Act, 1872¹⁶, or the ordinary dictionary sense of the word is used. In these circumstances, even wholly owned subsidiaries of foreign companies incorporated in Bangladesh are having to apply for permission as an agent. Freight forwarders in Bangladesh are having to apply for this permission as they are seen as acting as agents of their resident or non-foreign clients even when working as independent contractors. This is a strained interpretation of the agency relationship. Also, for various internal and unspecified reasons, this Section 18A permission is in practice being indefinitely delayed by Bangladesh Bank¹⁷.

31. Freight forwarding companies, and contract logistics companies¹⁸ have recently also fallen foul of Section 20(3) of the FERA read with Chapter 22, Paragraph 8(ii) of the Guidelines. Section 20(3) authorizes the Bangladesh Bank to give directions in regard to making payments and doing other acts by bankers, authorized dealers, travel agents, carriers, stock brokers, etc. In Chapter 22, Paragraph 8(ii) of the Guidelines, the Bangladesh Bank has directed all carriers and their agents, in respect of export of goods from Bangladesh (excepting exports from Type A industrial units located in the EPZs) to foreign countries by air, the Airway bills and any other documents of title to cargo should be drawn to the order of a bank in the country of import nominated by the AD designated

¹⁴ This is despite the fact that Section 13(2) of the FERA specifically recognizes that the holder of a security may be a nominee.

¹⁵ Section 14 of the FERA.

¹⁶ An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is represented, is called the "principal".

¹⁷ Apparently a policy decision has been made to discourage 100% foreign owned freight-forwarding companies.

¹⁸ See discussion on customs bonded warehouse licensing.

for this purpose by the respective exporters and delivered to the authorized representative of the AD.

32. In modern-day freight forwarding, particularly where multimodal transport, and transshipment at airport hubs is common, freight forwarders often consolidate shipments and issue a Master Airway Bill (MAWB) to the carrier in favour of their counterpart in the importing country, and a House Airway Bill (HAWB) in respect of each separate consignment in favour of the bank in the country of import as required by the Guidelines. The former is a non-negotiable internal document, whereas the latter is the negotiable document of title evidencing the consignee's right to the goods shipped. This procedure has not been accepted by the Bangladesh Bank, and freight forwarders using this procedure have been taken to task.

33. These provisions and the practical experiences are being referred here to highlight the anomalous situations created by a failure to appreciate that financial and commercial transactions have moved far ahead since the time of the enactment of the FERA. The FERA having been enacted almost 6 decades ago, it is clearly not always in synch with modern financial and commercial needs. Gaps are being filled by using the "general or special" permission provisions in the statute. One other problem is that in the case of queries arising, Bangladesh Bank does not give authoritative explanations, but decides matters on a case to case basis.

B. REGULATORY LAWS

Companies Act 1994

1. The Companies Act 1994 (CA, Act) governs companies from birth to death, i.e. from incorporation up to and including winding up and dissolution. A company may be incorporated by complying with the requirements of the Act in respect of registration¹⁹. The Act provides for continuing compliance requirements regarding the holding of board and shareholder meetings, filing of annual and other periodic and occasional returns regarding directors, special and extraordinary resolutions, transfer of shares, maintenance of books, accounts and registers, the issue of capital, and many other matters. It also establishes the office of the Registrar of Joint Stock Companies and Firms ("RJSC" or "Registrar"), and provides for the powers and responsibilities of the Registrar.

2. The Companies Act, 1994 does not prescribe any minimum amount of authorized, issued or paid up capital for a company. A company limited by shares requires a minimum of two shareholders. Therefore, the minimum authorized capital must be an amount equal to at least the face value of two shares in the company. Minimum capital requirements are prescribed in other laws for specific types of companies, for example banks must have a minimum paid up capital of Tk.1000 million by the end of 2005 (Bank Companies Act 1991). In the case of foreign investors, the capital proposed to be invested by them in the form of equity must come in through banking channels in convertible foreign currency. In such a case, dividends, and proceeds of the sale of shares, are easily repatriable. One issue arises from this requirement, however, in that in the case of a wholly owned local subsidiary of a foreign company, the use of nominee shareholders becomes difficult. A nominee shareholder has to purchase the shares held by him against foreign exchange sent through banking channels in his own name, rather than in the name of the parent company. This is a matter for Bangladesh Bank to resolve with the RJSC, through appropriate guidelines.

3. While the requirements for registration of a company are not very onerous, no comprehensive guideline is available for persons wishing to form a company, setting out all the requisite information, forms, formats, and the costs involved, although the fee schedule is well set and available from the RJSC. The RJSC has been known to refuse to give clearance for the name of a new company on the ground of its similarity with another name already registered, where the similarity is not very evident, e.g. in the case ACI Limited and ACNielsen Bangladesh Limited. However, there are other ways of obtaining the clearance of names. The RJSC, purportedly under the provision of Section 356(b) of the CA 20, requires the filing of a joint venture agreement between the promoters of a proposed company, although in every case a memorandum and articles of association are filed, these being other instrument constituting or regulating the company, and therefore the requirement of the provision is satisfied. The utility of this

¹⁹ This "registration" which incorporates a company is not to be confused with other "registrations" needed to access facilities from the various agencies and/or comply with regulatory requirements, such as VAT registration. Streamlining of registration processes is discussed in relation to the latter.

²⁰ The documents referred to in this Section are a deed of settlement, contract of co-partnery, or other instrument constituting or regulating the company.

provision is unclear; it is particularly burdensome when a joint venture agreement is executed overseas, given the complicated requirements for authentication and stamping of such a document in Bangladesh. Further, there is no requirement of confidentiality of such an agreement in the hands of the RJSC. In practice, a one page 'pretend' agreement is executed and filed, to get around this requirement.

4. The RJSC often attempts to make corrections to a memorandum and articles of association filed for the incorporation of a proposed company, to the extent of deleting or adding objects in the memorandum, and imposing various voting or directorship requirements in the articles of association. Although the RJSC should inform persons concerned of its requirements for filing of documents or production of information in writing, it seldom does so.

5. While there are issues with name clearance, among other initial formalities, last year it was possible to have a company registered within four days, provided the appropriate premium was paid, and/or the appropriate agent appointed to facilitate the process; however, for reasons unknown, this year the registration process has taken an average of 6-8 weeks at a minimum.

6. Entrepreneurs have difficulty in understanding and complying with the various requirements for holding meetings, maintaining records and registers, and filing returns prescribed by the Act. There is no service at the RJSC or anywhere else which can provide comprehensive, low cost and easily accessible assistance to companies in this regard, partly because companies are reluctant to pay for such services. Unlike in India, where more than thirty sets of rules and regulations have been issued to supplement, explain and facilitate the application of the bare provisions of the Companies Act there, no such rules have been promulgated here. Neither does the RJSC provide the forms, on the argument that the requisite forms are provided as annexes to the CA, and that copies are available in certain shops or from certain persons. As a matter of fact, the copies of the Act are difficult to find. The RJSC should be required to provide the forms, electronically and on paper, together with guidelines on how to complete them. The RJSC should also be required to accept the filing of forms on the internet, as and when electronic payment becomes practicable.

7. The CA provides for mortgages and charges on a company's property to be registered in a register of mortgages and charges maintained by the company and also requires these to be filed with the RJSC. There is no provision in the law for recording pledges of a company's shares made by a shareholder, which is a very common form of security given for financing in Bangladesh. There is therefore, no way of ascertaining whether shares have been pledged or not, and provision should be made for registering such pledges with the RJSC and in the books of the company. It has been noted in practice that although the law provides for the borrower to file a satisfaction of mortgage or charge with the RJSC and the RJSC to issue a notice to the lender to object within a stated time, the RJSC insists that the borrower should have the form of satisfaction of mortgage or charge be signed by the lender. This is not provided for by the law, and causes difficulty for the borrower as once the lender has been paid, it has little incentive to process the borrower's request for signature expeditiously, and often in the case of banks, the borrower has to wait for the next meeting of the board of the bank, whenever that may be. This extra-legal activity of the RJSC is capable of causing serious harassment of borrowers, and difficulties in obtaining finance by giving security over those mortgaged or charged properties; the practice of RJSC needs to be proscribed through strict application of the law,, and an explanatory regulation.

8. The CA prescribes penalties for delays and failures in complying with numerous requirements. The penalties are often not substantial enough to act as a deterrent, and are seldom imposed by either the RJSC or the Government, as the case may be. These penalties should be rationalized and uniformly applied.

9. For various matters, including condonation of delay in holding annual general meetings, applications to the High Court Division of the Supreme Court is required, with extensive procedures of advertisement, objections, and fines. The processes are time-consuming, expensive and of dubious value. In the matter of delay in holding meetings or filing certain returns, or amendment/correction of errors in returns, applications are seldom contested and/or turned down by the Court. The RJSC has certain powers of condonation already, which may be enhanced, and the powers in this regard currently given to the Court may be given to the RJSC, but with the fines being stepped up for successive slabs of time that the company is in default. The matter may be referred to the Court for adjudication if a substantive dispute is raised.

10. It must be stated, however, that the above recommendations in relation to enhancement of the RJSC's powers should only be effectuated after a comprehensive upgrading of the RJSC's capacity, which is noted by all concerned as being seriously deficient at present. RJSC as an institution is in need of extensive reform. It consists of just over 50 staff members, including the Registrar, deputy and assistant registrars, and staff who vet and compare documents for filing and providing certified copies. At present, about 250 to 300 companies apply for registration every month. All filing and record-keeping is done by hand. There is a rudimentary computer system, which is being used for non-essential purposes like making "sector-wise" indexes of companies, where all registered companies have been categorized in about 30 arbitrary categories. However, no categorization exists on the basis of public and private companies, or companies limited by shares or guarantees. The company files are maintained in a record room where files are taken out of and returned to shelves manually, which often results in files getting lost. There is not much security, and files may conceivably be tampered with without much difficulty. RJSC staff designated for providing search reports and certified copies are given responsibility by the first letter of company names. Therefore, if the person in charge of, for example, companies with names beginning with letters A-D is absent, search reports or certified copies for those companies cannot be obtained. Another example of inessential work being done by the already short-staffed RJSC was seen where one person was designated to go over the company accounts which were filed, for some unspecified purpose. None of the staff members of RJSC are trained in company law. Allegations of obstructionism, incompetence and corruption abound. It was noted with surprise that the RJSC does not have any facility to provide the forms of returns required to be filed, on the pretext that the law does not require them to do so, that the forms can be found in the Companies Act itself (which is often out of print), and that "their boys" photocopy and sell the forms and make a living out of it.

11. There is also confusion and lack of clarity as to what the role of the RJSC is in administering the relevant provisions of the CA. The High Court Division in a recent decision has accepted that the role of the RJSC in relation to the filing of returns is that of a filing house²¹. The role of the "RJSC" as a filing authority and a register for public notice should be clarified and the powers currently exercised by the RJSC (often not sanctioned by the Act) to "accept" documents for filing should be restricted to the bare

²¹ The City Bank Ltd. Vs. The Registrar, Joint Stock Companies and others 21 BLD (HCD) 2001 @ 496.

minimum. Recently, the RJSC has started to require that any person wishing to search the records of a company should provide a power of attorney granted by that company to the person wishing to make the search. This is a patently illegal and absurd requirement, and goes wholly against the purpose of the RJSC as an office of public record and notice. The RJSC should be required to file documents as they are presented, as long as the prescribed particulars are there, without being given the authority to go behind the documents, since the filings are there to put the public on notice and inquiry of certain facts and events. It should also be required to follow the provisions of the CA in relation to giving certified copies of documents filed with it to anyone making payment of the required fees²². The RJSC certainly does not have the capacity currently to analyze all the information submitted in any meaningful sense, but uses its powers in a manner such as to encourage rent-seeking behavior.

12. RJSC at present acts as a registrar for limited companies (public & private), trade organisations, societies and partnership firms. It may be more appropriate for the RJSC to act as a registrar for limited companies and partnership firms thereby restricting its activities to a single type of organization.

13. The RJSC's operations should be standardized, and methods of communication with companies through public media be sanctioned by amending the law. At present, the RJSC can only contact companies through sending notices to their registered offices, which information is often out of date in the RJSC's files.

14. The CA should also be amended or the necessary rules issued to permit the RJSC to entertain applications for registration of companies, and filing of returns through post, since the RJSC does not have a countrywide presence, only having offices in the capital Dhaka, Chittagong and one or two other cities.

15. RJSC should be required by law to have a comprehensive user-friendly manual of its activities, a "consumer"–information/helpdesk, a checklist of requirements, fees and specific timetables for issuance of all certificates, certified copies of documents and other records and receipts it is authorized to issue. Currently, the RJSC maintains records manually, with frequent misplacements, deliberate or otherwise. There is a substantial delay in carrying out due diligence company searches and obtaining certified copies of the records of a company, unless a premium is paid over and above the specified fees. Capacity enhancement at the RJSC needs to be targeted as much as, if not more, than amendment of the CA itself.

Securities and Exchange Commission Act 1993 **Securities and Exchange Ordinance 1969**

16. The Securities and Exchange Commission (SEC) formed under the Securities and Exchange Commission Act 1993 (SECA) regulates the issuance of securities in Bangladesh under the provisions of the SECA and the Securities and Exchange Ordinance 1969 (SEO). ADB's Capital Market Development Program is addressing the development of the capital market and issues relating to these laws, and as such these are not addressed in detail here.

²² Section 347(5) of the CA provides that any person may inspect the documents kept by the Registrar on payment of such fees as may be specified by the Government, and any person may require a certificate of the incorporation, or certificate of commencement of business, or any company, or a copy or extract of any other document or any part of other document, to be certified by the Registrar on payment for the certificate, certified copy, or extract, of such fees as the Government may specify.

17. In the early years after the end of the British Raj, the public issue of securities was controlled by the Controller of Capital Issues (hereinafter referred to as the “CCI”) under the Capital Issues (Continuance of Control Act) , 1947. The legal regime was expanded in 1969 through the promulgation of the Securities and Exchange Ordinance, 1969 (hereinafter referred to as the “SEO, 1969”). Finally, in 1993 the CCI was replaced by the Securities and Exchange Commission (hereinafter referred to as the “SEC”) upon promulgation of the Securities and Exchange Commission Act, 1993 (hereinafter referred to as the “SECA, 1993”).

Securities and Exchange Commission Act 1993

18. The SECA 1993 provides that the Commission is responsible for assuring the proper issuance of securities, protection of the rights of the investors and the development and regulation of capital and securities market. In pursuance of these goals, the SEC is empowered to take any or all of the following measures, among others:

- i) regulation of stock exchanges and the securities market;
- ii) regulation of stock-brokers, bankers to an issue, issue managers and trustees, underwriters, registrars, portfolio managers, investment advisers and other intermediaries related to the securities market;
- iii) registration, regulation and management of mutual funds and similar joint investment arrangements;
- iv) prevention of fraudulent and corrupt trading in securities;
- v) provision of training in investment and the securities market;
- vi) prevention of insider trading;
- vii) acquiring shares or stocks of a company or taking control, and “takeover and regulation of companies”²³;
- viii) Inspection, investigation, audit, obtaining information from issuers of securities, stock exchanges and other similar self-regulatory organizations; et cetera.

19. No stock broker, sub-broker, share-transfer agent, banker to an issue, portfolio manager, investment advisor, underwriter or any other intermediary who may be connected with the securities market is allowed to sell or carry out business in securities except in accordance with the regulations or conditions attached to a registration certificate obtained from the SEC. The SEC is empowered to suspend or cancel any registration certificate in accordance with regulations issued under the SECA 1993, subject to providing the persons concerned a reasonable opportunity for hearing. In recent years this provision has been used quite often, and some would also say it has been abused. Numerous writ petitions are pending in the High Court Division challenging orders of suspension and cancellation issued by the SEC purportedly under this provision. In most cases the ground of contention is that the SEC does not provide any adequate and reasonable opportunity for a hearing, and that SEC’s orders are non-speaking orders, inasmuch as they merely say that the explanations provided by the persons concerned are not acceptable, without stating why they are not acceptable.

²³ This may be the result of a typographical error in the Bangla text of the Act, and perhaps the correct reading would be the “regulation of takeovers of companies”.

20. Under the SECA 1993, the Government reserves the power to give directions in writing to the Commission in furtherance of the Act, which it must abide by.

21. Any person who violates the provisions this Act will be liable to not more than five years imprisonment or a fine of not less than Tk.100,000.00.

22. The SECA 1993 provides for an appeal to the SEC by any person dissatisfied and aggrieved by any order of any member or official of the SEC, in accordance with the regulations issued in this regard. It is interesting to note that the SEC has issued an "Appeal Regulation" in 1995, which provides for certain time limits and procedures for filing such appeals. At the same time, there are other appeal provisions, for example, in the Securities and Exchange Commission (Stock Dealer, Stock Broker and Authorised Representative) Regulations, 2000 provide for different time limits and procedures, and these are conflicting provisions which have not been rationalized or reconciled.

23. Section 24 gives the power to the Government to frame Rules for the purposes of the SECA 1993. Section 25 provides the power for the SEC to promulgate regulations for the purposes of the SECA 1993, with the prior permission of the Government. Such regulations cannot be inconsistent with the provisions of the SECA 1993 or of any Rules framed thereunder.

SEC, the Institution

24. The SEC came into being in 1993 under the provisions of the SECA 1993. Initially, it had provision for a Chairman, two full time members, and two part time members. Later, the law was amended to provide for four full time members. Right from the beginning, the SEC suffered from a lack of an adequate number of staff properly trained in capital market affairs. That lack still continues. The SEC does not have a full time Corporate Accountant in place. The Chairman and members have not been from a capital market background.

25. The Corporate Accounts department consists of once cost accountant, two persons who have intermediate qualifications in chartered accountancy and one person who has a degree in accountancy. This department does not have the capacity to review the half-yearly accounts of the listed companies. The SEC, like other regulators dealing with corporate accounts, has to depend to a large extent on the performance of the auditors of these companies. Likewise, the Commission does not have a full time corporate lawyer on board. The surveillance and investigations units are also not adequately staffed or trained. Therefore, the quality of the monitoring activities of the SEC remains open to question.

Securities and Exchange Ordinance 1969

26. Securities and Exchange Ordinance 1969 (hereinafter referred to as the "SEO 1969" or the "Ordinance") provides the basic set of laws governing the capital market. SEO 1969 gives the SEC control over the issue of capital by companies in Bangladesh. No company incorporated in Bangladesh shall, except with the consent of the SEC make an issue of capital outside Bangladesh. Further no company, whether incorporated in Bangladesh or not, shall, except with the consent of the SEC make an issue of capital In

Bangladesh, make any public offer of securities for sale, or renew or postpone the maturity or repayment of any security maturing for payment in Bangladesh. SEC has, however, granted all private companies whose total capital at any given time after making an issue of capital does not exceed Taka One Crore, exemption from Section 2(A) pertaining to the issue of capital.

27. The SEO 1969 has been amended several times recently to give the SEC more and more apparently unfettered rights to issue directions to capital market stakeholders. Two of the important provisions in this respect are Sections 2CC and 20 A. By using these provisions, the SEC is creating inroads into the company law regime contained in the Companies Act, 1994, and that too by orders under these sections. An anomalous and undesirable situation is being created whereby a regulatory agency is in effect amending the provisions of an Act of Parliament, without any further reference to the legislature, and often in knee-jerk reactions to emergent situations in the capital markets. Directions issued by the SEC recently have appeared to be targeted to specific companies, or in instant reaction to extreme situations, without bearing in mind the overall impact of the provisions. For example, where a company decided to declare a dividend which was at a rate of 50% of the previous year's dividend, the SEC in an extra-ordinary move came out with a circular stating that any company which would declare a dividend of less than 60% of its previous year's dividend would be placed in the Z category (i.e. non-performing company category).

28. It is not the SEC's job, strictly speaking, to interfere directly or indirectly in a company's business decisions, which categorization based on dividend performance certainly is. That is the business, if anybody's at all, of the shareholders and the stock exchanges. The reason often cited is the undeveloped and uninformed nature of the investors. However, it is doubtful that such measures will lead to a more informed and developed set of investors who will be responsible for the consequences of their own investment decisions. Ensuring transparency is certainly very important, and one of the very basic necessary pre-conditions of a well-organised capital market. However, interference by the regulators on arbitrary bases has been deterring good companies from entering into the capital market which can only be detrimental to its long term health.

29. The SEC has been given, by an amendment to the SEO in 1997, enormous powers to impose at any time any terms and conditions upon any issuer of securities in Bangladesh, which terms and conditions would supersede any provision of law, contract, memorandum and articles of association applicable to the issuer. This power provided by Section 2CC of the SEO is too wide in scope and is used by the Securities and Exchange Commission to impose post facto, unreasonable obligations.

30. Section 2CC deserves to be quoted in full:

i) "Notwithstanding anything contained in the Companies Act, 1994 (Act 18 of 1994), or in any other law for the time being in force, or in any contract or any Memorandum and Articles of Association of any company, any consent or recognition accorded under section 2A, section 2B or section 2C, whether before or after the commencement of this section shall be subject to such conditions, if any, whether for immediate or future fulfillment as the commission may, from time to time, think fit to impose."

31. The width of this provision is almost unprecedented, and matched only by the width of Section 20A, introduced in November 2000, which is as follows:

ii) “Power of Commission to issue directions in certain cases.- where the Commission is satisfied that in the interest of investors or securities market or for the development of the securities market it is necessary so to do, it may, by order in writing, issue such directions as it deems fit to any Stock Exchange, stock broker, stock dealer, issuer or investor or any other person associated with the capital market.”

32. If one looks back at the institutional strength, or rather the lack thereof, of the SEC, the dangers of giving such wide powers to it become immediately apparent. Was the legislature fully aware of the impact of these provisions, when amending the existing laws to introduce these? There are no inbuilt safeguards against abusive use of these powers, and so court cases proliferate. In many cases, however, the persons against whom these powers are arbitrarily used capitulate rather than challenge the action, given the powers of SEC to “make their lives miserable”. The SEC, rather than assisting stakeholders in improving their record-keeping and other compliance measures (which is what Bangladesh Bank, commendably, does with banks), uses minor lapses to impose punitive measures. This has not been conducive to creating a healthy interrelation and any measure of predictability between the regulator and the regulated.

33. Having said all that, it is undeniable that the SEC’s interventions have forced listed companies to be much more regular in holding annual general meetings, declaring dividends, and disseminating price sensitive information. It is also undeniable that the week self-governance of the stock exchanges in relation to their members, brokers and listed companies has often forced the hands of the SEC, or provided the handle for acting in a high-handed manner.

34. Under the SEO, the SEC has a series of powers to call for information and carry out investigations into the activities of market intermediaries and listed companies. Some of the more pertinent are referred to below.

35. Any officer authorised by the Commission for the purpose of inquiring into the correctness of any statement made in an application for consent or recognition to an issue of capital may order the company to submit to him such accounts, books or other documents or to furnish to him such information, as he may reasonably think necessary.

36. The Commission also regulates the stock exchanges in Bangladesh, which must be registered under the Ordinance. The Commission has the power to inspect the books of accounts and other documents of every stock exchange. Moreover, every stock exchange must submit to the Commission an annual report and periodical returns relating the Stock Exchanges’ affairs. Where the Commission is of the opinion that a Stock Exchange or any member, director or officer thereof has neglected or failed to comply with the provisions of this Ordinance or any rule or regulation made thereunder, the Commission may suspend or cancel the registration of the Stock Exchange and/or remove the person in authority concerned.

37. An issuer of listed security has the obligation to furnish to the Stock Exchange, to the security holders and to the Commission an annual report of its affairs and such statements and other reports as may be prescribed.

38. The Commission may, on its own motion or in the case of the issuer of a listed security, on representation of holders of not less than five percent of equity securities at any time by order in writing cause an enquiry to be made into the affairs of any Stock Exchange or the business or any transaction in securities by any member, director or officer of the Stock Exchange or of any issuer, or of a director or officer thereof.

39. If any person fails to provide any document or information requested by the Commission it is empowered to fine the concerned person a sum not less than Taka 100,000.00. Any person who is found to be carrying out fraudulent acts as specified in Section 17 of the Ordinance shall be punishable with imprisonment for a term, which may extend to five years or with fine, which may extend to Taka 500,000.00 or with both. There have been a spate of cases recently where the SEC has started with issuing notices to stock-brokers on the basis of complaints by investors regarding non-payment of proceeds of sale of shares or non-delivery of share certificates, to show cause why they should not dispose of the complaints, and has ended up fining, suspending or even canceling the registration of the stock-broker for lapses in record keeping, without actually ever disposing of the complaint of the investor.

40. The debt market in Bangladesh is in its infancy. Debt instruments are usually issued against the fixed assets of a company, which are to be kept under lien with a trust although the Trusts Act 1882 does not have clear provisions for financial intermediary trusts. The principal types of domestic securities available in Bangladesh are Government debt securities, listed debentures and treasury bills offered by Bangladesh Bank to financial institutions only.

41. The process by which debt securities are issued in Bangladesh depends on whether the instrument is listed or not. If the securities are listed there are specific guidelines to the issuance of corporate bonds/ debentures as prescribed by SEC. If the Securities are not listed then the issuance process is at the discretion process of the issuer and there are no restrictions, unless the issuer is a bank in which case prior approval of the Bangladesh Bank is likely to be necessary. If the securities are of public limited companies offered to the general public, listing with a domestic stock exchange is mandatory. The issuer of publicly listed securities shall have to follow the 'Listing Rules and Procedures' of the local stock exchanges concerned that is Dhaka Stock Exchange and Chittagong Stock Exchange.

42. Unlisted debt securities/bonds may be issued by entering into contractual arrangement directly with potential investors. Such debt securities/bonds are not required to be regulated by the SEC and are only subject to the regulatory authority of the issuer of the bond and its memorandum and articles of association.

43. The existing laws do not recognize the numerous kinds/forms of securities available in the financial market and therefore there is no defined rules and regulation specific to the numerous security instruments. Accordingly, the issuance of security instruments occur by convoluted interpretations to bring such instruments within the ambit of the existing laws, rules and regulations. It is recommended that detailed specific statutory provisions be formulated to facilitate and provide for the issuing of debt instruments.

Bank Company Act 1991

44. The Bank Company Act 1991 (BCA) governs the formation of banks and their regulation by the Bangladesh Bank. It defines banking business. In terms of dealing with private investors, this law itself does not have a direct impact, as much as the rules, regulations and circulars issued by the Bangladesh Bank in respect of lending limits, security for loans and treatment of overdue loans, among others, do²⁴.

45. In addition to the primary function of issuing and regulating currency and generally to operate and supervise the currency, monetary and credit system of the country, the regulation of the commercial banking system has become central to the role of the Bangladesh Bank. This was necessitated also by the denationalization of banks in late 1970s and the growth in the number of private commercial banks in the country over the last decade and a half. Severe mismanagement, mostly induced by extra-commercial considerations, saw the banking sector facing a major liquidity crisis and crisis of confidence in the late 1980s. The Bank Companies Act 1991 seeks to address the problems with a proper regulatory framework. The salient features of the Bank Company Act, 1991 are given below.

46. The provisions of the Act are in addition to and, unless expressly provided, not in derogation of the Companies Act, 1913 (now replaced by the Companies Act of 1994) and any other law for the time being in force. So, the relevant provisions of the Bangladesh Bank Order, among others, shall continue to apply, unless expressly derogated from. No company shall, unless provided in the Act, carry on banking business in Bangladesh unless it holds a license issued in that behalf by the Bangladesh Bank.

47. Non-banking financial institutions obviously are outside the purview of the new Act and the banks continue to be prohibited, inter alia, from undertaking what is known as the leasing business, which has been by now fairly developed into an alternative method of financing investment. In India, banks themselves are permitted to carry on leasing business.

48. The Act contains strict requirements as to the minimum paid-up capital and reserves of banks. No bank company may now commence or carry on business in Bangladesh without meeting these requirements, unless specially given more time to comply by the Bangladesh Bank.

49. No bank company, not being a nationalised bank or a specialised bank, incorporated in Bangladesh shall commence business in Bangladesh unless it satisfies the following conditions, namely:

- i) that the subscribed capital of the company is not less than one-half of the authorised capital;
- ii) that the paid-up capital of the company is not less than one-half of the subscribed capital;
- iii) that the capital of the company consists of ordinary shares only;
- iv) the voting rights of any one share-holder are strictly proportionate to the contribution made by him to the paid-up capital of the company of the

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In this connection, please see the section on the Foreign Exchange Regulation Act, 1947

company provided that any one shareholder or his family, singly or jointly, may not hold more than 10% of a bank's shares, and in any event shall not exercise voting rights in excess of five percent of the total voting rights of all the share-holders²⁵.

50. A director of a bank company, not being its chief executive, by whatever name called, shall not hold office for more than six years in two consecutive terms²⁶. Bangladesh Bank reserves the rights to nominate up to two directors on the Board from among depositors.

51. One of the most important regulatory provisions in the Act is that if any director of a bank company fails to (a) pay any advance or loan or any installment thereof or interest thereon, (b) pay any amount due on any guarantee or (c) do or perform any act agreed to or undertaken in writing to be done or performed by him, and such failure continues for a period of two months after notice in writing has been served on him by the bank company through the Bangladesh Bank calling upon him to make the payment or to do or perform the act, his post will fall vacant at the expiry of the said period. Under this power a large number of defaulting directors had been made to vacate their offices and almost all these orders have been upheld by the Appellate Division of the Supreme Court.

52. There is a prohibition on a person becoming a director of more than one bank company or of more than one non-banking financial institution or of more than one insurance company at the same time. This prohibition does not apply to directors representing the government.

53. No bank company shall:

1. make any loans or advances against the security of its own shares; or
2. grant unsecured loans or advances to, or make loans and advances on the guarantee of,
 - i) any of its directors;
 - ii) any of the family members of any of its directors;
 - iii) any firm or private company in which the bank company or any of the persons referred to above is interested as director, proprietor or partner; or
 - iv) any public limited company which is controlled by any director of the bank company or by any member of the family of any of its directors or in which any of the persons mentioned above has such share by which he is empowered to vote for 20% or more of the shareholding of the company.

54. No bank company shall make loans or advances to any of its directors or to individuals, firms or companies in which it or any of its directors is interested as partner, director or guarantor, as the case may be, without the approval of the majority of the directors of that bank company, excluding the director concerned.

²⁵ This provision creates interesting problems of interpretation, in cases where several shareholders own more than 5% of the shares individually, under Government dispensation.

²⁶ This provision also creates problems of interpretation, inasmuch as two consecutive terms are usually not of exactly six years' duration, unless the annual general meetings of the company are held on precisely the same day each year. These interpretation issues exemplify the need for careful drafting to avoid ambiguity, confusion and litigation.

55. The Bangladesh Bank has the power to determine policy as regards advances to be made by banks. The Bangladesh Bank has been given extensive power to issue directions to bank companies either generally or to any one or a group of bank companies in the following matters:

- i) credit ceilings to be maintained;
- ii) the minimum ratio of small loans and/or other loans to the total advances to be maintained;
- iii) the purpose for which advances may or may not be made;
- iv) the limit up to which advances may be given to any bank company or group of bank companies to a person or a group of persons;
- v) secured advances and ceiling of interest on advances;
- vi) the rates of interest to be charged on advances.
- vii) Every bank company in Bangladesh shall maintain in Bangladesh in cash, gold or unencumbered approved securities the price of which shall not at the close of business on any day be less than such percent of the total of its time and demand liabilities in Bangladesh as the Bangladesh Bank may decide from time to time.

56. Bangladesh Bank may, by recording reasons in writing, by order remove the chairman or a director or the chief executive of a bank company if it is necessary in the public interest or to prevent the affairs of the company being conducted in a manner detrimental to the interest of the depositors, or to secure the proper management of any bank company. The Bangladesh Bank may even supersede the Board of Directors of a bank company and the functions of the Board shall be performed by such person as the Bangladesh Bank may from time to time appoint.

57. Among the extensive regulatory and supervisory powers of the Bangladesh Bank are the powers to acquire the undertaking of a bank company. The government has the power, after consultation with the Bangladesh Bank, to make a scheme for the future of a bank company. The Bangladesh Bank may itself apply to the government for an order of moratorium in respect of a bank company. The total period of moratorium ordered by the government may not exceed six months. If, during the period of moratorium it appears to the Bangladesh Bank that it is necessary in the public interest, it may prepare a scheme for reconstitution or amalgamation of the bank with another bank. A very successful exercise of this power took place in the case of the now defunct BCCI Bank. Eastern Bank Limited is the result of the reconstitution of the defunct bank, and to a large extent the depositors of the defunct bank are assured of the return of at least fifty percent of their lost deposits.

58. No bank company which holds a license granted under this Act may be voluntarily wound up unless the Bangladesh Bank certifies in writing that the company is able to pay in full all its debts to its creditors as they accrue. The Bangladesh Bank may also apply to the government for suspension of business by a bank company and to prepare a scheme of reconstitution or amalgamation.

59. Severe penalties, of imprisonment or of fines, are provided for contravention of any provision of this Act.

60. In reviewing the law and discussions with stakeholders, no immediate issues arose in respect of its specific provisions, which are not seen to have any direct impact

inhibiting the inflow of FDI or the growth of SMEs. However, the following were highlighted as potential areas for support in providing better financing opportunities:

- i) escrow accounts,
- ii) risk treatment of segregated assets in relation to asset-backed instruments.

61. While the BCA provides specifically for bank companies to execute and administer trusts, and to act as trustees, almost none of the banks here provide formalized escrow account services to their customers. If this is addressed through a circular of the Bangladesh Bank, with specific guidelines for opening and operating escrow accounts, financial transactions between contracting parties could be made much more secure.

62. More importantly for potentially less costly methods of providing finance, specific provisions need to be made for the issuance of asset-backed securities through bankruptcy remote special purpose vehicles or special accounts in banks, with appropriate tax treatment. Also, loan portfolios segregated for such purposes need to be classified as “non-risk” assets for the purpose of computing the capital adequacy requirements of the bank.

63. Two other issues may be touched upon. One is the requirement of prior permission of the lending bank before any change can be made in the board of directors of a borrower. This appears to militate against the concept of corporate liability, and implies a reliance on the bankability of personalities involved in a business operation, rather than the bankability of a project, which may in turn lead to less efficient due diligence and risk assessment practices. It also prevents shareholders of a company from exercising their basic right to remove a non-performing director. The other issue relates to the Credit Information Bureau of the Bangladesh Bank. Complaints have been received that the records kept therein are not up to date, the persons whose names are in the database are not informed of such inclusion until an application for a loan or other facilities to a bank is rejected on that ground, and it is difficult to rectify mistaken inclusion of names into the list. These matters ought to be reviewed and necessary amendments made to the relevant rules to address these issues. The process should be both more transparent and more accountable.

Financial Institutions Act 1993

64. Chapter V of the Bangladesh Bank Order, 1972 (P.O.127 of 19) is entitled PROVISIONS RELATING TO NON-BANKING INSTITUTIONS RECEIVING DEPOSITS AND FINANCIAL INSTITUTIONS. This Chapter consists of 10 sections which, until 1993 constituted the main body of legislation regarding the regulation of financial institutions. These sections gave, in very general terms, regulatory and supervisory authority over non-banking institutions and financial institutions to the Bangladesh Bank. For the purposes of these provisions "Financial institution" meant any non-banking institution which carried on as its business or part of its business the financing whether by way of making loans or advance or otherwise, of trade, industry, commerce or agriculture, or which carried on as its business or part of its business the acquisition of shares, stock, bonds, debentures or debenture stock or securities issued by a Government or local authority or other marketable securities of a like nature or which carries on as its principal business hire-purchase transactions or the financing or such transactions.

Leasing business was outside the purview of this legislation and came to be regulated by the law relating to bailment under the Contract Act. These provisions were the product of a time when, among others, all banks and development finance agencies had been nationalised in the wake of the independence of the country. Only in the last decade and a half, which has seen the growth of financial institutions of a non-banking nature, has investors' interest been focused on the regulation of such institutions. Even so, the legislators were forced to prioritise the issue of regulatory legislation for N-BFIs when a giant N-BFI, the BCI, collapsed in 1991 leaving thousands of depositors destitute. 1993 saw the enactment of the Financial Institutions Act, which excluded from its ambit bank companies²⁷.

65. The Financial Institutions Act, 1993 defines "financial institutions" as such on-banking financial institutions which (a) provide loans and advances for industry, trade, agriculture or housing; or (b) carries out operations relating to the underwriting, take-over, investment or re-investment or shares, stock, bonds, debenture or debenture stock or other marketable securities issued by the government or any registered organisation; or (c) carries on the business of hire-purchase of machinery or equipment; or (d) finances venture capital, and includes in the definition merchant banks, investment companies, mutual associations, Mutual companies, leasing companies and building societies. (It may be noted that merchant banks, investment companies, mutual associations and mutual companies must be registered by the Securities and Exchange Commission under the Securities and Exchange Commission Act, 1993). Although leasing business has been brought within the purview of this Act, there is a strong body of opinion which suggests that banks should be permitted to undertake leasing business through subsidiary companies. The salient features of the Act are as follows.

66. No person (and person includes companies, firms and associations) shall carry on any financial business without a license from the Bangladesh Bank. Before granting a license Bangladesh Bank will have to be satisfied about the following matters regarding the applicant:

- i) financial status
- ii) management structure
- iii) adequacy of capital-structure and prospective income
- iv) objects mentioned in the memorandum of association
- v) public interest.

67. Bangladesh Bank may cancel the license of any N-BFI for any of the following reasons:

- i) not carrying on the activities for which it was established;
- ii) winding up or closing down of activities of a financial institution;
- iii) submitting false or misleading information or documents in order to obtain a license;
- iv) running its business in a manner harmful to the interest of depositors;
- v) assets not enough to cover liabilities to the depositors;
- vi) contravening conditions of the license;
- vii) conviction of the N-BFI or any of its officials for an offence under this Act.

²⁷ New Commercial Legal Regime in Bangladesh: Syed Ishtiaq Ahmed, 2002

68. No N-BFI is entitled to declare any dividend on its shares until it has written off its preliminary expenses, operational expenses, commission on account of sale of shares, brokerage, losses and all other expenditure which has been capitalised.

69. Every N-BFI must exhibit/keep open for inspection at a public place in all its offices and branches a copy of its latest audited balance-sheet, together with the names of the directors, and within 6 months of the end of the relevant financial year shall publish its balance sheet in at least on daily newspaper.

70. Extensive restrictions on providing loan facilities etc. are applicable to N-BFIs. The directors of an N-BFI will be jointly and severally liable to compensate for any loss arising out of unsecured loans, advances or credit facilities provided in contravention of these provisions. Contravention of this provision may also result in heavy financial penalties.

71. Bangladesh Bank is empowered to determine the following by order:

- i) the maximum rate of interest payable by an N-BFI on different classes of deposits;
- ii) the maximum amount of loan to be taken from a person by an N-BFI;
- iii) the maximum time-limit for repayment of loans given by N-BFIs;
- iv) the maximum rates of interest chargeable on different classes of loans given by N-BFIs and the method of calculation of that rate;
- v) the maximum limit for loans to be given to a person by an N-BFI;
- vi) the reserve to be maintained by an N-BFI in the Bangladesh Bank;
- vii) other matters in the public interest or for improvement of the fiscal policy.

72. Bangladesh Bank has wide powers of inspection. Audited balance sheets and profit and loss accounts have to be submitted annually, and the auditor must be approved by the Bangladesh Bank. An N-BFI must inform the Bangladesh Bank as soon as it apprehends that there is a possibility of its being unable to meet its depositors' claims or when it has to suspend payment to a depositor. Bangladesh Bank may take a wide variety of measures including prohibiting an N-BFI from carrying on financial business, appointing a person at its cost to properly manage the affairs of the N-BFI, taking over the control or management of the business of the N-BFI or appointing some other person to do so.

73. If Bangladesh Bank considers it necessary in the interest of the depositors it may suspend the operations of an N-BFI for a period not exceeding 6 months at a time, and may also formulate a scheme to merge the said N-BFI with another N-BFI. These are essential central banking functions in relation to such institutions.

74. The Financial Institutions Act 1993 (FIA) was introduced, among others, to facilitate lease financing of equipment and machineries, and has served the purpose well. However, due to its hurried introduction, a major anomaly lies in inconsistent definitions of "lease" in different statutes. A leasing company is defined in the FIA to be a company which as its business or part of its business provides financing for leases or itself leases out machineries and equipment. The Bangla word "*ijara*" used in this definition translates to "lease" in English but has not been defined separately in the FIA.

75. The term “lease” in the FIA is used in relation to movable property whereas the definitions of “lease” in the Transfer of Property (TP) Act 1882, Registration Act 1908 and Stamp Act 1899 relate to immovable property.

76. In the TP Act lease has been defined with regard to immovable property and is said to be transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or at specified times on such terms and conditions agreed by the transferee and the transferor.

77. In the Stamp Act lease has been defined to include a lease of immovable property as well as the following:

- i) a document of purchase or leasehold of land;
- ii) a deed of undertaking by a tenant to pay rent regularly or other undertakings in writing, not being a counter part of a lease, to cultivate, occupy, pay or deliver rent for immovable property;
- iii) any instruments by which tolls of any description are let;
- iv) any writing on an application for a lease intended to signify that the application is granted.

78. These definitions are inconsistent with the use of the word lease in the FIA and cause confusion in relation to the application of these three latter Acts to lease transactions of movables.

Insurance Act 1938

Insurance Corporations Act 1973

79. The insurance industry is regulated under the provisions of the Insurance Act, 1938, by the Chief Controller of Insurance, acting under the purview of the Ministry of Commerce. The Insurance Act, read with the Insurance Rules promulgated thereunder provides extensively for various aspects of insurance companies, and regulations of the insurance business. However, without going into the provisions themselves, it may be said that the insurance sector is plagued by many inefficiencies, which the Department of Insurance is unable to address.

80. Generally, private insurance companies provide a narrow range of products and the service quality is alleged to be low. It is very difficult to obtain payment of insurance claims, either at all or within a limited time. These delays or defaults are blamed on the delayed or erroneous survey reports, delays from SBC in settling reinsurance claims, and funding shortfalls by the companies. Limited access to actuarial data results in setting of unreasonable or unrealistic premia for insurance products. Other problems include inadequate or non-existent assessments for insurable risks, issuance of policies without payment of premium, payment against false claims, failure of payment against genuine claims, personal cash incentives demanded for processing documentation, tax evasion on underwriting. The Department of Insurance lacks sufficiently trained staff and

infrastructure, providing no leadership or incentive to take a more active role in monitoring and intervention in its supervisory capacity.²⁸

81. Section 27 of the Insurance Act as amended in 2000, limits the investment of insurance company funds by providing that at least 30% of the funds of life insurance companies must be invested in government securities and the balance may be invested elsewhere, including in the capital market. The Chief Controller of Insurance has notified a list of eligible investments other than government securities in 2002. Insurance companies are allowed to invest in shares and debentures of companies of which at least 25% is owned by the Government, or of public listed companies that have a record of dividend payments of more than 10% in at least five out of seven years preceding the date of investment.

82. The Insurance Corporations Act 1973 set up two state-owned insurance corporations, namely Jiban Bima Corporation (dealing with life insurance), and Shadharan Bima Corporation ("SBC" - dealing with general insurance). Until the mid-1980s, by mandate of this law, only these two corporations were permitted to transact insurance business. By a process of liberalization, today there are 37 general insurance companies and 14 life insurance companies.

83. However, Section 23 of the Insurance Corporation Act, 1973 provides that fifty per cent of all insurance business relating to any public property or to any risk or liability appertaining to any public property shall be placed with the Sadharan Bima Corporation and the remaining fifty per cent of such business may be placed either with that Corporation or with any other insurer in Bangladesh. For this purpose, "public property" means –

any property movable or immovable which belongs to, or the protection of which is the legal responsibility of, -

- i) the Government or a local authority; or
- ii) any company, firm, undertaking, institution, organisation or other establishment which is managed or controlled by the Government or a local authority or in which the Government, by itself or jointly with a local authority or company managed or controlled by it, holds controlling financial share or interest or which is specified by the Government for the purpose of this section; and
- iii) a project financed out of an external loan or with external aid until it reaches-
- iv) in the case of an industrial project, the stage at which it is capable of commencing normal production; and
- v) in the case of any other project, the stage at which it is capable of being put to the use for which it is intended.

84. Section 23A of the Act further provides regarding re-insurance, that every insurer registered and carrying on insurance business in Bangladesh shall re-insure, on generally acceptable terms and conditions, such portion of his insurance business as he

²⁸ A Comparative Analysis of Corporate Governance in South Asia: Charting a Roadmap for Bangladesh: Bangladesh Enterprise Institute, 2003

cannot retain on his own account. Fifty per cent of the re-insurable general insurance business shall be re-insured with the Sadharan Bima Corporation and the remaining fifty per cent of such business may be re-insured either with that Corporation or with any other insurer whether in or outside Bangladesh. The whole or any portion of the re-insurable life insurance business may be re-insured with any insurer outside Bangladesh.

85. It may therefore be seen that by law the state-owned general insurance corporation has been given a substantial protection in terms of market share. It is arguable that this has prevented the insurance market from achieving depth. For many years, discussions have been ongoing on the policy front to open up the insurance market to direct foreign investment and competition, but in the absence of an effective regulatory framework, this has not taken place and is not likely to take place in the near future.

Money Loan Court Act 2003

86. Legal proceedings for recovery of outstanding loans due to banks or financial institutions may be filed under the Money Loan Court Act, 2003 ("MLCA") in the Money Loan Court ("MLC").

87. The MLCA is applicable to "financial institutions", a term defined in Section 2(a) of the MLCA as including, among others, banks licensed under the Bank Company Act 1991,. Section 2(b) defines "loan" as including, among others, advance, debt cash loan, overdraft and banking credit

88. Section 8(2)(b) of the MLCA requires that the plaint of a case filed with the MLC contain a schedule with the description and identification of secured property. Section 8(7) of the MLCA provides where a plaintiff does not include such schedule, the plaintiff may apply to the Court to direct the defendant to submit a list of his immovable and movable properties with an affidavit to the Court. There is no specific provision on the consequences of a defendant failing to comply with such an order of disclosure, in which event Section 52 of the MLCA on contempt of the MLCA may apply rendering the defendant liable to fine of Tk.1,000 and 10 days simple imprisonment.

89. Section 12(3) of the MLCA provides that where a financial institution has extended a loan against hypothecation of movable property and has been empowered to sell the property by a power of attorney at the time of granting the hypothecation, the financial institution shall not file any suit in the MLC until such property has been sold and the sale proceeds adjusted against outstandings from the Borrower, or has failed to sell the property.

90. Section 12(6) of the MLCA further provides that if any financial institution does not comply with the provisions of, among others, under Section 12(3) of the MLCA the Court may on its own or on the basis of an application of the debtor pass a decree deducting the value, if any, shown by the financial institution; and if no such valuation has been provided, the Court may evaluate the goods on the basis of a report of the Sub-Registrar within whose the jurisdiction the property lies. The financial institution is not a party eligible to make an application for such valuation. It is likely that the time that may be spent in obtaining orders of the Court under such provisions could provide an

opportunity for disposal or deterioration of the secured property, or inflation of the value put thereon, to the detriment of the lender.

91. Section 46(1) of the MLCA provides that if after the commencement of repayments by a borrower of its loan under its loan agreement with the financial institution agreeing for repayments over a period of:

- i) three years, the borrower does not repay (a) a minimum of 10% of its loan in the first year, (b) a minimum of 15% of its loan in the second year, and (c) a minimum of 25% of its loan in the third year, or
- ii) less than three years, the borrower does not repay a minimum of 20% of its loan;

the financial institution is to file a case under the MLCA within one year after the foregoing period.

92. Sections 46(2) and 46(4) provide that if the loan has been rescheduled, the period mentioned in Section 46(1) and Section 46(3), respectively, commences again from the date of commencement of the rescheduled payment period. Section 46(5) provides that in the event of a suit filed beyond the periods mentioned in the foregoing provisions, the MLC shall inform the chief executive of the financial institution in writing and the disciplinary action is to be taken against the officer responsible for such failure. Section 47 provides that no suit under the MLCA shall exceed 200% of the principal amount of the loan. Section 48 provides the foregoing time periods shall be computed on the basis of the working days of the MLC judge.

Customs Act 1969²⁹

Imports and Exports (Control) Act 1950

93. The Customs Act 1969 and the Import and Export (Control) Act 1969 are of cardinal importance to private sector investment. The Customs Act 1969 sets out the goods which are to dutiable and the rate at which the duty is chargeable, provides for the procedures for import and export of goods, and the collection of duties thereon. It provides for the valuation of goods for the purpose of assessment of duties, import, export and warehousing of goods under bond, and penalties for breach of these provisions.

Customs Duties

94. In general, no import duty is charged on the import of capital machinery and spares up to 10% of the value of such capital machinery, if these are for 100% export oriented industries. Neither is VAT payable on these. Import duty at 7.5% *ad valorem* is payable on other capital machinery.

²⁹ The commentary on this section is based on a review of the relevant laws, interviews with senior officials of the National Board of Revenue, Customs Bond Commissionerate, Duty Drawback Office, an unpublished report entitled 'Corruption in the Customs Department' by J. Munshi, Transparency International Bangladesh, April 2000, and a Bangladesh Enterprise Institute report entitled "The Cost of Doing Business".

95. The major issue in relation to customs as identified by practitioners has been the fixation of the assessable value of goods for the levy of customs duty. Section 25 of the Act provides that whenever customs duty is leviable on any goods by reference to their value, among others, the actual price or the nearest ascertainable equivalent of such price, at which such goods are ordinarily sold, or offered to for sale, under fully competitive conditions, shall be the value for assessment of customs duty. The Act authorizes the Government to make rules to determine the price in respect of imported goods. Further, notwithstanding anything else contained in this section, the Government may fix, for the purpose of levying customs duties, tariff values or minimum values for any goods imported or exported as chargeable with customs duty *ad valorem*.

96. One of the major problems with the law is the continuous process of amending the rates of customs duty set under the annual budget, through the use of Statutory Regulatory Orders (SROs) passed by the relevant ministry. Importers of commodities, raw materials, equipment, machinery etc. who contract to import goods taking into account a certain rate of customs duty may be subjected to increases made after the letters of credit are opened and the goods shipped, through changes in these rates, as the rates prevailing at the time of submission of the bills of entry prevail. This can seriously upset the cost-benefit analysis, pricing and financing structures of businesses. Since this is a part of the fiscal management of the Government, and many issues can have an impact upon the decision-making process in this regard, many such changes to the duty structure have been challenged in court on allegations of non-transparent decision-making for collateral purposes, involving high costs to the importer and loss or delay in revenue collection. More certainty and transparency in the decision-making process could minimize these costs.

97. The Customs administration for imports and exports is also known to be non-transparent and adds substantially to the cost of business. Customs duties are set according to the H.S. Code classification of goods. In instances where a good does not correspond to an H.S. Code the customs officials often fit them forcibly into an H.S. Code merely to impose duty. The amount of duty the importer pays depends on subjective and somewhat arbitrary decisions of the customs official with respect to valuation and classification. Customs officials may use this power to extort bribes from importers.³⁰ This leads to confusion, litigation and ensuing delays and costs.

98. The government draws more than 50% of its revenue from import duties, value added tax, and supplementary duties and so tends to set these duties according to their revenue needs rather than rational and consistent policy. The result is that duties tend to be high and haphazard. For example, identical goods may be assigned different HSC codes and different tariff rates. A certain chemical may appear both as a raw chemical with a high customs and supplementary duty or as a fertilizer with low customs and no supplementary duty.

99. The system of pre-shipment inspection (PSI) was introduced in 2000 to prevent mis-description of goods for avoidance of duty. However, the customs authorities retained the right to make random inspections of ten percent of goods imported, with the

³⁰ E.g. cigarette paper is imported as "writing paper" with a reduction in the duty from 40% to 25%. There has been a dramatic reduction in the import of cigarette paper according to customs department data without any reduction in cigarette manufacture.

result that importers with proper PSI certification would be subjected to the threat of such inspection unless unofficial arrangements were made to avoid these, and there is no mechanism to ensure that inspections are limited to “ten percent”. The introduction of the Pre-Shipment Inspection (PSI) procedures apparently reduced the incidence of discretion in imposing tariffs; PSI implementation has standardized and simplified the classification function and has greatly reduced the monopoly powers of the customs official in this function. However, there has been a concerted effort on the part of the customs authorities to do away with the PSI system, but recently the PSI agents have been appointed for 3 more years beginning 1 September 2005.

100. When a customs officer imposes a penalty or confiscates goods the trader may appeal to Superintendent, Principal Appraiser, or Commissioner depending on the amount involved. The quasi-legal proceedings are not bound by legal technicalities nor constrained by a time frame and therefore they afford a great deal of flexibility and discretion to the adjudicator. Discretion in these cases is easily translated into bribery opportunity.

101. The case may be delayed indefinitely until appropriate extra-legal payments are made or higher political influence is brought to bear on the adjudicator. Even if an order is passed it may not actually be “issued” or implemented until the necessary corruption transaction takes place. The adjudicator is not accountable to a higher authority and these cases are decided without transparency.

Duty Drawback

102. The Customs Act, 1969 in Chapter VI provides for the drawback of customs duty on the export of imported goods, and more importantly, on goods used in the manufacture of goods which are exported. However, reportedly, since the promulgation of the Value Added Tax Act, 1991 (VAT Act), drawback is claimed on inputs under Section 13 of the latter, and the provisions of the Customs Act, 1969 are no longer in use, although they have not been repealed.

103. Section 13 of the VAT Act provides that, notwithstanding anything contained in Chapter VI of the Customs Act, 1969, any person will be entitled to draw back value added tax, supplementary duty, import duty, excise duty, and all other kinds of duty and tax (except advance income tax and supplementary duty on inputs notified by the Government in the Gazette) on inputs used in the manufacture or production of exported goods or services or goods and services deemed to be exported. The drawback must be claimed within 6 months of the date of export (the date of export is the date on which the bill of export for the goods or services concerned is handed over to the relevant officer under Section 131 of the Customs Act, 1969). It is further provided that the National Board of Revenue (NBR) may permit an exporter to claim drawback on the actual rate of the taxes etc. paid on the inputs (based on the bills of entry) or on a flat-rate based on the input-output co-efficient of the product exported. Rule 29 of the VAT Rules 1991 contain detailed provisions on the procedures for obtaining duty drawback.

104. Principally, exporters may obtain duty drawback on the basis of returns filed with the relevant VAT authorities, or by filing separate applications for drawback³¹. In case of drawback on the basis of VAT returns, the Commissioner of the VAT Commissionerate concerned will forward the returns to the Director General³². Thereafter, an officer empowered in this regard by the Director General will inspect the return and, keeping in mind the normal input-output ratio, or any pre-determined co-efficient, and after reviewing the tax rebates if any obtained by the exporter, as well as the bill of export and bill of lading evidencing the export of the goods or services concerned, upon his satisfaction, will recommend to the Director General the reimbursement of a sum determined by him, and the Director General shall take steps to have the said amount deposited in the exporter's bank account through a cheque.

105. Duty drawback is administered by the Duty Drawback Office (popularly known as DDO) of the NBR. It is headed by a Director General, and has a Joint Director, 3 Deputy Directors, 6 Superintendents and only 4 Inspectors, although originally mandated to have some 45 members of staff.

106. In the case of an "established exporter" (i.e. an exporter recorded as such by the DDO on the basis of his export performance and drawback claims in the past 12 months), each reimbursement will have to be made within 7 days of receipt of the return on the basis of preliminary inspection, and adjustments may be made later if there is any discrepancy identified thereafter. In the case of other exporters, the time limit is 30 days after receipt of the return, and upon completion of the inspection described above.

107. In practice, after receipt of an application the Director General signs it and forwards to the relevant group within the office. The departmental assistant concerned makes a preliminary inspection of the documents filed with the application, makes a file note and places the file before the inspector/appraiser in charge of the group. The appraiser makes a recommendation on the amount to be reimbursed upon a detailed review of the note and all the documents, and "various sides" of the issue. Similar procedures are gone through by the principal appraiser/superintendent of the group who then places the recommendation before the deputy director or joint director, who then places the file before the Director General.

108. Duty drawback may be claimed on the basis of a flat rate for some 16 categories (with a total of about 100 sub-categories) of goods. The flat rates are calculated by the DDO and notified by the NBR. In calculating the flat rates, the DDO takes into account the value of the goods, duty and taxes payable thereon and on the inputs, and the current rate of applicable duty and taxes. The flat rates are applied to the input-output co-efficient of a particular product, which itself is determined by a team formed of the joint director of the DDO, one deputy director, one cost accountant, one assistant commissioner of the Bond Commissionerate, the relevant group superintendent/principal appraiser and a specialist nominated from different agencies depending on the nature of the product concerned. The team determines the co-efficient on the basis of a specific application filed by an exporter, after physically verifying the production process. DDO does not have enough sector specialists in its employment for the job, and a decision

³¹ There are two other ways of claiming duty drawback, through submission of VAT Form 24 on the basis of *challans* (invoices), and through returns or applications submitted for zero rated deemed exports or local supplies against back to back Letters of Credit paid in foreign currency.

³² Although this is the procedure prescribed in the VAT Rules, by an office order issued in 1992 the NBR has permitted applications to be filed directly with the DDO.

was taken by the NBR in 2001 to include external specialists at the cost of the exporter. The entire process is time-consuming and expensive for the exporter.

109. However, in the case of goods to which a flat rate is applicable, drawback may be obtained directly from the exporter's own bank, upon submission of the bill of export and obtaining the proceeds realization certificate, and the exporter's bank is directly reimbursed by the Government through Bangladesh Bank.

110. An exporter may also obtain duty drawback on the basis of actual rates of duty paid on all inputs. In the absence of a fully operational and computerized MIS system³³, the calculations have to be made by hand. It is time-consuming, and there is ample scope for advertent or inadvertent errors in the process. An example is the measurement of a particular input in kilograms and the calculation of the co-efficient in centimeters, resulting in an error in the magnitude of about 100 times. However, as a result of various provisions of the VAT Act and the VAT Rules, drawback of VAT paid on utilities such as electricity, gas, telecommunications etc. at actual rates has become easier, since the utility providers have VAT registration and the amount of VAT has to be mentioned separately in the invoices for these³⁴.

111. The principal documents which are required to be filed with applications for duty drawback are the bill of export, commercial invoice and packing list of the products exported signed by the Customs authorities, copies of the bill of lading/airway bill and letter of credit all certified by the exporter's bank, and the proceeds realization certificate in relation to realization of the foreign currency export proceeds. In case of applications for duty drawback at actual rates, the bills of entry for the imported inputs need to be provided. There are other documents required for various other inputs, such as the original bills for electricity and gas, certified copies of the memorandum and articles of association of limited companies, original insurance policies etc.

112. Although the time limits for reimbursement are 7 days and 30 days from receipt of applications, as mentioned above, due to a shortage in manpower in the DDO office, quite often the time limits are not adhered to. The DDO does not generate the paperwork required for processing an application, and exporters often have to wait for the necessary documentation from the Customs Commissionerates or banks concerned. On average, after receipt of all required documents in good order, 30% of the applications are processed and reimbursements made within 21 days. It is estimated that in the 2003 Financial Year, about Tk.120 crores was claimed back as duty drawback. Officials of the DDO estimate that in the context of the total amount of exports from Bangladesh, only about 10% of the amount which may legally be claimed back is actually claimed. They attribute this to the complications and delays inherent in the process, and lack of knowledge of non-traditional exporters of the availability of this facility.

113. The information required for duty drawback is not readily available to an exporter, because as is usual for almost all regulators in Bangladesh, there is no public

³³ A donor-funded project had been begun to put in place the ASYCUDA system, but was not completed. Also, the required Order under the Customs Act or the VAT Act to make the records kept in automated form legally valid has not yet been issued.

³⁴ Incidentally, this created a difficulty for industries in EPZ's, since they bought these utilities directly from the EPZ Authorities, who did not have VAT registration and did not specify the VAT separately in their invoices. This issue is now being addressed by the EPZ Authorities agreeing to specify the VAT component of their invoices separately.

information desk or office at either the NBR or the DDO. Various middlemen are available to assist in obtaining the information and accessing the officials concerned. However, once reached, the officials are helpful.

Customs Procedures

114. The Import and Export (Control) Act 1950 permits the Government to publish rules concerning import and export of goods in Bangladesh. The Import and Export Manual sets out the rules and procedures that need to be followed for import and export of goods. These rules are comprehensive and sets out the procedures for obtaining import-export licenses, suspension and cancellation of licenses. However, this Manual is not available generally and government officials as well as entrepreneurs are unaware of their rights, duties and liabilities and the manner in which the customs regime should be administered. As a result most work carried out is based on 'traditional practices' which is time consuming. The processes, like in any other field, are said to be non-transparent. Publicizing the rules and simplifying the processes would be of enormous assistance in reducing costs for both exporters and importers.

115. Customs and port procedures are a significant problem for firms that export and import. Customs clearance for an export takes approximately nine days, while import clearance takes twelve days.³⁵ The number of forms and procedures required for shipment either by seaport or airport illustrates the difficulties faced in completing customs formalities. In order to berth at the Chittagong port, incoming and out going vessels have to fill out a total of 40 forms, whereas modern ports around the world require only seven forms. For instance, in the case of Penang Port I in Malaysia, a ship is required to submit only eight forms. In airport customs in Bangladesh, at present, an importer, exporter or cargo and freight agent must obtain 43 permissions to release consignments. It takes up to twelve days to clear a shipment through customs and exporting a shipment can take up to nine days.

116. The Customs Act prohibits undue delay in clearing of imports but an insufficient definition of the term "undue delay" provides an opportunity to customs officials to hold the goods indefinitely in order to extort bribes. Goods to be cleared are not placed in a time-priority queue and therefore bribery clients are cleared first. Non-clients are made to wait until they pay. (The law sets the timetable to a maximum of one week, and PSI further restricts processing time to 48 hours. These new developments make it hard for officials to use delay tactics with large or sophisticated importers. However, these limits are not practically enforceable should the Customs authorities wish to delay matters.)

117. A table provided by a PSI agent is annexed to this report as Annexure 4 showing the different steps required for clearance of goods through Customs and the possible delays and opportunities for rent-seeking.

Bonded Warehouse Licensing Procedures

118. Private warehouses are licensed under the provisions of Section 13 of the Customs Act, 1969. At any warehousing station, the Commissioner of Customs (Bond) or any other Commissioner of Customs authorized by the NBR may license private warehouses wherein dutiable goods imported by or on behalf of the licensee, or any

³⁵

World Bank. *Bangladesh: Key Challenges for the Next Millenium*, April 1999.

other imported goods in respect of which facilities for deposit in a public warehouse are not available, may be deposited. Such a license may be cancelled by one month's notice in writing, or if the licensee contravenes any provision of the Customs Act or breaches any condition of the license. Such warehouses are required to comply with the provisions of Chapter XI of the Customs Act, 1969.

119. An application for a license may be made in a prescribed form providing the required particulars. Thirty-two licenses and relevant papers are required to apply for such a license. Required documents include: Trade license, Fire license, Factory license, Board of Investment registration, VAT registration, Import and Export Registration certificate, nationality certificate, Bangladesh Garment Manufacturers and Exporters Association (BGMEA) membership certificate. Obtaining these documents is a difficult and time consuming task. For example, to get a Fire license, the factory owner was asked to produce a Trade license. But a Trade license is not available without a fire license. Applicants are therefore caught up in a vicious circle. To escape this vicious circle, unofficial payment is the usual way out.

120. Recently, inquiries have been made by contract-logistics suppliers as to the possibility of providing bonded warehouse services in the private sector to third parties, for example, garments manufacturers, who otherwise have to have private warehouse facilities of their own. The problems with individual units having to have their own warehousing facilities are, among others, space constraints and the cost and logistical difficulties of maintaining such facilities, and lack of proper facilities for buyers to inspect and accept or reject finished goods prior to shipment, knowing that goods are not being switched after quality inspections have been carried out at the manufacturer's premises.

Customs Department

121. The Customs Department is a functional entity of the National Board of Revenue or NBR which reports to the Ministry of Finance and collects all revenues for the GOB. The Department itself is organized into three branches which are:

- i) Customs Houses
- ii) Excise and VAT
- iii) Intelligence

122. There are four customs houses, one each in Dhaka, Chittagong, Mongla, and Khulna each managed by a Commissioner and charged with collecting customs duty on imports. Value-added-taxes are collected by the Excise and VAT branch which consists of six Commissioner level offices, two in Dhaka and one each in Chittagong, Rajshahi, Jessore, and Khulna. An additional Appeals Commissioner is located in Dhaka. The Intelligence branch investigates fraud, evasion, smuggling, and other cases related to the GOB's control on the inflow of goods into the country. It controls foreign exchange, arms, and narcotics. The intelligence branch is also responsible for customs valuation, audit, and oddly, for training of customs officials.

123. The duties of the Customs Department is prescribed in the Customs Act of 1969, the Value Added Tax Act of 1991, and related acts of Parliament dating from British India. They include the assessment and collection of the following revenues:

- i) customs duty
- ii) value added tax
- iii) supplementary duty
- iv) advance income tax
- v) license fees.

124. Collateral functions of the Department include:

- i) prevention of smuggling
- ii) prevention of commercial fraud
- iii) adjudication of customs offences
- iv) maintenance of security
- v) narcotics and arms control
- vi) controlling the flow of foreign exchange.

125. A consolidation and reduction in the number of functions to be carried out by the Customs authorities may reduce the alleged rampant, abuses of their functions.

Dhaka Municipal Corporation Ordinance 1983

126. Trade Licenses (TL) are matters of local authority taxation in municipal or city corporation areas, and are provided for by the municipal or city corporation ordinances or acts. These laws authorize the municipal or city corporation to levy taxes and issue, among others, what are called trade licenses.

127. We take as an example the provisions of the Dhaka City Corporation Ordinance 1983. It covers the area described in the First Schedule to the Ordinance. Section 67 of the Ordinance provides the authority for the City Corporation, with the previous sanction of the Government, to levy taxes, rates, cesses, tolls and fees mentioned in the Second Schedule to the Ordinance. Section 69 provides for the Government to frame model tax schedules, by which, if so framed, the Corporation shall be guided in levying a tax, rate, cess, toll or fee. The Second Schedule lists 24 different taxes etc, and has two residual sections allowing the levy of any other fees permitted under any of the provisions of the Ordinance, and any other tax which the Government is empowered to levy by law. Among the taxes listed is the tax on professions, trades and callings, which is levied by way of requiring persons to obtain trade licenses in order to lawfully carry out a profession, trade or calling within the City Corporation boundaries.

128. By the Municipal Corporation Model Tax Schedule, 1985³⁶ promulgated under the provisions of Section 69 of the Ordinance of 1983, the professions, trades and callings to which such a tax is applicable are listed, with the maximum rates of tax for each specified therein, ranging from Tk.100 to a maximum of Tk.10,000. By an Order dated 02.12.2002 the Dhaka City Corporation has issued a list of 133 categories with the applicable rates of tax. The last category is a residual category. The Order also provides for the tax rate on billboards and signboards.

³⁶ This Schedule appears to have been made applicable to the Dhaka, Chittagong, Khulna and Rajshahi City Corporations, although promulgated under the Dhaka City Corporation Ordinance 1983.

129. Application forms for TLs were prescribed by the Dhaka Municipal Corporation (Taxation) Rules 1986³⁷ and are available at the City Corporation Building or at any one of the ten zonal offices of the City Corporation in Dhaka. The form requires certain information about the ownership, nature, and location of the business/trade/profession concerned. If the premises are owned by the applicant, the up to date corporation tax receipt needs to be attached with the application, and if rented then the rent receipt.

130. The process of application or the cost of obtaining a trade license or renewing it annually are not too time-consuming or high. The only issue is availability of information as to where to go to get the forms and make the application.

Bangladesh Standards and Testing Institution Ordinance 1985

131. The Bangladesh Standards and Testing Institutions Ordinance 1985 (BSTI Ordinance 1985) sets up the Bangladesh Standards and Testing Institution (BSTI), which is the agency responsible for setting standards for selected consumer goods produced in Bangladesh. The BSTI ordinance makes it mandatory to register the specifications of products which are brought under the control of the BSTI and makes it necessary for entrepreneurs to register with the BSTI if dealing in these products. BSTI appears to have very little capacity in testing products and enforcing its standards. Recently, BSTI has been more pro-active in such enforcement but due to the lack of proper investigation and failure to follow due process, most of its actions have been challenged in Court and stayed.

132. BSTI has taken no steps to make entrepreneurs aware of the standards required to obtain certification and/or provide services to the SMEs so as to enable them to increase the standard of their goods in order to obtain certification. It also does not have adequate testing facilities. As a result, SMEs who do not have access to laboratories have to opt for trial and error methods to obtain certification. Not only is this time consuming but leads to “non-transparent” means of obtaining certification. BSTI should be required by law to publicize the standards demanded by it, provide adequate testing facilities or certify other testing institutions to carry out the testing for its certification, and provide advisory and technical assistance to entrepreneurs to achieve the standards set by it.

133. In all the institutions referred to above there is a lack of standardization with regard to the procedures followed by the respective institutions. There is a lack of rules and entrepreneurs are often unaware of the procedures or the forms which are required to register their product. It is recommended that a user friendly manual or information pack is provided to the entrepreneurs, similar to that recommended for the RJSC, which should include a checklist of requirements, fees and specific timetables for issuance of all permits/licenses etc. under its control. Moreover, similar to the recommendation for the RJSC, a set of defined rules should be published and made available to the officials and entrepreneurs so as to reduce the discretionary power of the officials.

³⁷ Copy of Rules not made available upon inquiry at the City Corporation, and not found in the Bangladesh Gazette.

Bangladesh Telecommunications Act 2001
Bangladesh Energy Regulatory Commission Act 2002

134. In mapping out the scope of this Report, these two sector specific regulatory laws were chosen for two primary reasons; (a) that these two sectors deal with vitally important infrastructure and have attracted/have the potential to attract substantial private investment, and (b) the laws have been put in place without sufficient attention to setting up the administrative mechanism of the regulators. What follows is therefore not an analysis of the two laws, but a short picture of what has happened in the initial stages of attempting to make the laws effective.

135. Historically, the telecommunications sector was the preserve of the state sector telecommunications monopoly. The Bangladesh Telegraph and Telephone Board (BTTB) was not only the monopoly service provider, it was also the regulator of this sector. The National Telecommunications Policy, 1998 (NTP) acknowledges that the telecommunications sector in Bangladesh was “characterized by a very low level of penetration, limited capability to meet the growing demand, low level of investment and old outdated systems and technologies necessitating reactive remedial measures”. The laws regulating the sector were the Telegraph Act, 1885, the Wireless Telegraphy Act, 1933 and the Bangladesh Telegraph and Telephone Board Ordinance 1979.

136. In the early through mid-1990s, 4 cellular telephone operators were licensed by the Government to provide cellular mobile telephony. These operators were initially in a situation where they were being regulated by their competitor, BTTB. Matters like interconnection, upon which access to customers with fixed lines depended, were delayed by BTTB on collateral considerations, as BTTB slowly realized that it would face stiff competition notwithstanding the advantages it had as a fixed line operator and a state agency. As a result of the growing demand for independent regulation, the Ministry of Post and Telecommunications (MOPT) took over the regulatory function and thereafter in 2001 the Bangladesh Telecommunications Act, 2001 (BTA) was promulgated, to set up the Bangladesh Telecommunications Regulatory Authority (BTRA) and provide for independent regulation of the telecommunications sector.

137. Right at the outset, there was difficulty in making the new law effective. The BTA provided that it would come into force on such date as the Government may by notification in the official Gazette, appoint. The Government by notification in the Gazette appointed 8 July 2001 as the date for the BTA to come into force. Thereafter, as the BTRC could not be formed because the required 5 commissioners could not be appointed in time, another Gazette notification was issued on 9 August 2001, effective retrospectively from 12 July 2001, canceling the earlier notification and appointing 31 January 2002 as the date of coming into force of the law. In the meantime, confusion abounded as to who had the authority in the interim to take any regulatory steps in the sector, whether the Government acting through MOPT continued to be the regulator in the interim period, what would happen to actions taken by the MOPT between 8 July and 12 July, and 8 July and 9 August 2001, etc. The BTA has not repealed the Telegraph Act 1885 or the Wireless Telegraphy Act 1933, thereby failing to consolidate all such matters in one body of law, leaving further scope for confusion and dual authority.

138. The BTRC was hurriedly staffed with former civil servants and former senior BTTB staff, thus in many ways negating at the outset the impetus towards an independent commission. The BTA provides for certain activities to be the preserve of

the BTRC, for example licensing, and for policy matters to remain within the purview of the Government. This has resulted in some confusion as to the pace of deregulation of the industry. In other cases, for example the issuance of satellite television licenses, BTRC and the Government have each been saying that the other is the authority for granting licenses (in the aftermath of the celebrated ETV case). Although the BTA itself spells out in broad categories the objectives and responsibilities of the BTRC, in the last two and a half years the BTRC has not yet framed the necessary detailed rules, regulations and guidelines for putting into place and carrying out those tasks in a transparent and objective manner, nor has it set up the essential spectrum management committee as specifically mandated by the BTA³⁸. As usual, rumours of political interference and corruption have abounded. In January 2005, when the terms of all the Commissioners and the Chairman ended, there was a period of some months before the vacancies were filled. At this time, although the law provides for a quorum of at least three Commissioners, including the Chairman or Vice-Chairman, for any meeting of the Commission, decisions kept being taken, and in one case a crucial decision to purportedly award a license to an apparently state-owned company, Teletalk Limited, was taken by the single Commissioner then present in the BTRC. This license is now under litigation. All this is reminiscent of the establishment of the Securities and Exchange Commission in 1993, understaffed and staffed with persons not knowledgeable about the capital market, resulting in years of inefficient and obstructive operations.

139. Similarly, in 2003, the Energy Regulatory Commission Act (ERCA) was enacted, for the stated objective - "to make provisions for the establishment of an independent and impartial regulatory commission to create an atmosphere conducive to private investment in the generation of electricity, and transmission, transportation and marketing of gas resources and petroleum products, to ensure transparency in the management, operation and tariff determination in these sectors, to protect consumers' interest and to promote the creation of a competitive market". The Commission is not yet fully established or functional. After repeated attempts to find members and a Chairman, first the members were appointed. Thereafter a search committee was formed to find a Chairman, which ultimately received and reviewed the qualifications of three proposed candidates from a shortlist, and found all three to be unqualified for the job. Nevertheless, one of those candidates has been appointed by the Government as Chairman in the absence of alternatives. While all this was going on, there was confusion as to who would continue to issue licenses under the relevant laws, the Power Cell of the Ministry of Energy, or the ERCA. Apparently, the Power Cell began forwarding applications to the ERCA soon after appointment of the members, although the Commission was not fully functional. It remains to be seen what happens in this sector as a result of one more regulatory authority being formed without adequate resources.

³⁸ Section 56. In the absence of the Committee, the Frequency and Wireless Board remains in charge of allocation of radio frequencies.

**PROPERTY LAWS
ENVIRONMENTAL LAWS
PROCEDURAL LAWS
COMMERCIAL LAWS
LABOUR/EMPLOYMENT LAWS**

PROPERTY LAWS

Transfer of Property Act 1882³⁹

State Acquisition and Tenancy Act 1950

Registration Act 1908

1. The Transfer of Property Act, 1882 (“TPA”), the State Acquisition and Tenancy Act “SATA”) , 1950 and the Acquisition and Requisition of Immovable Property Ordinance (“ARIPO”), 1982 are the principal laws relating to land in Bangladesh. Although the Registration Act, 1908 is a procedural law, it is referred to in this section of the Report as registration of land related transactions is a major function under this Act.

2. The “TPA” deals with the transfer of all kinds of property. Surprisingly, it does not define property, but (a) states that property of any kind may be transferred, except as otherwise provided by this Act or any other law for the time being in force; and (b) provides a list of property which cannot be transferred (e.g. the chance of an heir-apparent succeeding to an estate, or a mere right to sue, or a public office or salary of a public officer). Immovable property is not defined, but is interpreted as not including standing timber, growing crops or grass.

3. Although the TPA deals with the transfer of property, as its name suggests, but it deals in detail only with the transfer of immovable property. There are no specific provisions in relation to the transfer of movable property, and confusion exists as to the ability to transfer the rights to the income from an asset without transferring the underlying asset itself. This has an effect in setting up structures for modern financial instruments.

4. The SATA deals with the acquisition by the state of the interests of rent-receivers and certain other interests in land in Bangladesh and defines the law relating to tenancies to be held under the state. It provides for the preparation of the record of rights for the purposes of recording title and possession and interest in land for the collection of land revenue.

5. The Registration Act deals with the registration of deeds, the procedures and fees therefore. It has as its objectives the conservation of evidence, assurance of title,

³⁹ An extremely detailed and comprehensive study of land records and land administration systems in Bangladesh was done under the ADB TA No.2307-BAN: Modernization of Land Administration. Therefore, this Report is not going into great detail on this subject.

publicity of documents and prevention of fraud⁴⁰. However, many of its provisions are unclear and there is no easily accessible checklist or schedule of requirements and costs for the transfer of property and registration of deeds, this needs to be provided. The list of deeds requiring registration have not been updated or modified for a long time, and new financial or security instruments are often forced into the existing definitions for purposes of registration.

6. By recent amendments to the Registration Act, all contracts for sale of land have been made compulsorily registrable within 30 days of execution, and all instruments of transfer are required to be accompanied by photographs of the transferor and transferee. Amendments have been made to the TPA to prevent the sale of mortgaged land without the consent of the mortgagee. These are to obviate fraud.

7. The principal difficulties investors, and particularly foreign investors face in dealing with land in Bangladesh are that (a) it is difficult to establish the chain of title to land; (b) conducting land registry searches are extremely time-consuming and difficult, and often the records are not available; and (c) registration of title or other rights to land is costly and time-consuming.

8. A vast amount of land in Bangladesh is subject to dispute or some cloud on the basis of title to land and possession, inheritance, land transactions, adverse possession, oral gifts, diluvium and subsequent re-formation, registration procedures, encroachment, improper maintenance of records, and the absence of an effective land policy.

9. There are three official sources of land records, which are the registers kept under the deeds registration system provided for by the Registration Act, the Record of Rights maintained under the provision of the SATA, and the publication of khatians (land records for the purpose of collection of rent rather than for establishing title) under the settlement and revisional settlement operations under Part V of the SATA. Land records are maintained by the sub-registrars' offices under the Registration Act and Ministry of Law, as well as by the Assistant Commissioner (Lands) under the Ministry of Land. There is no single central registry which tracks title and changes in title as well as encumbrances on land. Land records held in different offices are not updated contemporaneously or even within a reasonable period of time.

10. The registration of a person as the registered owner of an interest in land is open to challenge in the civil courts, even if that person takes the interest in good faith, without notice of prior interests and for valuable consideration. Since mortgage of land is often a major security required by financiers, the absence of clearly defined systems for registration and search of title often causes delay and in some cases insurmountable obstacles to obtaining finance.

Patent and Design Act 1911
Trade Marks Act 1940
Copyright Act 2000

11. The Trade Marks Act 1940, Patents and Designs Act 1911, and the Copyright Act 2000 are there to protect intellectual property in Bangladesh. The Copyright

⁴⁰ 1936 (ALL)239:161 IC 903.

Ordinance 1962 has been repealed and re-enacted in 2000 to incorporate provisions bringing it into line with the requirements of TRIPS. It is noted that weak administration and enforcement under these laws are a serious obstacle to the transfer of technology to Bangladesh.

12. The new copyright legislation provides for comprehensive protection for copyright for sixty years. Section 14 of the Copyright Act 2000 (hereinafter referred to as the "Act") provides a definition and an extensive list of rights that accompany the copyright. For example, in terms of provisions regarding computer technology the rights include translation, copy, circulation amongst public, presentation, recording, selling or renting of any computer programs. Computer program is defined as any readable instrument including sound, sign or direction produced in any means by which the computer can be operated in some way. Section 4 of the Act provides that the publishing of works or preparation of works in public would not constitute a breach of copyright if there is no intention to breach copyright. However if any person uses work that has been copyrighted without the permission of its owner for commercial purposes or where the owner has an exclusive right uses it in any way that would constitute a breach of copyright. Any person found to be in breach of a copyright will be subject to a maximum punishment of four years imprisonment and a fine of Taka 200,000.00.

13. Following the Act a Copyright Office, a Register of Copyright and a Copyright Board is mandated to be set up to carry out the responsibilities provided under the Act. Further, the Copyright Board will be in charge of granting copyright license. The Act sets the duration of copyright at sixty years for any published novel, music, film, photographs, sound recording etc. Where an application is made by any person under the Act the Registrar of Copyright may allow that person to publish such works if he believes it to be in the public interest provided the copyright holder is adequately compensated. The Act empowers the Government to order, by notification in the gazette, works published or presented abroad or by international institutions to be regarded as if they were published in Bangladesh simultaneously.

14. The Act makes the initial steps towards providing copyright protection for computer programs but fails to appreciate the enormity of computer technology. Unlike the UK Copyright, Designs and Patents Act 1988 which deals with computer programs, databases, works in electronic form separately the Act only uses the term computer program. The recently enacted Act has dealt with certain aspects of the Information Technology revolution by including 'computer program' as a property that may be protected but does not expressly or adequately tackle other emerging dimensions of computer and information technology that bring to fore the problems of copyright infringement and issues of jurisdiction. Until this inadequacy is remedied it appears that, at least in the short run attempts to 'shoehorn' or 'forcibly fit' internet related conduct into the existing legal framework will have to continue.

15. The trademarks, patents and designs registration regimes are not suited to many of the new innovations in trade and commerce and products, and are particularly unsuited to electronic commerce. Trademarks are only registrable in relation to goods; service marks are not registrable. They are also not very effective in protecting the rights of persons owning the trademarks, patents and designs. The processes of registration need to be streamlined, and the process speeded-up. Currently, registration of a trademark may take up to 5-7 years. Once a registration is obtained enforcement

provisions regarding punishment of infringement are weak and non-preventative. In the case of infringement, Injunctions may be obtained against offending products, but these are difficult to enforce. Piracy of a design is punishable by a fine of Tk.500.00 only, or damages to be claimed and awarded, which is a long and costly procedure in suit in the civil courts.

16. The offices of the Registrar of Trade Marks, Patents and Designs, and the Copyrights Registry lack the capacity to administer the laws and tackle the issues emerging in today's much faster moving world of commerce and technology. They do not have the requisite expertise, personnel or technological resources to provide a fast, efficient and transparent system of registration, protection and enforcement of these rights. As in most other similar registries, allegations of opaque practices and unofficial payments abound, and the recommendations for standardization and capacity building made above apply to these agencies as well.

17. The Trade Marks Act 1940 and Merchandise Marks Act of 1889 have been consolidated as the new draft Trade Marks Act. These laws are under submission to the Ministry of Law and it is hoped that they will be enacted into Acts of Parliament soon. This will be a welcome change and supply what was needed. The pre-existing uncertain state of affairs regarding enforcement of foreign award has come to an end as the new law provides for enforcement of such awards in Bangladesh. The Law Commission is at work for replacement of the Patent and Designs Act of 1911 and soon they are going to submit their recommendations and the draft to the Ministry of Law for enactment.

ENVIRONMENTAL LAWS

The Environmental Policy 1992

18. The objectives of the Environmental Policy 1992 are to maintain ecological balance and overall development through protection and improvement of the Environment and to protect the country against natural disasters, identify and regulate activities which pollute and degrade the Environment.

19. The policies for the realization of the overall objectives of this Environment Policy are provided for 15 different sectors. The relevant sectors for power plants are the Industry and energy and Fuel sectors and the policies for there are listed below:

20. Industry:

- i) Adoption of corrective measures by polluting industries in phases.
- ii) Undertake Environmental Impact Assessment (EIA) for all new industries both in public and private sectors.
- iii) Impose ban on establishment of industries producing goods which cause environment pollution; close down such already existing industries in phase and discourage use of such polluting products through development/ introduction of their environmentally sound substitutes.

- iv) Encourage development of environmentally sound and appropriate technology and initiatives on research and extension in the fields of industry balance such initiatives with the best use of labour and provision of proper wages.
- v) Prevent wastage of raw materials in industries and ensure their sustainable use.

21. Energy and Fuel:

- i) Reduce and discourage the use of those fuels which pollute the environment and increase the use of environmentally sound and less harmful fuels.
- ii) Reduce the use of fuel wood, agricultural residues etc. to meet energy need and increase the use of alternative energy sources.
- iii) Adopt appropriate precautionary measures against adverse environmental impact of the use of nuclear radiation and pollution.
- iv) Develop improved energy saving technology and proliferate its use.
- vi) Conserve country's fossil fuel reserves and renewable sources of energy.
- vii) Conduct Environmental Impact Assessment (EIA) before implementing the projects for extraction of fuel and mineral resources.

22. Pursuant to the Environment Policy 1992 the Government has published the Environment Action Plan 1992 and has enacted the Environment Conservation Act 1995. Under the Environment Action Plan the Department of Industry is introduce pollution control measures and identify existing and potential polluters.

Environmental Conservation Act 1995

23. Under Section 12 of the Environment Conservation Act 1995 (ECA 1995) no industrial unit or project can be established or undertaken without obtaining environmental clearance from Department of Environment (DOE). Accordingly, APCL would have to obtain an environmental clearance certificate from the DOE.

24. Under Section 20 of the ECA 1995 states, the Government is empowered to make rules for carrying out the purposes of this Act.

Environmental Conservation Rules 1997

25. The Environmental Conservation Rules 1997 ("ECR 1997") categorises all the projects in 4 divisions namely (a) Green, (b) Orange A (c) Orange B and (c) Red.

26. Power plants have been listed under the Red category and thus APCL would have to comply with all rules relating to the Red category specified in the Environmental Conservation Rules 1977. For proposed industrial units and projects under this category firstly a Location Clearance Certificate and thereafter an Environmental Clearance Certificate is given. However, the Director General of the DOE may, if he feels it proper, grant an Environmental Clearance Certificate without first giving the Location Clearance

Certificate. The sponsor of an industrial unit is required to apply to the Divisional Officer with the requisite fees as specified in Schedule 13 of the Rules. (Rule 7 ((2), (3), (4))

27. The following must be submitted with the application for obtaining an Environmental Clearance Certificate:

- i) Feasibility report of the industrial unit or project (applicable only for proposed industrial unit or project).
- ii) IEE(Initial Environmental Examination) Report including program outline of Environment Impact Assessment (EIA), unit or project, or EIA Report based on program outline previously approved by the Department including Layout Plane (showing location of Effluent Treatment Plant (ETP)) of the industrial unit or project, process Flow Time frame Diagram (applicable only for proposed industrial unit or project).
- iii) EMP report including Process Flow Diagram of the industrial unit or project, Layout Plan (showing location of ETP), diagram of ETP with information on function (applicable only for existing industrial unit or project).
- iv) Pollution Effect Abatement Plan along with Emergency Plan for adverse environmental impact.
- v) No objection Certificate of the local authority.
- vi) Outline of relocation or rehabilitation plan (where application).
- vii) Other necessary information (where applicable).

28. Upon receiving the application the Location Clearance Certificate will be granted within 30 to 60 working days for the proposed industrial unit. A Location Clearance Certificate enables the sponsor to undertake land development and infrastructure development programs and based on the program outline mentioned in IEE Report including Time Frame and ETP Diagram, prepare EIA Report and submit the same for approval of the Department of Environment within the given time. The EIA Report and the Time Frame with the ETP Diagram are normally approved within 60 working days of receipt. (Rule 7 (6) (d), (8), (9), (11))

29. Once the sponsor receives the approval of EIA he will be able to open letters of credit for importable machinery which will include ETP related machinery. Once the ETP is installed he would be able to apply for the Environmental Clearance Certificate without which the sponsor would not be able to obtain gas connection or commence trail production. Once the sponsor applies for the Environmental Clearance Certificate after ETP installation it would normally granted within 30 working days. (Rule 7 (12), (13))

30. For existing industrial units and projects under the Red category the Environmental Clearance Certificate is normally granted to the sponsor within 30 to 60 working days upon submission of all the documents as specified in Rule 7 (6) (d) and the requisite fee. (Rule 7 (14))

31. The validity of Environmental Clearance Certificate for Red categories is 1 year from the date of issue and must be renewed 30 days before expiry date of the Certificate. If the application for Environmental Clearance Certificate is not given it will be rejected stating the reasons. (Rule 8)

32. The schedules of the Rules provide for the Quality Standards of air, water, noise, odour and other environmental components.

The Factories Act 1965

33. The Factories Act 1965 provides for the control of the internal environment of factories or industries. It provides that every factory shall be kept clean and free from effluvia arising from any drain privy or other nuisance.

34. Effective arrangements shall be made in every factory for the disposal of wastes and effluent due to the manufacturing process carried on therein. The Government also prescribes a standard of adequate ventilation and reasonable temperature for any factory or class or description of factories or parts.

35. Three major issues have been identified by environmental law practitioners in the above statutory scheme. First, a lot of laws directly concerning 'environmental material' i.e. in relation to forests, water, hills etc. were enacted at a time when environmental concerns were not at the forefront of decision-making, and also for purposes of generating revenue or allocating resources (e.g. the Forest Act, 1927). Second, the agencies which have control of these resources do not coordinate well with the agencies of government charged with protecting the environment. Third, public participation in environmental issue-related decision-making processes is not mandated by statute. Zoning requirements are not strictly enforced, or in many cases industrial units were set up in areas far enough from locality, but the expansion of human habitat has meant that these are surrounded by residential areas (this is true, for example, of the Tejgaon Industrial Area of Dhaka).

36. Recently, due to the activities of environmental activist organizations like Bangladesh Environmental Lawyers' Association (popularly known as BELA) and Bangladesh Poribesh Rakshya Andolon, environmental concerns are being brought to the public knowledge, and litigated in court. This will create awareness among both investors and members of the public for the need to conform to environmental legislation in formulating and operating commercial and industrial projects. Recently, a very large housing project in the private sector has been declared illegal in writ proceedings in the Supreme Court, for violation of environmental guidelines, not conforming to the master plan formed for the development of Dhaka city and its surrounding areas, and as having filled in a protected water body, even though the developers had in their possession documents purporting to indicate the required permission from the various regulatory agencies.

PROCEDURAL LAWS

Code of Civil Procedure 1908

Specific Relief Act 1877

Penal Code 1860

Arbitration Act 2001

Bankruptcy Act 1997

37. The Specific Relief Act 1877 provides for the specific enforcement of contractual terms provided monetary compensation is not adequate compensation, the contract does not run into numerous details, or it is not a contract for the enforcement of personal service. Specific performance of contracts is an equitable remedy and the courts have a judicial discretion whether to grant it or not. Relief may be granted at the discretion of the courts by way of temporary or permanent injunctions.

38. The Code of Civil Procedure 1908 prescribes that the subordinate courts which are courts of civil judicature have jurisdiction to try all suits of a civil nature except suits of which their cognizance is either expressly or impliedly barred. It provides for three kinds of jurisdiction of the subordinate courts: pecuniary, territorial and jurisdiction over subject-matter. A suit in which the right to property or to an office is contested is a suit of a civil nature. The court of first instance is usually the court of the Subordinate Judge, which has the unlimited pecuniary jurisdiction. Every suit is required to be instituted in the court of the lowest grade competent to try it.

39. The Law of Arbitration Act, 2001 formally came into force earlier this year. Prior to the enactment of this legislation the question of enforcement of foreign arbitral awards was not beyond doubt. The enforcement of such awards was uncertain mainly because no necessary domestic law existed or had been enacted for the enforcement of the foreign arbitral awards. Section 45 of the Arbitration Act now provides for the recognition and enforcement of foreign arbitral awards. Foreign arbitral award is defined as an arbitral award made in pursuance of an arbitration agreement, in the territory of any state other than Bangladesh. The Arbitration Act recognises a foreign arbitral award as binding on the persons as between whom it was made and may, accordingly, be relied on by those persons by way of defense, set-off or otherwise in any legal proceedings in Bangladesh. A foreign arbitral award shall be enforceable by the Court under the Code of Civil Procedure in the same manner as if it were a decree of the Court.

40. Section 7 of the Arbitration Act provides that notwithstanding anything contained in any other law for the time being in force where a party to an arbitration agreement institutes legal proceedings in a Court against another party to such agreement, the Court shall have no jurisdiction to hear and determine such legal proceedings except as provided by the Arbitration Act.

41. Further, Section 10 provides that a court before which an action is brought in a matter, which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless the agreement is null and void. The provision essentially allows a party to an arbitration agreement to apply to court for the matter in dispute to be referred to arbitration so long as the party has not filed his first statement on the substance of the dispute.

42. Section 9 of the Arbitration Act stipulates the form of arbitration agreements. It provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. It additionally provides that such agreement shall be in writing and that an agreement shall be deemed to be in writing if it is contained in a document signed by the parties.

43. These laws as they now stand are neutral in effect in relation to the growth and development of the private sector, save that the Arbitration Act 2001 has made progress towards non-judicial dispute resolution being made easier, but the administration of the Code of Civil Procedure and the Specific Relief Act through the civil courts system requires to be made much more efficient, transparent and certain. Judicial reform is being undertaken as part of the World Bank funded project and will address these issues.

44. Under Section 294B of the Penal Code 1860 (PC) it is an offence to offer any sort of prize in connection with trade; the definitions of the offences in this section are so wide as to encompass almost all types of promotional activities for the sale of products. Notwithstanding this provision, promotional activities are very common for SMEs offering products for sale in the Bangladesh market, so much as to make the law almost totally ineffective in relation to its actual purpose. However, the provision is often used by unscrupulous persons to either harass competitors or to obtain undue monetary benefit through the threat of arrest and lengthy litigation under the law. It is recommended that this provision be repealed.

45. The Bankruptcy Act, 1997 provides for the liquidation of companies in situations, among others, when they are unable to pay their debts. This law has hardly ever been used, although substantively in existence since the 1920s, because of social pressures on banks or financial institutions wishing to use it as a means of recovery of loans.

COMMERCIAL LAWS

Negotiable Instruments Act 1881 Contract Act 1872

46. The Contract Act, 1872 was enacted with the view to "...define and amend certain parts of the law relating to contracts..."⁴¹. The Act does not profess to be a complete code dealing with the law relating to contracts. The intention of the Legislature was not to deal exhaustively with any particular chapter or subdivision of the law relating to contracts.⁴² The Act was an outcome of different systems adopted in the form of legislation. The Act deals with the manner of making valid agreements, contracts, its kind, manner and possibilities and impossibilities of performance, parties to such performance, quasi-contracts, breach of contract and its consequences. It also deals with indemnity, guarantee, bailment agency and the effect of contracts through agency. In this respect, the Act is a comprehensive piece of legislation. There is one basic difference between the law of contracts and other laws. It does not specify a number of rights and duties, which the law protects or enforces. It rather consists of a

⁴¹ The Preamble of the Contract Act, 1872.

⁴² *Irawaddy Flotilla Co. v. Bugawandas*, (1891) 18 I.A. 121; *Jwaladuti R. Pillani v. Bansilal Motilal*, (1929) 56 I.A. 174; *Meghu Mian v. Kishun Ram*, 1954 A.P. 477.

number of limiting principles, subject to which the parties may create right and duties for themselves, which the law will uphold. In a sense, the parties to a contract make the law for themselves. So long as they do not infringe some legal provision, they remain at liberty to make what rules they like regarding the subject matter of their agreement, and the law protects the parties in respect of their mutual determinations. Therefore, in its application, it is neutral of effect in terms of commercial transactions, and a detailed discussion of its provisions is not required for this Report.

47. The Negotiable Instrument Act, 1881 defines and deals with negotiable instrument, which are a mainstay of commercial transactions. Negotiable instruments, as defined under the Act, include promissory notes, bills of exchange and cheques. It deals with the parties to each different type of negotiable instrument, and their rights and liabilities. It also provides for the procedures with respect to drawing, negotiation, presentation, discharge, dishonour, acceptance and payment of or against negotiable instruments. Special rules of evidence are provided for, and special provisions relating to cheques, which are treated as a special class of negotiable instruments, because of the involvement of banks in the process. By a recent amendment, dishonour of cheques has been made a criminal offence, and upon due notice of dishonour being given to the drawer of a cheque, a summary criminal proceeding may be filed, upon which a warrant of arrest may be issued against the drawer of the cheque. This provision has had a salutary effect on the previously common practice of providing dated or post-dated cheques, which were then dishonoured by non-availability of funds. The legal interpretations and practices in relation to negotiable instruments is quite well-settled, and in line with established international documentary credit practices. However, the principal difficulties arise in dispute resolution in relation to negotiable instruments by reason of the fact that inexperienced bankers often do not follow the requirements, among others, for keeping the instruments valid through non-expiry⁴³, notifying and presenting documents in due time and by the correct procedure, and judges of the subordinate courts with jurisdiction over such disputes who are not at all well versed in documentary credit concepts and practices.

Foreign Private Investment (Promotion and Protection) Act 1980

48. The policy framework for foreign investment in Bangladesh is based on the Foreign Private Investment (Promotion and Protection) Act, 1980 which provides for:

- i) Non-discriminatory treatment between foreign and local investment.
- ii) Protection of foreign investment from expropriation by the state.
- iii) Ensured repatriation of proceeds from sale of shares and profit.

49. For foreign investment, there is no limitation pertaining to equity participation, i.e. 100 percent foreign equity is allowed. Fully foreign owned firms or joint ventures are in no way obliged to sell their shares through public issues, irrespective of the amount of their paid-up capital. However, foreign investors or companies with foreign investment are eligible to buy shares through the stock exchange. Foreign investors or companies may obtain full working capital loans from local banks. The terms of such loans will be determined on the basis of bank client relationship.

⁴³ This is a major issue in relation to promissory notes.

50. Foreign entrepreneurs enjoy the same advantages as domestic entrepreneurs in respect to tax holiday, payment of royalty, technical know-how fees etc. A foreign technician employed in foreign companies is not be subjected to personal tax for up to 3 years, and beyond that period his/her personal income tax payment is governed by the existence or non-existence of an agreement on the avoidance of double taxation with the country of citizenship.

51. Full repatriation of capital invested from foreign sources is allowed. Similarly, profits and dividend accruing to foreign investment may be transferred in full. If foreign investors reinvest their repatriable dividends and or retained earnings, those are treated as new investment. Foreigners employed in Bangladesh are entitled to remit up to 50 percent of their salary and enjoy facilities for full repatriation of their savings and retirement benefits.

52. The process of issuing work permits to foreign experts on the recommendation of investing foreign companies or joint ventures operate without any hindrance or restriction. Multiple entry visas are issued to prospective foreign investors for 3 years. In case of experts, multiple entry visas are issued for the whole tenure of their assignments.

53. Foreign investment in “Thrust Sectors”, particularly in small industrial units, are given priority in allocation of plots in BSCIC industries estates.

54. Investment of non-resident Bangladesh are treated at par with foreign direct investment. Investment guarantee and dispute settlement will be guided by international arrangements and provisions.

Board of Investment Act 1989

55. The Board of Investment Act 1989 provides for the establishment of a board to encourage investment in the private sector and to provide necessary facilities and assistance in the establishment of industries. The Act does not define “industry”⁴⁴, but refers throughout to “industries” and “industrial projects”.

⁴⁴

The Industrial policy defines industries as below:

“4.1 “Industry” is broadly defined to include both manufacturing industry and service industry.

“Manufacturing Industry” includes all production, processing and assembling activities as well as repairing and reconditioning of processed goods.

“Service Industry” includes those service-oriented activities which involve significant use of equipment or fixed assets. The list of service activities which are currently declared “Industries” is shown in Annexure –1.

“Large Industry” is defined to include all industrial enterprises employing 100 or more workers and/or having a capital of over Taka 300 million.

“Medium Industry” will cover enterprises employing between 50 and 99 workers and/or with a fixed capital investment between Taka 100 million and Taka 30 million.

“Small Industry” will mean enterprises employing fewer than 50 workers excluding the cottage units and/or with a fixed capital investment of less than Taka 100 million.

“Cottage Industry” covers household based units operated mainly with family labour.

“Reserved Industries” are those which are earmarked exclusively for public investment through executive order. The current list of “Reserved Industries” is shown in Annexure – II.

“Thrust Sectors” are those industrial activities which are identified or so declared by the Government for the purpose of targeting special incentives and support measures. The current list of Thrust Sectors is shown in Annexure – III.

The definition of “Industry” may be modified consistent with contemporaneous need.”

56. The Board of Investment (BOI) has been established under the Act. It consists of the Prime Minister as Chairman (or a person nominated by the Prime Minister from among the minister-members of the Board), the Ministers for Industry, Finance, Power/Fuel/Mineral Resources, Commerce, Textiles, and Planning, the Governor of Bangladesh Bank, Secretaries of Industries, Finance and Internal Resources Divisions, President of the FBCCI, President of the Bangladesh Chamber of Industries and the Chairman of the Executive Council of the BOI.

57. Among the functions of the BOI are:

- i) providing all kinds of facilities for the investment of local and foreign capital for rapid industrialization in the private sector;
- ii) implementation of Government policy relating to investment of capital in industries in the private sector;
- iii) approval and registration of all industrial projects in the private sector involving local and foreign capital;
- iv) creation of infrastructural facilities for industries in the private sector;
- v) determination of terms and conditions for employment of foreign officers, experts and other employees necessary for industries in the private sector;
- vi) providing necessary assistance in the financing of important new industries in the private sector;
- vii) collection, compilation, analysis and dissemination of all kinds of industrial data and establishment of a data bank for this purpose; and
- viii) doing such other acts and things as may be necessary for the performance of its functions.

58. BOI is mandated to have a six-member Executive Council, which shall be appointed by the Government. The Executive Council is the body responsible for the implementation of the decisions of the Board.

59. Section 5 of the BOI Act provides that at the time of approving an industrial project the board shall give its decisions on all facilities that may be required for implementation of the project in due time, and one of the matters on which such a decision may be given is the extent and the terms and conditions of foreign loan and of suppliers credit.

60. Under the provisions of the Foreign Exchange Regulation Act, 1947, (the FERA) read with paragraph 1 of Chapter 23 of the Guidelines for Foreign Exchange Transactions issued by the Bangladesh Bank, industrial enterprises in the private sector may, without prior approval from the Bangladesh Bank or BOI, enter into supplier's credit and other foreign currency loan contracts with lenders abroad if the effective rate of interest does not exceed LIBOR + 4%, repayment period is not less than 7 years, and down payment is not more than 10%. These loan agreements, however, need to be registered with BOI. In other case, the Guidelines provides that foreign loans not conforming with these general guidelines may also be contracted with prior BOI approval. It may be noted that the substantive provision of Section 4 of the FERA provides for the special or general permission the Bangladesh Bank, and not BOI. The BOI Act also does

not specifically mandate such prior approval in the sense of not registering a project if it does not agree with the terms and conditions for such a loan. Also, there is no provision for such approval being required for subsequent loans. However, such a requirement may arguably be justified in view of the fact that repayment of such loans may entail large foreign currency commitments in a country where foreign currency reserves are required to be carefully maintained and monitored.

61. What happens in practice is that BOI requires the filing of loan agreements for prior approval in all cases of foreign borrowings, within or without the parameters specified in the Guidelines. There being the usual shortage of manpower, and particularly manpower with the required expertise to meaningfully review the loan documents, and in the absence of regular meetings of the Executive Council, a bottleneck is created and delays result in approval being granted. There are no published guidelines upon which approval may be given or refused, and no time frame for consideration of such proposed loan agreements.

62. The provision that 100% foreign owned, or joint venture units in EPZs may obtain foreign currency loans from overseas banks and financial institutions without prior Bangladesh Bank or BOI permission appears to make justification of the prior approval requirements stated above difficult.

63. If the purpose of the exercise is monitoring of foreign exchange commitments of the country, post-facto registration of loan agreements for information purposes may be sufficient.

64. The Bangladesh Bank committee has also been interventionist in the approval of foreign loans. One local investor had a foreign partner willing to invest in a textile sector project under government-announced terms and conditions. However, when the committee suggested new terms and conditions in the loan agreement, the foreign investor immediately withdrew his offer. This combination of approval difficulties and delays make the financial side of an investment difficult to complete.

65. Another matter of immediate concern to investors is the authority of BOI to provide work permits to foreign employees. The rules in this regard are opaque, and there is a circularity with the visa requirements enforced by the Ministry of Home Affairs. A foreigner cannot get an employment visa prior to arrival in Bangladesh without a work permit, and often cannot get a work permit without an employment visa. While the Bangladesh Investment Handbook published by the BOI lists the broad guidelines for expatriate employment prescribed by the Government, there is no easily available documented procedure for such application and guidelines for the terms and conditions for such employment which are considered by BOI in making the decision to grant or refuse a work permit. There is also no timeframe for the BOI to make the decision.

Bangladesh Export Processing Zones Authority Act 1980

66. Export Processing Zones have been set up in Bangladesh under the Bangladesh Export Processing Zones Authority Act, 1980 ("BEPZA Act"), in order to assist and promote the establishment of export-oriented industries, by providing various facilities and incentives in terms of taxation, priority provision of utilities, and until recently, disallowance of trade union activities.

67. The BEPZA Act provides for the Authority set up by it to take possession of land acquired/requisitioned by the Government for the creation and development of export processing zones, to allot such land to qualifying industries, to provide infrastructure facilities such as transportation, warehousing and utilities, etc.

68. The Act provides for the Government to Exempt an export processing zone ("EPZ") from the application of any statute, or to modify the application of any statute, listed in Section 11A of the BEPZA Act, and the statutes listed include the Stamp Act, Companies Act, Foreign exchange Regulation Act, Employment of Labour (Standing Orders) Act, Industrial Relations Ordinance, Income Tax Ordinance, Factories Act, etc. There are separate procedures under relevant laws for repatriation of funds in relation to foreign-owned industries in EPZs.

69. In 1996 a law was passed for the creation of private EPZs, called the Bangladesh Private Export Processing Zone Act, 1996. Under this law, private entities would be able, under license from the Government, to set up EPZs with the same facilities as state-owned EPZs set up under the BEPZA Act. The experience of the one attempt to set up a private EPZ, the Korean EPZ in Chittagong has not been a happy one. Due to political backtracking after signing an agreement with the sponsor, there was litigation in relation to excess compensation being charged for the land acquired for the KEPZ, and the license is yet to be issued since new conditions were inserted in the license which were not in the agreement with the Government to issue the license. It should be clearly provided that the terms and conditions of a license will not deviate from the terms and conditions agreed by negotiation between the parties.

LABOUR/EMPLOYMENT LAWS

The Employment of Labor (Standing Order) Act 1965

70. The ELA 1965 regulates the conditions of service of workers employed in the organisations to which it applies. Under the ELA 1965 there are three grounds on which workers can be relieved of their positions.

Retrenchment

71. The procedures for retrenchment for workers are prescribed under Section 12 of the ELA and apply only to workers who have been in continuous service for at least one year. The section provides that:

- i) The worker must be given one month's notice in writing indicating the reason for retrenchment or payment in lieu of such notice;
- ii) notice must be sent to the Chief Inspector of Factories or officer authorised by him; and
- iii) the worker must be paid at the time of retrenchment compensation in accordance with a formula linked to the period of service, or gratuity at prescribed rate (whichever is higher).

72. The principle of retrenchment established in Section 13 of the ELA is generally that the worker who was the last person to be employed in a specific category of employees who are to be retrenched, must be retrenched first.

Discharge

73. As provided in Section 16 of the ELA, a worker may be discharged on grounds of physical or mental incapacity or continued ill health.

Dismissal

74. Under Section 17 of the ELA it is permissible to dismiss, without prior notice or payment in lieu thereof, a worker on grounds of misconduct or if the worker is convicted of an offence.

75. If the worker is dismissed, and he has been employed continuously for not less than one year, he must be paid compensation by the employer equivalent to his wages for fourteen days for every year of service, or for any part thereof in excess of six months or a gratuity, if any (whichever is higher).

76. Section 17(3) further provides a list of acts or omissions which can be regarded as misconduct. It includes, inter alia, willful insubordination or disobedience, whether alone or with others, theft, fraud or dishonesty in connection with the employer's business or property, taking or giving bribes, habitual absence without leave, riotous or disorderly behavior, neglect or illegal strike.

77. Section 18 deals with procedure for dismissal, which must be complied with to ensure that the order of dismissal is valid. Some of the salient features of the procedure are that no order for discharge or dismissal of a worker will be made unless-

- i) the allegations are recorded in writing;
- ii) a copy of the allegations are given to the worker and he has been given not less than three days to respond;
- iii) a personal hearing is held (if requested by the worker).

78. A worker charged for misconduct may be suspended pending inquiry into the charge. Unless the matter is pending before any court, the period of such suspension is not to exceed sixty days.

79. In case of illegal strike, an employer may discharge or dismiss one or more workers individually or collectively, by notice posted on the notice board, after obtaining permission from the Labour Court.

Termination

80. Section 19 of the ELA provides for the procedure and compensation for termination of employment in a manner other than those stated above

81. For terminating the employment of a permanent worker, the employer must give prior notice in writing (one hundred and twenty days for monthly rated workers and sixty days for other workers). In lieu of such notice the wages for the applicable notice period may be paid.

82. The law further provides for prescribed compensation to be paid for every completed year of service by the employer for the worker whose employment is terminated in such a manner.

83. A permanent worker may resign upon one month's notice in writing, in case of monthly rated workers, and fourteen days' notice in the case of other workers.

Industrial Relations Ordinance 1969

84. The Industrial Relations Ordinance 1969 (the "IRO") regulates the relations between employers and workmen and lays down the provisions for the settlement of disputes arising between them.

85. The IRO lays down the provisions for the formation for trade unions, the inter-relation between trade unions where there is more than one trade union, collective bargaining, and provides protection for both employers and employees.

Minimum Wages Ordinance 1961

86. In the public sector, the Government on the recommendation of the National Wages Commission, established from time to time, determines wages and fringe benefits of the workers, and public sector employees are also covered by the Pay Commission set up by the Government from time to time.

87. In the private sector, the wages and fringe benefits of the workers and the employees may be determined through collective bargaining procedure. However, under the Ordinance minimum wage rates may be fixed by the Minimum Wages Board.

88. The Minimum Wages Ordinance, 1961 (hereinafter referred to as the "MWO, 1961" or the "Ordinance", interchangeably) provides for the regulation of minimum rates of wages for workers employed in industrial undertakings, and prescribes the mechanisms for fixing the minimum wage rates. Under the Ordinance, the Government has established a Minimum Wages Board, which may recommend minimum rates of wages for workers in industrial undertakings, if a reference is made to it by the Government in this regard. The Government may, upon receipt of a recommendation by the Minimum Wages Board, declare the minimum rates of wages recommended by the Board for various workers to be the minimum rates of wages for such workers. Once a minimum rate of wage has been declared for a particular class of worker, no employer shall pay any worker wages at a rate lower than the rate so declared for such a worker,

subject only to such deductions as may be authorized under the Ordinance or any other law for the time being in force.

89. The Government has recently purported to fix the minimum wage rate for adult, unskilled and juvenile workers in private sector industries by issuing a gazette notification under the MWO, 1961. This notification has been challenged in the High Court Division of the Supreme Court in a writ application, and the judgment is expected to be reported shortly. The minimum wage rates specified in the notification have not yet been applied in practice.

Maternity Benefits Act 1939

90. The Maternity Benefits Act, 1939 requires that no employer may knowingly employ women during six weeks immediately following the date of delivery and no woman shall work during the six weeks immediately following the delivery.

91. Subject to the provisions of the Act, every woman employee is entitled to payment of maternity benefits at the rate of her average daily earnings calculated to the nearest quarter of a year, for the actual days of her absence which include holidays and non-working days, during the period of six weeks immediately preceding delivery (including the day of her delivery), and for a period of six weeks immediately following the delivery.

92. Leave and holiday of the workers and employees are regulated by the Shops & Establishment Act, 1965 and the Rules. The Government may also declare other holidays for workers by notification in the Official Gazette.

Shops and Establishment Act 1965

93. Under the Shops and Establishment Act 1965 every worker who has completed one year of continuous service in a factory is allowed to take a paid leave of absence during the subsequent period of twelve months for the number of days calculated at the rate of one day for every twenty two days of work performed by him during the previous twelve months. However, the worker shall cease to earn any leave under this section when he has earned twenty days of leave. The period of leave is inclusive of any holiday which may occur during such period. Every worker is allowed at least ten days festival holidays with wages. A worker may be required to work on any festival holiday, but he must be allowed to take two days' holidays with full pay and a substitute holiday. Section 80 of the Act entitles every worker to take ten days casual leave with full wages in a year and fourteen days sick leave on half-average wage in a year.

Gratuity

94. Under Bangladeshi law gratuity is a form of bonus that is paid to the employee at the discretion of the employer and as provided under the contract of service with the employee. An employee in an organization will therefore not be able to demand gratuity unless it is expressly provided in his or her contract of service.

95. The major issues with regard to this set of laws is, (a) the definition of a worker, (b) the application of the laws, and (c) trade union activities.

96. Under the ELA, a worker is defined as any person employed in any shop, commercial establishment or industrial establishment to do any skilled, unskilled, manual, technical, trade promotional or clerical work for hire or reward, whether the terms of employment be expressed or implied, but does not include any such person –

- i) who is employed mainly in a managerial or administrative capacity; or
- ii) who, being employed in a supervisory capacity, exercises, either by nature of the duties attached to the office or by reason of power vested in him, functions mainly of managerial or administrative nature.

97. It is often difficult to classify an employee in accordance with this criteria as either a worker or a non-worker. The recent trend has been, in white-collar industries, for any employee to claim to be a worker for the purposes of taking recourse to the various beneficial provisions of these laws, in particular for filing suit in the Labour Courts. In order to avoid application of these laws, employers are resorting to contractual employment for limited durations, subject to renewal of contract on satisfactory performance.

98. Trade disputes are often not resolved in accordance with the provisions of the IRO 1969, with neither the employees nor the employers following the provisions for due notice and discussions prior to striking work or declaring lock-outs. The extreme politicisation of trade union activities in most industries is a matter of concern. Recently, trade union activities have been permitted in EPZs as a result primarily of US interest in this regard.

III. ASSESSMENT OF THE LEGISLATIVE AND REGULATORY PROCESS

1. A short review of the general constitutional framework of the State is provided below, as background to the legislative process.

Republic

2. Bangladesh is a unitary, independent, sovereign, democratic republic. The Constitution is the supreme law of the Republic and if any law is inconsistent with the Constitution that other law is, to the extent of the inconsistency, void. The three organs of the Republic are the Executive, the Legislature and the Judiciary.

Constitution

3. The Constitution guarantees certain fundamental rights to citizens of the Republic. All laws inconsistent with the provisions of Part III of the Constitution which guarantees fundamental rights are void. All citizens are equal before law and are entitled to equal protection of law. To enjoy the protection of the law, and to be treated in accordance with law is the inalienable right of every citizen, and every other person for the time being within Bangladesh. No action detrimental to the life, liberty, body, reputation or property of any person is to be taken.

Executive

4. The President of Bangladesh is the Head of State. In the exercise of all his functions, save that of appointing the Prime Minister and the Chief Justice, the President acts in accordance with the advice of the Prime Minister. There is a Cabinet of Ministers with the Prime Minister as its head. The executive power of the Republic is exercised by the Prime Minister. The President makes rules for the allocation and transaction of the business of the Government. The executive authority of the Republic extends to the acquisition, sale, transfer, mortgage, and disposal of property, the carrying on of any trade or business and the making of any contract. Parliament may by law regulate the appointment and conditions of service of persons in the service of the Republic.

Legislature

5. The legislative powers of the Republic are vested in Parliament. Parliament consists of 300 members elected from single territorial constituencies by direct election, and 30 women members elected by those 300 members. Bills are presented to Parliament for making laws. When a bill is passed, it is presented to the President for assent. When the President has assented or is deemed to have assented to a bill passed by Parliament it becomes law and is called an Act of Parliament. No tax may be levied or collected except by or under the authority of an Act of Parliament. At any time when Parliament stands dissolved or is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate Ordinances, which has force of law as an Act of Parliament. An Ordinance must be laid before Parliament at its first meeting following the promulgation of the Ordinance.

Judiciary

6. The Constitution provides that there is a Supreme Court of Bangladesh comprising the Appellate Division and the High Court Division. The Chief Justice of Bangladesh and the other Judges are independent in the exercise of their judicial functions. The Chief Justice and other Judges are appointed by the President.

7. The High Court Division has original, appellate and other jurisdictions, powers and functions as are or may be conferred on it by the Constitution or any other law. In particular, the High Court Division has what is in common parlance known as the “writ jurisdiction”, for issuing writs in the nature of habeas corpus, mandamus, certiorari and quo warrant. It has extensive powers of judicial review over administrative actions. The High Court Division has original jurisdiction in several fields including company matters, admiralty, and income tax references. It has superintendence and control over all courts and tribunals subordinate to it.

8. The Appellate Division has jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division.

9. In addition to the Supreme Court, there are subordinate courts which are established by law (rather than directly under the constitution). The subordinate courts are the courts of the District Judge, Additional District Judge, Joint District judge, and Assistant Judges.

10. Appointments of person to offices in the judicial services (including judges of the subordinate courts) and as magistrates exercising judicial functions are made by the President. The control and discipline of persons employed in the judicial service and magistrates exercising judicial functions vest in the President who exercises them in consultation with the Supreme Court. All persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.

Legal Enforcement of Rights

11. The Code of Civil Procedure, 1908 prescribes that the subordinate courts which are courts of civil judicature have jurisdiction to try all suits of a civil nature except suits of which their cognizance is either expressly or impliedly barred. It provides for three kinds of jurisdiction for the subordinate courts: pecuniary, territorial and jurisdiction over subject-matter. A suit in which the right to property or to an office is contested is a suit of a civil nature. The court of first instance is usually the court of the Joint District Judge, which has unlimited pecuniary jurisdiction. Every suit is required to be instituted in the court of the lowest grade competent to try it.

12. Bangladesh courts follow an adversarial procedure for the determination of disputes. After hearing a case, the court pronounces judgment and a decree follows on the judgment. A decree may be executed either by the court which passed it, or it may be sent to another court for execution. The property of a judgment-debtor will be liable to attachment and sale in execution of a decree, subject to the rules in this regard prescribed by law. Property may be attached prior to judgment in certain cases where the court is satisfied that the defendant, with intent to obstruct or delay the execution of a possible decree is about to dispose of the whole or part of the property or remove it from

the court's jurisdiction. The courts may make orders of temporary injunction or other interlocutory orders in a suit.

Functionality of the Court System for Commercial Matters

13. By the provisions of the Code of Civil Procedure, a suit must be filed at the first instance in the court with the pecuniary jurisdiction to hear such a suit. The Civil Courts Act 1887 delimits the pecuniary jurisdiction⁴⁵ of subordinate courts, in that Assistant District Judges (the lowest rung of the civil subordinate judiciary) have a limit of Taka 200,000.00, Senior Assistant District Judges have a limit of Taka 400,000.00, and Joint District Judges have unlimited pecuniary jurisdiction.

14. As a result of the pecuniary limitations, commercial matters are usually filed in the first instance in the court of a Joint District Judge. Prior to becoming a Joint District Judge some 10 years or so after joining the judicial service, the judicial officer concerned deals primarily with "civil matters", i.e. real property and family dispute related matters. The legal curriculum at university does not place an emphasis on commercial, corporate or fiscal laws. Therefore, at the time a judge of the subordinate courts begins to hear commercial matters, he would have had very little opportunity to be exposed to such matters or to have received training in the related laws. Commercial concepts become difficult to explain, particularly those relating to international trade and finance. Similarly, lawyers appearing in the subordinate courts do not have much experience in commercial matters. This results in delays, as well as decisions being rendered on an unsound legal basis.

15. Certain company matters as prescribed by the Companies Act, 1994, income tax references under the Income Tax Ordinance 1984, admiralty suits under the Admiralty Act, 2000 are among a few commercially oriented matters which may be filed in the High Court Division of the Supreme Court in its original jurisdiction. Customs rulings are also often challenged in the High Court Division by way of writ proceedings (judicial review of administrative action). In these cases, the judges of the Supreme Court are certainly more experienced, however the benches of the High Court Division with jurisdiction to hear such matters are of necessity small, and also have large backlogs of cases.

16. In either level of the judiciary, disposal of cases may take as long as 3-5 years on average.

17. Delays are further incurred due to the enormous back-log of cases already there in the subordinate courts. The inherent inefficiencies of the judicial system are being addressed in detail in a World Bank funded Judicial Sector Reform project.

Legislative Process

18. Legislation is the business of Parliament. Usually, the line ministry concerned (as found in the Rules of Business of the Government ("RBG")⁴⁶) proposes a new law or amendments to the existing law. The RBG provides that the Ministry of Law, Justice and

⁴⁵ Pecuniary jurisdiction is related to the valuation of a suit made at the time of filing.

⁴⁶ The Rules of Business are rules framed by the President of Bangladesh in exercise of powers conferred by Article 55(6) of the Constitution, for the allocation and transaction of business of the Government.

Parliamentary Affairs ("Ministry of Law") shall be consulted on all proposals for legislation, and that all laws on subjects allocated to each ministry shall be a part of its business. It further provides that in respect of all matters to be submitted to the Cabinet, the Secretary of the Ministry concerned shall transmit to the Cabinet Secretary a concise and clear memorandum of the case, referred to as the "Summary", giving the background and relevant facts, the points for decision and the recommendations of the Minister in Charge. The Summary shall be self-contained as far as possible, and shall include as appendices such relevant papers as may be necessary for proper appreciation of the matter.

19. The ministry concerned may itself prepare a draft of the statutory enactment required, or request the Ministry of Law to prepare the relevant draft. At the drafting stage, detailed file notes are usually made explaining the need for the law or the amendment and the purposes to be served by it. There is no formal requirement for public consultation or setting up of committees of experts for proposing legislation or reviewing drafts. After internal review (and very seldom is there public review of draft statutes, or public consultation prior to drafting, or even informal consultation. However, sometimes, vested interests do get involved in promulgation of a law, or more often in the issuance of subordinate legislation) the draft is placed before the Cabinet Committee of Ministers, together with the relevant Summary. Once the Cabinet approves the draft, it is placed before Parliament through the Ministry of Law, together with a brief one or two paragraph statement of purpose, for a first reading, and then sent to the Parliamentary committee concerned for further review. It is then placed before Parliament for second and third readings and then voted upon. Once it receives the affirmative vote of Parliament, it is sent to the President for signature, whereupon it becomes law.

20. As mentioned above, at any time when Parliament stands dissolved or is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate Ordinances, which has force of law as an Act of Parliament. An Ordinance must be laid before Parliament at its first meeting following the promulgation of the Ordinance.

21. Acts of Parliament and Ordinances may provide the power for the Government or the agency in charge of administering the laws to make rules for carrying out the purposes of the Acts/Organances. The rule-making powers may be limited to certain parts of an enactment, or be general in nature. The enactments often provide for the implementing agencies to make regulations, usually when licensing or other similar authority is given in the parent Act. There are usually no well-defined procedures of consultation prior to making rules, and in particular, regulations.

22. There is no coordinating body for laws, and it is up to the Ministry of Law as to how far all other laws are reviewed to assess the effect any legislative enactment or amendment may have. In the case of rules or regulations, usually no broad view of conflict or confusion with other parent or subordinate legislative instrument is taken. This results in situations of conflicting requirements being in place. While in some cases line ministries will take the assistance of outside experts in drafting or reviewing laws, this is rare. However, recently, the Securities and Exchange Commission has been one regulatory institution which has circulated to stakeholders certain draft rules and regulations, as well as circulars, for comments prior to enactment.

23. In relation to fiscal laws, particularly customs-related laws, statutory regulatory orders (SROs) are used abundantly to deviate from the parameters set in many particulars in parent laws, especially in the setting of rates for duties and taxes. In the mid-1990s a Law Reform Commission was formed, but it has not taken on the function of a central clearing house for legislation.

Law Reform Commission

24. By the Law Reform Commission Act, 1996, a permanent Law Reform Commission was set up, with the mandate to, among others, review the relevant laws and propose amendments or new laws in order to expedite dispute resolution at various levels of civil and criminal courts; make recommendations for the modernization of the judicial system; and specifically with a view to attracting local and foreign investment and bearing in mind the requirements of an open-market economy, recommend amendments or new laws in order to create a competitive environment in industry and commerce, recommend amendments to laws relating to copyright, trade marks, patents, arbitration, contract, registration and other such matters, and review the need for setting up separate commercial and financial courts. Additionally, it is mandated to review and resolve conflicts of laws in the same sphere by proposing consolidating legislation where a multiplicity of laws exists.

25. The Commission consists of a Chairman and two members, supported by a requisite number of staff and funded from the national budget. By an amendment to the law in 2001, specific provision was made to provide the Commission with highly qualified researchers and draftsmen, as well as consultants on a needs basis. As of 2004, the Commission has only 3 research officers. So far, the Chairman of the Commission has been a retired Chief Justice of Bangladesh, and members have been retired judges of the Supreme Court. It appears that the Commission, like many other such institutions in the country, has never been fully operationalized by access to adequate financial and human resources. In the almost 10 years of its existence, the Commission has proposed amendments to a handful of laws, such as the Arbitration Act, 2001 and Admiralty Act, 2000, and proposed new laws for i-commerce, and freedom of information. Although it has the statutory mandate to act as a clearing house of laws on its own account, it is not taking on that role.

26. Mandatory procedures should be set up, based on best practices in other countries with parliamentary legislative systems, for the publication of white papers and meaningful consultation with citizens, prior to enactment of legislation. This is an activity where the Commission could play a significant part.

IV. CONCLUSION AND RECOMMENDATIONS

CONCLUSION

1. The broad brush review above of some of the major commercial laws of Bangladesh shows that there are laws in existence which cover, in some way or other, almost every facet of commercial operations in Bangladesh. The perceived pervasive lack of confidence in the legal framework stems from it not necessarily being clearly determinative of rights and obligations of entrepreneurs in terms of certainty in interpretation and application of legal instruments and principals. This is the result not necessarily just of the specific provisions of law, but of –

- i) weaknesses in the judicial system in dealing with commercial issues;
- ii) lack of knowledge of the law, brought about in large measure through the lack of access to legal instruments;
- iii) lack of understanding of the law, on the part both of the administrators of the law, and the entrepreneurs together with their professional advisers;
- iv) discretion inherent in laws in the absence, among others, of a strong framework of rules and regulations making the interpretation and application thereof inconsistent and uncertain;
- v) a business-unfriendly attitude on the part of government and regulatory body officials in the interpretation and application of laws;
- vi) lack of transparency and accountability on the part of government and independent regulators in their decision-making roles.

2. There are legal provisions which need to be updated to become relevant to modern day financial and commercial transactions, such as the FERA. There are laws which need to be more specific and reduce administrative discretion, such as the Income Tax Ordinance and the Customs Acts. There needs to be greater participation and accountability in the formulation of subordinate legislation. Very importantly, there needs to be unrestricted and easy public access to legal instruments, and provisions to obtain authoritative opinions quickly from regulators, even prior to entering into regulated transactions. Time limits need to be provided, with “default clauses”, whereby unless a decision is positively refused within a certain time, it will be deemed to have been given in favour of the applicant at the expiry of a certain time-limit.

RECOMMENDATIONS

3. In light of the above, the following recommendations may be made

Short Term

4. In the short term, the specific legal provisions, and practices of regulators such as the RJSC identified above, which are obstructing foreign direct investment, may be dealt with by suitable amendment and practice directions. Examples are:

- i) The provisions in the Income Tax Ordinance relating to self-assessment may be simplified, particularly the requirement for an increase over the previous year's declared income be deleted.
- ii) Rules may be framed under the Stamp Duties (Additional Modes of Payment) Ordinance, 1974 to provide for the payment of stamp duty on share transfer instruments by bank draft, pay order or means other than adhesive stamps.
- iii) The requirement for submission of loan documentation to the BOI may be removed.
- iv) Clear instructions, co-ordinated between BOI, Ministry of Home Affairs, and Ministry of Foreign Affairs, may be issued by the Government in relation to the issuance of e-visas and work permits.
- v) RJSC's recent practice of asking for joint venture agreements for incorporation of a company and powers of attorney for conducting corporate searches may be stopped by instruction of the Government, as being unsupported by the law.

5. One very important step may be taken in the short term, and then consolidated over the medium term, which is to make legal instruments easily and publicly available. The Government may by executive order require each ministry, agency, and department to compulsorily maintain a library of all legislative instruments and provide copies to members of the public, if required on payment of the cost of reproduction or purchase. This should be done at least prospectively, immediately in the short term.

Medium Term

6. In the medium term, the priority should be two-fold:

- i) the capacity of all the regulatory agencies to deliver their mandated tasks must be increased, through provision of necessary and adequate technical and human resources, continuous training of personnel, establishment of dedicated cadres, and changing of the mind-set from at worst obstruction and at best indifference to positive facilitation;
- ii) the laws discussed above, in particular the fiscal and regulatory laws, should be addressed to make administration of these laws transparent, simple and uniform, through amendments where necessary, or through operationalization of the built in safeguards, such as random audits in income tax and customs, and the removal of the discretion of officials to pick and choose whom to target for purposes other than those envisaged in the laws themselves.

7. In support of the above, and in continuation of the steps taken in the short term to bridge the information gap, publication of all statutory instruments promptly on an official website should be arranged. In effect, the official Gazette should not only be printed, all such instruments should be uploaded instantaneously, and publication of any such instrument on the website should be deemed to provide notice to all Government functionaries dealing with the issues contained therein of the content and effectiveness of the instrument. This would stop, for example, a commissioner of customs saying to an importer that although the NBR has issued an order, he had not "officially" received the order and instructions to implement it.

8. As a matter of policy, all processes for disposing of applications for licenses, permits, authorizations, clearances etc. should be made time-bound, and in the absence of reasons given in writing within a particular period, such an application should be deemed to have been approved in favour of the applicant. The human interface between Government/regulatory agencies and clients should be reduced as much as possible, with more and more regulatory functions being automated.

9. Serious consideration should be given to the setting up of separate commercial courts with judges specially trained in

Long Term

10. Over the longer term, the process of legislation should be made more transparent and participatory in terms of public consultation. It should be made more effective by providing for adequate expert input at the conceptual and drafting stage.

11. A permanent and continuing process of review of laws in a holistic manner should be put in place, in light of government policy and public feedback. Strengthening of the Law Reform Commission and enabling it to perform its mandated tasks would go a long way towards addressing these issues.

TERMS OF REFERENCE

Design Phase of the proposed Bangladesh Private Sector Development Support Project

Components 5.1.1 and 5.1.2

An audit and analysis of all major laws and regulations that impinge on commercial relations and private investment in Bangladesh.

5.1.2 A review of the legal and regulatory formulation process in Bangladesh. The review will examine the current process of legal and regulatory formulation and make recommendations for improvement.

Introduction

The proposed Private Sector Development Support Project (PSDSP) in Bangladesh, to be valued at around \$150m, will be led by the World Bank and will be funded and supported by a group of development partners, known as the Development Partners Support Group (DPSG). The DPSG is made up of FIAS, SEDF, the World Bank, the United Kingdom's Department for International Development (DFID), the European Union (EU), Japan (JICA and JBIC), the Canadian International Development Agency (CIDA), and the Asian Development Bank (ADB). JICA has been involved with the DPSG since the outset and is supporting this particular component of the PSDSP design phase.

The design phase will be led by the Foreign Investment Advisory Service (FIAS), a joint service of the International Finance Corporation (IFC) and the World Bank. FIAS is working with the IFC's South Asia Enterprise Development Facility (SEDF) to implement seven separate projects which will support the design phase of the PSDSP.

This series of FIAS activities in support of the proposed PSDSP was conceived late in 2004 and, following approval from the Ministry of Finance in April 2005, will now commence in May 2005 and run approximately through to December 2005.

The proposed PSDSP will have three components:

Regulatory reforms and streamlining

Economic zones (export processing zones, industrial parks, special economic zones)

Capacity building in Government on PSD issues

The design phase will focus its work on four strategic elements:

Institutionalizing the PSD regulatory reform process

Embedding the process of regulatory reform within Government

Piloting reform through the development and management of economic zones

Enhancing Government's capacity to implement and administer the business regulatory environment

Background

PSDSP: The aim of the proposed PSDSP is to help the Bangladeshi private sector enhance its competitive strength and successfully respond to the challenges posed by the end of the Multi-Fiber Agreement (MFA). The focus of the proposed PSDSP will be on streamlining regulatory processes and procedures, provision of infrastructure and focused capacity building in Government on PSD issues.

The design and supervision of the proposed PSDSP will be led by the World Bank, working in conjunction with Government of Bangladesh's Private Sector Development (PSD) Task Force which has been formed to help steer the project. The PSD Task Force is made up of senior inter-departmental officials headed by the Principal Secretary of the Prime Minister's Office. To support the work of the PSD Task Force and the design of the PSDSP, a PSD Core Group has also been formed, which is made up of 30 senior working-level civil servants from across a number of PSD-related agencies. The PSD Task Force and PSD Core Group will be supported by the Development Partners Support Group (DPSG). The overall process will benefit from the inputs of the newly-formed Private Sector Consultative Group (PSCG), whose membership is made up of key private sector representatives.

A letter which set out the proposed framework and approach of PSDSP was submitted to the Government of Bangladesh by the World Bank in February 2005. The scope of the proposed project was subsequently approved in a letter from the Economic Relations Division (ERD) of the Ministry of Finance to the World Bank on 23 April 2005, along with some suggestions which can be taken into consideration during the World Bank appraisal process. Following receipt of this in-principle approval from the Government of Bangladesh, the design phase activities for PSDSP may now commence.

It is anticipated that the World Bank will approve a formal Project Concept Note by June 2005. The DPSG pre-appraisal mission is scheduled for the last two weeks of September. It is expected that this will be followed by an appraisal mission around January 2006. The approval of the project by the World Bank Board is anticipated between March and June 2006.

The design phase activities of the proposed PSDSP have been developed over the last several months. The activities and focus of the design phase were chosen based on the outcomes of a number of high-level meetings with Government and other stakeholders. The initial scope of the design phase activities draws heavily on the deliberations and outcomes of the December 2004 roundtable (supported by DFID, FIAS and SEDF) on competitiveness, economic zones and the business environment, and reflects the thrust of the Government's 2005 draft Poverty Reduction Strategy Paper (PRSP).

Ahead of formalizing the final structure of the proposed PSDSP it was agreed to undertake an extensive amount of analytical work during the preceding design phase. To facilitate this, the DPSG was formed. It is working in concert with the PSD Task Force, the PSD Core Group and the PSCG. The Executive Chairman of the Board of Investment has been appointed secretary of the Task Force. The Board of Investment will also coordinate the initial design phase activities and the formation and training of the PSD Core Group and host a project secretariat which is now being established. The DPSG has agreed to fund the cost of these various activities during the design phase, a total value of \$1.3m.

The PSDSP is being prepared in the context of the expiry of the Multi-Fiber Agreement, the recent increase in foreign investor interest in Bangladesh and the finalization of the PRSP. While the expiry of the MFA poses particular challenges for the ready made garment (RMG) industry, there is also a broader challenge, i.e., the need to broaden Bangladesh's export basket. Irrespective of how the RMG sector performs in the post-MFA world, Bangladesh needs to reduce its excessive dependence on a single export item. This places a premium on enhancing the competitiveness of Bangladeshi firms, including those of domestically-oriented firms. In a globalized world, with liberalized imports, all firms need to be competitive.

Foreign investment will be pivotal in enhancing competitiveness – that is why the recent increase in foreign investor interest in Bangladesh is a particularly important development. In order to diversify its export basket, Bangladesh needs a critical mass of high-performing, dynamic firms that are “trail-blazers”. Many such firms will be foreign-owned, including joint ventures. It is thus important that the recent foreign direct investment (FDI) interest is transformed into actual investments. This will have a powerful signaling effect in attracting further investment. Some Bangladeshi firms also have the potential to become trail-blazers. Finally, in order to achieve the pro-poor growth emphasized in the PRSP, the benefits of economic growth will have to be wide-spread. This will require linkages between the high-performing enterprises and new FDI and other enterprises in the economy, especially small and medium sized enterprises (SMEs).

Enhancing competitiveness, attracting and sustaining large volumes of foreign investment, and engendering broad-based enterprise growth will require actions on many fronts. Analytic work by the World Bank Group, such as the 2003 Investment Climate Assessment, the study on the rural non-farm sector, and the more recent Competitiveness Study, has identified a wide range of factors that affect competitiveness. Of these, two sets of factors appear to be particularly important: the regulatory interface between government and the private sector, and the provision of infrastructural services.

Bangladesh is not attracting FDI commensurate with the size of its economy and the opportunities available. FDI has not grown at levels expected. For example, a 1999 World Bank Report forecast FDI into Bangladesh which was running at an estimated level of \$400 million per year would be at \$800 million. The latest full year FDI figures for Bangladesh from the International Monetary Fund (IMF) show just under US\$80 million of FDI in 2002 having, peaked the previous year at US\$280 million. Despite heartening progress in macro-economic performance, Bangladesh is falling short of its growth potential. It is being outperformed by other populous and, low income competitors such as China and India.

To establish the basis for PSD reform, building a consensus and commitment among all stakeholders, in both the private and public sectors, for the necessary regulatory and administrative reform agenda will be

crucial. The institutionalization of this commitment is the central objective of this FIAS activity. And effective institutionalization can only be achieved with a close understanding of the particular context in a given country at a given time, hence the nature of this project.

Commercial regulations are desirable and necessary. Modern government could not function without using regulations to collect information, such as tax returns, and regulate market activities as necessary to implement public policies. In fact, all over the world, the number of regulations and administrative procedures seems to be increasing as governments require more information for their activities, and regulate more stringently to control risks to safety, health, and the environment. Administrative regulations can also create benefits for enterprises by setting market frameworks in which commercial transactions can take place in a pro-competitive and low cost environment.

The challenge of reform is to enable both governments and markets to perform well. Government formalities that are unneeded or are damaging in a market economy should be eliminated, but deregulation is not the guiding principle of reforms to administrative formalities. Regulatory and administrative barriers to investment are sometimes inadvertent results of poor government, sometimes unfortunate but accepted results of good government, and sometimes strategic attempts by organized interest groups to block market entry. When regulations and administrative procedures are legitimate interventions by governments to pursue public policy goals, the issue is how these procedures should be carried out so that they do not represent an excessive burden on private investors. This is a “good governance” agenda, rather than a simplistic deregulatory or small-state agenda.

Good government in this context means government that is able to carry out its public policy functions efficiently, transparently, and consistently with principles of open and competitive markets. The international emphasis now placed on capacity-building for good governance is essential to improving administrative practices. One of the Millennium Development Goals, for example, is to develop an “open, rule-based, predictable, non-discriminatory trading and financial system” through good governance.

Because work on regulatory and administrative barriers aims to change the incentives underlying commercial decisions in the market, it is explicitly market-based, aiming at bottom-up, sustainable growth. It stands in welcome contrast to the investment incentives, trade zones, and other top-down supports for investment projects that are common in developing countries. Governments must be committed to private sector-led growth if they are to be successful in reducing their regulatory and administrative burdens.

How important are administrative barriers within the broad agenda to enable private sector development? A growing pool of studies and comparative indicators suggest that they are more important than many think for both static and dynamic performance. The dynamic impacts are hard to measure, but evidence is mounting that reducing regulatory and administrative barriers to market entry has important economy-wide effects, including accelerating multifactor productivity growth across the economy, reducing the cost of capital by reducing regulatory risk, boosting innovation, increasing the national savings rate, contributing to poverty reduction, and complementing competition policy.

The World Bank’s Doing Business 2005 report reached several conclusions about the costs and impacts of regulatory and administrative burdens. In administrative costs alone, there is a threefold difference between poor and rich nations. The number of administrative procedures and the delays associated with them are twice as high in poor countries. Chad, for example, requires 19 procedures to register a new business, as compared with two procedures in Australia. In the Congo, it takes 155 days to register a business. In addition, businesses in poor nations have less than half the property-rights protection available to businesses in rich countries. In Angola, it takes more than three years to enforce a contract.

Administrative barriers can be decisive for investment decisions on location that occur at the margin. Lower costs of entry and production, because they immediately affect the bottom-line and project timing, may have disproportionate effects, even if investment decisions are primarily based on other factors. A 2002 FIAS study of 32 countries estimated that each reduction of 10 percent in the average costs of administration procedures affecting investors would increase FDI flows by 5 per cent. These problems require much more than marginal changes to a few procedures. Developing countries face a triple legacy of 1) numerous interventions into business decisions from previous state-led economic models, 2) poor institutional capacities to implement them, and 3) weak reform and corrective mechanisms to remedy problems.

The resulting overly complex, multi-layered, arbitrary, and interventionist administrative and regulatory environments make it almost impossible to create a transparent and predictable business environment. Sustainable changes require institutional reforms to the state. FIAS has argued that governments will have

to shift their mindsets in terms of scope and approach in order to win FDI in an increasingly competitive global market.

Private sector growth is the fundamental driver of poverty alleviation and overall economic growth in Bangladesh. Yet, Bangladesh faces a productivity challenge. The private sector assessment suggests that regulation and its discretionary enforcement are one of the important drags on private sector dynamism. In Bangladesh, regulation in several forms is identified by private firms as constraining to their operation and growth. These include the areas of tax administration, customs and trade regulation, business registration and labor regulation. However, more generally, a substantial percentage of firms face major or severe problems due to regulatory uncertainty and corrupt enforcement of the rules governing them.

Legal, regulatory systems should carry out key functions in market economies, including ensuring: easy entry and exit; easy and secure transactions, flexible operation and competition. Weak or burdensome regulation and institutions undermine growth, investment and employment and contribute to informality. However, good regulation means essential, effective and enforceable measures not any regulation. Given the evidence from Bangladesh that suggests regulatory burden is too high, the benefits of regulatory reform are clear.

Regulatory Impact Assessment:

Bangladesh has entered an initial stage of such reform, namely deregulation – to remove unnecessary regulations and simplify or streamline certain key processes, in terms of both the number formalities and their administration. For continued progress, it must continue deregulation but also continue to a second, more ambitious phase of regulatory reform that makes good regulation a systematic and institutionalized function of government. To do so, it must put systems in place to produce high quality regulations, to improve regulatory processes through the introduction of regulatory impact assessment (RIA), and to update and review all existing regulations.

Regulatory impact assessment evaluates the impact of public laws and regulations on the economy and business. It allows policy makers to assess trade-offs and consider new ways to regulate and alternatives to regulation. Important institutional approaches include regulatory impact assessment, business-government consultation, and accession to international, regional agreements harmonizing regulations.

It is a method of:

systematically and consistently examining the positive and negative impacts arising from proposed government actions;
considering alternatives and consulting affected parties; and
communicating the information to decision-makers.

Its effect is to broaden the mission of regulators from highly-focused problem-solving to balanced decisions that trade off problems against wider economic and distributional goals.

RIA can be useful in assessing existing regulations as well as new regulation. However, it takes time and careful capacity building to introduce. It requires strong political support from the highest level of the executive, and usually involves setting up a regulatory affairs office attached to a powerful ministry or the prime minister or president's office. It requires agencies and public officials to learn new ways of thinking about regulation. It is most successful when the private sector is also engaged through consultation.

Given the large number of existing regulations, government must set strategic priorities that focus on:
functional types of regulation (e.g. regulation restricting competition);
regulations identified by expert bodies; or
sectoral regulations, such as those affecting certain industries or professions.

The overall RIA component is designed to demonstrate the value of an RIA process to PSD stakeholders in Bangladesh and would consist of the following four components:

An audit and analysis of all major laws and regulations, which impinge on commercial relations and private investment in Bangladesh.

Review of the legal and regulatory formulation process in Bangladesh. The review will examine the current process of legal and regulatory formulation and make recommendations for improvement.

Design of an appropriate RIA unit for Bangladesh including analysis of options for its location.

Design and implementation of a pilot RIA.

The pilot would be designed to examine both existing and proposed regulations in a small but focused area. The area for pilot would be selected using the FIAS triage classification system which has the following dimensions: most commonly-encountered area of regulation (because reforming this area will help many businesses); most severe regulatory area (because reforming this area will open up new opportunities for investment); and easy reforms (to show willingness to reform and to start momentum).

Objectives

Components 5.1.1 and 5.1.2 are two of the four sub-components of the FIAS/SEDF project dealing with regulatory impact assessment and which are dealt with in this TOR. The objective of the overall component is to build knowledge of regulatory impact assessment models and adopt a regulatory impact assessment unit in the Government of Bangladesh. It will form an important part of the early implementation stage of the PSDSP. The RIA work will be underpinned by a broad-based review of the legal and regulatory framework, the objective of which will be to show the costs, and benefits, of laws and regulations and their effect on the private sector.

The particular objective of 5.1.1 is to obtain a good understanding of the current laws and regulations in Bangladesh which have an effect on the private sector and, through this audit and analysis, have a clearer idea of the scope and effect of this legal framework. Following from this activity, the objective of 5.1.2 is to understand the process of formulation of these laws and regulations affecting the private sector. Based on the outputs of these activities, this FIAS/SEDF project will separately go on to examine the options for a form of regulatory impact assessment process being adopted in Bangladesh.

Scope of Work

5.1.1: An audit and analysis of all major laws and regulations, which impinge on commercial relations and private investment in Bangladesh. For example, this would include laws and regulations would include commercial, tax, land, finance, arbitration, customs, intellectual property, banking, and labor. **The consultant, having reviewed and listed the full range of commercial-related laws and regulations in Bangladesh, will reduce the list to those laws and regulations which have the keenest impact on the private sector. Armed with an understanding of the full array of laws and regulations, key tasks then are:**

To provide the full list of private sector-related laws and regulations

To then make a brief synopsis of the **major** commercial related laws and regulations, **including from the national and municipal level**

To identify gaps in the legal framework

To assess the effectiveness of the court system and how it rules on commercial legal matters

To focus on which parts on the commercial regulatory environment are working particularly well and what process/approaches should be replicated in other regulatory area which are performing less well

Herewith some samples of relevant laws to be included in the audit for analysis:

Field	Name of Laws
1)Commercial	The Contract Act, 1872 The Sale of Goods Act, 1930 The Companies Act, 1994 The Negotiable Instrument Act, 1881
2)Tax	The Income Tax Ordinance, 1984 The VAT ACT
3)Land	The Transfer of Property Act, 1882 The Stamp Act, 1882 The Registration Act, 1908 The Specific Relief Act The Estate Acquisition and Tenancy Act
4)Finance	The Bank companies Act, 1991 The Insurance Act, 1938 The Insurance Corporation Act, 1973 The Insurance Rules, 1958 The Trust Act, 1982 The Loan Recovery Court Act The Money Loan Court Act 1990

	The Security Exchange Commission Act
5) Arbitration	The Arbitration Act The Bankruptcy Act, 1997
6) Intellectual Property	The Patent and Design Act, 1911 The Trade Marks Act, 1940 The Copyright Ordinance, 1974 The Copyright Amendment Act, 1974 The Copyright Amendment Ordinance, 1978
7) Environment	Environment Registration Act
8) Labor	The Workmen's Compensation Act, 1923 The Factories Act, 1965 The Industrial Relations Ordinance, 1969

5.1.2: Review of the legal and regulatory formulation process in Bangladesh. The review will examine the current process of legal and regulatory formulation and make recommendations for improvement. The review would be required to consider the following:

To identify how laws, regulations, and policies are formed

Is there a clearing house in government for approval of various policies, regulations and laws; the interplay with parliament, how are Bills initiated?

Is there a legislation coordination body, does it work well? Do they have their own form of cost/benefit analysis for regulation; how is the private sector consulted at the moment, if at all?

Is there regulatory inflation?

Are new regulations coming on the books, but old ones are not being repealed?

Is there a tendency to shift from the use of laws (through parliament) to subordinate regulations and forms thereof (from ministries)?

How effective is the process of promulgation of laws?

To identify consultative and drafting process of laws and regulations

Outputs

The consultant(s) should deliver written outputs in English. It would include following:

A list of all commercial-related laws/regulations

About 200-word synopsis of each of the laws/regulations with their objective

An assessment on whether the laws/regulations are proving effective in practice, for example, the patent law or the regulation on leasing

The functionality of the court system for commercial matters

A review of the consultation process and the approved process of policy and regulatory development; how is the process supposed to work? For example, are the steps: policy paper, **drafting**, consultation, revised policy paper, preparation of a Bill, public consultation, submission to parliament, enactment etc? And how are things working in practice with some current examples?

Examples of laws/regulations which have been repealed and what happened and why?

An assessment of any informal efforts in Government on examples of regulatory reform, and what happened?

And what sort of approaches to development of an RIA system in Bangladesh might be considered.

10 hard copies and one electronic soft copy of the final report should be submitted

Timeframe

Implementation Period Friday July 1, 2005 to Wednesday August 31, 2005

Work Plan To be submitted by Thursday July 7, 2005

DPSG Briefing Informal status briefing to the membership of the DPSG, July 25, scheduled for 1630 hours at SEDF offices

Draft Final Report To be submitted by Sunday August 20, 2005

Final Report Taking into account feedback, to be submitted by Thursday August 31, 2005

Other

During the study period, JICA would invite one Japanese consultant or researcher for several weeks to make advice for JICA and the engaged consultant(s). JICA would hold regular meetings as required with the consultant(s) and the DPSG membership during conduct of the work described in this TOR to ensure implementation of a high standard and to ensure that the outputs serve the requirements of the PSDSP design phase as much as possible.

LIST OF LAWS RELATING TO COMMERCIAL ACTIVITIES IN BANGLADESH⁴⁷**ACTS**

Admiralty Court Act 2000(43 of2000)
 Advertisement Control Act 1952 (EBA 15 of 1952), Undesirable
 Advertisement Prohibition Act 1963 (12 of 1963), Indecent
 Agni Protirodh and Nirbapon Ain 2003 (7 of 2003)
 Ain Commission Act 1996 (19 of 1996)
 Ain Sringkhola Bignakari Aparad (Druta Bichar) Ain 2002 (11 of 2002)
 Alluvial Lands Act 1920 (5 of 1920)
 Anti-Corruption Commission Act 2004 (5 of 2004)
 Arbitration Act 2001(1 of2001)
 Arpita Shampatty Prattarpan Ain 2001 (16 of 2001)
 Artha Rin Adalat Act 2003 (8 of 2003)
 Arthik Prothisthan Ain 1993 (27 of 1993)

Bank Company Act 1991(14 of 1991)
 Banker's Books Evidence Act 1891 (18 of 1891)
 Bankruptcy Act 1997 (10 of 1997)
 Bills of Lading Act 1856 (9 of 1856)
 Boilers Act 1923 (5 of 1923)
 Building Construction Act 1952 (EBA11 of 1953)

Carriage by' Air Act 1934 (20 of 1934)
 Carriage by' Air (International Convention) Act 1966 (9 of 1966)
 Carriage by' Air (Supplementary Convention) Act 1968 (5 of 1968)
 Carriage of Goods by Sea Act 1925 (26 of 1925)
 Carriers Act 1865 (3 of 1865)
 Civil Courts Act 1887 (12 of 1887)
 Code of Civil Procedure 1908 (5 of 1908)
 Code of Criminal Procedure 1898 (5 of 1898)
 Companies Act 1994 (18 of1994)
 Companies Profits (Workers Participation) Act 1968 (12 of 1968)
 Contract Act 1872 (9 of 1872)
 Control of Essential Commodities Act 1956(1 of 1956)
 Cooperative Societies Act 2001 (47 of2001)
 Copyright Act 2000 (28 of 2000)
 Court Act, Admiralty 2000 (43 of2000)
 Court Fees Act 1870 (7 of 1870)
 Customs Act 1969 (4 of 1969)

Depository Act 1999 (6 of 1999)
 Dhaka Electricity Supply Authority Act 1990 (36 of 1990)
 Drugs Act 1940 (23 of 1940)
 Drugs (Amend) Act 1963 (22 of 1963)
 Drugs (Control) (Amend) Act 1997 (18 of 1997)
 Easement Act 1882 (5 of 1882)
 Electricity Act 1910 (9 of 1910)

Electricity Supply Authority Act 1990 (36 of 1990), Dhaka
 Employers Liability Act 1938 (24 of 1938)

⁴⁷ Only the parent statutes are listed, not the amending legislation. Laws are read as last amended.

Employment of Children Act 1938 (26 of 1938)
 Employment of Labour (Standing Order) Act 1965 (EPA 8 of 1965)
 Energy Regulatory Commission Act 2003 (13 of 2003), Bangladesh
 Environment Conservation Act 1995 (1 of 1995), Bangladesh
 Environment Court Act 2000 (11 of 2000)
 Essential Articles (Price Control and Anti-Hoarding) Act 1953 (22 of 1953)
 Essential Commodities Act 1956 (EP A No.1 of 1956), Control of
 Essential Commodities Act 1957 (3 of 1957)
 Evidence Act 1872 (1 of 1872)
 Evidence Act 1939 (30 of 1939), Commercial Documents
 Explosives Act 1884 (4 of 1884)
 Explosive Substances Act 1908 (6 of 1908)
 Export Processing Zones Authority Act 1980 (36 of 1980), Bangladesh
 Export Processing Zones Act 1996 (20 of 1996), Bangladesh Private
 Export Processing Zones (Trade Union & Industrial Relations) Act 2004 (23 of 2004)
 Factories Act 1965 (EPA No.4 of 1965)
 Financial Institution Act 1993 (27 of 1993)
 Fire Fighting & Prevention Act 2003 (7 of 2003)
 Flag Vessels (Amend) Act 2003 (26 of 2003), Bangladesh
 Foreign Exchange Regulation Act 1947 (7 of 1947)
 Foreign Private Investment (Promotion and Protection) Act 1980 (11 of 1980)
 Foreigners Act 1946 (31 of 1946)

General Clauses Act 1897 (10 of 1897)
 Gift Tax Act 1990 (44 of 1990)

Import and Export (Control) Act 1950 (39 of 1950)
 Import of Goods (Price Equalization Surcharge) Act 1967 (3 of 1967)
 Insurance Act 1938 (4 of 1938)
 Insurance Corporation Act 1973 (6 of 1973)
 Investment Board Act 1989 (17 of 1989)

Law Commission Act 1996 (19 of 1996)
 Limitation Act 1908 (9 of 1908)
 Loan Recovery Court Act 2003 (8 of 2003)

Mines Act 1923 (4 of 1923)
 Mines & Mineral Resources (Control & Development) Act 1992 (39 of 1992)
 Money Laundering Prevention Act 2002 (7 of 2002)

Narcotics Control Act 1990 (20 of 1990)
 Negotiable Instrument Act 1881 (26 of 1881)

Pension Act 2002 (27 of 2002)
 Partnership Act 1932 (9 of 1932)
 Patents and Designs Act 1911 (2 of 1911)
 Patents and Designs (Amend) Act 2003 (15 of 2003)
 Payment of Wages Act 1936 (4 of 1936)
 Payment of Wages (Amend) Act 1980 (27 of 1980)
 Penal Code 1860 (45 of 1860)
 Petroleum Act 1934 (30 of 1934)
 Petroleum Act 1974 (69 of 1974), Bangladesh
 Petroleum Corporation (Amend) Act (32 of 1990), Bangladesh
 Poribesh Adalat Act 2000 (11 of 2000)
 Ports Act 1908 (15 of 1908)
 Powers of Attorney Act 1882 (7 of 1882)
 Premises Rent Control Act 1991 (3 of 1991)
 Prevention of Corruption Act 1947 (2 of 1947)
 Private Export Processing Zone Act 1996 (20 of 1996), Bangladesh
 Privatization Act 2000 (25 of 2000)
 Provident Fund Act 1925 (19 of 1925)
 Public Demands Recovery Act 1913 (3 of 1913)

Rajshahi City Corporation Act 1987 (38 of 1987)
Registration Act 1908 (16 of 1908)
Registration of Foreigners Act 1939 (16 of 1939)
Requisition of Moveable Property Act 1988 (26 of 1988)

Sale of Goods Act 1930 (3 of 1930)
Securities and Exchange Commission Act 1993 (15 of 1993)
Shops and Establishment Act 1965 (EP A 7 of 1965)
Small and Cottage Industries Corporation Act 1957 (17 of 1957), Bangladesh
Small Causes Courts Act 1887 (9 of 1887)
Special Powers Act 1974 (14 of 1974)
Specific Relief Act 1877 (1 of 1877)
Stamp Act 1899 (2 of 1899)
Stamp Duties (Additional Modes of Payment) Act 1974 (71 of 1974)
State Acquisition and Tenancy Act 1950 (28 of 1951)
Tariff Commission Act 1992 (43 of 1992), Bangladesh
Telecommunication Act 2001, (18 of 2001) Bangladesh
Telegraph Act 1885 (13 of 1885)
Telegraph and Telephone Board (Amend) Act 1995 (16 of 1995), Bangladesh
Territorial Water and Maritime Zones Act 1974 (26 of 1974)
Tobacco Originated Goods Marketing (Control) Act 1988 (45 of 1988)
Town Improvement Act 1953 (13 of 1953)
Trade Marks Act 1940 (5 of 1940)
Transfer of Property Act 1882 (4 of 1882)
Trust Act 1882 (2 of 1882)

Undesirable Advertisement Control Act 1952 (15 of 1952)
Usurious Loans Act 1918 (10 of 1918)

Value Added Tax Act 1991 (22 of 1991)

Water Development Board Act 2000 (26 of 2000), Bangladesh
Water Supply and Sewerage Authority Act 1996 (6 of 1996)
Wireless Telegraphy Act 1933 (17 of 1933)
Workmen's Protection Act 1935 (4 of 1935)

PRESIDENT'S ORDERS

Bangladesh Bank Order 1972 (P.O. 127 of 1972)
Trading Corporation of Bangladesh Order 1972 (P. O. 68 of 1972)

ORDINANCES

Abandoned Buildings (Supp. Provision) Ordinance 1985 (54 of 1985)
Acquisition and Requisition of Immoveable Property Ordinance 1982 (2 of 1982)

Capital Development Authority Ordinance 1960 (23 of 1960)
Chartered Accountants Ordinance 1961 (10 of 1961)
Chittagong City Corporation Ordinance 1982 (35 of 1982)
Chittagong Development Authority Ordinance 1959 (51 of 1959)
Chittagong Port Authority Ordinance 1976 (52 of 1976)
Companies Profits (Workers Participation) (Amend) Ordinance 1985 (8 of 1985)

Dhaka City Corporation Ordinance 1983 (40 of 1983)
Drug (Control) Ordinance 1982 (8 of 1982)
Drugs (Supplementary Provisions) Ordinance 1986 (13 of 1986)

Employment Ordinance 1965 (32 of 1965), Control of
Investment Corporation of Bangladesh Ordinance 1976 (40 of 1976)

Khulna City Corporation Ordinance 1984 (72 of 1984)

Land Development Tax Ordinance 1976 (42 of 1976)
Land Reforms Ordinance 1978 (49 of 1978)
Land Reforms Ordinance 1984 (10 of 1984)

Merchant Shipping Ordinance 1983 (26 of 1983), Bangladesh
Minimum Wages (Fixation) (Repeal) Ordinance 1977 (29 of 1977)
Minimum Wages Ordinance 1961 (39 of 1961)

Mongla Port Authority Ordinance 1976 (53 of 1976)
Municipality Ordinance 1977 (26 of 1977)

Oil, Gas and Mineral Corporation Ordinance 1985 (21 of 1985), Bangladesh

Paurashava Ordinance 1977 (26 of 1977)
Petroleum Corporation Ordinance 1976 (88 of 1976), Bangladesh
Petroleum Products (Development Surcharge) Ordinance 1961 (25 of 1961)
Pharmacy Ordinance 1976 (13 of 1976)
Pilotage Ordinance 1969 (5 of 1969)

Registration (Extension of Limitation) Ordinance 1975 (60 of 1975)

Revenue Laws Amendment Ordinance 1976 (8 of 1976)
Riot and Civil Commotion Risk Insurance Ordinance 1941 (3 of 1947)
Rural Development Board Ordinance 1982 (53 of 1982), Bangladesh
Rural Electrification Board Ordinance 1977 (51 of 1977)

Sales Tax Ordinance 1982 (18 of 1982)
Securities and Exchange Ordinance 1969 (17 of 1969)
Shipping Ordinance 1976 (72 of 1976), Inland
Standard and Testing Institution Ordinance 1985 (37 of 1985), Bangladesh
Standard of Weights and Measures Ordinance 1982 (12 of 1982)

Telegraph and Telephone Board Ordinance 1979 (12 of 1979), Bangladesh
Trade Organization Ordinance 1961 (45 of 1961)

LIST OF MAJOR LAWS REVIEWED

FISCAL LAWS:

Income Tax Ordinance 1984
Value Added Tax Act 1991
Stamp Act 1899
Foreign Exchange Regulation Act 1947 and Guidelines
Prevention of Money-laundering Act 2002

REGULATORY LAWS

Companies Act 1994
Securities and Exchange Commission Act 1993
Financial Institutions Act 1993
Bank Company Act 1993
Customs Act 1969
Insurance Act 1938
Insurance Corporation Act 1973
Insurance Rules 1958
Imports and Exports (Control) Act 1950
Money Loan Court Act 2003
Dhaka Municipal Corporation Ordinance 1983
Bangladesh Standards and Testing Institution Ordinance 1985
Bangladesh Telecommunications Act 2001
Bangladesh Energy Regulatory Commission Act 2002

PROPERTY LAWS

Transfer of Property Act 1882
State Acquisition and Tenancy Act 1950
Trust Act, 1882
Patent and Design Act 1911
Trade Marks Act 1940
Copyright Act 2000

ENVIRONMENTAL LAWS

Environmental Policy 1992
Environmental Conservation Act 1995
Environmental Conservation Rules 1997
Factories Act 1965

PROCEDURAL LAWS

Code of Civil Procedure 1908
Specific Relief Act 1877
Registration Act 1908
Arbitration Act 2001
Bankruptcy Act 1997
General Clauses Act 1897

COMMERCIAL LAWS

Contract Act 1872
Negotiable Instruments Act 1881
Admiralty Act 2000
Bangladesh Merchant Shipping Ordinance 1983

Foreign Private Investment (Promotion and Protection) Act 1980
Board of Investment Act 1989
Bangladesh Export Processing Zones Authority Act 1980
Private EPZ Act 1996

LABOUR/EMPLOYMENT LAWS

The Employment of Labor (Standing Order) Act 1965
Industrial Relations Ordinance 1969
Minimum Wages Ordinance 1961
Maternity Benefits Act 1939
Shops and Establishment Act 1965

Customs Working Procedure

Serial No.	Description of Activities	CRF Consignment without change in Valuation or Classification	CRF Consignment with change in Valuation or Classification	CRF consignment under 100% physical examination	Goods shipped without PSI	Remarks
1	Entry of CRFs into the daily register with signature.	√	√	√		Records maintained manually. Can save time and ensure correctness, if done electronically.
2	CRFs & register sent to the relevant AC/ DC of the PSI desk.	√	√	√		Not necessary. Register & CRFs can be sent directly to the Commissioner.
3	Register & CRFs sent to the Commissioner for selection of consignments for 100% physical examination. Commissioner himself selects all such	√	√	√		Not necessary since computer will randomly select. Commissioner can only select files that are at his discretion.
4	Commissioner selects signs the CRFs selected for physical examination, sends back to the PSI desk.	√	√	√		
5	PSI desk distributes CRFs to different Assessment Sections.	√	√	√		There should be time limit for distribution of CRFs.
6	Shipping agent submits IGM to the noting section who checks the IGM before lodgment of B/E.	√	√	√	√	
7	On the basis of draft B/E data sheet & all import documents provided by the C&F agent, the computer section prints Bill of Entry (B/E).	√	√	√	√	
8	Full set of the document including the B/E (folder) handed over to the C&F agent. Assessment Section receives documents from C&F agent.	√	√	√	√	

CUSTOMS PROCEDURE

Annexure 4

Customs Working Procedure

Serial No.	Description of Activities	CRF Consignment without change in Valuation or Classification	CRF Consignment with change in Valuation or Classification	CRF consignment under 100% physical examination	Goods shipped without PSI	Remarks
9	Appraiser checks B/E with the declaration given in all import documents. If OK, signs B/E and forward it to Principal Appraiser (PA).	√	√			Without a successful negotiation or "special arrangements" importers cannot have their goods cleared from customs. It may even happen when there is no need for opening file or note sheet and things are completely in order. Failed negotiation or reluctance to negotiate shall invariably lead to harassment and delays.
10	PA checks declaration regarding valuation & classification. If OK, prints assessment notice and completes assessment with signature. File sent back to Appraiser for necessary action. If beyond PA's jurisdiction, assessment finalized upon approval from relevant officer.	√				Time limit required to clear file.
11	If after checking, it appears to the PA that valuation or classification needs to be changed, sends back B/E and other relevant documents to Appraiser.		√			<ul style="list-style-type: none"> ▪ Not necessary. Repetition of work. Appraiser can check and confirm whether valuation or classification needs to be changed. ▪ Note sheets initiated at this stage. In many cases not done for reasons relating to incorrect valuation or classification. Suggested re valuation or classification may be on incorrect reference or wrong interpretation of the rules. ▪ Note sheet containing a variety of opinion passed by the hierarchy along with numerous initials - common feature for customs assessment. It may be found in the end that initiation of such action was not necessary at all. ▪ Principal cause for delays, malpractice and harassment.

Customs Working Procedure

Serial No.	Description of Activities	CRF Consignment without change in Valuation or Classification	CRF Consignment with change in Valuation or Classification	CRF consignment under 100% physical examination	Goods shipped without PSI	Remarks
						<ul style="list-style-type: none"> There should be strict guideline when to open a file. Provisions for disciplinary action against initiating such note sheets necessary, if done on invalid grounds. Assigned officer should complete assessment without seeking opinion from his Assigned officer should be held accountable for incorrect assessment.
12	Appraiser opens file and forwards to Jetty Customs for physical examination with approval from Principal Appraiser (PA).			√		
13	Appraiser checks B/E with the information given in all import documents, signs B/E and forward it to Principal Appraiser (PA) for his approval for physical examination. After PA's approval file goes to Jetty Customs for physical examination.				√	
14	Physical examination performed, report sent to Commissioner. If within Commissioner's jurisdiction, file sent to relevant assessment section with instruction to complete assessment.			√	√	

Customs Working Procedure

Serial No.	Description of Activities	CRF Consignment without change in Valuation or Classification	CRF Consignment with change in Valuation or Classification	CRF consignment under 100% physical examination	Goods shipped without PSI	Remarks
15	In case of discrepancy, file sent to relevant PA with instruction to issue show cause notice and complete assessment after following the procedure.			√		
16	If within jurisdiction of lower ranking officers; such as, AC, DC or JC, file sent to appropriate officer for necessary action.			√	√	
17	Appropriate officer sends file to PA of relevant section with instruction to complete assessment after following the procedure.				√	
18	If within PA's jurisdiction, approves the changes, get B/E amended and print Assessment Notice. Completes assessment by signing documents. If not within his jurisdiction, file sent to the appropriate officer for approval.		√			
19	Appraiser checks B/E, physical examination report, and all relevant documents. If B/E is to be amended, Appraiser sends back file to PA with remarks on valuation, classification or matters relating to the result of physical examination.			√		<ul style="list-style-type: none"> Physical examination - another source of corruption. Increased number of physical examination gives opportunity to abuse power as well as indulge in corrupt practices. Serious dearth of equipment and qualified personnel in customs lab, yet they conduct analysis / tests for most complex chemicals & other items. In many cases relationship with importers determines the findings. Assessments are made on inconclusive reports or tests not carried out that have bearing on results.

CUSTOMS PROCEDURE

Annexure 4

XVI

Customs Working Procedure

Serial No.	Description of Activities	CRF Consignment without change in Valuation or Classification	CRF Consignment with change in Valuation or Classification	CRF consignment under 100% physical examination	Goods shipped without PSI	Remarks
20	If assessment based on reclassification or valuation requires AC, DC, JC or Commissioner's approval, file forwarded to each relevant officer's		√			
21	PA instructs Appraiser to collect information on pricing from PSI agency. If not available, Appraiser checks customs records. If B/E is to be amended, Appraiser sends file to PA with necessary information.				√	Corrupt practices are widespread for non PSI consignments. Grossly undervalued declaration accepted when demand is met.
22	If within PA's jurisdiction, approves the changes, get B/E amended and print Assessment Notice. Completes assessment by signing documents. If not within his jurisdiction, file sent to the appropriate officer for approval.				√	
23	All original documents except for the CRF handed over to C&F agent by assessment section	√	√	√		
24	All original documents handed over to the C&F agent by the Assessment Clark.				√	
25	Payment of duty at bank. "Treasury Speed" section issues Release Order.	√	√	√	√	
26	Submission of release order and other documents to the shipping agent. Shipping agent issues delivery order.	√	√	√	√	

CUSTOMS PROCEDURE

Annexure 4

XVII

Customs Working Procedure

Serial No.	Description of Activities	CRF Consignment without change in Valuation or Classification	CRF Consignment with change in Valuation or Classification	CRF consignment under 100% physical examination	Goods shipped without PSI	Remarks
27	Submission of delivery order, release order and other documents to Preventive Cell of Jetty Gate Customs for verification.	√	√	√	√	
28	Payment of port charges and where applicable demurrage charges. Port authority issues “Cart ticket” for delivery of goods after verification of documents. For Containerized cargo, indent to be given to port authorities to keep down container.	√	√	√	√	

SUMMARIES OF LAWS⁴⁸

THE ARBITRATION ACT 2001

WHAT IS ARBITRATION?: Arbitration is a process of dispute resolution in which a neutral third party (called the arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. It is the means by which parties to a dispute get the same settled through the intervention of a third person, but without having recourse to court of law.

WHAT IS AN ARBITRATION AGREEMENT? (i) Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not [Sec. 2(n)]. (ii) The parties make an agreement that instead of going to the court, they shall refer the dispute to arbitration. (iii) The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement [Sec. 9(1)].

An arbitration agreement/clause must be in writing [Sec. 9(2)]. Although no formal document is prescribed, however, it must be clear from the document that the parties had agreed to the settlement of dispute through arbitration. Where the arbitration agreement or clause is contained in a document, the parties must sign the document [Sec. 9(2)(a)]. Besides, the arbitration agreement may be established by- (a) an exchange of letters, telex, telegram or other means of telecommunication; or (b) an exchange of statements of claim and defense in which the agreement is alleged by one party and is not denied by the other [Ss. 9(2)(b) & 9(2)(c)].

APPOINTMENT OF AN ARBITRATOR: Who May Be Appointed? : A person of any nationality may be an arbitrator, unless otherwise agreed by the parties [Sec. 12(2)]. In case of an international commercial arbitration, where the parties belong to different nationalities, the Chief Justice of Bangladesh may appoint an arbitrator of a nationality other than that of the parties [Sec. 12(10)].

NUMBER OF ARBITRATORS: The parties are free to fix the number of arbitrators by agreement [Sec. 11(1)]. On failure to do so, the tribunal shall consist of three (3) arbitrators [Sec. 11(2)]. Unless otherwise agreed by the parties, where they appoint an even number of arbitrators, the appointed arbitrators shall jointly appoint an additional arbitrator who shall act as the Chairman of the tribunal [Sec. 11(3)].

GROUND FOR CHALLENGING APPOINTMENT [Sec. 13(1)(3): The appointment of an arbitrator may be challenged if (i) circumstances exist that give rise to justifiable doubts as to his independence or impartiality or (ii) he does not possess the qualifications agreed to by the parties.

PLACE OF ARBITRATION: The parties are free to agree on the place of arbitration [Sec. 26(1)] and failing an agreement to do so, the place shall be determined by the arbitral tribunal having regard to the circumstances of the case and convenience of the parties [Sec. 26(2)].

WHO MAY REFER TO ARBITRATION? An arbitration agreement is a contract and thus, any party who is competent to contract may refer to arbitration.

WHAT DISPUTES MAY BE REFERRED? The parties to an arbitration agreement may refer to arbitration, a dispute which has arisen or which may arise between them, in respect of a defined legal relationship, whether contracted or not [See Sec. 10]. Thus, all matters of civil nature whether they relate to present or future disputes may form the subject matter of reference. The dispute, however, must be the consequence of legal relationship arising out of an obligation, the performance of which is a duty under the law and for its breach a remedy is provided.

BAR TO SUIT: When the parties have entered into an arbitration agreement, they cannot file a suit in a court of law in respect of any matter covered by the agreement; otherwise the very purpose of arbitration will be frustrated. The court will normally not intervene except where so provided by the Act [Sec. 7].

WHAT DISPUTES CANNOT BE REFERRED FOR ARBITRATION The following disputes cannot be referred to arbitration: (i) Insolvency proceedings (ii) Lunacy proceedings (iii) Proceedings for appointment of a guardian to a minor. (iv) Question of genuineness or otherwise of a will or matter relating to issue of a

⁴⁸

Summaries have been provided in this Annexure of only those laws which have not been substantively summarized in the text of the Report.

probate (v) Matters of criminal nature (vi) Matters concerning Public Charitable Trusts (vii) Disputes arising from and founded on an illegal contract

ARBITRATION AWARD: An arbitral award made by an arbitration tribunal pursuant to an arbitration agreement shall be final and binding both on the parties and on any persons claiming through or under them [Sec. 39(1)]. However, this does not affect the right of a person to challenge the award in accordance with the provisions of this Act [Sec. 39(2)].

SETTING ASIDE AN AWARD [Ss. 42 & 43]: An application for setting aside an arbitral award may be made before the court, by a party within three months of receipt of the award by him. The court may set aside an award on grounds (i) a party was under some incapacity (ii) the arbitration agreement is not valid under the law (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case (iv) the award deals with a dispute not contemplated by or beyond the scope of the submission to arbitration (v) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement or with the law (vi) the subject-matter of the dispute is not capable of settlement by arbitration under the law; or (vii) the arbitral award is in conflict with the public policy of India.

APPEAL [Sec. 48] An appeal shall lie before the court, against the orders (i) granting or refusing to grant any interim measure (ii) setting aside or refusing to set aside an arbitral award and (iii) granting or refusing to grant an interim measure of protection. No second appeal shall lie against the appellate order of the court, except, however, that an appeal may be made to the Supreme Court.

THE BANGLADESH EXPORT PROCESSING ZONE AUTHORITY ACT, 1980

The Bangladesh Export Processing Zones Authority Act, 1980 has been enacted for regulating the establishment of the Bangladesh Export Processing Zones Authority for the purpose of creation, development, operation, management and control of Export Processing Zones and for matters connected therewith.

EXPORT PROCESSING ZONE: The government has been empowered under this Act to declare, by a Notification in the Official Gazette, certain places as Export Processing Zones for the purpose of setting up export oriented industries [Sec. 10].

EXPORT PROCESSING ZONE AUTHORITY (EPZA): Under this Act, the Government must establish an authority to be known as the Bangladesh Export Processing Zone Authority for carrying out the purposes for which this Act has been established [Sec. 3(1)]. The Authority shall be a body corporate having perpetual succession and a common seal, with power to acquire, held and dispose of property, both movable and immovable, and shall by the said name sue and be sued [Sec. 3(1)]. The general directions and administration of the affairs of the Authority is vested in the Executive Board which may exercise all powers and do all acts and things as may be exercised or done by the Authority. However, in discharging its functions, the Board must act in accordance with the guidance, order and instructions given by the Board of Governors of the Authority from time to time [Sec. 3A].

OBJECTS OF EPZA [Sec. 4A]: (1). To foster and generate economic development of Bangladesh by encouraging and promoting foreign investments in a zone; (ii), To diversify the sources of foreign exchange earnings by increasing export of Bangladesh through a zone; (iii). To encourage and foster the establishment and development of industries and commercial enterprises in a zone in order to widen and strengthen the economic base of Bangladesh; (iv). To generate productive employment opportunity and to upgrade labour and management skills through acquisition of advanced technology.

FUNCTIONS OF EPZA [Sec. 7]: The functions of the EPZA are (i). to take possession of land to be acquired or requisitioned by the Government for the purpose of creation and development of a zone; (ii). to allot land and building spaces in a zone to investors on sale, lease or on rent and to allow them to mortgage the allotted lands for raising loan from financial institutions or commercial banks; (iii). to provide infrastructure facilities, including building, utilities and ware houses; (iv). to process application for setting up industries within a zone and accord sanction in accordance with the guidelines given by the Government from time to time; ties in accordance with customs; (v). to provide customs bonded facilities in materials for regulations for importation into a zone of building construction purposes and packaging materials, raw materials and intermediate goods for the purpose of processing for exports; (vi). to allow import of raw-materials or semi-processed or other goods required for use in the zone processed or other goods to be specified by the

[Board] in such manner as may be prescribed; (vii). to assist in transportation of imported raw-materials and intermediate goods in bonded conditions and export of finished products; (viii). to provide necessary banking facilities within the zone in consultation with the Bangladesh Bank; (ix). to establish liaison with the port, municipal and other authorities to make arrangement for transportation of imported raw-materials and intermediate goods on bonded condition and for export of finished products; (x). to sanction employment of foreign nationals in accordance with the guidelines given by the Government from time to time, to posts for which local expertise is not available for efficient running of the industries in a zone; (xi). to do such other act and thing as may be necessary to be done connection with, or conducive to, the performance of the aforesaid function.

BOARD OF GOVERNORS OF EPZA [Ss. 5 & 5A]: The Board of Governors of the EPZA consists of (i). A Chairman, (ii). a Minister-in-Charge of the Ministries or Divisions dealing with industries, commerce, finance, planning, foreign affairs, energy and ports and shipping, ex-officio, (iii). Governor, Bangladesh Bank, ex-officio, (iv). Secretaries of the Ministries or Divisions dealing with industries, commerce, finance, planning, foreign affairs, energy, ports and shipping and internal resources, ex-officio, (v). Chairman of the Executive Board, who shall also be the Secretary of the Board, ex-officio. The Prime Minister, or a member, who is a Minister nominated by the Prime Minister, shall be the Chairman of the Board. The functions of the Board are to (i). formulate the policies for operation and management of the Authority and zones, (ii). review, from time to time, the activities and performance of the Executive Board and the zones, (iii). give orders or issue instructions which are deemed appropriate for the purpose of efficient management of the affairs of the authority and the zones.

TYPES OF INDUSTRIES TO BE SET UP IN A ZONE: The Authority may, with the previous approval in writing of the Government, determine, from time to time, the type of industries to be set up in a zone [Sec. 16].

THE CONTRACT ACT, 1872

The Contract Act, 1872 was enacted with the view to "...define and amend certain parts of the law relating to contracts..."⁴⁹

The Act does not profess to be a complete code dealing with the law relating to contracts. The intention of the Legislature was never to deal exhaustively with any particular chapter or subdivision of the law relating to contracts.⁵⁰

The Act was an outcome of different systems adopted in the form of legislation. This Act originally contained II Chapters. The Indian Partnership Act, 1932 (9 of 1932) repealed the last Chapter XI. Formerly Partnership Act was a part of contract Act. Chapter VII of the Act headed as 'Sale of Goods' was also repealed by the Indian Sale of Goods Act, 1930 (3 of 1930).

The Act deals with the manner of making valid agreements, contracts, its kind, manner and possibilities and impossibilities of performance, parties to such performance, quasi-contracts, breach of contract and its consequences. It also deals with indemnity, guarantee, bailment agency and the effect of contracts through agency. In this respect, Act is comprehensive piece of legislation.

There is one basis difference between the law of contracts and other laws. It does not specify a number of rights and duties, which the law protects or enforces. It rather consists of a number of limiting principles, subject to which the parties may create right and duties for themselves, which the law will uphold. In a sense, the parties to a contract make the law for themselves. So long as they do not infringe some legal provision, they remain at liberty to make what rules they like regarding the subject matter of their agreement, and the law protects the parties in respect of their mutual determinations.

Formation of Contract

1. The first stage of a contract is a proposal or an offer, which is made by one person to another for doing or refrain from doing an act.

⁴⁹ The Preamble of the Contract Act, 1872.

⁵⁰ *Irrawaddy Flotilla Co. v. Bugawandas*, (1891) 18 I.A. 121; *Jwaladuti R. Pillani v. Bansilal Motilal*, (1929) 56 I.A. 174; *Meghu Mian v. Kishun Ram*, 1954 A.P. 477.

2. The second stage is the acceptance of the proposal by the person to whom it is made. A proposal when accepted becomes a promise.
3. Next comes the consideration involved in the promise.
4. Every promise and every set of promises forming the consideration for each other is an agreement.
5. An agreement enforceable by law is a contract.

Communication, Acceptance and Revocation

A proposal has to be communicated and the communication is complete only when the person to whom it is made has received the communication. A proposal can be revoked before the communication has been received and accepted, but not afterwards.

An acceptance of a proposal has to be without conditions attached. A conditional acceptance is not an acceptance.

Valid contracts

There are five essential prerequisites for a valid contract:

1. There should be a proposal and an acceptance.
2. The consideration must be lawful.
3. There must be a free consent of both parties, i.e. it should not have any of the following elements:
 - ◆ Coercion (Section 15)
 - ◆ Undue Influence (Section 16)
 - ◆ Fraud (Section 17)
 - ◆ Misrepresentation (Section 18)
 - ◆ Mistake (Section 21 to Section 23)
4. Both the parties must be competent to enter into the agreement, i.e., they should not be:
 - ◆ Minor according to the law to which he is subject
 - ◆ Person of unsound mind
 - ◆ Any person who is disqualified from contracting by any law to which he is subject
5. The agreement should not expressly be declared to be void. Under the Contract Act, the following agreements are expressly declared to be void:
 - ◆ Agreement in restraint of the marriage of any person other than a minor;
 - ◆ Agreement in restraint of trade;
 - ◆ Agreement in absolute restraint of judicial proceedings, (an agreement to refer to arbitration is not a restraint and it is not therefore, void);
 - ◆ Agreement, the meaning of which is not certain or capable of being made certain;
 - ◆ Agreement by way of wager.
 - ◆ Agreement becomes void even if only one or any part of one of its several considerations for a single object is unlawful.
 - ◆ Agreement could be void if it's meaning is not free from doubt.

Performance

Parties to a contract are obliged to perform their respective promises. Where an offer of performance has not been accepted by the promisee, the promiser is not responsible for non-performance. When a party to a contract refuses to perform, the promisee may put an end to the contract.

Time for performance of a promise is important. If no time has been specified, it should be performed in a reasonable time.

Discharge of a Contract

A contract terminates in the following situations:

1. Performance: When all the terms of the contract in terms of performance have been carried out.
2. Release: When one party to the contract agrees to excuse performance by the other party after breach of the contract by the latter.
3. Discharge by implied consent or impossibility of performance: The law does not compel a party to do something, which cannot be done. Contract is discharged when performance becomes impossible:
 - ◆ Due to destruction of the subject-matter;
 - ◆ Due to death or incapacity of the promisor in a contract for personal services;
 - ◆ Due to subsequent change of legislation;
 - ◆ Due to non-existence or cessation of a state of affairs, the existence or continuance of which formed the basis of the contract; and
 - ◆ Due to such an alternation of circumstances as to bring about complete frustration of the commercial object.
4. Discharge by tender: Where a party is ready and willing to perform his promise and has offered to do so at the right time and place, but the other party does not accept the performance, the contract is discharged by tender or 'attempted performance'.
5. Novation: If the parties to a contract agree to substitute a new contract for it or rescind or later it, the original contract need not be performed.
6. Void Contracts: When an agreement is discovered to be void.
7. Breach of contract: When a contract has been broken.

Consequences of Breach of Contract

1. Compensation for loss or damage caused by breach
2. Compensation stipulated for breach in the contract itself
3. Party rightfully rescinding a contract is also entitled to compensation

Agency

The law relating to agency is part of the Contract Act.

➤ Elements of agency

1. An agent is defined as "a person employed to do any act for another, or to represent in dealings with third persons."
2. The person for whom such an act is done or who is so represented is called the Principal.
3. Section 226 of the Contract Act states that "Contracts entered into through an agent, and obligation arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts has been entered into and the acts done by the principal in person".
4. A contract of agency may be made in writing or verbally. When it is in writing, it is in the form of power of attorney.
5. An agent cannot lawfully employ another to perform acts, which he has expressly or impliedly undertaken to perform personally, unless by ordinary custom of trade or from the nature of the agency, a sub-agent must be employed. This involves the general maxim of law that one who has been delegated cannot further sub-delegate.
6. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency. Where a sub agent is properly appointed, the principal is, represented by the sub-agent and is bound by and responsible for his acts as if he were an agent originally appointed by the principal. The agent is responsible to the principal for the acts of the sub-agent. The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud or willful wrong. If an agent does something on behalf of the principal but without his knowledge or authority, the principal may elect to ratify the action or to disown it. A principal ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed part.

➤ Termination of agency

An agency is terminated under the following circumstances:

1. By the principal revoking his authority
2. By the agent renouncing the business of the agency
3. By the business of the agency being completed
4. On the death of either the principal or the agent

➤ Agent's Duties

1. An agent is bound to conduct the business of his principal according to the directions given by the principal
2. In the absence of any directions as to the mode of conduct of business, the agent has a duty to carry out the same in accordance with the standard practice of such business.

➤ Liability of Agent

1. When the agent acts otherwise and any loss is caused, he must compensate for the same to his principal
2. If any profit accrues, the agent must account for it.
3. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal or acquainting him with all material circumstances, which have come on his own knowledge on the subject, the principal may repudiate the transaction if the contract turns out to be against the latter's interest.
4. If an agent does a criminal act, the principal is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequence of that act.
5. Where an agent goes beyond the scope of his authority and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.
6. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal nor is he personally bound by them.
7. Misrepresentations made or frauds committed by agents acting in the course of their business for their principals have the same effect on agreement made by such agents as if such misrepresentations or frauds has been made or committed by the principals; but misrepresentations made or frauds committed by agents in matters which do not fall within their authority, do not affect their principals.

Indemnity

It is a contract where one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person.

➤ Rights of the indemnity-holder

The indemnity-holder has the following rights in circumstances where he is sued:

1. All damages he may be compelled to pay in a suit in respect of any matter to which the promise to indemnify applies.
2. All costs which he may be compelled to pay in any such suit.
3. All sums paid under the terms of any compromise of any such suit.

The rights can only be enforced if the following conditions are fulfilled:

- ◆ He did not contravene the orders of the promisor
- ◆ He acted in a prudent manner as he would have done in absence of any contract of indemnity
- ◆ Promisor authorized him to bring the suit

The word "bailment" is defined in Section 148 of the Act as the delivery of goods by one person to another for some purpose, upon a contract that they shall be returned or otherwise disposed of according to the directions of the person delivering them, when the purpose is accomplished. In the case of litigation papers in the hands of the advocate, there is neither delivery of goods nor any contract that they shall be returned or otherwise disposed of.

Guarantee

➤ Elements of guarantee

1. A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of his default.
2. The person who gives the guarantee is called the "surety".
3. The person in respect of whose default the guarantee is given is called the "principal debtor"
4. The person to whom the guarantee is given is called the "creditor".
5. A guarantee may be written or oral.
6. A guarantee may be continuing in nature, i.e., it may extend to a series of transactions. The surety may revoke it at any time by:
 - ◆ Giving notice to the creditor

- ◆ Death of the surety
- 7. Guarantee is invalid when it is contracted on the basis of:
 - ◆ Misrepresentation
 - ◆ Concealment
 - ◆ A clause stating that the surety shall not act upon it until another person has joined in as the company-surety and the same has not happened.
- Right of surety
- 1. A surety has two rights against the principal debtor:
 - ◆ Right to be subrogated, i.e., the substitution of one person for another.
 - ◆ Right to indemnify
 - ◆ Right to payment or performance which the creditor had against the principal once the surety has performed the guaranteed duty.
- 2. Rights of surety against the creditor
 - ◆ Benefit the securities of the creditor against the principal debtor.
- 3. The rights of surety against co-sureties include
 - ◆ The right of contribution as the co-sureties are liable to contribute equally whether they are co-sureties jointly or severally
 - ◆ Where at the time of guarantee, one of the co-sureties receives a security from the principal debtor or, on payment of the debt, he receives surety from the creditor, the co-sureties are entitled to share the benefits of security
 - ◆ Where there are co-sureties, a release by the creditor of one of them does not discharge the others neither does it free the surety so released from his responsibilities to other sureties.
- Discharge of surety
- 1. Discharge where any variation in the contract is made without the consent of the surety.
- 2. Discharge on the death of the principal debtor.
- 3. Discharge by the creditor's act or omission impairing the surety's eventual remedy.
- 4. Discharge where surety
 - ◆ Compounds with
 - ◆ Gives time to
 - ◆ Agrees not to sue
 the principal debtor.
- Liability of Surety
- 1. The liability is company-extensive with the principal debtor.
- 2. Co-sureties are liable to contribute equally unless the terms of the contract state otherwise.

Bailment

- Elements
- 1. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the direction of the person delivering them.
- 2. The person delivering the goods is called the "bailor".
- 3. The person to whom they are delivered is called the "bailee".
- 4. Delivery may be physical or constructive.
- Duty of bailor
- 1. Duty to disclose faults in good bailed.
- 2. Duty to repay the bailee of necessary expenses.
- Duty of bailee
- 1. Duty to take care of goods bailed.
- 2. Duty to return the goods bailed upon the expiration of the period for which the goods were bailed or the purpose of the bailment is fulfilled.
- Liability of bailee

1. Bailee is liable to compensate the bailor the former uses the goods pledged without the authorization of the latter or not in accordance with the contract.
2. Bailee is liable to make goods any loss to the bailor, default with regards to the goods bailed.

➤ Liability of a bailor

1. Bailor has the responsibility to compensate the bailee for any loss sustained by reason that the bailor was not entitled with regards to the goods bailed:
 - ◆ To make the bailment
 - ◆ To receive back the goods
 - ◆ To give directions

➤ Right of bailor

1. Bailor is entitled to the profits or increase from the goods bailed.

➤ Termination of bailment

1. The bailor can terminate the contract if the bailee does anything with regards to the goods bailed, which are inconsistent with the conditions of bailment.
2. A gratuitous bailment can be terminated by the death of either the bailee or the bailor.

➤ Special provision

The following can claim a general lien on any goods bailed to them for a general balance of account:

1. Bankers
2. Factors
3. Wharfingers
4. Attorneys
5. Policy-brokers

➤ Suits by bailor and bailee against wrongdoer

1. Either the bailor or bailee may bring a suit against a third party who is responsible for some wrong doing with respect to the goods bailed.
2. Relief or compensation obtained in any suit would be dealt according to the respective interests of the bailor and the bailee

Pledge

➤ Elements

1. The bailment for the security of goods as security for payment of a debt or performance of a promise is called "pledge".
2. The bailor is called "pawnor".
3. The bailee is called the "pawnee".
4. Pledge by mercantile agent valid if he is expressly authorized by the owner of the goods to make the same.

➤ Right of pawnee

3. Right of retainer for
 - ◆ Payment of debt
 - ◆ Performance of promise
 - ◆ Interest for debt
 - ◆ All expenses for possession and preservation of the goods pledged
4. Right to extraordinary expenses
5. Right of pawnee to good title to the goods if he has accepted the goods pledged on good faith and without noticing the pawnor's defect of title
6. Right where pawnor defaults
 - ◆ Sue the pawnor upon debt or promise
 - ◆ Retain the goods pledged as collateral security
 - ◆ Sell the pledged goods upon giving notice to the pawnor notice

➤ Liability of pawnee

3. Pawnee cannot retain for debt or promise other than for which goods pledged.
4. Pay balance amount to pawnor if the goods pledged is sold in case of the default of the pawnor and the amount received as the sale consideration exceeds the amount due in respect of debt or promise due from the pawnor.

- Right of pawnor
- 3. Right to redeem goods pledged anytime before the actual sale of the goods provided any extra expense incurred by the pawnee for such default is paid for.
- Liability of pawnor
- 1. Pay balance amount to pawnee if the goods pledged is sold in case of the default of the pawnor and the amount received as the sale consideration falls below the amount due in respect of debt or promise due from the pawnor.
- 2. Where the pawnor only has limited interest in the good pledged, the pledge is valid only to that extent.

THE COMPANIES ACT, 1994

The incorporation of a Company is governed by the Companies Act 1994. The Companies Act is an Act to consolidate and amend the law relating to companies and certain other associations. It extends to the whole of Bangladesh. Chapters I and II deal with the incorporation of a company and matters incidental thereto.

PRIVATE COMPANY [Sec. 2q]: It means a company which (i) restricts the rights to transfer its shares, if any; (ii) limits the number of its members to fifty not including employees of the company, and (iv) does not offer its shares and debentures for subscription by the general public.

PUBLIC COMPANY [Sec. 2r]: It means a company incorporated under this Act or under any law at any time in force before the commencement of this Act and which is not a private company;

NAME [Sec. 11]: The name of a corporation is the symbol of its personal existence. Any suitable name may be selected subject, however, to the following instructions: (i) No company can be registered with a name, which in the opinion of the Government is undesirable. (ii) Such name should not be identical with or should not too nearly resemble, the name of another registered company, (iii) Whatever be the name of the company if the liability of the members is limited the last word of the name must be 'Limited' and in the case of a private company 'Private Limited' [Sec. 6 (i), 7 (i)]. Name of the Company must be printed on the outside of every place where the business of the company is carried on. Such name including the address of the registered office must also be mentioned on all business letters and other official publications, on all negotiable instruments issued or endorsed by the company and on all other orders, receipts, etc.

DOCUMENTS REQUIRED FOR INCORPORATION: After obtaining Registrar's approval for the company's name, the promoters should prepare the following documents, in the prescribed manner and form: (i) Memorandum of Association (ii) Articles of Association (iii) Prospectus /Statement in lieu of prospectus is not required in case of a private Company (iv) Copy of import agreements. (v) Statutory declaration (vi) Copy of Letter of Register indicating approval of name (vii) Power of Attorney. (viii) Notice of situation of registered office and particulars of Directors. The documents should be duly executed signed and stamped from the date of approval of name by the Registrar. It is to be ensured that subscribers to the Memorandum and Articles of Association of the proposed company are same as the promoters whose names are appearing in the application for availability of name. In the case of a change, the changed subscribers will be asked to make a fresh application for availability of name. The Registrar Of Companies (ROC) may allow the same name, if available after six month from the date when the name was allowed to the original promoter.

MEMORANDUM OF ASSOCIATION: [Sec 2 n, 5-16] Meaning and Purpose of Memorandum: An important step in the formation of a company is to prepare a document called memorandum of association. It is the charter of the company and is very important document as it contains the basic conditions on which the company is incorporated. Any act outside the memorandum is ultra vires the company.

REQUIREMENTS WITH RESPECT TO MEMORANDUM [Sec 6-10]:The memorandum of every company shall state - (a) the name of the company with "Limited" as the last word of the name in the case of a public limited company, and with "Private Limited" as the last words of the name in the case of a private limited company; (b) the place in which the registered office of the company is to be situated; (c) the objects of the company; to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of the main objects; (d) other objects of the company not included in sub-clause (c).

In the case of a company having a share capital - (a) unless the company is an unlimited company, the memorandum shall also state the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount; (b) no subscriber of the memorandum shall take less than one share; and (c) each subscriber of the memorandum shall write opposite to his name the number of shares he takes.

CERTIFICATE OF INCORPORATION: When the Registrar decides to register a company it issues a Certificate of Incorporation of Company which is conclusive evidence as regards the compliance with the requirements of the Act in regards to registration of company and the matter precedent or incidental thereto. The date mentioned in this certificate of incorporation is the date of incorporation of the company. It brings the company into existence as a legal person.

TYPES OF SHARES: A company may issue following types of Shares- (A) Equity shares (B) Preference shares

WINDING UP: Winding up of a company is a process by which business of the company is wound up, and the company ceases to exist anymore. All the assets of the company are sold, and the proceedings collected are used to discharge the liabilities on a priority basis.

MODES OF WINDING UP [Sec.234]: There are three ways, in which a company may be wound up. They are: (a) winding up by the court. (b) Voluntary winding up, [which may be (i) Members Voluntary winding up. (ii) Creditors Voluntary winding up.] and (c) Winding up subject to supervision of the court

WINDING UP BY THE COURT: A company may be wound up by the court in such situations, when (i) the company itself, has passed a special resolution in the general meeting to wound up its affairs. (ii) there is a default, in holding the statutory meeting or in delivering the statutory report to the Registrar (iii) If the company fails to commence its business within one year from the date of its incorporation, or suspends its business for a whole year (iv) If the number of members, in a public company is reduced to less than seven, and in case of private company less than two (v) If the company is unable to pay its debts (vi) If the court, itself is of the opinion that the company should be wound up [Sec. 241]. The company itself, or any creditor, contributory or any person authorised by the Government in case of oppression or mismanagement of the company's affairs, or the Registrar, or can apply to Court for a winding up petition [Sec. 245]. The Court may (i). dismiss such petition with or without costs, make an interim order as it thinks fit, or (iii). pass an order for winding up of the company with or without costs [Sec. 248].

CONSEQUENCES OF COURT PASSING AN ORDER FOR WINDING UP [246-266]: (i) Court will send notice to an official liquidator, to take charge of the company. He shall carry out the process of winding up, (ii) The winding up order, shall be applicable on all the creditors and contributories, whether they have filed the winding up petition or not. (iii) The official liquidator is appointed by Government (iv) The company shall relevant particulars, relating to, assets, cash in hand, bank balance, liabilities, particulars of creditors etc, to the official liquidator. The official liquidator shall within six months, from the date of winding up order, submit a preliminary report to the court regarding: (a) Particulars of Capital (b) Cash and negotiable securities (c) Liabilities (d) Movable and immovable properties (e) Unpaid calls, and (f) An opinion, whether further inquiry is required or not. The Govt. shall keep a cognizance over the functioning of official liquidator, and may require him to answer any inquiry.

STAY ORDER: [Sec.250] Where, the court has passed a winding up order, it may stay the proceedings of winding up, on an application filed by official liquidator, or creditor or any contributory.

DISSOLUTION OF COMPANY [Sec.277] Finally the court will order for dissolution of the company, when the affairs of the company are completely wound up, or the official liquidator is unable to carry on the winding up procedure for want of funds.

APPEAL: [Sec. 285] An appeal from the decision of court, will lie before that court, before whom, appeals lie from any order or decision of the former court in cases within its ordinary jurisdiction

VOLUNTARY WINDING UP [Sec.277]: A company may, voluntarily wind up its affairs, if it is (i) when the period, if any, fixed for the duration of the company by the articles expires, or the even, if any occurs, on the occurrence of which articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily. A company may voluntarily wind up itself, either by passing: An ordinary resolution, where the purpose for which the company was formed has completed, or the time limit for which the company was formed, has expired. Or By way of special resolution

Once the resolution of voluntarily winding up is passed, then the company may be wound up, either through: (i) Members voluntarily winding up, or (ii) Creditors voluntarily winding up

MEMBERS VOLUNTARILY WINDING UP [Sec.292 -296] Directors of the company shall call for a Board of Directors Meeting, and make a declaration of winding up, accompanied by an Affidavit, stating that; The

company has no debts to pay, or The company will repay its debts; if any, within 3 years from the commencement of winding up, as specified in declaration

Who shall carry out the winding up procedure? & What shall be the procedure? The company shall appoint one or more liquidators, in a general meeting, who shall look after the affair of winding up procedure, and distribution of assets. The liquidator so appointed, shall be paid remuneration for his services, which shall also be fixed in general meeting. The company shall also give notice of appointment of liquidator to the registrar within ten days of appointment. Once the company has appointed liquidator, the powers of Board of Directors, Managing Director, and Manager, shall cease to exist. The liquidator is generally given a free hand, to carry out the winding up procedure, in such a manner, as he thinks best in the interest of creditors, and company. In case, the winding up procedure, takes more than one year, then liquidator will have to call a general meeting, at the end of each year, and he shall present, a complete account of the procedure, and position of liquidator

When affairs of the company are fully wound up The liquidator shall take the following steps, when affairs of the company are fully wound up Call a general meeting of the members of the company, lay before it, complete picture of accounts, winding up procedure and how the properties of company are disposed of. (i) The meeting shall be called by advertisement, specifying the time, place and object of the meeting. (ii) The liquidator shall send to, the Registrar and official Liquidator copy of account (iii) If from the report, official liquidator comes to the conclusion, that affairs of the company are not being carried in manner prejudicial to the interest of its members, or public, then the company shall be deemed to be dissolved from the date of report to the court. However, if official liquidator comes to a finding, that affairs have been carried in a manner prejudicial to interest of member or public, then court may direct the liquidator to investigate further.

CREDITORS VOLUNTARILY WINDING UP [Sec.297 -305] Where the resolution for winding up has been passed, but the Board of Directors are not in a position to give a declaration on the liability of company, they may call a meeting of creditors, for the purpose of winding up. It is the duty of Board of Directors, to present a full statement of company's affairs, and list of creditors along with their dues, before the meeting of creditors. Whatever resolution, the company passes in creditor's meeting, shall be given to the Registrar within ten days of its passing.

Who shall carry out the winding up procedure? & What shall be the procedure? Company in the general meeting [in which resolution for winding up is passed], and the creditors in their meeting, appoint liquidator. They may either agree on one liquidator, or if two names are suggested, then liquidator appointed by creditor shall act. Any director, member or creditor may approach the court, for direction that ; (i) Liquidator appointed in general meeting shall act, or (ii) He shall act jointly with liquidator appointed by creditor, or (iii) Appointing official liquidator, or (iv) Some other person to be appointed as liquidator (v) The remuneration of liquidator shall be fixed by the creditors, or by the court. (vi) On appointment of liquidator, all the power of Board of Directors shall cease. (vii) In case, the winding up procedure, takes more than one year, then he will have to call a general meeting, and meeting of creditors, at the end of each year, and he shall present, a complete account of the procedure, and the status / position of liquidation

When affairs of the company are fully wound up The liquidator shall take the following steps, when affairs of the company are fully wound up: (a) Call a general meeting, and meeting of creditors, and lay before it, complete picture of accounts, winding up procedure and how the properties of company are disposed of. (b) The meeting shall be called by advertisement, specifying the time, place and object of the meeting. (c) The liquidator shall send to the Registrar and official liquidator copy of account, within one week after the meeting. (d) If from the report, official liquidator comes to the conclusion, that affairs of the company are not being carried in manner prejudicial to the interest of its members or public, then the company shall be deemed to be dissolved, from the date of report to the court. However, if official liquidator comes to a finding, that affairs have been carried in a manner prejudicial to interest of members or public, then court may direct the liquidator to investigate further.

DISTRIBUTION OF PROPERTY OF COMPANY ON VOLUNTARILY WINDING UP [BOTH MEMBERS AND CREDITORS VOLUNTARILY WINDING UP] [SEC. 307]: Once the company is fully wound up, and assets of the company sold or distributed, the proceeds collected are utilised to pay off the liabilities. The proceeds so collected shall be utilised to pay off the creditors in equal proportion. Thereafter any money or property left, may be distributed among members according to their rights and interests in the company.

WINDING UP SUBJECT TO SUPERVISION OF COURT [Sec.316-344]: Winding up subject to supervision of court, is different from "Winding up by court." Here the court only supervises the winding up procedure. Resolution for winding up is passed by members in the general meeting. It is only for some specific reasons, that court may supervise the winding up proceedings. The court may put up some special terms and

conditions also. However, liberty is granted to creditors, contributories or other to apply to court for some relief.

The court may also appoint liquidators, in addition to already appointed, or remove any such liquidator. The court may also appoint the official liquidator, as a liquidator to fill up the vacancy. Liquidator is entitled to do all such things and acts, as he thinks best in the interest of company. He shall enjoy the same powers, as if the company is being wound-up voluntarily. The court also may exercise powers to enforce calls made by the liquidators, and such other powers, as if an order has been made for winding up the company altogether by court.

PRIORITY INDISPOSING LIABILITIES [Sec.325]: When the company is wound up, by any mode, the liabilities shall be discharged in the priority such as (i) All wages, taxes, cesses and rates due from the company to the Government or a state govt. (ii) Workman's dues (iii) Debts due to secured creditors, in case of insolvency (iv) All wages and salary of any employee due within four months. (v) All wages holiday remuneration becoming payable to any employee. All such debts shall be paid in full. If assets are insufficient to meet them, they shall abate in equal proportions.

WINDING UP OF UNREGISTERED COMPANY [Sec. 371-377]: In simple words, an unregistered company, is a company not included as a company registered under this Act or under any company law in force at any time, and is a company consisting of more than seven members. An unregistered company, cannot be wound up voluntarily, or, subject to super vision of court. (Sec. 377)

The circumstances, in which unregistered company may be wound up, are as follows: (i) If the company, is dissolved, or has ceased to carry on business, or is carrying on business only for the purposes of winding up, it's affairs, (ii) If the company is unable to pay it's debt (iii) If the court is of opinion, that it is just and equitable, that the company, should be wound up.

A creditor, contributory, or company itself by filing a petition, or any person authorised by Government may institute winding up proceedings. In respect to other aspects, the same provisions and procedure shall follow, as in winding up of registered company. A foreign company, carrying on business in Bangladesh, which has been dissolved, may be wound up, as unregistered company.

FOREIGN COMPANY [Sec. 378-384]: A foreign company, is a company which is incorporated outside Bangladesh, and having a place of business in Bangladesh. Winding up of such companies is only limited to the extent of it's assets in Bangladesh. In respect of assets and business carried outside Bangladesh, Bangladesh courts has no jurisdiction. Winding up of a foreign company can only be made through court. Even if the company had been dissolved or ceased to exist in the country of it's incorporation, winding up order in this country can be made. Even if a foreign company has been wound up according to foreign law, the courts in Bangladesh still protect the Bangladesh Creditors. The surplus assets, after paying the creditors, should be distributed among the share holders equally in the same proportion, as the assets ---- to the total issued and paid up capital. Pendency of a foreign liquidation does not affect the jurisdiction to make winding up order. As, for persons claiming to be creditors, their presence, itself is sufficient. It is not required to be shown, that company carried on business operations from any place of business in Bangladesh.

THE CODE OF CIVIL PROCEDURE 1908

The Civil Procedure Code (C.P.C.) is to regulate the functioning of Civil courts. CPC lays down the rules in which a civil court is to function, which may be summed up as: (a) Procedure of filing the civil case. (b) Powers of court to pass various orders (c) Court fees and stamp involved in filing of case (d) Rights of the parties to a case, viz. plaintiff and defendant (e) Jurisdiction and parameters within which the civil courts should function (f) Specific rules for proceedings of a case (g) Right of Appeals, review or reference.

The provisions of the CPC may be analysed under 4 heads – (I) JURISDICTION, (II) SUITS, (III) RELIEF, and (IV) PUBLIC INTEREST LITIGATION.

(I) JURISDICTION: Jurisdiction of civil courts can be divided on two basis. (i) Pecuniary/Monetary (ii) Territorial/ Area wise Classification

PECUNIARY JURISDICTION: Pecuniary jurisdiction of the court divides the court on a vertical basis. It sets a pecuniary limit on the jurisdiction of every court in Bangladesh and no Court can exercise jurisdiction over suits the value of the subject matter of which exceeds such pecuniary limit [Sec. 6].

TERRITORIAL JURISDICTION: Territorial Jurisdiction divides the courts on a horizontal basis. They are (i) District Courts (ii) High Court.

HOW IS TERRITORY DECIDED? [Ss. 15 – 24a]: Territory of a court is decided after taking into account several factors. They are: (i) In case of immovable property: If the suit is with regard to recovery, rent, partition, sale, redemption, determination of right of immovable property, it shall be instituted in the court within the local limits of whose jurisdiction the property is situated. (ii) immovable property situated within the jurisdiction of different courts. In such a case the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situated. (iii) In case of dispute between two or more persons with respect to movable property, business or any other wrong done. Where a wrong has been caused to a person, or any damage has been caused to a movable property, then the suit may be instituted either, (i) In the place, where wrong or damage has been caused, or (ii) In the place, where defendant the person who caused the loss resides.

LACK OF JURISDICTION A court may dismiss the case outright, if, it (the court) does not have requisite jurisdiction, either pecuniary or territorial.

(II) SUITS: Suits of civil nature falls into various categories, depending on the nature of suits, or status of person filing the suit etc. These categories include: (i) Suits By Or Against Govt./ Public Office [O27](ii) Suits By Or Against Military / Naval Men / Airmen [O28](iii) Suits By Or Against Corporations [O29] (iv) Suits By Or Against Firms And Persons Carrying On Business In Names Other Than Their Own [O30]. (v) Suits By Or Against Trustees, Executors and Administrators [O31] (vi) Suits By Or Against Minors And Persons Of Unsound Mind [O32] (viii) Suits Relating To Matters Concerning The Family (ix) Summary Procedure. (Suit Relating To Bills Of Exchange, Hundis, Promissory Notes Etc.) A suit may be instituted against any officer employed by any of the Armed forces; i.e. Navy, Military or Airforce in their personal capacity and it shall proceed in the same manner as between two private parties.

PROCEDURE FOR FILING SUITS: There is a detailed procedure laid down, for filing a civil case. If the procedure is not followed, then the registry has a right to dismiss the suit. The Procedure includes: (i) Filing Of Suit / Complaint (ii) Vakalatnama (iii) Court Fees (iv) How Proceedings Are Conducted (v) Written Statement (vi) Replication By Plaintiff (vii) Filing Of Other Documents (viii) Framing Of Issues/ List Of Witness (ix) Final Hearing (x) Appeal, Reference And Review (xi) Limitation

ORDER OF "RES JUDICATA": {Some issue cannot be raised, once decided} [Ss. 10 & 11]- "Res Judicata" means an issue, which has already been decided by the court, in a previous case, cannot be raised again in a subsequent case. If such an issue, which is raised again, is substantial and material in a case, then the court may dismiss the whole case out rightly, before final hearing.

LIMITATION: These are some suits, which have to be filed within a specified time limit if they are filed, after the expiry of time specified, then the court may dismiss it at once, without going into any merits or details of the case. For eg. suit for on account and a share of the profits of a dissolved partnership (3 years, from date of dissolution), money payable for money lent (3 years, from the date when the loan is made), suit for possession of immovable property or any interest therein based on title (12 years, from the date of possession of the defendant becomes adverse to the plaintiff.)

DISMISS IN DEFAULT (Order 9): If neither party appears on the date of hearing then the court is entitled to dismiss the suit, Or If the Defendant appears and the plaintiff does not appear, then the court is bound to dismiss the suit. However, if the plaintiff appears and the defendant does not appear, then the court is authorised to either postpone the hearing or proceed with the suit "Exparte", i.e. without defendant.

DISPOSAL OF THE SUIT AT FIRST HEARING (Order 15): A Court may also dispose of the suit in it's very first hearing, on any one of the grounds: - 1. NO ISSUE: If no relevant issue is raised before the court, by either of the parties during first hearing, the court may dispose of the suit. 2. ONE OF SEVERAL DEFENDANTS NOT AT ISSUE If there are more than one defendant, and any of the defendant is not in issue i.e. not connected with the case filed, then the court may dispose of the suit against or in favour of such defendant only. With respect to other defendants, the suit will continue in its usual course. 3. FAILURE TO PRODUCE EVIDENCE: If either party, fails to produce evidence without any justifiable reasons, then the court may pass a judgment, without going any further. 4. IRRELEVANT PARTIES: If irrelevant parties have been imploded in the plaint, the court may either order for deletion of such names, or outright reject the suit.

SECURITY TO BE DEPOSITED BY DEFENDANT OR PLAINTIFF (Order 24 & 25): The court may order the defendant to deposit a specific amount of money, in a suit filed against him for recovery of any debt. The court may also order plaintiff to deposit any kind of security, on an application made by the defendant Such an order is passed, to ensure the Bonafide and Integrity of the parties to the suits.

RELIEF: The Civil Court is empowered to give various types of relief and orders. All such relief and order can be clubbed into two categories, viz, A. Initial / Temporary orders, and B. Final Orders.

A. INITIAL / TEMPORARY ORDER :- There are also various types of temporary or initial orders, each of a different kind, and having a different implication altogether. They are: (I) Temporary Injunction [O39 R1-5] - These include: (a) Restraining the defendant from damaging or disposing his property (b) Restraining the defendant from dispossessing the plaintiff from disputed property (c) Restraining the defendant from doing any other act which may make the whole suit infructuous (d) Restraining the defendant from committing any breach of contract (e) Restraining the defendant from committing injury of any kind. However later on during the pending of suit or at the time of final hearing the court may revoke or modify the injunction granted; (2) Interlocutory Order [O39, R 6-R10] - Interlocutory orders are also somewhat similar to temporary injunctions. Interlocutory order only settles intervening matter relating to the cause. Such orders are made to secure some end and purpose necessary and essential to the progress of case and generally collateral to the issues to be settled by the court in the final judgment. These orders are also of different natures, such as: (a) Interim Sale: Interim sale of any movable property may be ordered, if it is subject to natural decay, such as vegetable etc (b) Detention Preservation, Inspection, etc of subject matter of suit. The court may order for: (i) Detention, preservation or inspection of property or documents. (ii) Authorize any person to enter into any land or building, which is in the possession of other party, for the purposes of detention, preservation or inspection etc. (iii) To authorize any person to take samples. (iv) Deposit of Money;

B. FINAL ORDERS. Once a final order is passed by the court, the case is said to be disposed of in favour of either of the parties. Such a final order consists of more than one order. They are: -

(i) JUDGMENT (Order 20 Rule 1-5. 5(a)): A judgment is a final decision, which decide about rights and liabilities of the court. The court may pronounce judgment orally on the day of final hearing, or at some other short date [not more than 7 days]. Once, a judgment has been passed a certified copy of the judgment can be obtained on payment of nominal amount by parties on application to the Court. The judgment shall contain (a) Points for determination (b) Concise statement of the case (c) Reason for such decision, (d) Issues framed if any, and decision on each issue.

(ii) DECREE (Order 20, Rule 6):- A decree contains, more than judgment. It contains (a) It shall agree with the judgment (b) Number of the suit (c) Names and descriptions of the parties (d) Registered Addresses of parties (e) Particulars of the claim (f) Relief granted on other determination (g) Amount of the costs incurred in the suit (h) Who shall pay the cost, and how and in what proportion it shall be paid (i) Date on which judgment was pronounced. A decree is drawn up within 7 days from the date on which the judgment is pronounced [O20 R5a]. A copy of decree can also be obtained in the same way, as a copy of judgment. In case of a suit for Recovery of Money, if Decree is passed against defendant, then after the decree is passed, defendant may apply to the court for postponing the payment, or that, money be paid in installments. There can be various kinds of Decrees, such as: -(i) Decree for recovery of immovable property, (ii) Decree for delivery of movable property, (iii) Decree for possession (iv) Decree for specific Performance of contract for the sale etc.

EXECUTION (OF DECREE AND ORDERS) (order 21) Court on it's own motion: The court, may on it's own motion, order for the execution of it's order, by directing the opposite party to either deposit money in court, or furnish a surety, or any other direction. Application by Decree-Holder (O21 R10) A decree holder (i.e. one in whose favour, the decree has been passed) can also apply to the court, which passed the decree, for it's execution. The application shall be signed and verified by the applicant, and in writing It should also contains the details of the suit and order passed. When the application is admitted, the court shall enter the date on which it was made and pass necessary order for execution. Then the court shall issue process for execution of the decree O21 R24 .Finally on the date mentioned in the execution order the officer interested shall endorse the execution process. In the execution order, if the court feels the need, it may also order for (i) Attachment of the property of person, against who decree has been passed. or (ii) Sale of the property.

PUBLIC INTEREST LITIGATION: "Public Interest Litigation", is filed in the same manner, as a writ petition is filed. IN HIGH COURT two (2) copies of the petition have to be filed. Also, an advance copy of the petition has to be served on the each respondent, i.e. opposite party, and this proof of service has to be affixed on the petition. IN SUPREME COURT (4)+(1) (i.e. 5) sets of petition has to be filed opposite party is served, the copy only when notice is issued.

Proceedings, in the PUBLIC INTEREST LITIGATION commence and carry on in the same manner, as other cases. However, in between the proceedings if the judge feels he may appoint a commissioner, to inspect allegations like pollution being caused, trees being cut, sewer problems, etc. After filing of replies, by

opposite party, and rejoinder by the petitioner, final hearing takes place, and the judge gives his final decision.

THE IMPORT AND EXPORT (CONTROL) ACT, 1950

OBJECTIVE: The main objective of the Act is to prohibit, restrict or control imports into and exports from Bangladesh.

MAIN PROVISIONS:

(i) Powers to prohibit or restrict imports and exports:- [Sec. 3] The Act stipulates, that the Federal Government may prohibit, restrict or otherwise control the import or export of goods of any specified description, or regulate generally all practices (including trade practices) and procedure connected with the import or export of such goods. Besides the Act provides that no goods of the specified description shall be imported or exported except in accordance with the conditions of a license to be issued by the Chief controller or any other officer authorized in this behalf by the Federal Government. In addition the Govt. may impose conditions on the clearance of imported goods, whether for home consumption or warehousing or shipment abroad.

(ii) Continuance of existing orders: [Sec.4] All orders made under section 3 of the Imports and Exports (Control) Act, 1947, and in force immediately before the commencement of this Act shall so far as they are not inconsistent with the provisions of this Act, continue in force and shall be deemed to have been made under this Act.

(iii) Prohibition to sell or purchase import license: [Sec.4A] No person shall sell, purchase or otherwise deal in an import license.

(iv) Prohibition regarding sale and transfer of goods by industrial consumer [Sec. 4B] Except with the previous permission in writing of the Chief Controller or any other officer authorized in this behalf by the Federal Government, no person without any license, shall sell or otherwise transfer goods meant for industrial consumers for a purpose other than the purpose or purposes for which the license was issued or such goods were imported.

(v) Penalty [Sec.5] :- On contravention of any of the provisions of the Act, the person so contravening without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Customs Act, 1969 (IV of 1969), as applied by sub-section (3) of section 3 of this Act be punishable with imprisonment for a term which may extend to one year, or with fine, or with both. Besides the Federal Government, or any officer authorized by it, may suspend, adjust, deduct or cancel the whole or, as the case may be, any part of export quotas whether granted to or acquired on the basis of performance, purchase or by any other means whatsoever, and suspend or, as the case may be, cancel the export registration of such person, after giving the concerned person, a reasonable notice to that effect.

(vi) Commercial Courts [Sec. 5A] The Government by notification, in the Gazette can constitute as many commercial court, as it considers necessary and specify the territories that come under each of them. A Commercial Court shall consist of a person who is, or has been, a Sessions Judge or a High Court Judge who shall be the Chairman, and two members, appointed by the Federal Government and on such terms and conditions as the Federal Government may determine and it shall have all the powers conferred by the Code of Criminal Procedure, 1898 (Act V of 1898), on a Court of Session exercising original jurisdiction. Commercial Court shall not merely by reason of a change in its composition, be bound to recall and rehear any witness who has given evidence, and may act on the evidence already recorded by it or produced before it and in all matters with respect to which no procedure has been prescribed by this Act, follow the procedure prescribed by the Code of Criminal Procedure, 1898 (Act V of 1898), for trial of cases by Magistrates. A person conducting prosecution before a Commercial Court shall be deemed to be a Public Prosecutor and such court shall sit at such place or places as the Federal Government may direct. An appeal may be filed against the decision of the Commercial Court to the High Court within thirty days. No act or proceedings of a Commercial Court shall be invalid by reason only of the absence of one or more members, or the existence of any vacancy amongst its members, or any defect in its composition, provided that the Court shall not hear a case in the absence of the Chairman.

(vii) Jurisdiction: [Sec. 5B] The contravention of any order made under section 3 relating to export trade shall be tried exclusively by a Commercial Court and it shall not take cognizance of an offence except

upon a complaint in writing made by an officer of the Export Promotion Bureau authorized by its Chairman by a general or special order in this behalf. Commercial Court shall, as far as may be, dispose of a matter within a period of ninety days following the filing of the complaint: However any decision of the Commercial Court shall not be rendered invalid by reason of any delay in the disposal of a matter.

(viii) Transfer Of Pending Cases:- [Sec. 5C] All cases to which the jurisdiction of the Commercial Court extends and which may be pending in any court immediately before the establishment of the Commercial Court shall stand transferred to the Commercial Court the Commercial Court shall not, by reason of such transfer, be bound to recall and rehear any witness who has given evidence in the case before the transfer and may act on the evidence already recorded by or produced before the court which tried the case before the transfer.

Cognizance of Offences [Sec.6] No court shall take cognizance of any offence punishable under section 5 except upon complaint in writing made, -- (i) in the case of an offence which is punishable both under this Act the rules made there under and also, whether by confiscation or otherwise, under the Customs Act 1969 (IV of 1969) by the Collector of Customs or (ii) by an officer of Customs authorized in writing in this behalf by a Collector of Customs, or (ii) in the case of any other offence, by the chief Controller or by an officer authorized by him in writing in this behalf; and no court inferior to that of a Magistrate of the first class shall try any such offence.

THE INSURANCE ACT, 1938

OBJECTIVE OF THE ACT: The Insurance Act, 1938 regulates the Insurance Sector in Bangladesh with regulatory oversight provided by the Controller of Insurance on authority under the Ministry of Commerce. The objective of the Act is to amend and consolidate the law relating to the business of insurance in Bangladesh.

IMPORTANT DEFINITIONS:

1. Insurance Company: The Act defines an insurance company as any insurer being a company, association or partnership which may be wound up under the companies Act, 1913, or to which the partnership Act, 1932 applies [Sec. 2(8)].
2. Insurer [Sec. 2(9)]: An insurer is any individual or unincorporated body of individuals or body corporate incorporated under the laws of any country or State outside Bangladesh carrying on insurance business. This definition excludes certain persons specified in the Act.
3. Insurance Agent: any person who has been granted a licence under sec. 42 of this Act is an insurance agent [Sec. 2(10)].
4. General Insurance Business: The term means fire, marine or miscellaneous insurance business, whether carried on singly or in combination with one or more of them [Sec. 2(6C)].
5. Life Insurance Business[Sec. 2(11)]: it means the business of effecting contracts of insurance upon human life, including any contract whereby the payment of money is assured on death (except policies for death by accident only) or the happening of any contingency dependant on human life or which is subject to payment of premiums for a term dependant on human life and shall be deemed to include (a) the granting of disability and double or triple indemnity accident benefits, if so provided in the contract of insurance; (b) the granting of annuities upon human life; (c) the granting of superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade or employment or of the dependants of such person.

MAIN PROVISIONS:

I. Provisions applicable to Insurers: The Act applies to every insurer in relation to any class of insurance business as long as his liabilities in Bangladesh in respect of that business remain unsatisfied [Sec. 2A]. Only a public company, a society registered under the relevant laws in Bangladesh or a body corporate incorporated under the law of any country outside Bangladesh, not being a private company or a subsidiary of a private company, can start an insurance business in Bangladesh [Sec. 2C(1)(b)]. A Certificate of Registration has to be obtained from the Controller of Insurance for the establishment of an insurance business in Bangladesh. However, a contract of insurance entered into by a person who was carrying on insurance business at the commencement of this Act, shall not be invalidated if such person fails to obtain the said certificate in accordance with the provisions of this Act [Sec. 3(1)].

After the commencement of the Insurance (Amendment) Ordinance of 1970, insurers are prohibited from transacting both life insurance and general insurance business [sec. 3AA(1)].

Under the Act the Controller of Insurance has to prepare mortality tables indicating the average mortality rates of all policy holders, prepare a statement of yield indicating the range of rates of interest or yield on the investments of the insurers' funds, and lay down the level of expense of procurement and management of an insurer, in an interval of not less than 5 years [Sec. 3BB (1)]. He also has to determine, at intervals of not less than 1 year, the rates of premium for general insurance business in consultation with the insurers carrying on such business [Sec. 3BBB]. Every insurer shall maintain a record or register of policies containing the names and addresses of all the policy holders and the date on which they were effected, and also a record of any transfer, assignment or nomination of which the insurer has notice, and a register of claims containing the date of each claim, the name and address of claimants, the date on which the claim was discharged, and the date and grounds of rejection if the claim was rejected [Sec. 14].

II. Provisions applicable to Investments: Under this Act, every insurer shall invest an amount of assets not less than the amount of his liabilities to life insurance policy holders in Bangladesh on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in Bangladesh less (i) the amount of premiums which have fallen due to the insurer on such policies but haven't been paid and the days of grace for payment of which have not expired, and (ii) any amount due to the insurer for loans granted on and within the surrender values of policies of life insurance maturing for payment in Bangladesh issued by him or by an insurer whose business he has acquired and in respect of which he has assumed liability [Sec. 27(1)]. Every insurer of general insurance business must have assets invested in Bangladesh in accordance with the provisions of this Act [Sec. 27a(1)].

III. Provisions applicable to Assignment or Transfer of Policies and Nominations: A life insurance policy can be transferred with or without consideration only by an endorsement on the policy itself or by a separate instrument, signed by the transferor or the assignor or his duly authorised agent and attested by at least 1 witness [Sec. 38(1)]. The holder of a life insurance policy may nominate the person to whom the money secured by the policy shall be paid on the event of his death. The nomination must be made at the time of effecting the policy or before the policy matures for payment [Sec. 39(1)].

IV. Provisions applicable to Commission, Rebates and Licensing of Agents: The Act prohibits any person to pay remuneration or reward by way of communication or otherwise for procuring insurance business to any person other than an insurance agent or the employer of such agent [Sec. 40(1)]. In the case of life insurance business, no person shall pay and no insurance agent shall receive any renewal commission after the expiry of the licence during the validity of which the insurance agent procured such business, unless such licence has been renewed under sec. 42(4) [Sec. 40(1B)]. Remuneration or commission paid to an insurance agent shall not exceed 40% of the first year's premium payable on any policy and 5% of a renewal premium payable on such policy, in the case of a life insurance business. In all other cases, such amount shall be 15% of premium [Sec. 40(2)]. Offering or accepting any rebate on commission payable or premium shown on a policy, as an inducement to any person to renew or continue an insurance related to risk of life or property in Bangladesh, is prohibited under the Act, unless such rebate is taken in accordance with the published prospectuses or tables of the insurer. Contravention of this provision is punishable with a fine, which may extend up to 500 takas [Sec. 41].

A temporary license may be granted for procuring or soliciting life insurance business to any person who possesses the requisite qualifications as prescribed in the Act and who makes an application in the prescribed manner to the Controller of Insurance accompanied by the prescribed fee. Such license shall remain in force for a 2-year period [Sec. 42(1) & (2)].

V. Provident Societies: Under the Act, provident society means a person or a body of persons, not being an insurer, carrying on the business of insuring payment on the happening of certain contingencies, namely, the birth, marriage or death of any person or survival by a person of a stated or implied age or contingency; failure of issue; occurrence of a social, religious, or other ceremonial occasion; loss of employment or retirement; disablement due to sickness or accident; necessity of providing education for dependant; any other contingency prescribed or authorised by the Government. Such payment may be of an annuity of an annuity of or equivalent to 100 taka or less payable for an uncertain period; or a gross sum of 900 taka or less [Sec. 65 (1) & (2)].

VI. Provisions applicable to Offences and Penalties [Sec. 102-105]: Contravention of any of the provisions of this Act shall be punishable with fine or imprisonment (in some cases) or with both. Any director, managing

agent, manager or other officer of an insurance company (or any partner in case the insurer is a firm) who is knowingly a party to any default by such company or firm, shall be punishable with a fine which may extend to 10000 takas and an additional fine up to 1000 takas daily in the case of a continuing default. If the defaulter is a provident society, then any director, managing agent, manager, secretary or other officer of the society who is knowingly a party to the default, shall be punishable with a fine which may extend up to 500 takas and in the case of a continuing default, a fine up to 500 takas for every day during which the default continues. Any insurer or any person acting on behalf of an insurer, who carries on any insurance business in contravention of some of the provisions of this Act, shall be punishable with a fine, which may extend up to 10000 takas. Any person who knowingly takes out an insurance policy with any insurer or person guilty of an offence under Sec. 103(1) shall be punishable with a fine, which extend up to 5000 takas. Making a false statement knowingly in any return, report, certificate, balance sheet or other document, required under the provisions of this Act, is punishable with imprisonment for a term which may extend to 3 years, or a fine up to 10000 takas, or both. Wrongfully obtaining or withholding any property of the insurer by any director, managing agent, manager or other officer or employee of an insurer, for purposes other than those expressed or authorised under the Act, shall be punishable, on a complaint by the Controller, with fine up to 10000 takas. In such cases, the court may also order delivery or refund of any such property, and on default of the order, may sentence the defaulter to imprisonment for a period not exceeding 2 years.

THE NEGOTIABLE INSTRUMENTS ACT, 1881

Negotiable instruments, as defined under the Act, include :

1. Promissory Notes,
2. Bills of Exchange and
3. Cheques

The statute deals with:

- I. Definitions of the various types of negotiable instruments
- II. Parties involved
 - Maker of a bill of exchange or cheque is called the "drawer"
 - The person in case of a bills of exchange or a cheque, directed to pay is called the "drawee"
 - The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "payee"
 - "Holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.
- III. The rights and liabilities of the parties to the instrument
- IV. Procedures with respect to:
 1. Drawing, i.e. making of the instrument
 2. Negotiation, i.e. transfer of the instrument
 3. Maturity of the instrument, i.e., the date on which the payment for an instrument falls due and needs to be given for presentment. Three days of grace need to be given to the party paying.
 4. Presentment, i.e., presenting the instrument to the payer for payment
 5. Payment, i.e. discharging of liability by paying the amount due on the instrument
 6. Discharge from liability
 7. Dishonour, default in making payment
 8. Noting and Protest upon dishonour
 9. Acceptance and Payment for Honour in case of default of the party originally liable
 10. Compensation for default in payment
- V. Special Rules of evidence, which are applicable only for the purposes of the Act.
- VI. Special provisions relating to cheques as they are a special class of negotiable instruments and some of the general principles cannot be applied.
- VII. International Law governing the principles enunciated in the Act.
- VIII. Penalties for dishonour of cheques

LIABILITY UNDER THE NEGOTIABLE INSTRUMENTS ACT [Sec. 138]: Where any cheque drawn by a person for the discharge of a liability is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or because it exceeds the amount arranged to be paid from that account by an agreement made with that bank then such person shall be

deemed to have committed an offence and shall be punishable with imprisonment for a term, which may extend to two years, or with fine, which may extend to twice the amount of the cheque, or with both.

WHAT CONSTITUTES AN OFFENCE [Sec 138]: (i) Such cheque should have been presented to the bank within a period of six months of the date of on which it is drawn or within the period of its validity, which ever is earlier; and (ii) The payee or holder in due course of such cheque should have made a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque within thirty days of the receipt of the information by him from the bank regarding the return of the cheque unpaid; and (iii) The drawer of such cheque should have failed to make the payment of the said amount of money to the payee or the holder in due course of the cheque within fifteen days of receipt of the said notice. The cheque in question should have been issued in discharge of whole or part of a debt or liability otherwise the maker of the cheque is not liable for prosecution. For example if the cheque is given as a gift or present and if the bank dishonours it the maker of the cheque is not liable for prosecution.

OFFENCES BY COMPANIES [Sec 140]: If the person committing the offence is a company, every person who, at the time offence was committed, was in charge of, and responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished. If a person proves that the offence was committed without his knowledge, or that he had exercised due diligence to prevent the commission of such offence, he shall not be punishable. Where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial Corporation owned or controlled by the Central Government or State Government, he shall not be liable for prosecution. Where any offence has been committed by a Company and if it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary, or other officer of the Company, such person shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

PRESENTATION OF CHEQUE ANY NUMBER OF TIMES [Sec 138]: There is no embargo upon the payee to successively present a dishonoured cheque during the period of its validity. Similarly, there is no restriction regarding the no of times a cheque can be presented and that every subsequent representation and dishonour gives rise to fresh cause of action for filing complaint. In the course of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reason and being presented again by the payee after sometime, on his own volition or at the request of the drawer, in expectation that it would be encashed. For dishonour of one cheque there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within 15 days of the receipt of the notice served. On each presentation of the cheque and its dishonour, a fresh right and not cause of action accrues. Therefore the payee without taking pre-emptory action in exercise of his right may, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. Cause of action would arise only on failure to pay after notice. Once a notice for payment is given a fresh cause of action will not arise if the cheque is presented again and it is dishonoured.

EFFECT OF STOP PAYMENT (i) Stop payment instructions cannot obviate the offence. (ii) Even if stop payment instructions are given and notice of the same is given to the payee or holder in due course liability cannot be avoided. (iii) The position will not be different even if the drawer had instructed the bank to stop payment prior to the presentation of the cheque for encashment.

Once the cheque is issued there is a presumption, that the holder received the cheque for the discharge, of any debt or liability and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action under the Act.

NOTICE IN CASE OF DISHONOUR [Ss. 91 – 98]: The requirement of giving of notice is mandatory. If no notice making a demand for payment is served upon the drawer within 30 days from the date of dishonour of cheque, a complaint is not maintainable unless the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period. Notice means a notice in writing. A postal acknowledgement due containing the signature of the accused is proper proof of service of the notice on the addressee shown in the postal acknowledgement. When a notice is returned by the sender as unclaimed such date would be the commencing date in reckoning the period of 15 days. Such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address. The notice need not necessarily be by registered post only. It can be sent by a telegram, fax or by a letter as well. However it is preferable to send the notice by registered post, as that is clear evidence of service.

PERIOD FOR PAYMENT If payment is not made within 15 days of the receipt of the notice then the offence shall be deemed to have been committed. The cause of action for filing complaint would arise after the completion of 15 days from the date the drawer receives the notice and fails to pay the amount within that period. The court cannot take cognizance prior to the lapse of the period of 15 days even if there was a denial of the liability earlier, even after denial liability to pay the amount, the accused can at any time change his mind within 15 days of receipt of notice, make payment and avoid prosecution. The offence shall be deemed to be committed only from the date when notice period expired. The drawer cannot take the excuse that he had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentation for the reasons stated above

REMEDIES: 1) To file a civil suit 2) To file a criminal complaint under section 138 of the Negotiable Instruments Act, 1881

FILING OF A COMPLAINT [Sec 141]: The court will not take cognizance of any offence unless (i) The payee or holder in due course of the cheque makes a complaint in writing (ii) The payee cannot lodge a complaint after the completion of one month from the date on which the cause of action arose. (iii) A complaint can be filed through Power of Attorney, agents of the payee or holder in due course (iv) A complaint has to be filed in writing alongwith the list of witnesses and the list of documents.

WHERE TO FILE THE COMPLAINT [Sec 141]: A complaint can be filed in a court within the jurisdiction of which- a. The cheque has been drawn b. The place where the cheque is presented for collection c. The place where it is received after endorsement d. The place where cheque is dishonoured. The offence shall not be triable by any court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the first class.

LIMITATION [Sec 141]: A complaint has to be filed within one month of the date on which the cause of action arise i.e. within 45 days of the offender receiving the notice to make payment.

PROCEDURE ON RECEIPT OF THE COMPLAINT If the magistrate is of the opinion that there are sufficient grounds for proceeding he shall call the complainant for pre summoning evidence and the necessary documents are exhibited. Thereafter summons are issued for the attendance of the accused and the witnesses. The evidence of the witnesses is recorded. The particulars of the offence are stated to the accused, and he shall be asked whether he pleads guilty or has any defense to make. If he accused pleads guilty, the magistrate shall record the plea and convict him. If the accused does not plead guilty the Magistrate shall proceed to hear the complainant and the accused and take all the evidence as may be produced by both. On the hearing and evidence the Magistrate shall pass the order of conviction or acquittal.

THE REGISTRATION ACT, 1908

OBJECTIVE:- The main purpose for which the Act was designed was to ensure information about all deals concerning land so that correct land records could be maintained. The Act is used for proper recording of transactions relating to other immovable property also. The Act provides for registration of other documents also, which can give these documents more authenticity. Registering authorities have been provided in all the districts for this purpose.

Note that this registration is entirely different from registration of charge done by Registrar of Companies under Companies Act. If the charge relates to immovable property, registration with Registrar (appointed by State Government) under Registration Act and registration under Companies Act with ROC are both required.

Documents of which registration is compulsory [Sec.17] - Registration of documents relating to immovable property is compulsory. Registration of will is optional. [Sec.18]

Documents not requiring registration - Some documents though related to immovable property are not required to be registered. These are given in section 17(2) of the Act.

Time of presentation for registration - Document should be submitted for registration within 4 months from date of execution [section 23]. Decree or order of Court can be submitted within four months from the day it becomes final. If document is executed by several persons at different times, it may be presented for registration within 4 months from date of each execution [section 24]. If a document is executed abroad by some of the parties, it can be presented for registration within four months after its arrival in India [section

26]. RE-REGISTRATION - If a person finds that a document has been filed for registration by a person who is not empowered to do so, he can present the document for re-registration within 4 months from the date he became aware of the fact that registration of document is invalid [section 23A].

Where document should be registered - Document relating to immovable property should be registered in the office of Sub-Registrar of sub-district within which the whole or some portion of property is situated [section 28]. Other document can be registered in the office of Sub-Registrar where all persons executing the document desire it to be registered [section 29]. A Registrar can accept a document which is registerable with sub-registrar who is subordinate to him [section 30(1)]. Document should be presented for registration at the office of Registrar/Sub-Registrar. However, in special case, the officer may attend residence of any person to accept a document or will [section 31].

All persons executing document must appear before Registrar - All persons executing the document or their representatives, assigns or agents holding power of attorney must appear before registering officer [section 34(1)]. They have to admit execution and sign the document in presence of Registrar, as required under section 58(1)(a). Appearance may be simultaneous or at different times [section 34(2)]. If some of the persons are unable to appear within 4 months, further time up to additional 4 months can be given on payment of fine up to 10 times the proper registration fee [proviso to section 34(1)].

If document relates to transfer of ownership of immovable property, passport size photograph and finger prints of each buyer and seller of such property shall be affixed to document. [proviso to section 32A]. The Registrar is required to ensure that these are endorsed on the document.

Registration by Registering Officer - If the Registering Officer is satisfied about identity of persons and if they admit about execution of documents, and after registration fees are paid, the registering officer will register the document [section 35(1)]. He will make necessary entries in the Register maintained by him.

Certification of registration - After all formalities are complete, the Registering Officer will endorse the document with word 'Registered', and sign the same. The endorsement will be copied in Register. After registration, the document will be returned to the person who presented the document [section 61].

Effective date of document - A document takes effect from its date of execution and not from date of registration. However, if the document states that it will be effective from a particular date, it will be effective from that date [section 47].

Document registered has priority over oral agreement - Any non-testamentary document registered under the Act takes effect against any oral agreement relating to the property. The only exceptions are : (a) If possession of property (movable or immovable) is delivered on basis of such oral agreement and such delivery of possession is valid transfer under any law (b) Mortgage by deposit of title deeds takes effect against any mortgage deed subsequently executed and registered which relates to same property [section 48].

Effect of non-registration - If a document which is required to be registered under section 17 or under provisions of Transfer of Property Act, 1882 is not registered, the effect is that such un-registered document * does not affect any immovable property comprised therein * cannot be received as evidence of any transaction affecting such property. - - - Thus, the document becomes redundant and useless for all practical purposes. It can be accepted as evidence in criminal proceedings.

THE SECURITIES AND EXCHANGE COMMISSION ACT, 1993

The Securities and Exchange Commission Act of Bangladesh has been enacted to provide for the establishment of a Securities and Exchange Commission in Bangladesh for the protection of interests of investors, development of the securities market and other ancillary matters.

ESTABLISHMENT AND CONSTITUTION OF THE SECURITIES AND EXCHANGE COMMISSION: As per the provisions of this Act, the Government shall establish a Securities and Exchange Commission, by Gazette Notification, for carrying out the purposes of this Act [Sec. 3(1)]. This Commission shall have a

corporate entity [Sec. 3(2)]. It shall consist of (i). a Chairman, (ii). 4 whole time members, (iii). an Officer not below the rank of Joint Secretary of the Ministry or Division of Finance, to be nominated by the said Ministry or Division, (iv). a Deputy Governor of Bangladesh Bank, to be nominated by that Bank [Sec. 5(1)]. A person shall be disqualified for being appointed as a Chairman or a whole time member of the Commission if (i). he has been declared insolvent by Court, (ii). he has been declared to be of unsound mind by Court, (iii). he has been convicted of an offence involving moral turpitude, (iv). in the opinion of the Government, he has misused his position and his removal from the post is necessary in keeping with public interest, or (v). he is appointed as a Director or Officer of any Company or organization [Sec. 6(1)].

FUNCTIONS OF THE COMMISSION: The main functions of the Commission are to ensure proper issue of securities, to protect the interests of investors in securities and to develop the capital and securities market [Sec. 8(1)]. In pursuance of these functions it may be required to (i). control the trade of any stock exchange or security market, (ii). Determine and control the duties of stock brokers, bankers, and other intermediary organizations connected with the securities market, (iii). register and regulate joint investments, (iv). Develop, review and control authorized self controlled organizations, (v). prohibit fraudulent or dishonest trade in connection with the securities market, (vi). Promote awareness and education about investment matters, (vii). Prohibit beneficial business in case of securities, (viii). Regulate acquisition of companies and supervise control of the Company's shares and stocks, (ix). Call for, inspect, inquire and audit information from stock exchanges, (x). compile, explain and publish matters relating to financial activities of security issue, (xi). Levy fees and other necessary costs, (xii). Undertake research programmes, (xiii). Perform all other functions required for the purpose of the provisions of this Act [Sec. 8(2)].

REGISTRATION UNDER THE COMMISSION: All stock brokers, sub brokers, share transfer representatives, bankers-in-issue, trustees, registrars of issues, underwriters, portfolio managers, investment advisers, and other media related to the securities market have to apply for registration in the prescribed manner to the Commission [Sec. 10(2)]. If the application is accepted, the Commission gives the party a Certificate of Registration. No party can sell or perform any security related business except with the conditions mentioned in the Certificate of Registration or regulation or information received from the Commission [Sec. 10(1)].

OFFENCES AND PENALTIES: On contravention of any of the provisions of this Act (including attempt, abetment or incitement of contravention), a person shall be liable to rigorous imprisonment of not more than 6 months or a fine of up to 5 Lakh Taka or both [Sec. 18(1)]. On failure to comply with any orders or directions, or to furnish necessary information, or to give necessary assistance to the person or committee conducting enquiry or investigation, in accordance with the provisions of this Act, the defaulting party may be warned in writing by the Commission after being given a fair hearing or he may be fined up to 1 Lakh Taka, but he shall not be liable to prosecution [Ss. 18(2) & 18(3)]. Cognizance of offences under this Act shall be taken only by a Court of Sessions, upon a complaint in writing made by the Commission or a person authorized by it [Sec. 19]. If a Company is guilty of contravening any of the provisions of this Act, then every proprietor, director, manager, secretary or other officer or agent of the Company shall be deemed guilty of the offence, unless such person proves that the offence was committed without his knowledge or that he exercised due diligence to prevent its commission [Sec. 20].

APPEAL: An appeal against any order of a Member or Officer of the Commission can be made to the Commission, whose decision on such appeal shall be final [Sec. 21(1)].

THE SECURITIES AND EXCHANGE ORDINANCE, 1969

OBJECTIVE OF THE ACT: This Ordinance has been enacted to provide for the protection of investors, regulation of capital markets and dealings in securities in Bangladesh.

IMPORTANT PROVISIONS:

- I. Issue of Capital: This Ordinance empowers the Securities and Exchange Commission of Bangladesh (the 'Commission') to control and regulate the issue of capital by companies in Bangladesh. As per the provisions of this Act, no company incorporated in Bangladesh can make an issue of capital outside the country without the consent of the Commission [Sec. 2A(1)] and no company, whether incorporated in Bangladesh or not, can make an issue of capital or any public offer of securities for sale, or renew or postpone the date of maturity or repayment of any security maturing for payment in Bangladesh, except with the consent of the Commission [Sec. 2A(2)]. However, the Commission may, on receiving an application, make an order recognizing an issue of capital made or to be made outside

Bangladesh [Sec. 2A(3)]. A statement of consent or recognition of the Commission is needed by any person issuing a prospectus or other document inviting subscription or publicly offering for sale of securities in Bangladesh [Sec. 2B]. Accepting or giving consideration for any securities in respect of an issue of capital made or proposed to be made in Bangladesh or elsewhere, without the consent or recognition of the Commission to such issue of capital, is prohibited [Sec. 2C].

With respect to the control of issue of capital the Commission has been given the power to (i). impose necessary conditions from time to time [Sec. 2CC], (ii). grant exemption from all or any of the provisions of Ss. 2A, 2B and 2C, [Sec. 2D(1)](iii). condone contravention of any of the said provisions [Sec. 2d(2)], and (iv). call for information for the purpose of inquiring into the correctness of a statement made in an application to the Commission for consent or recognition in relation to the issue of capital [Sec. 2E].

II. Registration and Regulation of Stock Exchanges: This Act prohibits any stock exchange to operate without registration [Sec. 3]. To be eligible for registration under this Ordinance, a stock exchange has to fulfill certain conditions and requirements in order to ensure fair dealings and protect investors [Sec. 4(1)]. These conditions may relate to (i). qualifications for membership, admission, suspension etc., (ii). constitution and powers of the governing body and powers and duties of its office bearers, (iii). representation of the Commission on the Governing Body of a Stock Exchange or any of its committees, (iv). the manner in which business should be transacted, (v). Memorandum and Articles of Association, rules, regulations and byelaws of a Stock Exchange, and (vi). maintenance of accounts and audit [Sec. 4(2)]. A Stock Exchange, which is eligible for registration, has to make an application to the Commission in the prescribed form and manner [Sec. 5(1)] and if the Commission is satisfied after inquiry that the Stock Exchange is eligible for registration and that registering the Stock Exchange would be in public interest and in the interest of trade, then it will grant a Certificate of Registration to such Stock Exchange [Sec. 5(2)]. Registration may be cancelled by the Commission if its is of the opinion that a Stock Exchange or any of its members, directors or officers has contravened any of the provisions of this Ordinance, or has neglected or failed to comply with any requirement, rule, regulation or direction made under this Ordinance and such cancellation is necessary for the protection of investors and to ensure fair dealings and administration of the Stock Exchange. Such cancellation must be made by an order in writing [Sec. 7(1)].

The Ordinance puts certain restrictions on dealings in securities. These are: (i). prohibition of any person to transact any business in securities on any stock exchange unless he is a member of such stock exchange, (ii). prohibition of any business to be transacted on a stock exchange in a security which is not listed on such stock exchange, unless such security is a government security or a bonus entitlement voucher, (iii). prohibition of any person to act as a dealer on a security listed on a stock exchange outside such stock exchange, and (iv). prohibition of any person other than a member to act as a broker or jobber for any security not listed on a stock exchange. The above prohibitions shall not apply to the discounting of any security evidencing a loan [Sec. 8]. Listing of securities on a stock exchange has to be done by submitting an application to the stock exchange in the prescribed form by the issuer of such securities [Sec. 9(1)].

III. Regulation of Issues: An issuer of a listed security has to furnish an annual report of its affairs and other related statements and reports to the Stock Exchange, the security holders and the Commission [Sec. 11(1)]. The Ordinance prohibits short selling of securities by directors or officers of an issuer of a listed equity security or any beneficial owner of more than 10% of such securities [Sec. 13]. If any director, officer or principal shareholder of any listed equity security makes a gain by trading of such security within a period of not less than 6 months, such person shall make a report and tender the amount of gain to the issuer [Sec. 14(1)].

IV. Penalties: Acts committed in contravention of the provisions of this Ordinance may be punishable by imprisonment or fine or both [Sec. 22 & 24].

V. Civil Liabilities: Contracts made in contravention of any of the provisions of this Ordinance or any rule made there under shall be voidable as regards the rights of any party to the contract contravening such provision or any third party who acquires a right under the contract with actual knowledge of the facts

which have led to the contravention of the provisions of this Ordinance. Any person affected by such contract may sue for rescission of the contract or for damages.

SPECIFIC RELIEF ACT, 1887

Specific relief is an equitable remedy and the courts have a judicial discretion regarding its enforcement. It is a form of judicial redress whereby the specific enforcement of the contractual terms take place where

1. Monetary compensation is not adequate
2. Monetary compensation cannot be ascertained
3. Monetary compensation cannot be got for non-performance
4. Act agreed to be done is in the performance of a trust

The Act deals with the following subjects:

I. Modes of granting specific relief

1. Taking possession of property and delivering to claimant
2. Order a party to do an act that he is under an obligation to do.
3. Preventing party from doing that which he is under an obligation not to do
4. Determining and declaring rights of parties otherwise than by an award of compensation
5. Appointing a receiver which is at the discretion of the court

II. Specific performance of contracts

1. Contracts which may be specially enforced and the procedure related to the same
2. Contracts which cannot be specially enforced
3. Persons entitled/not entitled to specific performance
4. Persons against whom contract may be/may not be specifically enforced

III. Rectification of Instruments

1. Situations when instruments may be rectified, e.g., in case of fraud, etc.
2. Procedures of rectification

IV. Rescission of contracts

1. Situations when contracts may be rescinded
2. Rescission as an alternative to specific performance

V. Cancellation of instrument

1. Situations when cancellation may be ordered
 - Person against whom written instrument is void or voidable
 - Who is under reasonable apprehension that if left outstanding
 - May cause him serious injury
 - May have to sue to have it adjudged void/voidable
 - Court may order accordingly and order it to be delivered up and cancelled
2. Discretion to grant compensation

VI. Relief may be granted by way of:

1. Temporary injunction
2. Permanent injunction

VII. Decrees and decisions

1. Decrees granting relief
2. Declaratory decrees where the titles to right or character of a person are declared. The declaration is binding only on
 - Parties to the suit
 - Persons claiming through them respectively
 - Trustees

THE STAMP ACT, 1899

The basic purpose of Stamp Act, 1899 is to raise revenue to Government. However, over a period of time, the stamped document has obtained so much value that a 'stamped document' is considered much more authentic and reliable than an un-stamped document.

Power of Parliament in respect of stamp duty - Parliament can make law in respect of Stamp Duty. It can prescribe rates of stamp duty. The stamp duty rates prescribed by Parliament in respect of bill of exchange, cheques, transfer of shares etc. will prevail all over Bangladesh.

Instruments chargeable to stamp duty - Instrument includes every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded [section 2(14) of Bangladesh Stamp Act]. Any instrument mentioned in Schedule I to Bangladesh Stamp Act is chargeable to duty as prescribed in the schedule [section 3]. The list includes all usual instruments like affidavit, lease, memorandum and articles of company, bill of exchange, bond, mortgage, conveyance, receipt, debenture, share, insurance policy, partnership deed, proxy, shares etc. Thus, if an instrument is not listed in the schedule, no stamp duty is payable. 'Instrument' does not include ordinary letters. Similarly, an unsigned draft of an agreement is not an 'instrument'.

Duty payable when several instruments - In case of sale, mortgage or settlement, if there are several instruments for one transaction, stamp duty is payable only on one instrument. On other instruments, nominal stamp duty of Tk. 3 is payable [section 4(1)]. If one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duties payable on separate instruments [section 5]. However, it may happen that one instrument covering only one matter can come under more than one descriptions given in Schedule to Stamp Act. In such case, highest rate specified among the different heads will prevail [section 6].

Powers to reduce stamp duty - Government can reduce or remit whole or part of duties payable. Such reduction or remission can be in respect of whole or part of territories and also can be for particular class of persons. Government can also compound or consolidate duties in case of issue of shares or debentures by companies [section 9 (a)]. 'Government' means Central Government in respect of stamp duties on bills of exchange, cheque, receipts etc. and 'State Government' in case of stamp duties on other documents [section 9(2)].

Mode of payment of stamp duty - The payment of stamp duty can be made by adhesive stamps or impressed stamps. Instrument executed in Bangladesh must be stamped before or at the time of execution (section 17). Instrument executed out of Bangladesh can be stamped within three months after it is first received in Bangladesh [section 18(1)].

Valuation for stamp duty - In some cases, stamp duty is payable on ad valorem basis i.e. on basis of value of property etc. In such cases, value is decided on prescribed basis.

Adjudication as to stamp duty payable - Adjudication means determining the duty payable. Normally, the person paying the duty himself may decide the stamp duty payable and pay accordingly. However, in cases of complex documents, the person paying the duty may not be sure of the stamp duty payable. In such case, he can apply for opinion of Collector. He has to apply with draft document and prescribed fees. Collector will determine the stamp duty payable as per his judgment [section 31(1)].

What is meant by 'duly stamped' - 'Duly stamped' means that the instrument bears an adhesive or impressed stamp not less than proper amount and that such stamp has been affixed or used in accordance with law in force in Bangladesh [section 2(11)]. In case of adhesive stamps, the stamps have to be effectively cancelled so that they cannot be used again. Similarly, impressed stamps have to be written in such a way that it cannot be used for other instrument and stamp appears on face of instrument. If stamp is not so used, the instrument is treated as 'un-stamped'. Similarly, when stamp duty paid is not adequate, the document is treated as 'not duly stamped'.

Instrument cannot be accepted as evidence if not duly stamped - An instrument not 'duly stamped' cannot be accepted as evidence by civil court, an arbitrator or any other authority authorised to receive evidence. However, the document can be accepted as evidence in criminal court.

Case when short payment is by mistake - If non-payment or short payment of stamp duty is by accident, mistake or urgent necessity, the person can himself produce the document to Collector within one year. In such case, Collector may receive the amount and endorse the document that proper duty has been paid [section 41].

Stamp duty on Receipt - Receipt includes any note, memorandum or writing [whether signed by any person or not] (a) where any money, or any bill of exchange or promissory note is acknowledged to have been received or (b) where any other movable property is acknowledged to have been received in satisfaction of a debt or (c) whereby any debt or demand is acknowledged to have been satisfied or discharged or (d) which signifies or indicates any such acknowledgment [section 2(23)].

Stamp duty on transfer of shares in a company or body corporate - It is 1.5% of the value of consideration of the value of share in an incorporated Company or other body corporate. As per section 21, the duty has to be calculated on the basis of market price prevalent on date of instrument and not on the face value of shares.

THE TRADEMARKS ACT, 1940

WHAT IS A TRADEMARK? A trademark is a mark used in relation to goods for the purpose of indicating a connection between the goods and some person having the right as proprietor to use the mark. It is a visual symbol in the form of a word, device or a label applied to articles of commerce with a view to indicate to the purchasing public that they are goods manufactured or otherwise dealt in by a particular person or a particular organisation as distinguished from similar goods manufactured or dealt in by others [Sec 2(l)]

FUNCTIONS OF A TRADEMARK: A trademark serves the purpose of identifying the source or the origin of goods. Trademark performs the following four functions. (i) It identifies the product and its origin. (ii) It proposes to guarantee its quality. (iii) It advertises the product. The trademark represents the product (iv) It creates an image of the product in the minds of the public particularly the consumers or the prospective consumers of such goods.

MARKS NOT REGISTERABLE [Ss. 8 – 10]: (i) The use of which would be likely to deceive or cause confusion (ii) A mark the use of which would be contrary to any law for the time being in force (iii) A mark comprising or containing scandalous or obscene matter (iv) A mark comprising or containing any matter likely to hurt the religious susceptibilities of any class or section (v) A mark which would be disentitled to protection in court of law (vi) A mark which is identical with or deceptively similar to a trademark already registered in respect of the same goods or goods of the same description (vii) A word which is the accepted name of any single chemical name or chemical compound in respect of chemical substances. (viii) A geographical name or a surname or a personal name or any common abbreviation thereof or the name of a sect, caste or tribe in India. (ix) Besides others.

REGISTRATION Who Can Apply ? Any person who claims to be a proprietor of a trademark and is desirous of registration of the mark can apply [Sec 14(1)]. The application may be made in the name of an individual, partners of a firm, a Corporation, any Government Department, a trust or joint applicants.

APPLICATION [Sec 14]: After completing all specifications on the prescribed application form, an application shall be filed in the office of the trademark Registrar "within whose territorial limits the principal place of business in Bangladesh of the applicant or in the case of the joint applicants the principal place of business in India of the applicant whose name is the first mentioned in the application, as having the place of business is situated. Every application for registration of a trademark shall contain a representation of the mark in the place provided in the form for the purpose. Ten additional representations of the mark have to be supplied with the application.

Upon submission of an application for registration of a trademark, there can be four outcomes: (i) The application is accepted as it is. (ii) The application is accepted subject to certain amendment. (iii) The application is accepted but later it is found to have been accepted in error. (iv) The application stands rejected. The application is thus either accepted completely or is accepted subject to amendments.

ADVERTISEMENT [Sec 15]: Soon after acceptance of the application, the application is advertised by the Registrar, together with the conditions and limitations, as soon as may be. Any person may, within three months from the date of the advertisement or readvertisement of the application for registration or within such further period not exceeding one month, give notice in writing to the Registrar of opposition to the registration. If such an opposition does not arise then the mark is deemed to be registered.

TIME PERIOD: The registration of a trademark shall be for a period of seven (7) years, but it may be renewed from time to time [Sec 18].

INFRINGEMENT [Sec. 21]: Infringement of a trademark occurs if a person other than the registered proprietor in the course of trade, in relation to the same goods or services for which the mark is registered, uses the same mark or deceptively similar mark. The taking of any essential feature of the mark or taking

the whole of the mark a few additions and alterations would constitute infringement. The infringing mark must be used in the course of trade, that is, in a regular trade wherein the proprietor of the mark is engaged. The use of the infringing mark must be printed or usual representation of the mark in advertisements, invoices or bills. Any oral use of the trademark is not infringement. Any or all of the above acts would constitute infringement.

REMEDIES: The proprietor of a trademark has a right to file a suit for infringement of his right and obtain (i) Injunction- an injunction restrains the defendant from using the offending mark pending the trial of the suit or until further orders. (ii) Damages in assessing the damages the important question is what is the loss sustained by the plaintiff. The loss must be the natural and direct consequence of the defendant's acts. The object of damages is to compensate for loss or injury. (iii) Accounts of profits. Where a plaintiff claims the profits made by the unauthorised use of his trademark, it is important to ascertain to what extent he trademark was used, in order to determine what proportion of the net profits realised by the infringer was attributable to its use.

NO ACTION FOR INFRINGEMENT OF UNREGISTERED TRADE MARK [Sec 20]: No person shall be entitled to institute any proceeding to prevent, or recover damages for, the infringement of an unregistered of an unregistered

JURISDICTION [Sec. 73]: A suit for infringement of registered trademark is filed in District Court having jurisdiction or in a High Court having original jurisdiction to entertain such suits. The infringement must have

THE TRANSFER OF PROPERTY ACT, 1882

CONTRACT OF SALE [Sec. 54]: A contract for the sale of immovable property is a contract laying down that the 'Sale' of such property shall take place on the terms settled between the parties in the said contract. Such contract for sale does not create any interest in or charge on such immovable property. The contract for sale does not result in any transfer of ownership. However a sort of obligation is created in respect of the ownership of the property

ESSENTIAL ELEMENTS OF SALE [Sec. 54]

PARTIES :-A minor or lunatic cannot be a transferor / vendor as he is not competent to contract under Contract Act, 1872. However it has been held that a minor or a lunatic can be a transferee or purchaser in the case of transfer by way of sale or mortgage, represented by his Guardian.

SUBJECT MATTER Subject matter is the transferable immovable property.

PRICE The transfer by way of sale must be in exchange for a price. Price normally means money. The price can be paid fully in cash or it can be partly paid and partly promised to be paid in future. The price can be fixed by the agreement between the parties before the conveyance of the property. The price is to be fixed reasonably.

DELIVERY OF PROPERTY Transfer by way of sale in the case of tangible property worth less than taka One Hundred can be made either by a registered instrument or by delivery of property by putting the purchaser or the person directed by the purchaser, in possession of property. If the consideration for the sale is more than Tk.100/- then the instrument must be registered under the Registration Act, 1908

RIGHTS AND DUTIES OF SELLER AND BUYER **DUTIES OF SELLER BEFORE SALE** (i) To disclose any material defect- (ii) To produce documents of title- (iii) To answer question about the property or the title thereto- (iv) To execute conveyance- (v) To take care of the property and title documents- (vi) To pay outgoings - **DUTIES OF SELLER AFTER SALE:** (i) To deliver possession of the property - (ii) Implied covenant for title - (iii) To deliver title deeds on receipt of consideration-

SELLER'S RIGHTS BEFORE SALE [Sec. 55] (i) To take rents and profits –

BUYER'S DUTIES BEFORE COMPLETION OF SALE [Sec. 55] (i) To disclose fact which materially increases the value of property- (ii) To pay price for the property- (iii) To bear loss to the property- (iv) To pay public charges and rents-

LEASE [SEC. 105]:- A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

LESSOR, LESSEE, PREMIUM AND RENT [SEC. 105] The transferor is called the lessor, the transferee is called the lessee, the price is called the premium , and the money, share, service or other thing to be so rendered is called the rent

LEASES HOW MADE [SEC. 107] A lease of immovable property from year to year, or for any term exceeding one-year or reserving a yearly rent, can be made only by a registered instrument. All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Where a lease of immovable property is made by a registered instrument, such instrument binds both lessor and the lessee.

ESSENTIAL ELEMENTS (i) Parties- (ii) Subject matter of lease- (iii) Duration of lease- (iv) Consideration.

SUB-LEASE- A lessee can transfer the whole or any part of his interest in the property by sub-lease. However, this right is subject to the contract to the contrary and he can be restrained by the contract from transferring his lease by sub-letting. The lessee can create sub-leases for different parts of the demised premises. The sub-lessee gets the rights, subject to the covenants, terms and conditions in the lease deed

RIGHTS AND LIABILITIES OF LESSOR AND LESSEE In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:

RIGHTS AND LIABILITIES OF THE LESSOR [SEC. 108] (a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover; (b) the lessor is bound on the lessee's request to put him in possession of the property (c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

RIGHTS AND LIABILITIES OF THE LESSEE [SEC. 108] (a) If during the continuance of the lease any accession is made to the property, such accession shall be deemed to be comprised in the lease (b) If by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

PROVIDED that, (a) if the inquiry be occasioned by the wrongful act or default of the lessee, he shall be entitled to avail himself of the benefit of this provision; (b) If the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor; (c) If the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor etc.

HOW DOES A LEASE END [SEC. 111] A lease of immovable property determines- (a) By efflux of the time limited thereby, (b) Where such time is limited conditionally on the happening of some event-by the happening of such event, (c) Where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event-by the happening of such event, (d) In case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right, (e) By express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them, (f) By implied surrender, (g) By forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease, (h) On the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

HOLDING OVER –[SEC. 116] EXTENDED POSSESSION If a lessee or underlessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or underlessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month according to the purpose for which the property is leased.

MORTGAGE: 'Mortgage' is the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced, by way of loan or an existing or future debt. The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured are called as 'mortgage money' and the instrument by which transfer is effected is called a mortgage-deed. Mortgage can be (i) Simple mortgage (ii) Mortgage by conditional sale (iii) Usufructuary mortgage (iv) English Mortgage (v) Mortgage by deposit of title deeds or (vi) Anomalous mortgage [Sec 58(a)].

WHEN MORTGAGEE CAN TAKE POSSESSION OF MORTGAGED PROPERTY IN CASE OF DEFAULT [SEC. 69]: Under this provision, mortgagee can take possession of mortgaged property and sale the same without intervention of Court only (i). in case of English mortgage, (ii). if there is default of payment of mortgage money.

CHARGE – Where immovable property of one person is, by act of parties or by operation of law, made security for payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all provisions in respect of 'simple mortgage' will apply to such charge. [Sec 100].

A 'charge' is not 'mortgage'. In every mortgage, there is 'charge', but every charge is not a mortgage. Section 100 of Transfer of Property Act states that if immovable property is made as security for payment of money and if it does not amount to mortgage, then the latter person is said to have a charge on property.

REGISTRATION, LICENSES, CONSENTS AND PERMITS WHICH MAY BE REQUIRED AND THE RELEVANT AUTHORITY

ESSENTIAL

*Certificate of Incorporation for joint-stock company	RJSC⁵¹
*Utilities	BTTB, WASA, TITAS, PDB/REB, DESA⁵²
*VAT, TIN Certificate	NBR
*Trade License	City Corporation/municipal authority

ENTERPRISE/PROJECT SPECIFIC

Land Purchase and Development	RAJUK
Environmental Clearance Certificate	DOE
Export/Import License, bonded warehouse facilities	CCIE
Product standards mark	BSTI
Patents and trade marks, design registration	RTM
"Certificate of Registration" of Plant (if any) under the Factories Act, 1965 (Act IV of 1965)	CIFE
Consent for opening and operating on-shore foreign exchange (FX) or offshore Foreign Currency bank accounts	BB
Consent for the purchase of FX for Taka through normal commercial banking channels in Bangladesh and for the transfer of such FX from bank accounts inside Bangladesh into bank accounts outside Bangladesh	BB
Consent to make or remit payments in FX from bank accounts in Bangladesh or outside Bangladesh	BB
All import permits, certificates, licenses and other consents allowing the Company to import into Bangladesh all plant, machinery, equipment, spare parts, materials and supplies required for the plant	CCIE
Statutory notifications granting exemption from Customs Duties and VAT on the importation of plant and equipment (including spare parts) for incorporation into the Company's plant and the temporary importation of erection materials, machinery and equipment (subject to re-export)	NBR
Statutory notification granting the Company exemption from taxation on its income related directly to the plant/tax holidays	NBR
No objection certificate to obtain export permit to export any imported equipment not forming a permanent part of the plant	BB

⁵¹ It is possible to function under different corporate/non-corporate institutional forms, such as partnerships or sole proprietorships.

⁵² As required.

Permission for transporting chemicals, toxic wastes and hazardous materials on land and water routes
DOE/DOEXP

Approval of installations for boilers at the Plant under Sections 6 and 7 of the Boilers Act, 1923 (Act V of 1923)
Department of Explosives/CIFE

License for the Company to obtain and have arms for the purposes of the security of the Plant **MOHA**

License under the Petroleum Act, 1934 (Act LXIX of 1934) for storage of petroleum products at or proximately to the Plant **Department of Explosives**

Approval of the Plant as satisfying the fire safety and protection standards under the Fire Service Ordinance, 1959 (Ord. No. XVII of 1959) and Civil Defense Act 1952 (Act. XXXI of 1952) **DFSCD**

Consent to operate the Plant based on the implementation of measures identified in the EIA ("Environmental Clearance Certificate") **DOE**

Consent for the execution of any financing documents, including approval of the term sheets for the Company's foreign currency loans **MOF (ERD)/BOI**

Registration of the executed financing documents **BOI**

Registration for availing infra-structural facilities and institutional support including TIN Certificate, Trade License, Incorporation Certificate etc **BOI**

Work permits for foreign personnel including the Company's employees and residence visas **BOI/MOHA**

National security clearance for expatriate employees of the Company **MOHA**

Consent for remittance of up to fifty percent (50%) of salaries and savings by expatriate employees of the Company without restriction **BB**

Registration of agreements under which royalties, technical know-how fees and technical assistance fees are payable by the Company **BOI**

Statutory notification granting foreign collaborators, companies and experts exemption from tax or withholding tax on such of their income as is paid as "royalties", "technical assistance fees" and "technical know-how fees" by the Company in connection with the Plant **NBR**

Exemption from Section 3D(2) of the Insurance Act 1938 (Act IV of 1938) to permit the Company to obtain insurance for the Plant from companies outside Bangladesh **MOC/CI**

Certificate under Section 3D(1) of the Insurance Act 1938 (Act IV of 1938) to enable the Company to obtain reinsurance for the Plant from companies outside Bangladesh **CI**

Exemption for insurers (other than the SBC) from the obligation to reinsure all or any part of insurance cover relating to the Plant with the SBC and permissions allowing the Company to effect such reinsurance with reinsurers outside Bangladesh on terms whereby:

remittance/deposit of premia in Foreign Currencies to such reinsurers by the Company is permitted;

the proceeds of any claims under such reinsurances may be paid directly by the reinsurers pursuant to the loss(es) payable endorsed upon any such reinsurances and such proceeds may be deposited/retained in Foreign Currencies outside Bangladesh;

the conduct and settlement of claims shall be undertaken by and at the sole discretion of the reinsurers; and disputes between the insured and the insurers will be resolved by the reinsurers according to such law as the relevant insurers and reinsurers may agree **CI**

Statutory notification granting the Foreign Investors of the Company (if a public limited company) exemption from capital gain tax in respect of any transfer or disposal of shares in the Company **NBR**

Statutory notification granting foreign employees of the Company exemptions from taxation on their personal income in Bangladesh **NBR**

Statutory notification granting the Company an exemption from any tax on the sale of electricity to BPDB **NBR**

Statutory notification that any foreign lenders will be exempted from taxation on their income in Bangladesh **NBR**

Statutory notification granting exemption from stamp duties in respect of the registration of all deeds, documents and instruments contained in any financing documents and conveyances of land **NBR**

Consent for payment by the Company to persons outside Bangladesh under Section 6 of the Foreign Exchange Regulations Act, 1947 (Act VII of 1947) ("FERA") in respect of all transactions of the Company as may be necessary **BB**

Consent for the issuance, export and transfer of securities in Bangladesh or outside Bangladesh under Section 13 of FERA, purchased in Taka or in Foreign Currency. **BB**

Consent to lend money to the Company or purchase the Company's securities under Section 16 of FERA (transactions involving foreigners) **BB**

Easement or lease agreement and approval for construction of shoreline work, jetty, intake and outfall structures of once through cooling system and dredging of river **IWTA**

Approval for construction of shoreline work, jetty, intake and outfall structures including sheet piling and dredging or rivers **BWDB/Local authority**

Abbreviations:

BB	-	Bangladesh Bank
BOI	-	Board of Investment
BPDB	-	Bangladesh Power Development Board
BSTI	-	Bangladesh Standards Testing Institute
BTTB	-	Bangladesh Telegraph and Telephone Board
BWDB	-	Bangladesh Water Development Board
CCIE	-	Chief Controller of Import and Export
CI	-	Controller of Insurance
CIFE	-	Chief Inspector of Factories and Establishment
DFSCD	-	Department of Fire Service & Civil Defense
DWASA	-	Dhaka Water and Sewer Supply Authority
DOE	-	Department of Environment
DOEXP	-	Department of Explosives
FERA	-	Foreign Exchange Regulation Act 1947
GOB	-	Government of Bangladesh
IWTA	-	Inland Water Transport Authority
MOC	-	Ministry of Commerce
MOF	-	Ministry of Finance (Economic Relations Division)
MOHA	-	Ministry of Home Affairs
NBR	-	National Board of Revenue
RAJUK	-	Rajdhani Unnayan Kartripakkha
RJSC	-	Registrar of Joint Stock Companies and Firms
RTM	-	Registrar of Trade Marks
SEC	-	Securities and Exchange Commission
SBC	-	Sadharan Bima Corporation
TITAS	-	Titas Gas Transmission and Distribution Company

All the registrations, permissions and approvals noted below are not necessary for all enterprises. BOI registration, BB approvals for foreign exchange transactions, approvals/permits under the CCIE, DOEXP, CIFE and some others may be applied for only if necessary for the enterprise in question. Similarly, with the exemptions from NBR. The items marked with an asterisk are required for almost all enterprises.

Using land as collateral for borrowings raises another set of registration-related issues which will be addressed separately.

SUMMARY OF MAJOR TAXES AND FEES APPLICABLE TO A COMPANY LIMITED BY SHARES BUT NOT PUBLICLY LISTED WITH A STOCK EXCHANGE⁵³

Registration fees payable to the RJSC at the time of incorporating the Company:

Authorised capital up to Tk.10 million	Tk.5,800.00
For each additional Tk.10m or part thereof	Tk.1,500.00

2. Stamp duty payable at the time of incorporation

Authorised capital up to Tk.30 million	Tk.4,500.00
Authorised capital above Tk.30 million	Tk.10,500.00

Income tax: 35%

Capital Gains Tax: 15%

VAT⁵⁴: Goods – 15%
Services – 15%

Transfer of securities (stocks, shares):

1.5% of the value of the transfer
Tk.20.00 on each share certificate

Conveyancing of movable property:

5% of the value of the transaction

Mortgage/lease of immovable property in favour of a bank or a financial institution in respect of a loan:

Securing up to Tk.1.0 million	Tk.1,500.00
Securing an amount exceeding Tk.1.0 million up to Tk.5.0 million	Tk.3,500.00
Securing an amount exceeding Tk.5.0 million –	
(a) for the first Tk.5.0 million	Tk.3,500.00
(b) for the remainder	0.10% of the amount secured

Fees for obtaining a trade license: Tk.100.00-10000.00 based on size and nature of business

⁵³ These rates are subject to change, and also may vary due to special exemptions or preferences given to individual enterprises or classes of enterprise or economic sector.

⁵⁴ On goods and services not exempted from VAT.