9

LITIGATIONS PENDING FOR SETTLEMENT IN PUBLIC UNDERTAKINGS

MINISTRY OF INDUSTRY
(DEPARTMENT OF PUBLIC ENTERPRISES)

COMMITTEE ON PUBLIC UNDERTAKINGS 1992-93

TENTH LOK SABHA

LOK SABHA SECRETARIAT
NEW DELHI

NINTH REPORT

COMMITTEE ON PUBLIC UNDERTAKINGS (1992-93)

(TENTH LOK SABHA)

LITIGATIONS PENDING FOR SETTLEMENT IN PUBLIC UNDERTAKINGS

MINISTRY OF INDUSTRY (DEPARTMENT OF PUBLIC ENTERPRISES)

Presented to Lok Sabha on 20-8-1992
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CORRIGENDA TO THE 9TH REPORT OF THE COMMITTEE ON PUBLIC UNDERTAKINGS (1992-93) ON 'LITIGATIONS PENDING FOR SETTLEMENT IN PUBLIC UNDERTAKINGS'

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(1992-93)

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INTRODUCTION

I, the Chairman, Committee on Public Undertakings having been authorised by the Committee to present the Report on their behalf, present this, Ninth Report on 'Litigations Pending for Settlement in Public Undertakings'.

2. Public Undertakings have been resorting to protracted litigations involving large number of cases between Public Undertakings *inter-se*, Public Undertakings and Government Departments and Public Undertakings and private parties, individuals and employees resulting in huge unproductive expenditure and wastage of time and energy. The phenomenon of resorting to futile and avoidable litigation by the Public Undertakings has been engaging the attention of the Committee on Public Undertakings for quite some time. It is in this context that the Committee on Public Undertakings (1992-93) selected the subject for horizontal study. The detailed examination of litigation cases pending in Public Undertakings is in progress. In the meantime, the Committee felt the urgency to lay down certain guidelines to be implemented without further loss of time to enable Public Undertakings to initiate speedy action for elimination of unnecessary and avoidable litigation.

3. The Committee took evidence of the Secretary, Ministry of Industry (Department of Public Enterprises), the Chairman, SCOPE who is also Secretary, Ministry of Steel and the representatives of State Trading Corporation of India Ltd. (STC), Fertilizers and Chemicals Travancore Ltd. (FACT) Minerals and Metals Trading Corporation of India Ltd. (MMTC), Industrial Development Bank of India (IDBI), India Tourism Development Corporation (ITDC), and the Indian Council of Arbitration (ICA) on 12th August, 1992.

4. The Committee considered and adopted the Report at their sitting held on 19th August, 1992.

5. The Committee are obliged to the Members of the Committee on Public Undertakings (1992-93) for the useful work done by them in taking evidence and sifting information which forms the basis of the Report. They would also like to place on record their sense of deep appreciation for the invaluable assistance rendered to them by the officials of the Lok Sabha Secretariat attached to the Committee.

6. The Committee wish to express their thanks to the Cabinet Secretaries (both the present and his predecessor), the Finance Secretary, the Commerce Secretary, the Secretaries of Department of Public Enterprises and Department of Expenditure for placing before them the information

they wanted in connection with the subject. They also wish to thank in particular the Secretary, Department of Public Enterprises, the Chairman, SCOPE and Secretary, Ministry of Steel and the representatives of STC, FACT, MMTC, IDBI, ITDC and ICA who appeared for evidence and assisted the Committee by placing their considered views before the Committee.

NEW DELHI;
August 19, 1992

Sravana 28, 1914 (Saka)

(A.R. ANTULAY)
Chairman,
Committee on Public Undertakings.

PART—I

Background Analysis

I. Introductory

1.1 With the Public Sector having come to occupy a pivotal role in several key sectors like industry, trade, transportation, banking, etc., a large number of contracts are entered into by them mainly with private parties as well as with other Public Undertakings and Government Departments. In spite of best intentions and efforts, it is a matter of common experience that disputes arise during actual implementation of the contract for various reasons. To run a company efficiently, maintain harmonious relationship, invest scarce resources in productive activities and complete the projects in time, it is imperative on the part of every enterprise to narrow down the areas of disputes in the contract itself and to make adequate provisions for amicable and quick settlement of disputes at moderate cost.

1.2 Nevertheless, Public Undertakings have been resorting to protracted and numerous litigations between Public Undertakings *inter se*, Public Undertakings and Government Departments and Public Undertakings and private parties, individuals and employees incurring unproductive expenditure and causing wastage of time not commensurate with the outcome. Adjudication of claims and disputes through litigation, besides being a long drawn-out process, results in locking up of large amounts of money, scuttling of projects under implementation and rendering otherwise profitable transactions into losing ones.

1.3 The tendency to resort to unnecessary and frequent litigations even on petty matters has led to increasing accumulation of cases and overloading of Courts and Administrative Tribunals which has rendered them unable to handle the spate of fresh litigation, much less liquidate the arrears of pending cases. The growing menace of litigations and overburdening of courts has been a matter of concern for all the Judiciary, the Executive and the Parliament.

1.4 As early as in 1974-75, commenting adversely on litigations between Government organisations, the Public Accounts Committee in their 154th Report (5th Lok Sabha) had observed as follows:—

> "The Committee cannot understand why it has not been possible to resolve a dispute between two Government organisations by mutual consultation. Instead the parties have had to resort to litigation, thus incurring avoidable expenditure. The Committee desire that the existing instructions for settlement of disputes between Government

Departments and Public Sector Undertakings should be reviewed thoroughly and a suitable machinery evolved for the resolution of a inter-Department and inter-Government dispute. The Committee suggest that this recommendation may be brought to the notice of the Cabinet Secretary."

1.5 Subsequently on 19th December, 1975 the Cabinet Secretariat issued *inter-alia* the following guidelines with regard to litigations after taking orders of the Cabinet:—

"Insofar as dispute between one Government Department and another are concerned, there can be no question of taking recourse to litigation or even arbitration in seeking settlement of points at issue. If a discussion at the level of Ministers concerned does not result in agreement the problem can always be taken to the Cabinet for final decision."

1.6 On several occasions the Supreme Court and High Court have deprecated the tendency on the part of Public Undertakings to resort to litigations on trivial matters on the pretext of technical pleas. The Courts have time and again called for the intervention of the Government for eliminating unnecessary litigations in Public Undertakings. In a recent case, M/s Oil & Natural Gas Commission and other-vs-Collector of Central Excise JT 1991(4) SC 158 dated 11.10.1991, the Supreme Court passed the following orders:

"We direct that the Government of India shall set up a Committee consisting representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of Government of India, Ministry and Public Sector Undertakings of the Government of India and Public Sector Undertakings in between themselves, to ensure that no litigation comes to Court or to Tribunal without the matter having been first examined by the Committee and its clearance for litigation. . . . . It shall be the obligation of every Court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with."

1.7 The phenomenon of resorting to unnecessary and avoidable litigation by Public Undertakings was commented upon adversely by the Committee on Public Undertakings in their Ist Report (10th Lok Sabha) presented to Parliament on 10.12.1991. In paragraph 2.13 of the Report, the Committee had recommended:

". . . . . Every Public Undertaking must endeavour to live upto the expectations of public. It should inspire confidence in its straight and fair dealing—be that MMTC, SAIL or any other Public Undertaking either while dealing with the sister undertaking in the public sector or with any other private party; be the dealing with customers, suppliers,

dealers or parties, individuals in any other category having anything to do with the public undertaking—of public or private sector. The approach and aptitude of every public undertaking with public undertaking or private parties should always be just fair, reasonable and equitable and none-customers, supplier or any dealer with any Public Undertaking should be made to suffer and incur losses for the lapses of public undertakings. Public confidence in fairness of Public Undertaking should be considered to be the very foundation of public accountability of Public Undertakings. Any act on its part which will undermine public confidence in it should, indeed, warrant severe censure. . . . . ."

In para 2.16 of the same Report, the Committee had also observed:

". . . . the Committee, therefore, desire that the new guidelines of Bureau of Public Enterprises regarding disputes between two Public Undertakings, in the instant case, between MMTC and SAIL should also be uniformly applied to all disputes to which one party is public undertaking. In other words, the new guidelines be applied not only to disputes between one public undertaking and another but to all disputes between one public undertaking on one hand and any other private party on the other. . . . ."

Compliance of these observations having been brought to the notice of all public undertakings has not yet been reported. Consequently perturbed by the alarming nature and number of litigations, many among them relating to even trivial matters, pending with most of the Public Undertakings, the Committee decided to select the subject, 'Litigations Pending in Public Undertakings for Settlement' for horizontal study.

II. Pending Litigations

A. *Cases at a Glance*

1.8 The Committee called for information from all the Public Undertakings regarding cases of litigation pending for settlement. Till the time of finalisation of this Report, data was received from 185 Public Undertakings. Owing to constraint of time, it has not been possible for the Committee to go into details of individual cases in all Public Undertakings. The process of examination is time consuming on account of the voluminous information relating to large number of cases being received from many of the Undertakings. However, the Committee has taken up detailed examination of the cases, which is in progress.

1.9 On a randum check of the information received from some of the Undertakings, the following is the information gathered about the number of litigations pending for settlement:

Name of Public Undertaking	Total No. of cases pending	No. of glaring cases involving less than Rs. 1 lakh or relating to pre-1981 period.
(1)	(2)	(3)
1. Andaman Nicobar Island Forest & Plantation Dev. Corpn. Limited.	10	1
2. Bengal Chemicals & Pharmaceuticals Ltd.	31	5
3. Bharat Electronics Ltd.	312	29
4. Bharat Gold Mines Ltd.	201	27
5. Bharat Leather Corpn. Ltd.	21	7
6. Bharat Petroleum Corpn. Ltd.	996	196
7. British India Corpn. Ltd.	20	14
8. Coal India Limited.	126	2
9. Cochin Refineries Ltd.	88	3
10. Cotton Corpn. of India Ltd.	9	2
11. Dredging Corpn. of India Ltd.	23	3
12. Engineering Projects (India) Limited.	105	6
13. Fertilizer Corpn. of India Limited.	245	44
14. Fertilizers & Chemicals Travancore Limited.	340	34
15. Garden Reach Shipbuilders & Engineers Limited.	49	4
16. Hindustan Aeronautics Ltd.	405	10
17. Hindustan Antibiotics Ltd.	16	4
18. Hindustan Copper Ltd.	450	42
19. Hindustan Fertilizer Corporation Limited.	121	21
20. Hindustan Insecticides Ltd.	41	6
21. Hindustan Paper Corpn. Ltd.	80	2
22. Hindustan Organic Chemicals Limited.	41	11

(1)		(2)	(3)
23.	Minerals & Metals Trading Corpn. of India Limited.	240	43
24.	State Trading Corpn. of India Limited.	787	256
25.	Industrial Development Bank of India.	187	3

B. *Some Startling cases*

1.10 The following were the number of glaring litigation cases pending in State Trading Corporation of India Limited (STC), Fertilizers & Chemicals Travancore Limited (FACT), Minerals & Metals Trading Corporation of India Limited (MMTC) and Industrial Development Bank of India (IDBI) selected for detailed examination by the Committee at the first instance.

Name of Undertaking		No. of cases involving Rs. 10,000/-or less	No. of cases involving more than Rs. 10,000/- but less than Rs. 1 Lakh	No. of cases relating to pre-1981 period
1.	S.T.C.	17	74	188
2.	F.A.C.T.	16	33	—
3.	M.M.T.C.	3	33	42
4.	I.D.B.I.	—	—	3

1.11 The details relating to all the above cases would be too lengthy to be reproduced in the Report. The Committee, therefore, decided to highlight only illustrative examples from among the startling cases.

C. State Trading Corporation of India Limited

1.12 One of the startling cases among the litigations pending in STC is suit No. 1555/1722 filed by M/s Photovision against the company and Syndicate Bank in the Small Causes Court, Bombay in 1982. According, to STC this case would take seven years more for settlement. The Committee called for the filed relating to the case. Brief facts of the case emerged on perusal of the file are as follows:—

(i) The plaintiff, M/s Photovision had given two Bank guarantees for Rs. 500/- and Rs. 442/- in 1977-78 valid for one year. After the guarantees expired the party asked for return of the original bank guarantees to be submitted to the Bank for cancellation. Party filed the suit for the bank guarantee amount since STC failed to return the bank guarantees.

(ii) The Board of Directors in their 430th meeting held on 14.9.1990 desired that Legal Division should review all cases and put up a report with recommendations for out-of-court settlement as far as possible in the following cases:—

1. In those cases in which STC was in the wrong;
2. Where issue was so small that the cost of litigation was not worth it, and
3. Where there is no hope of success in appeal irrespective of the merits of the case.

(iii) Thereafter, the Legal Division wrote to the plaintiff on 30.11.1990 for a meeting to discuss the case and also called for the advice of the lawyer dealing with the case.

(iv) On 5.12.1990, the Legal Division recorded the opinion in the file that the amount involved was extremely low and the Company's cost towards legal fee would definitely far exceed the amount claimed by the party. The Division recommended that the case be settled with the party by giving a letter to the bank stating that the company had no claim under the guarantees so that the bank could release party's money and/or by inviting the party for out-of-court settlement.

(v) CFM(KVS) to whom the file was sent wrote on the file that it was not clear as to whether the case pertained to STC, New Delhi or STC Bombay as no details were available on the matter. He recorded instructions that the opinion of the company's advocate might be awaited before approaching the party for out-of-court settlement and after receipt of opinion, the case might be reviewed to decide the further course of action.

(vi) On 12.12.1990 CGM(SS) wrote on the file that LA(RPM) and CFM(KVS) might jointly discuss the case with him. Thereafter, no further action was initiated on the file.

1.13 During the course of examination of the representatives of STC, the Committee wanted to know as to what efforts were made by the company to settle the claim. CMD, STC stated as follows:—

> "We wrote to this party on 30.11.1990. And they have not responded. Now we will make further efforts."

1.14 On being pointed out that the dispute was pending since 1977-78, but the letter was sent by STC to the plaintiff only on 30.11.1990, the CMD, STC conceded that there was inordinate delay. When the Committee enquired specifically whether any effort was made to resolve the dispute earlier, the CMD, STC replied in the negative.

1.15 From the documents available in the file and the fact that the case was pending in the Small Causes Court, Bombay, it should have been clear

to anyone going through the file that the case related to STC's Bombay office. Though CGM(SS) wanted to jointly discuss the case with CFM(KVS) and LA vide note dated 12.12.1990, no further action had been initiated in the case. On being asked to explain it, the CMD, STC stated:—

"We will have this case pursued and brought to a conclusion."

The witness further conceded:—

"This was a case of default."

1.16 The Committee felt that the amount spent on the case must have been more than the amount of the claim itself. The CMD, STC was quick to concede as follows.

"Yes, Sir. Even maintenance of this file would have cost more money."

1.17 When questioned as to whether he was not in agreement with the Committee that such cases should be discarded, the witness stated:—

"I am not justifying this case. It is a blatant case."

1.18 When it was pointed out by the Committee that there were several other such glaring cases, he explained as follows:—

"We had started examination of these pending cases last year and we have requested the Trading Division from where these cases originate that they should give their opinion as to whether the case should be pursued or should be compromised. But then we have one problem. The Trading Division is a little reluctant to take a decision whether the case should be conceded or compromised. Once the legal position is taken, the Trading Division sticks to it. They keep on justifying their position."

1.19 When the Committee enquired whether the CMD felt helpess if the Trading Division continued to justify their untenable and incorrect stand, the witness stated as follows:—

"To come to the conclusion that their stand is untenable and unjustifiable, the data has to come from the Trading Division."

He added:

"The examination is still going on. I took over as Chairman in June, 1990..."

1.20 The Committee pointed out that the CMD had been in office for 26 months. Replying to the question as to how many cases were reviewed by him during that period, he stated:—

"It has not come to the stage of review because the Trading Division maintains the position taken by them that this case is justifiable and should be contested."

1.21 The Committee wondered whether the Trading Division was an independent organisation outside the jurisdiction of the Chief Executive. On being asked whether the Committee should presume that he would only abide by the opinion of the Trading Division and would not do anything about the cases on his own, the CMD, STC pointed out:—

> "Examination has to be done between three parties namely, Trading Division, Law Division and Finance Division."

1.22 In reply to a query as to whether he could not get those officers working under him across the table to discuss the problem in a span of 26 months, the witness stated as follows:—

> "We got them, Sir. But the Point is the three heads have to concur to give up the financial claim to the court and the trouble arises when the Trading Division tends to justify the stand already taken by them and to give up the financial claim becomes difficult.

He went on further and held out an assurance:

"We will expedite this review."

1.23 To a specific question as to whether he agreed in principle that disputes between one public undertaking and another, public undertaking and the Government department and Public Undertaking and private agency should be sought to be settled through arbitration rather than going in for litigation, the CMD, STC replied in the affirmative and stated:—

> "In principle, I agree."

D. *Fertilizers and Chemicals Travancore Limited*

1.24 The total number of litigation cases filed by and against FACT since 1980 to May, 1992 were 949. The Committee found that in FACT there were a number of litigation cases relating to industrial disputes and service matters in respect of employees involving promotion, payment of emoluments and allowances, etc. pending for settlement. For instance, a case has been mentioned by FACT (Case No. 6/1990), in which 53 employees of FACT challenged the deduction of Rs. 5/- each from their salary towards Legal Aid Fund for the Trade Unions for one month before the Authority of Payment of Wages.

1.25 At the time of evidence of the representatives of FACT, the Committee wanted to know as to why the amount of Rs. 5/- was being deducted from the salary of employees. The acting CMD, FACT stated as follows:—

> "We are having an amonia tank near Cochin port. Two or three years ago, there was a public interest litigation from the citizens of Cochin that this tank is a health hazard to the people of Cochin and there should be a court judgement to stop the operation of that tank. Now, that is the life line of the Company. We have got seven thousand employees and about eleven unions. All of them were

agitated because it was published in the newspapers. They felt that if the court judgement goes against the company then they were in danger of losing their jobs. A number of meetings were held to create awareness among the people and they passed a resolution. They did it voluntarily."

E. *Minerals & Metals Trading Corporation of India Limited*

1.26 In 1966 MMTC filed a suit before Single Judge, Madras High Court for recovery of loan granted to V.V. Acharya for purchase of trucks—Case No. 216/66, MMTC-vs-M/s. (1) V.V.Acharya, (2) Calcutta Insurance Company (now National Insurance Co.) (3) E.A. Sriramaiah (4) Chamundi Financiers. Later appeals were filed before the Division Bench of the High Court and in the Supreme Court. However, against a claim of Rs. 1,10,314.74 only an amount of Rs. 1031.74 was granted by the court for recovery from the party.

1.27 Yet another glaring case pending for settlement was M/s. Wood Stock Energy Inc-vs-MMTC in the US Appeal Court pertaining to non-supply of 1 million barrels of crude oil to US firm. The firm sued MMTC in the Houston District Court and later appealed in the US Appeal Court. MMTC also made cross appeal. MMTC has so far paid US $ 10,53,687.22 + Rs. 1,58,666 towards Advocates' fees and incurred expenses amounting to Rs. 23,57,302 (approx.) towards TA/DA expenses. An amount of US $ 46,761.8 and Rs. 18,27,890 is still pending for payment to Advocates/Attorney's firms.

1.28 Giving the details of the case, a representative of MMTC stated in evidence:

> "The party filed a suit in America and so, first of all, we had to engage the lawyers. We did not have any lawyer from India. But the Indian Lawyer was giving us the advice in India. The amount in that case was one million dollar. The judgement was for 77 million dollars and we contested the case in the Houston Lower Court. We won the case to the extent that the damages were reduced from 77 million dollars to 1.2 million dollars. Now, we have gone on appeal to Higher Court and that appeal is going to come up in September-October."

1.29 The Committee also found that advocates' fees paid in two other cases were disproportionately high. One was Bipin Shah anr-vs-MMTC, SLP (crl.) 77/82 in the Supreme Court pertaining to disposing of coal stocks by the handling agent, M/s. T.M. Shah & Co. without permission. The Company has so far paid Rs. 52,000/- towards advocates fee. In the other case, SLP No. 16874/81, MMTC-vs-R.L. Kapoor filed by the Company before the Supreme Court, MMTC has so far incurred an expenditure of Rs. 2,09,600/- for payment of advocates fees.

F. *Industrial Development Bank of India*

1.30 According to the information furnished by the Company 76 litigation cases were pending in different courts for recovery of dues from different parties amounting to Rs. 393.31 crores. During evidence of the representatives of the Company the Chairman, IDBI informed the Committee as follows:—

> "We have only about 70 cases, because we have attempted to really settle these disputes outside the courts."

1.31 The amount of payment made by IDBI to advocates/solicitors towards court fees, fees and out of pocket expenses from 1980—1992 (till 1.6.1992) year-wise was as follows:—

Year	Amount paid (Rs)
1980	12,656
1981	-
1982	-
1983	40,000
1984	49,000
1985	9,39,281
1986	4,26,260
1987	9,28,976
1988	8,53,193
1989	22,30, 350
1990	7,88,929
1991	8,84,751
1992	9,36,855
Total	80,90,251

III. Elimination of Litigations

1.32 Unresolved disputes endanger trade relations, industrial climate and timely implementation of projects. It is in the interest of efficient and smooth functioning of an enterprise that disputes are resolved amicably without delay and wasteful expenditure.

1.33 In his report submitted before the Supreme Court in the context of M/s. ONGC-vs-Collector of Central Excise case, the Cabinet Secretary stated as follows:—

"I would also like to state that the Government respects the views expressed by this Honourable Court and has accepted them that public undertakings of Central Government and the Union of India should not fight their litigation in Court by spending money on fees on counsel, court fees, procedural expenses and wasting public time. It is in this context that the Cabinet Secretary has issued instructions from time to time to all Departments of the Government of India as well as to public undertakings of the Central Government to the effect that all disputes, regardless of the type, should be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government or through arbitration and recourse to litigation should be eliminated."

A. *Settling of disputes through Conciliation/Negotiation*

1.34 Conciliation is the cheapest, speediest and most effective method of settling a dispute irrespective of the nature of the dispute and the status of the party concerned. Indian Council of Arbitration (ICA), engaged in promotion of use of commercial arbitration, expressed the following views about Conciliation in the information furnished to the Committee:—

"Conciliation is carried out mainly through correspondence with a view to bringing the parties around an amicable settlement of disputes. Sometimes personal meetings with the concerned parties are also arranged. As a result of conciliation a number of trade complaints are settled amicably to the satisfaction of both the parties."

1.35 During the course of examination of the representatives of ICA, the Committee enquired as to whether the Council envisaged settlement of disputes through negotiation prior to arbitration. The Secretary, ICA stated as follows:—

"We do try this. In fact in many cases we call it counselling through corresponding, through arranging meetings of the parties. Many a time we have actively tried to sort out disputes without even arbitration. In fact our sole aim is to avoid disputes. To that extent, we have undertaken various research studies and we have published a study—how the parties can draft their agreements to narrow down their disputes and differences."

1.36 When the Committee desired to know the views of the Chairman, SCOPE and concurrently Secretary, Ministry of Steel as to how a claim made against a public undertaking by a private firm or citizen should be dealt with, the witness stated:

"The public sector undertakings, by the very nature of their constitution, are undertakings which are responsible and responsive to the Government and through the Government to the public. Therefore, it goes without saying that every public sector undertaking, in matters

of any dispute where a sister undertaking or any private individual is concerned, should make all efforts initially to get such issues settled through discussions, negotiations and find out ways and means of settling the issue amicably. Ultimately only litigation is to be resorted to. Litigation is going to bring loss to the public sector undertaking and to the other party as well. Therefore, to safeguard their own interest they should exhaust all means available to them. It is a good point."

1.37 Asked as to what was his experience with regard to resorting to the method of negotiation by Public Undertakings to resolve disputes, the witness asserted:

"I handled several public sector undertakings as the Chief Executive. In my personal experience during the last 18 years or so, I do not recall any incident where we did not resort to negotiation and discussion first. And it was in a very few cases that we had to resort to litigation."

1.38 On efforts made by FACT to settle disputes through negotiations, the Company informed the Committee in a note as follows:—

"Claims raised by the Vendors/Contractors are duly considered and decisions taken, following the prescribed procedure, negotiations are held with parties and attempts are made to settle such claims amicably as early as possible, without resorting to costly and time-consuming litigations and arbitrations....Wherever necessary discussions are held with the parties for settlement of the claim. In each case no payment of lawyer's fee is involved. Further, as a policy, in such instances it is not our practice to pay representatives' fee and/or commission."

1.39 The Committee took note of the claims which were settled by FACT through negotiations without incurring any additional expenses. When the Committee appreciatively referred to the procedure followed by FACT in settling of disputes through negotiations, the Acting CMD, FACT stated in evidence:—

"We have got a standard machinery. It is referred to the Committee of Officers, consisting of departmental head and other senior officers. They sit across the table with the party. They refer the dispute in all its totality and then they arrive at a certain settlement with the party and that is forming as the basis of the settlement. It is without cost."

1.40 Enquired as to whether he was of the view that in every case of dispute or claim where a public undertaking and another or the Government or a private party/citizen are involved, the first attempt should be made is for negotiation, the witness asserted in the affirmative.

Expressing his views on the same topic, the Chairman, IDBI stated in evidence:—

"I agree with you, Sir, on the point raised by you. I think that should be the regular approach of an organisation to settle matters even before arbitration. I suggest that there should be an instruction to all the organisations to have a regular procedure, or a sort of internal Committee to settle issues. I fully support that point."

1.41 When the proposition for making efforts to settle disputes between Public Undertakings *inter-se*, Public Undertakings and Government departments or private party or citizen at first through negotiation was posed before the CMD, MMTC, he replied emphatically:

"Absolutely right, Sir."

He Added:—

"The first attempt is to sort it out through mutal negotiations and if the mutual negotiations, across the table fail then there should be an attempt to resort to arbitration. Sometimes, there can be very unreasonable cases which may be wrong."

B. Arbitration

1.42 In a great majority of countries arbitration has been accepted as an effective means of settling disputes arising out of business contracts, both domestic and international. Arbitration is found congenial for the resolution of disputes, since on one hand it does not involve the technicalities of litigation process in the courts and on the other matters of technical and scientific nature could be referred to technically qualified persons in the subject matter if arbitration is resorted to. Arbitration has an edge over litigation in resolving international disputes in view of the conflicting legal procedures existing in different countries.

1.43 Arbitration has been a recognised method of dispensing justice in our country from time immemorial as would be evident from the Arbitration Act, 1940. Arbitration helps to reduce load on Civil Courts and for speedy disposal of disputes out of court involving minimum time and cost.

1.44 The attention of the Committee was drawn to the following extracts of an article by Shri F.S. Nariman, Senior Advocate on 'Public Sector Arbitrations in India and Abroad'—The Indian Experience:—

(a) Arbitration in the rest of the public sector: Institutional arbitration preferred:

"Parallel to Government Contracts, there are a vast area of contracts entered into by State, Industrial and Trading Corporations such as the State Trading Corporation, the Fertilizer Corporation of India, the Food Corporation of India, etc. and by monopoly services such as the Air India Corporation and Indian Airlines Corporation. Here, contracts, though stereotyped, are not wholly one sided—the arbitration clause often does provide for arbitrators being appointed by each

party to the dispute with the presiding arbitrator being nominated by the Chairman of the Corporation. The employee-arbitrator being nominated by the Chairman of the Corporation. The employee-arbitrator is not generally preferred in commercial contracts entered into by State (or Public Sector) Industrial Trading and Service Corporations. Much of such arbitration especially arbitration in contracts or projects with parties abroad—provide for institutional arbitration: such as the Indian Council of Arbitration or arbitration according to the rules of internationally renowned arbitrial organisations like the International Court of Arbitration of the ICC, or the London Court of International Arbitration.

(b) Public Sector Approach to arbitration—the spirit is lacking and the flesh is weak:

"I have mentioned earlier about the lack of a spirit of arbitration in India and mentioned what I believed to be the reasons for this. Public Sector Arbitration suffers from an additional handicap. Even if those in charge of Public Sector Corporations have, or are infused with, the spirit of arbitration *viz.* of finally settling (not merely resolving) disputes by arbitration, they often lack the will to act. The hierarchy of control of Public Sector Corporations in India inhibits the exercise of such will even where it exists. Heads of Public Sector Corporations established by statute are answerable and accountable to Heads of Department in the concerned Ministries of the Central or State Government; and it is a euphemism to describe such Corporations as "autonomous".

Public Sector Corporations have not disclosed any marked tendency for promptly honouring awards made against them—even when those responsible in such Corporations for the handling of its affairs consider the award to be just and fair: this is because of a psychological disease or affliction permeating all strata of officialdom-known (for want of a better name) as the Cat Syndrome: or, who will bell the Cat? Who will take the risk and responsibility to say." I accept this award, because by going to the Arbitration of an Arbitrator of my choice (or appointed with my consent) I have agreed to accept his decision as final and binding. I will not spend more public time and money in the fruitless quest of challenging it"? The answer is—no one. 'Let the court decide' that is the approach which high ranking officials of Public Sector Corporations always (or almost always) adopt. It is the Cat Syndrome which results in opponents of Public Sector Corporation (whether indigenous or foreign firms or companies) being dragged through two, or usually three rounds of litigation in the Superior Courts of the country, even after the award has been pronounced any Arbitrator or an Arbitral Tribunal appointed or constituted with the consent of such public sector corporation. And then, more often, the decision to challenge

an award is habit-oriented. And old habits die hard. I have known of Public sector corporations having appointed or consented to the appointment of a sole arbitrator (in one case, a retired judge of the Supreme Court) promptly challenging the award in the High Court, when his decision has gone against them. Perhaps one way to mitigate this is to adapt what is already being observed in the case of Departments of the Central Government. The rule enforced in all departments of the Central Government, is that unless the Attorney-General of India or one of the law officers of the Union of India certifies that it is a fit and proper case to be filed in the Supreme Court, the Departmental Head cannot do so on his own. This is a self-disciplining process within the various branches of the Union of India it has on the whole, worked quite well. It would be useful to adapt this system of certification in the case of awards made against public sector undertakings. After all, the object and end of all Arbitration is the resolution of disputes by an award which is not patently unjust and unfair its justness and fairness should not be left to be determined by the losing party alone, but endorsed by an independent third person.

(c) Conclusion

"In his autobiography, Lord Macmillan recounts the story of an eminent Queen's Counsel of his time—Sir Frank Lockwood, later Attorney-General of England. He had just concluded arguing a case for a private client in England's Highest Court of Appeal (the House of Lords); the Law Lords who heard the appeal had spoken their minds during argument (as judges sometimes do); there was little doubt about the outcome. Outside the Court room the client sidled up to his Counsel and whispered "Sir, can we not go to a higher Court?" The discomfited Frank Lockwood turned to his client looked at him for a long while, and said: "My dear fellow, they should really breed from you". The fellow obviously had the genes—he had exhibited all the traits of a true litigant if the same opprobrious reproach is not to attach to public (and private) sector corporations who after a final award goes against them, start a fresh round of litigious proceedings and pursue it to the final Court, only with a view to postponing their liability to pay sums declared due under the award—then there needs to be a serious reorientation of our approach to arbitration as an alternative means of dispute resolution. If arbitration in preference to litigation, be the mutually acceptable mode of proceeding, then its consequence must be accepted by all those who resort to it—with grace and equanimity. Unless monstrously unjust and unfair, the award of arbitrators must be accepted for what, in the end, an arbitral award professes to be—viz. final and binding on the parties."

1.45 The Indian Council of Arbitration (ICA) was set up, pursuant to a recommendation of the Committee on Commercial Arbitration constituted by the Ministry of Commerce, Government of India, on 15th April, 1965, for promoting the use of commercial arbitration. Tracing the genesis of the organisation, the Secretary, ICA deposed before the Committee:

> "Government had set up a Committee to see how provisions for amicable and quick settlement of disputes may be made to promote amity and goodwill among the people. This was to revive the spirit of Panchayat, which prevailed in our country, a system which is similar to arbitration and in our Constitution also, article 59(d) provides for encouragement of settlement of disputes through arbitration. So this Committee reviewed the entire arbitration at that time and they recommended that such a body should be set up. It should not only provide facilities as an alternative to litigation but also for promoting of this idea for arbitration in the country."

1.46 The membership of the Council includes 1500 companies, firms and individuals from different parts of the country. The members of the Council included:

> Mr. Justice M. Hidayatullah, Former Chief Justice of India and Vice President of India; Mr. Justice R.S. Pathak, Former Chief Justice of India, Ex-Judge, International Court of Justice, The Hague; Mr. Justice Y.V. Chandrachud, Former Chief Justice of India; Mr. Justice E.S. Venrkataramiah, Former Chief Justice of India; Mr. Justice H.R. Khanna, Former Judge, Supreme Court of India; Mr. Justice A.N. Grover, Former Judge, Supreme Court of India; Mr. Justice A.D. Koshal, Former Judge, Supreme Court of India; Mr. Justice D.M. Rage, Former Judge, Bombay High Court and Mr. Justice M.L. Verma, Former Judge, Delhi High Court.

1.47 Information relating to scales of arbitration fees and Administrative service is as follows:—

Scale of Arbitration Fees

The ICA provides a lumpsum scale of Arbitration fees for the entire case related to the amount in dispute on *ad valorem* basis, both for the arbitrators and for the administrative services of the Council, as given hereunder in (A) and (B) below:

(A) Arbitrator's Fees

The arbitrator's fee will be fixed by the arbitrators constituting the Bench in each case within the limits given hereunder, having regard to the nature of the case and the time taken to decide it.

For reach arbitrator, where the amount of claim is:

From Rs. 50,001 to Rs. 1 lacs	Rs. 1000/-to Rs. 1,500/-
From Rs. 1,00,001 to Rs. 5 lacs	Rs. 1,250/-to Rs. 3,000/-
From Rs. 5,00,001 to Rs. 10 lacs	Rs. 2,500/-to Rs. 6,000/-
From Rs. 10,00,001 to Rs. 25 lacs	Rs. 5,000/-to Rs. 8,000/-

From Rs. 25,00,001 to Rs. 50 lacs	Rs. 6,000/-to Rs. 10,000/-
From Rs. 50,00,001 to Rs. 1 crore	Rs. 7,000/-to Rs. 15,000/-
Over Rs. 1 crore	Such amount exceeding Rs. 15,000/- as may be fixed by the Bench in each case, as under:
For the next Rs. 4 crores	30% of the maximum for one crore, i.e. 30% of Rs. 15,000 per crore.
For the next Rs. 5 crores	20% of the maximum for one crore i.e. 20% of Rs. 15,000/-per crore.
For the next Rs. 15 crores	10% of the maximum for one crore, i.e. 10% of Rs. 15,000/-per crore.
For higher amounts	5% of the maximum for one crore, i.e. 5% of Rs. 15,000/-per crore.

The Arbitration Committee of the Council may prescribe higher scales of fee in suitable cases.

Where the parties have agreed to arbitration according to the Rules of Arbitration of the Council, the above lumpsum/ad valorem scales of arbitrators' fee provided in the ICA Rules, becomes automatically applicable to the case. In other (ad hoc) arbitration cases, where ICA Arbitration Rules have not been agreed to, interested parties have the option either to adopt the lumpsum ICA scale of fees as above or in the alternative to agree upon any other scale of arbitrator's fee on per sitting basis or otherwise.

(B) Administrative Fee of the ICA

The administrative fee will be fixed by the arbitrators constituting the Bench in each case within the limits given hereunder having regard to the nature of the case and the time taken to decide:

From Rs.50,001 to Rs. 1,250/-	Rs. 600/-to Rs.1 lac
From Rs. 1,00,001 to Rs. 5 lacs	Rs. 1,000/-to Rs. 2,500/-
From Rs. 5,00,001 to Rs. 10 lacs	Rs. 2,000/-to Rs. 5,000/-
From Rs. 10,00,001 to Rs. 25 lacs	Rs. 4,000/-to Rs. 6,000/-
From Rs. 25,00,001 to Rs. 50 lacs	Rs. 5,000/-to Rs. 8,000/-
From Rs. 50,00,001 to Rs. 1 crore	Rs. 6,000/-to Rs. 12,000/-
From the next Rs. 4 crores	20% of the maximum for one crore i.e. 30% of Rs. 12,000/- percrore.
For the next Rs. 5 crores	20% of the maximum for one crore i.e. 20% of Rs. 12,000/- per crore.
For the next Rs. 15 crores	10% of the maximum for one crore i.e. 10% of Rs. 12,000/- per crore.

For higher amounts	5% of the maximum for one crore i.e. 5% of Rs. 12,000/- per crore.

Where the parties have agreed to arbitration according to the Rules of Arbitration of the Council, the above lumpsum/ad valorem scales of administrative fee provided in the ICA Rules, becomes automatically applicable to the case. In other (ad hoc) arbitration cases, where the ICA Arbitration Rules have not been agreed to, interested parties have the option either to adopt the lumpsum ICA scale of fees as above or in the alternative to agree upon any other scale for the administrative services of the ICA.

1.48 In 1983 the Expert Committee on the Indian Council of Arbitration appointed by the Ministry of Commerce recommended in their Report that economic Ministries of the Government of India particularly production oriented ones, may be requested to recommend to the Public Sector Undertakings under their administrative control to make wider use of the arbitration clause and services of the Council.

1.49 On the objective of promoting the idea of arbitration in the country the Secretary, ICA pinpointed as follows:

"The whole idea for arbitration is an alternative to litigation."

1.50 Recounting the arbitration facilities made available by the Council, the Committee was informed in a note as follows:—

"The Council provides arbitration facilities for settlement of all types of commercial disputes including sale-purchase, building construction, engineering, transfer of technology, maritime disputes, etc. between Indian parties or between Indian and foreign parties. Arbitration procedure of the Council are framed on international standards and it maintains a comprehensive international panel of arbitrators with eminent and experienced persons from different lines of trade and professions, for facilitating the choice of arbitrators."

1.51 The Committee wanted to know as to what extent the services available with ICA were being used by Public Undertakings and Government Departments. The Secretary, ICA then replied as follows:

"Presently our set-up is not being fully utilised. This is the paradox. On the one hand there are cases where the courts are full and pending for over 10 years. On the other hand not many cases come to us. Moreover, the expenditure is a mere fraction when compared to that of courts."

1.52 In this context, the Committee noted that the Cabinet Secretariat and the DPE had issued guidelines from time to time to all Public

Undertakings and their administrative Ministries for settling of disputes through arbitration and eliminating recourse to litigations. As early as in 1975, the Cabinet Secretariat issued the following directions in this regard:

> "Regardless of the type of dispute, it has been decided that all disputes should be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government or through arbitration and recourse to litigation should be eliminated."

1.53 The Chairman, Committee on Public Undertakings held a meeting with the new Cabinet Secretary on 11.8.1992 for discussions on the subject. In a letter dated 12.8.92, the Cabinet Secretary stated as follows:—

> "We are in agreement with the principle of negotiations when a dispute arises between Central PSEs and a private citizen. We are also in agreement with the proposition that arbitration of disputes is a desirable thing. We would, however, suggest for your consideration that the sanctity of the contract between two parties needs to be recognised. Where the parties themselves do not wish to resort to arbitration in accordance with the contract, it may not be desirable to force the parties to resolve their disputes through arbitration. In such an event of bilateral understanding the sanctity of the contractual terms needs to be ensured."

1.54 When enquired as to whether he was in agreement with the view that every claim should be settled through negotiation failing which it may be referred to arbitration with the consent of both the parties, the acting CMD, FACT replied:—

> "Yes Sir, I agree with your viewpoint. The arbitration if referred to, should be settled between six months to one year period."

Commenting on the Arbitration Act, 1940 which is still in operation, the Chairman, IDBI stated in evidence:

> "On the arbitration Act, we have studied this and we discovered that it is not necessarily a speedy procedure. In fact, we found that in the Act itself there are so many weaknesses. We have a concrete case, not in our portfolio but in others lasting for 16 years in the arbitration."

1.55 The Secretary, Ministry of Commerce favoured PSUs agreeing to arbitration in case of a dispute irrespective of the fact whether the dispute was between a Public Undertaking and another, Public Undertaking and Govt. Department and Public Undertaking and private party/individual during a meeting of some Secretaries of the Government of India held in the chamber of the Chairman, Committee on Public Undertakings on 14.5.1992. The Secretary, Ministry of Commerce later submitted the following note containing draft guidelines for settlement of disputes through arbitration for the consideration of the Committee:

I. Commercial contracts between PSUs and Private Parties.

1. The contract should provide for suitable arbitration clause for the settlement of disputes between the parties unless there are special and substantial reasons for not including such a clause. (The reasons must be kept on record with the PSUs). The arbitration clause should *inter-alia,* provide for the method of invoking the arbitration mechanism, choice of arbitrators, the forum of arbitration, laws and procedures governing the arbitration

2. If the contract provides for arbitration and the private party requests for settlement of a dispute by arbitration in accordance with it, the PSU should not refuse to enter into arbitration, unless there are compelling reasons for such refusal. (The reasons for refusal must be communicated to the other party).

3. Even if a contract does not provide for arbitration, but the other party seeks arbitration for resolution of a dispute, the PSU should consider favourably the request for arbitration unless there are compelling reasons, including the safeguarding of the legitimate commercial interests of the PSU, for not accepting the request for arbitration. While evolving guidelines, it may be kept in view that PSUs enter into commercial contracts with foreign private parties as well. What is considered suitable for settlement of disputes between PSUs and Indian private parties may not be suitable for foreign private parties who may seek arbitration outside India in accordance with laws and procedure of other countries/arbitral bodies.

II. Contracts between PSUs

1. Contracts between PSUs and other PSUs should provide for arbitration for resolving disputes. Unless there are special and substantial reasons (to be recorded in writing), the arbitral mechanism may be the one established in the Bureau of Public Enterprises.

2. The Supreme Court judgement applies only to disputes between:—

1. PSUs and other PSUs.
2. PSUs and Ministries
3. Ministries and other Ministries
4. Among all of them.

Such disputes, if they are not resolved among the disputants themselves, should be referred to the Committee under the Cabinet Secretary for resolution. No court is to take cognizance of such a dispute unless the resolution of the dispute has been examined by the said Committee and it finds that juridical intervention is unavoidable. By its very nature, this judgement of the Supreme Court cannot be extended to the disputes between PSUs and private parties.

C. Inclusion of Arbitration clause in contracts

1.56 The guidelines issued by the BPE in 1976 on settlement of disputes between Government organisations provided as follows:

> "Public Enterprises which enter into commercial and other agreements should make a provision for arbitration by a single arbitrator in their conditions of contracts."

1.57 In a Memorandum, the Indian Council of Arbitration emphasised the need for incorporating an arbitration clause in all the contracts as follows:

> "Apart from other important clauses like quality inspection, mode of payment, risk in transit, force majeure, exchange rate variations etc. it is most advisable to include an appropriate arbitration clause in the contract. An arbitration clause is necessary and highly useful for avoiding breach of trade relationships and for amicable and quick settlement of any disputes and differences that may still arise during the course of business dealings. An institutional arbitration clause is preferable to *ad-hoc* arbitration clause. The arbitration clause recommended by the Council for inclusion in all trade contracts with Indian and foreign parties is as under:
>
> > "All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this contract or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties."

1.58 Circulating the Memorandum *vide* letter dated 29.10.1990 to the PSUs, the Ministry of Commerce stated as follows:—

> "In view of the enormous advantages available in the utilisation of the services of the Council, if is requested that all Government Departments, public sector undertakings and other commercial organisations, should make use of the arbitration clause of the Council in their commercial contracts with Indian and foreign parties."

1.59 In spite of the guidelines issued by Government it come to the notice of the Committee while examining some of the Undertakings, that many contracts being entered by PSUs did not contain arbitration clause. IDBI stated that out of 3,962 contracts entered into by the company between 1980-81 to 1991-92, 3,867 contracts did not contain arbitration clause. The number of contracts entered into by FACT from 1980 to May 1992 were 73,416 out of which 67,949 were without arbitration clause. Thus it is noticed that the contracts without arbitration clause were 98% in IDBI and 93% in FACT of the total number of contracts signed.

1.60 Recounting the need for including arbitration clause in all contracts irrespective of the party involved, the Chairman, SCOPE and Secretary, Ministry of Steel stated in evidence:—

"I would put it this way that there are certain obligations on both the parties to fulfil, the public sector undertakings on the one side and the other party whether it is a private party or a PSU on the other side. In a contract both are called upon to fulfil certain obligations on a long term basis. In such a case, arbitration clause should definitely be there to resolve before one resorts to litigation. Then there can be a running dispute arising during the course of the fulfilment of the contract itself which require a resolution.

"For example, I want somebody to construct a very large building on my behalf. The contractor is there and I enter into a contract and it is going to take more or less certain time to get fulfilled, may be two or three years. During the course of the operation of that contract, disputes may arise. Now if litigation is resorted to, the result could be the building will not be constructed because there may be a stay order from the court on this side or on that side and the construction is struck, money that has already been spent is struck and so on. As a result, ultimately, no solution comes out. Therefore, in a case of that nature it would certainly be advisable that you should have an arbitration clause. On the one hand the arbitration can go on and on the other, the work can be continued and that way the obligations would be fulfilled."

1.61 In the course of examination of the subject it came to the notice of the Committee that in spite of arbitration clause having been there in the contract in several disputes involving private parties or individuals, the Public Undertakings either resorted to litigation or allowed the matter to hang fire without referring it to arbitration. About 80 cases of one individual pertaining to MMTC had been hanging fire for years without having been referred to arbitration despite the fact that arbitration clause was incorporated in the agreement and repeated requests were made by the party concerned.

1.62 During evidence of the representatives of ICA, the Committee wanted to know whether the arbitration clause should be deemed to be there if it is not included in the contract for any reason. The Secretary, ICA replied as follows:—

"It is correct that there should be some compulsory provision. After a dispute arises, the party hoping to lose, will never agree to arbitration if it is not included in the contract. We must provide an administrative provision to this effect."

1.63 During the course of evidence of the Secretary, DPE, the Committee drew his attention to the note submitted by the Secretary, Ministry of Commerce for consideration of the Committee which *inter-alia* contained the following suggestions:—

"Even if a contract does not provide for arbitration but the other

party seeks arbitration for resolution of a dispute, the PSU should consider favourably the request for arbitration unless there are compelling reasons, including the safeguarding of the legitimate commercial interests of the PSU, for not accepting the request for arbitration."

1.64 When asked whether he was in agreement with this view, the Secretary, DPE replied emphatically:—

"Yes, absolutely."

1.65 In this connection, the Secretary, DPE had stated during a meeting held on 14.5.1992 as follows:—

"Indeed it is imperative for every public undertaking, while entering into a contract with private party/citizen to incorporate a clause for compulsory arbitration, as has been the mandate just referred to. But, in any given case, where willingly or unwillingly, arbitration clause does not find place in a contract entered into by a public undertaking with a private individual/party/citizen, the same must be read to have been there as a matter of fact and the dispute referred to arbitration; provided of course, the private party/citizen so agrees."

1.66 When the Chairman desired the Secretary, DPE to issue such a guideline to the Public Undertakings the latter stated in the meeting:—

"The instructions to all Public Undertakings to incorporate a clause about reference to arbitration in relation to their contracts with private parties/citizens have already been long issued. But there is nothing wrong to remind them again."

D. Appointment of Arbitrators

1.67 BPE guidelines issued on 4 October, 1977 regarding appointment of arbitrator provided as follows:—

"It has been decided that the parties to dispute need not necessarily appoint an arbitrator from the panel maintained by the Law Ministry. An arbitrator from Government (Central or State) or from any Public Undertaking, who is mutually acceptable, could also be appointed to arbitrate on the disputes."

1.68 About appointment of Government arbitrators in disputes between Government and private parties, the Indian Council of Arbitration stated in their 14th Annual Report as follows:—

"A number of contractors and organisations such as the Central Builders' Association had represented to the Council stating that the general practice in certain Ministries and Departments of Government of appointing arbitrators exclusively from among the officials of the concerned Ministries or Departments for settlement of disputes arising between concerned Ministries and the opposite parties or suppliers, is one-sided and against the spirit of universally accepted

principles of voluntary arbitration. The Council had taken up this matter by its letter dated 10th January, 1977 with the Ministry of Defence, Ministry of Railways, the Ministry of Works and Housing and, the Ministry of Supply and Rehabilitation and suggested that the practice should be discontinued. The Council pointed out that the appointment of Government officials as arbitrators tends to create apprehensions in the minds of the parties who have to submit to arbitration before a Government arbitrator when Government itself is a party. It goes against the fundamental principle of jurisprudence that justice should not only be done but should also appear to be done. The basis of voluntary arbitration is that there should be freedom in the choice of arbitrators to both the parties. The Council, therefore, suggested to the Ministries that the private parties should also have a say in the appointment of arbitrators and that the dispute should be referred to a forum on which the Government department as well as the private parties were agreed. Alternatively, the arbitration clause of the Council may be used or the parties should be able to choose the arbitrators from the panel of arbitrators maintained by a recognised organisation such as the Indian Council of Arbitration.

1.69 Commenting on the system of appointing of arbitrators by Public Undertakings, the Secretary, ICA stated in evidence:—

> "Their system is rather one-sided because they appoint their own officials as arbitrators without any reference to the other side which was not felt to be very just and fair."

The witness went on to explain further:—

> "Sir, most of the public sector undertakings in their arbitration clause have mentioned that the C.M.D of the Corporation will appoint the arbitrators. In fact, we had a detailed correspondence with many of the public sector undertakings to remove the system, we requested them that at least you provide that the officers of some other undertakings be appointed as arbitrators."

1.70 The Committee wanted to know whether such a procedure meant that a person who dealt with the file and may have taken adverse view against a disputant gets appointed arbitrator and judge in the same case. The Secretary, ICA then replied in the affirmative. The witness then made a frank confession as follows:—

> "I want to share frankly with you that the arbitrators, who are appointed, are normally retired persons. They normally have some links with officers. They say, as he is a retired person, let him continue and give him so much fees. There is no criterion for their fees. That is why, delay takes place. In that background, there is no professional approach in the arbitration.

Even the arbitrators are appointed on a per sitting basis. They have no pressure or motive to quickly finish a case."

1.71 On being enquired about the services of arbitrators available with the Council, the witness stated as follows:

"We have a very wide list of 700 persons. There are seven categories. Retired Judges of Supreme Court and High Courts, eminent lawyers, businessmen, engineers and technocrats are there."

He added:

"There are senior officers from public sector in our list. We suggested to them, if you want to appoint a public sector officer, let it be from our panel. For example, if it is a STC matter, let somebody from MMTC or SAIL be chosen, so at least the independence will be there. There are lawyers, businessmen and even public sector expertise in our panel. So, our panel is very wide."

E. Litigation as the last resort

1.72 In the meeting of some Secretaries of the Government of India held on 14.5.1992 in the chamber of the Chairman, Committee on Public Undertakings, while deprecating the attitude on the part of any officer to take shelter behind 'technicality' to resort to litigation the Chairman referred to the Supreme Court Order in Madras Port Trust-vs-Himanshu International (AIR 1979 SC 1144):

"We do not think that this is a fit case where we should proceed to determine whether the claim of the respondent was barred by S.110 of the Madras Port Trust Act (II of 1905). The plea of limitation based on this section is one which the court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. It is high time that Governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens....."

1.73 Driving home the point, the Chairman, SCOPE and Secretary, Ministry of Steel stated in evidence:

"I would agree with you that litigation should absolutely be the last resort, knowing the kind of burdens that are there on the courts and so on. There are so many cases pending and we know that litigation takes a very long time before results come out and in the meantime, things get bogged down. Therefore, all efforts should be made in advance to get the issue resolved at the level of public sector undertakings."

1.74 With a view to settling the disputes between Government Departments including Public Undertakings, the DPE decided to set up a

Permanent Machinery of Arbitrators in that Department in 1988. However, the Secretary, DPE informed in the meeting held on 14.5.1992 that later the Cabinet desired that cases other than taxation need not be referred to the Committee because such cases were already being taken up for decision by way of arbitration as per the instructions of the DPE.

1.75 In pursuance of the Supreme Court Order in the Civil Appeals case between ONGC and the Collector of Central Excise, Bombay, a Committee was constituted in December, 1991 comprising of:

1. Cabinet Secretary.
2. Secretary, Department of Industrial Development.
3. Secretary, Department of Public Enterprises.
4. Secretary, Department of Legal Affairs.
5. Finance Secretary.
6. Secretary of the concerned Ministries/Departments.

for deciding the cases of disputes referred to it by Ministries and Public Undertakings. The Supreme Court has also ordered that only those cases should be referred to the Court which have been cleared by the said committee for such a reference.

1.76 About the role of Government in monitoring the settlement of disputes in Public Undertakings and implementation of guidelines in this regard, the Cabinet Secretary observed in the meeting held on 17.6.1992 in the chamber of Chairman, Committee on Public Undertakings as follows:—

> "If a dispute (based on claim) relates to a Public Undertaking Government Department and private party-unlike a dispute between one Public Undertaking/Government department and another-the Cabinet Secretary does not have to function as a coordinating authority. Though it is a salutary principle to settle any dispute through negotiations, failing which, this dispute may be resolved through arbitration (in order to eliminating court litigation), it is the Secretary of the Bureau of Public Enterprises who may appropriately issue a circular to all PUs to that effect. Cabinet Secretary does not come in the picture; unless, of course, his advice is sought in respect of such a circular."

1.77 Explaining the role of the DPE, as a nodal agency in monitoring the implementation of the guidelines by the Public Undertakings, the Secretary, DPE stated in evidence:

> "So far as monitoring part is concerned, we do not monitor between the private parties and public sector. So far as the implementation of the circular is concerned, which relates to dispute between public sector and public sector, we already have a total of about 18 cases going on in our permanent machinery. And what I am trying to do is that they should not take much time. They initially took much time,

but now we have issued instructions to the Law Officer, who is a Joint Secretary from the Ministry of Law, that we should try to resolve all these cases within six months to a year."

1.78 The Committee noted that in 1975 the Cabinet Secretariat issued directions to the DPE that the directive issued to Public Undertakings regarding settlement of disputes should equally be applicable to banks and insurance companies, etc. The instructions were as follows:

"A directive may be issued to this effect to all Public Sector institutions (including banks and insurance companies as also any other company in which Government has a majority share holding)."

In this context, the Chairman, IDBI suggested in evidence as follows:

"I believe that our courts are burdened with so much work that there will have to be different kinds of machinery for this. For example, in the banking field there is mercantile law where the limitation period comes in. Therefore, we have to have a procedure and it should be a quick one."

PART II

RECOMMENDATIONS/OBSERVATIONS OF THE COMMITTEE

2.1 The Public Sector occupies a key role in the country's strategy of planned economic growth. For efficient and smooth functioning of a Public Undertaking, it is imperative that the enterprise should operate in a peaceful atmosphere of goodwill and cordial relationship and invest the scarce resources in productive activities. Disputes and disagreements, be those between Public Undertakings inter-se, Public Undertakings and Government Departments or Public Undertakings and private parties/ individuals, unless settled amicably and in time, tend to jeopardise the working of the enterprise. It is in this backdrop that wasteful and protracted litigations resulting in unproductive expenditure and wastage of time and energy attains significance.

2.2. The malady of resorting to futile and avoidable litigation by the Public Undertakings has been engaging the attention of the Committee for quite some time. It is in this context that the Committee selected the subject 'Litigations pending for settlement in Public Undertakings' for horizontal study with a view to laying down certain effective guidelines on the subject. Although the process of detailed examination of litigation cases pending in Public Undertakings is still in progress, the Committee felt the urgency to recommend the following guidelines without further loss of time to enable the PSUs to initiate speedy action for eliminating of unnecessary and avoidable litigation.

2.3 On a randum study of information received from Public Undertakings, the Committee are perturbed to find a large number of litigations pending for settlement involving expenditure on fees, etc. and wastage of public time notwithstanding repeated Government instructions to the contrary from time to time. What further agitates the Committee is the number of pending litigations relating to trivial matters or petty claims, some of which have been hanging fire for more than fifteen years. It hardly needs mention that in many such cases money spent on litigation is far in excess of the stakes involved, besides wasting valuable time and energy of the concerned parties as well as the Court.

(Recommendation S.No. 1, paragraphs 2.1—2.3)

2.4 The Committee are distressed to note that as many as 787 cases of litigation were pending in STC out of which the value of the claim in 17 cases was less than Rs. 10,000 and in 74 cases the claim ranged between Rs.10,000 and Rs. 1 lakh. Surprisingly, 188 cases related to pre-1981 period.

2.5 One of the most glittering cases the Committee came across during

examination is that of M/s. Photovision-vs-STC in which the private party had to resort to litigation for recovery of two bank guarantees for Rs. 500 and Rs. 442 from STC. Although the case related to 1977-78, no single attempt was made by the Company to settle the dispute prior to November, 1990. Inspite of a clear direction given by the Board of Directors in their meeting held on 14 September, 1990 to the effect that the Company should review all the pending cases and put up report with recommendation for out-of-court settlement, it is highly disappointing to find that the Company has been dragging its feet in the matter. No effort worth the name was made by the Company to hold negotiations with M/s. Photovision for out-of-court settlement of the case. Equally astonishing is the fact that no progress has been made in the review of other cases pending in the Company for settlement.

2.6 It is frustrating to find that the Chief Executive of a leading trading organisation in the country like STC fumbled and expressed helplessness before the Committee for want of information on a vital aspect of the working of the Corporation. The argument given by the CMD, STC that discussion has to be held between three parties namely trading, law and finance divisions and it is difficult to resolve any dispute till all these three concur is far from convincing. It further dismays the Committee to find that the CMD, STC could not come to a decision by himself considering the merits and demerits of each case. In Committee's view it is only in the event of such disagreement that a CMD being the head of an organisation should not only step in and take an over-all view but should also be instrumental in expeditious disposal of pending claims/disputes. The Committee, however, connot but deprecate such irresponsible and lackadaisical approach on the part of a CMD towards an important matter having much bearing on the efficient functioning of the Company. Taking into consideration the large number of cases which are pending in STC, the Committee recommend that the same should be reviewed immediately and the Ministry should also monitor the same regularly. In all such cases where inordinate delay has been involved due to the negligent attitude of officers including CMD, the responsibility be fixed. The Committee would like to be apprised of the action taken in this regard within a period of one month from the presentation of this Report. They also urge that besides making a conscientious effort for review of all litigation cases as already suggested, effort should also be made for settling these out of court through conciliation/negotiation or arbitration except those for which there are compelling and convincing reasons. They also recommend that a time bound programme for the same should be drawn up.

(Recommendation S.No. 2, paragraphs 2.4—2.6)

2.7 The Committee find that most of the litigation cases in FACT relate to service matters relating to the employees of the Company and industrial disputes. The Committee feel that such cases should have been resolved through an effective grievance redressal machinery on the lines of the Model Grievance Redressal Procedure for staff and officers in the central public sector enterprises formulated by the DPE. The Committee would urge the Public Undertaking to evolve and effective system of redressal of employees' grievances and industrial disputes within a stipulated period in order that it may conduct itself as a model employer and view the grievances of employees with sympathy and understanding. They should also make an earnest effort to see that all disputes are resolved amicably through an internal machinery/forum with a view to see that the employees and Public Undertaking do not take recourse to courts. The Committee would like to place on record their appreciation for the results achieved by FACT in settling of disputes through negotiations.

(Recommendation S.No. 3, paragraph 2.7)

2.8 The Committee note that MMTC has incurred disproportionately large amount of expenditure on some of the court cases. One of the glaring cases is that of MMTC-vs-V.V. Acharya in which despite the fact that the Company had been pursuing since 1966 the matter relating to loan for purchase of trucks in the High Court and the Supreme Court, a recovery of only Rs. 1031.74 was granted against a claim of Rs. 1,10,314.74. Yet in another case of M/s. Wood Stock Engg. Inc-vs-MMTC case, the Company has so far incurred an expenditure of more than Rs. 3 crores. The Committee take a serious view in this regard and are of the opinion that efforts should have been made to settle these cases through negotiation by utilising the services of an arbitration body like Indian Council of Arbitration failing which the matter should have been referred to arbitration through the Council.

(Recommendation S.No. 4, paragraph 2.8)

2.9 IDBI has 76 pending cases of litigation relating to recovery of dues amounting to Rs. 393.31 crores. The Company has so far incurred a total expenditure of Rs. 89,90,251 for litigation since 1980. The Committee express their deep concern over the magnitude of the amount involved in such cases.

(Recommendation S.No. 5, paragraph 2.9)

2.10 Conciliation/negotiation serves as a quick means for sorting out differences or disputes which may arise during the period of implementation of a contract. Besides, cost being nominal or almost nil, settlement of disputes through negotiation help to restore mutual trust and goodwill between the contracting parties. The Committee are pleased to note that nearly 50% of the complaints referred to the Indian Council of Arbitration are sorted out through conciliation to the mutual satisfaction of the parties

concerned. The Chairman, SCOPE and Secretary, Ministry of Steel also remarked that "every Public Sector Undertaking in matters of any dispute where a sister undertaking or any private individual is concerned, should make all efforts initially to get such issues settled through discussion/ negotiation and find outways and means of settling the issue amicably."

2.11 The concept of arbitration is known in this country from time immemortial. In the Panchayat System which existed in the country before the British Judicial System was introduced, all disputes arising between members of the community were—and to certain extent are even now—referred to the Panchayat, where the Panches, decide them. The basic advantages of arbitration are simplicity of procedure, low cost and cordial atmosphere. The arbitral system is preferred to litigation because it not only ensures expeditious disposal but is also helpful in building up cordial trade relations and goodwill.

2.12 It needs no reiteration that money, time and energy spent on litigation is not commensurate with the results. In view of the futility of pursuing litigations, there are no options left, but to make a concerted and wilful effort to liquidate such cases. The Committee recommend that all litigation cases and disputes pending in Public Undertakings should be reviewed with a view to settling them first through negotiation for out-of-court settlement failing which the same should be referred to arbitration. The Committee suggest that Public Undertakings should utilise the services of Indian Council of Arbitration for settling the case through negotiation/ arbitration. They also suggest that the time frame for settling any dispute through negotiation should be fixed as three months and for arbitration the same should be fixed between six months to nine months from the date of receipt of the claim/dispute.

(Recommendation S. No. 6, paragraphs 2.10—2.12)

2.13 The Committee are unhappy to note that inspite of guidelines issued by the BPE as early as in 1975 that all disputes should be resolved amicably by mutual consultation or through arbitration and recourse to litigation should be eliminated, Public Undertakings have been resorting to litigation without arbitration. The Committee deprecate the tendency on the part of Public Undertakings to flout guidelines laid down by Government. The Committee are of the view that the respective administrative Ministries should have monitored the implementation of the Government directives by the Undertakings and taken corrective steps.

(Recommendation S. No. 7, paragraph 2.13)

2.14 The Committee note that the Indian Council of Arbitration (ICA) sponsored and partly funded by the Ministry of Commerce, Government of India, for promoting the use of commercial arbitration has sufficient infrastructure and expertise to cater to the needs of Public Undertakings. Besides being economical the arbitration facilities available with ICA provide institutionalised arbitration which should be preferred to ad-hoc

arbitration. However, the Secretary, ICA stated in evidence: "Presently our set-up is not being fully utilised. This is the paradox. On the one hand there are cases where the courts are full and pending for over 10 years. On the other hand not many cases come to us. Moreover, the expenditure is a mere fraction when compared to that of courts". In Committee's view it is really unfortunate that inspite of the enormous advantages in the utilisation of the services of ICA, the same are not being utilised. They, therefore, recommend that Public Undertakings should gainfully avail of the facility provided by the Council.

(Recommendation S. No. 8, paragraph 2.14)

2.15 The Committee note that the Commerce Secretary was in agreement with them on the issue that Public Undertakings should agree for arbitration in case of a dispute irrespective of the fact whether the dispute was between a Public Undertaking and another, Public Undertaking and Government Department and Public Undertaking on the one side and private party/individual on the other. In a note submitted to the Committee he suggested the following guidelines for settlement of disputes through arbitration between PSUs and private parties (1) the contract should provide for a suitable arbitration clause for the settlement of disputes between the parties unless there are special and substantial reasons for not including such a clause, (2) if the contract provides for arbitration and if the party requests for settlement of a dispute by arbitration, the PSUs should not refuse to enter into arbitration unless there are compelling reasons and (3) even if a contract does not provide for arbitration but the other party seeks arbitration for resolution of a dispute, the PSU should consider favourably the request for arbitration unless there are compelling reasons. The Secretary, DPE had also made the matter sufficiently clear when he stated: "But, in any given case, where willingly or unwillingly, arbitration clause does not find place in a contract entered into by a Public Undertaking with a private individual/party/citizen, the same must be read to have been there as a matter of fact and the disputes referred to arbitration; provided, of course, the private party/citizen so agrees". The views of the Commerce Secretary and the Secretary, DPE were in consonance with the BPE guidelines issued in 1976 that "Public enterprises which enter into commercial and other agreements should make a provision for arbitration by a single arbitrator in their conditions of contract". The Committee are in full agreement with the views expressed by the Secretary, Ministry of Commerce and the Secretary, DPE. They are of the firm opinion that in all future contracts/agreements a clause for arbitration must be included unless there are strong and compelling reasons for not including the same. Besides they also recommend that in all existing contracts/agreements where there is no clause for arbitration, the arbitration clause should be deemed to exist unless the other private party/individual refuses to refer the same to conciliation/negotiation or arbitration. It is also recommended that in all such cases the dispute should be referred to Indian

Council of Arbitration for conciliation/negotiation within a period of one month; failing which the same be referred to arbitration by the Indian Council of Arbitration for making an award within a period of six to nine months unless the contract/agreement expressly prohibits recourse to conciliation or arbitration.

(Recommendation S. No. 9, paragraph 2.15)

2.16 The Committee also regret to note that in spite of arbitration clause having been included in the contract, in some cases Public Undertakings had not acceded to the request of private parties for arbitration, but resorted to litigation. The Committee are of the firm view that in case of a dispute, if the party concerned makes a demand for arbitration, the Public Undertaking should not refuse to enter into arbitration. They also suggest use of arbitration clause recommended by ICA in the contracts entered into by Public Undertakings.

(Recommendation S. No. 10, paragraph 2.16)

2.17 The Committee note with concern that there were instances in some Public Undertakings where persons who had dealt with the case and took adverse view against disputants, were appointed arbitrators in the same case. It is equally unfair to appoint an officer of the same Undertaking as arbitrator. The Committee do not approve of appointment of arbitrators unilaterally, without consulting the other party involved. They feel that it would be to the advantage of the contracting parties if arbitrators are invariably appointed through ICA from the panel maintained by the Council.

(Recommendation S.No. 11, paragraph 2.17)

2.18 The Committee are of the firm view that disputes should be referred to litigation only after other channels like negotiation and arbitration have been exhausted. They desire that the Committee of Secretaries appointed by Government in pursuance of Supreme Court order dated 11.10.1991 for deciding cases of dispute should function as another effective machinery for eliminating recourse to litigation by Public Undertakings.

(Recommendation S. No. 12, paragraph 2.18)

2.19 The Committee note that in 1975 while issuing directives regarding settlement of disputes in Public Undertakings, the Cabinet Secretariat had desired that those directives should also be made applicable to banks and insurance companies. The DPE being the nodal agency for all the Public Sector Undertakings, the Committee desire that the Department should circulate the recommendations contained in this Report to the PSUs and

financial institutions including banks, UTI, etc. for implementation within 15 days of presentation of the Report. The Committee would like to be apprised of the action taken in this regard within one month.

(Recommendation S. No. 13, paragraph 2.19)

NEW DELHI;
August 19, 1992

Sravana 28, 1914 (Saka)

(A.R. ANTULAY)
Chairman,
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