IN THE MATTER OF AN ARBITRATION

UNDER THE BAHAMAS ARBITRATION ACT 2009

SUBJECT TO THE ARBITRATION RULES OF UNCITRAL 2021

BETWEEN: -

THE GOVERNMENT OF THE COMMONWEALTH OF THE BAHAMAS

Claimant

-and-

GRAND BAHAMA PORT AUTHORITY LIMITED

Respondent

PARTIAL FINAL AWARD

Tribunal

Sir Anthony Smellie KCMG KC (Presiding Arbitrator)

Lord Neuberger of Abbotsbury (Co-Arbitrator)

Dame Elizabeth Gloster DBE (Co-Arbitrator)

Tribunal Secretary

Mr Joel Semakula

Date of Award

27 February 2026

Dates of hearing

8th-12th and 15th-19th September 2025

Seat of arbitration

The Commonwealth of the Bahamas

Contents

PARTIAL FINAL AWARD

Introduction

1. This arbitration ("**Arbitration**") arises out of a dispute between the Government of the Commonwealth of The Bahamas (the "**Government**") and Grand Bahama Port Authority Limited (the "**GBPA**"), whose relationship is governed by an agreement, known as the Hawksbill Creek Agreement:

   (a) which was entered into in August 1955 for a term of 99 years (the "**Original HCA**");

   (b) under which the Government leased to the GBPA related to some 50,000 acres of Crown land surrounding and in the vicinity of, together with the seabed underlying, Hawksbill Creek on the Island of Grand Bahama (the "**Leased Land**");

   (c) which contained various obligations on the Government and the GBPA (together the "**Parties**"), including obligations on the GBPA to develop the Port Area;

   (d) which has been amended from time to time (and the current version is referred to herein as "**the HCA**"); and

   (e) whose implementation has resulted in the creation and functioning of the harbour and town of Freeport.

2. The Government began this Arbitration on the grounds that: (i) it had presented a certain account (the "**Account**") to the GBPA, pursuant to clause 1(5)(d) of the HCA; (ii) the GBPA was accordingly liable to pay to the Government the sum of BSD 357.144m within 30 days thereafter; (iii) the GBPA had failed to pay BSD 357.144m or any other sum in respect of its liability; and (iv) the Government

accordingly claims to be entitled to recover BSD 357.144m (or in the alternative some other sum) in this Arbitration.

3. By way of response, the GBPA: (i) denied that it had any liability to the Government in respect of BSD 357.144m or any other sum under clause 1(5)(d) or at all; and (ii) contended by way of counterclaim in this Arbitration that it is entitled to damages and/or declaratory relief arising from the Government's alleged breaches of certain obligations contained in the HCA.

4. The issues raised by the Government's claim and by the GBPA's counterclaim involve points of law and questions of fact, on which the Parties each made written and oral submissions and adduced written and oral evidence during a hearing which took place over ten days beginning on 8 September 2025 (the "**Hearing**").

5. The members of the tribunal appointed to resolve these issues ("**the Tribunal**") wish to record their thanks to the Parties and their respective legal teams for the efficient, effective and constructive way in which the Arbitration was conducted.

Procedural formalities

Jurisdiction

6. The claims and counterclaims in this Arbitration are based on the parties' respective rights under the HCA, which includes clause 3(11), by which it was agreed between the Parties:

> "(11) That all questions or differences whatsoever which may at any time hereafter arise between the parties hereto or their respective representatives touching these presents or the subject matter thereof or arising out of or in relation thereto respectively and whether as to construction or otherwise shall be referred to arbitration pursuant to the provisions of The Arbitration Act and any statutory modification or reenactment thereof for the time being in force."

7. By clause 3(12) of the HCA, it was also agreed between the Parties:

"(12) That this Agreement shall be construed and interpreted according to the laws of the Bahama Islands."

The Parties and their representatives

8. The Claimant in this Arbitration is the Government of the Commonwealth of The Bahamas (i.e. the Government).

9. The Government is represented by Simons Muirhead Burton LLP, and the Government's relevant contact details for the purposes of this Arbitration are as follows:

Simons Muirhead Burton LLP
(Parvais Jabbar, Gordon Clough, and Enfys Jenkins)
87-91 Newman Street, London W1T 3EY
United Kingdom
Tel: +44 (0)20 3206 2700
Email: Parvais.Jabbar@smb.london, Gordon.Clough@smb.london, and Enfys.Jenkins@smb.london

Office of the Attorney General & Ministry of Legal Affairs
(David Higgins)
Paul L. Adderley Building, 18 John F. Kennedy Drive
P.O. Box N-3007, Nassau, N.P,
The Bahamas
Tel: + 1 (242) 502-0400
Email: davidhiggins@bahamas.gov.bs

10. The Respondent is the Grand Bahama Port Authority Limited (i.e. the GBPA), a private company incorporated under the laws of the Commonwealth of The Bahamas, having its registered address as Pioneers Way & East Mall Drive, PO Box F-42666, Grand Bahama Island, The Bahamas.

11. The GBPA is represented by Delaney Partners and by Callenders, and the GBPA's relevant contact details for the purposes of this Arbitration are as follows:

Delaney Partners
(Robert K Adams KC, Edward Marshall II, and R. Samuel Brown)
5th Floor, Lyford Cay House, Western Road, Lyford Cay
P O Box CB-13007, Nassau, The Bahamas
Tel: +1 (242) 702-4500
Email: radams@delaneypartners.com

Callenders
(Frederick RM Smith KC, R. Dawson Malone, and Pearline Ingraham)
Island House, East Atlantic Drive
Freeport, Grand Bahama, The Bahamas
Tel: + 1 (242) 352-7458
Email:fsmith@callenders.net

The initial procedure in the Arbitration

12. This Arbitration was initiated by a Notice of Arbitration ("**NoA**") served on the GBPA by the Government on 3 May 2024.

13. In the NoA, the Government claimed:

a) a declaration that the GBPA has breached clause 1(5)(d) of the HCA;
b) an order that the GBPA pay the Government the sum of BSD 357.144 million or such other sum as the Tribunal finds due under clause 1(5)(d) of the HCA, plus pre-award interest…;
c) an order that the GBPA pay post-award interest …;
d) such further or other relief the Tribunal deems appropriate; and
e) costs.

14. In paragraph 21 of the NoA, the Government appointed Lord Neuberger of Abbotsbury as its party-appointed arbitrator. His relevant contact details are as follows:

> The Rt Hon Lord Neuberger of Abbotsbury
> One Essex Court, Temple, London EC4Y 9AR
> United Kingdom
> Tel: +44 (0)20 7583 2000
> Email: dneuberger@oeclaw.co.uk; teamd@oeclaw.co.uk

15. On 3 June 2024, the GBPA served its "*Response to the Notice of Arbitration and Counterclaims*" ("**Response**") on the Government.

16. By the Response, the GBPA (therein "*the Respondent*") denied any liability to the Government (therein "*the Claimant*"), and requested the Tribunal to:

(a) dismiss the Claimant's claim in its entirety;
(b) declare that the Claimant has violated its obligations to the Respondent under the HCA;
(c) order the Claimant to pay to the Respondent compensatory and such other damages, as appropriate, in respect of the losses suffered as a result of the Claimant's conduct;
(d) order the Claimant to pay all arbitration costs, including the Respondent's representatives' costs and expenses;
(e) order the Claimant to pay interest on the amount of damages and costs; and
(f) order any further and/or additional relief as the Tribunal may deem appropriate.

17. In paragraph 19 of the Response, the GBPA appointed Dame Elizabeth Gloster DBE as its party-appointed arbitrator. Her relevant contact details are as follows:

> The Rt Hon Dame Elizabeth Gloster DBE
> One Essex Court, Temple, London EC4Y 9AR
> United Kingdom
> Tel: +44 (0)20 7583 2000

Email: egloster@oeclaw.co.uk; teamd@oeclaw.co.uk

18. On 7 July 2024, having obtained the confirmation of both Parties that they had no objection to the appointment, Lord Neuberger and Dame Elizabeth appointed Sir Anthony Smellie KCMG KC to chair the Tribunal.

19. Sir Anthony Smellie's relevant contact details are:

Sir Anthony Smellie KCMG KC
Three Verulam Buildings, Gray's Inn,
London WC1R 3NT, United Kingdom
Tel: +44 (0)20 7831 8441
Email: cijudges@gmail.com

20. The Tribunal was accordingly duly constituted on 7 July 2024.

21. On 10 January 2025, having obtained the agreement of the Parties thereto, the Tribunal appointed Mr Joel Semakula as Secretary to the Tribunal.

22. Mr Semakula's relevant contact details are as follows:

Mr Joel Semakula
Landmark Chambers, 180 Fleet Street,
London, EC4A 2HG, United Kingdom
Tel: +44 (0) 20 7430 1221
Email: JSemakula@landmarkchambers.co.uk

The progress of the Arbitration

23. It is unnecessary to set out all the communications between the Tribunal (through Sir Anthony or Mr Semakula) and the Parties during the course of the Arbitration,

and there are set out below the most important events in the course of this Arbitration.

24. A first case management conference was held remotely on 16 August 2024, following which the Tribunal issued a First Procedural Order on 5 September 2024.

25. The following pleadings were served:

(a) the Government's Statement of Claim on 6 September 2024;

(b) the GBPA's Defence and Counterclaim on 14 October 2024 (amended on 30 July 2025, and re-amended on 4 September 2025);

(c) the Government's Reply and Defence to Counterclaim on 3 December 2024 (amended on 28 August 2025);

(d) the GBPA's Rejoinder and Reply to Defence to Counterclaim on 20 January 2025;

(e) the Government's Reply to Defence to Counterclaim on 14 February 2025.

26. Following written submissions from the Parties and a remote oral hearing on 14 February 2025, the Tribunal issued a Ruling on 24 February 2025 rejecting an application by the GBPA for the determination of preliminary issues.

27. On 31 March 2025, the Government issued a Request for Further Information, to which the GBPA responded on 30 April 2025.

28. On 15 April 2025, following each of the parties having made, replied to, and responded to the replies in respect of, Document Production Requests, the Tribunal issued its rulings on those Requests.

29. Following a second case management conference held remotely on 25 July 2025, the Tribunal issued a Second Procedural Order on 13 August 2025.

30. The Hearing took place in The Cove at Atlantis, Nassau, New Providence, on the 8-12 and 15-19 September 2025 (although the Tribunal did not sit on 18 September).

31. In addition to the Tribunal members and the Tribunal Secretary, the following people attended the Hearing:

(a) On behalf of the Government:

Counsel

Harry Matovu KC, Brick Court Chambers

Richard Eschwege KC, Brick Court Chambers

Emilie Gonin, Brick Court Chambers

Danielle Carrington, Brick Court Chambers

Joanna Connolly, Brick Court Chambers

Simons Muirhead Burton LLP

Parvais Jabbar

Gordon Clough

Enfys Jenkins

Shirin Vakilzadeh

Kane Nosworthy

Office of the Attorney General

David Higgins

Representatives of the Government

Ryan Pinder, Attorney General

Jerome Fitzgerald, Senior Policy Advisor, Office of the Prime Minister;

(b) On behalf of the GBPA:

Counsel

Johnathan Adkin KC, Serle Court

Frederick Smith KC, Callenders & Co.

Robert Adams KC, Delaney Partners

Ruth Jordan, Serle Court

Marc Delahanty, Serle Court

Stefano Theodoli- Braschi, Serle Court

Callenders & Co.

Pearline Ingraham-Wood

Ebonesse Bain

Miquel Cleare

GPBA Representatives

Sarah St. George, Co-Chairman

Rupert Hayward, Co-Chairman

Henry St. George, Vice President

Karla Mcintosh, Vice President of Legal Affairs

Ian Rolle, President

Deann Seymour, Chief Financial Officer

Fatima-Zahra Kaboub, Assistant to Sarah St. George.

32. The following witnesses of fact gave evidence at the Hearing:

(a) For the Government

Sir Baltron Bethel

Dr Marcus Bethel

The Attorney General, Mr Ryan Pinder

Mr Peter Hickman

Ms Phylicia Woods Hanna (not cross-examined)

(b) For the GBPA

Mrs Willie Moss

Ms Sarah St George

Mr Rupert Hayward

Mr Steven Siegel

Mr Michael Antoni

Ms Karla McIntosh (not cross-examined).

33. The following expert witnesses and chartered accountants gave evidence at the Hearing:

(a) Mr Michael Pilgrim of FTI Consulting for the Government; and

(b) Mr Mark Taylor of Secretariat Partners UK LLP for the GBPA.

34. By email dated 17 September 2025 the Tribunal gave directions as to the matters in relation to which it took the view that it would be assisted by the Parties' oral submissions ("**the Oral Closings Directions**"). In particular, by paragraphs B1 and B3 of the Oral Closings Directions the Tribunal raised the following questions in relation to the counterclaim:

> "1. To the extent that the matters complained of by GBPA consisted of the enactment of primary legislation, whether it is open to GBPA to claim that they constitute a breach of contract for which damages can be recovered and/or in respect of which GBPA is entitled to a declaration? (The parties are referred, for instance, to Chitty on Contracts paras 14-00 – 14-012 and *Searle v Commonwealth of Australia* [2019] NSWCA 127.)
>
> 2.Whether the breaches complained of, and any damages which could otherwise be claimed by GBPA, are time-barred.
>
> 3.If a right to damages is established in principle, how such damages should be assessed. In light of the time available for oral submissions and the fact that detailed submissions on the figures are better left to PHBs, this aspect should only be dealt with at a high level.

4.Whether the GBPA is entitled to declaratory relief, and if so, what the terms of that relief should be and why."

35. At the end of the Hearing, the Parties agreed with the proposal made by the Tribunal that:

(a) the Parties would provide written Post-Hearing Briefs ("**PHBs**") limited in accordance with written directions to be issued by the Tribunal, as soon as possible;

(b) thereafter the Tribunal would issue a Partial Final Award ("**Partial Award**")

(c) the Parties would thereafter have the opportunity to make submissions on outstanding and consequential matters and costs as directed by the Tribunal when the Partial Award was issued; and

(d) the Tribunal would thereafter issue a Final Award dealing with outstanding matters and costs.

36. By further email dated 24 September 2025, and by reference to the earlier Oral Closings Directions, the Tribunal gave further directions as to the issues which it wished to have addressed in the written PHBs ("**the Written Closing Directions**"). The Written Closing Directions stated, so far as material for present purposes, as follows in relation to the counterclaim:

> "As to the issues in paragraph B.3, the Parties may make concise written submissions, strictly limited to identifying the passages in the evidence which bear on the quantification of any damages, if the Respondent is entitled to damages. At this stage, the Parties should not make submissions as to the quantification of such damages.
>
> The Parties will note that the Tribunal has ruled that certain issues should not be the subject of written submissions "at this stage". That is because the Tribunal considers that at the moment it should consider most of the points of principle which have been raised, and that detailed consideration of other points, which could be costly and time-consuming, should be postponed until the Tribunal has decided whether, and if so how, they should be dealt with."

37. The Parties submitted their respective PHBs on 11 October 2025. Following a direction from the Tribunal a responsive brief on two specific issues was submitted by GBPA on 17 December 2025.

The uncontroversial factual background

The Original HCA

38. The development of Hawksbill Creek as a port and town was a project conceived in the early 1950s, by the late Sir Jack Hayward and two other people, Wallace Groves and Charles Allen, who, after discussions with what was then the Colonial Government of the Bahamas, formed the GBPA for carrying out that project ("the **Project**").

39. To that end, on 4 August 1955, the Acting Governor of The Bahamas, acting on behalf of what was then the Colonial Government, entered into the Original HCA with the GBPA (therein "**the Port Authority**") for a term of 99 years.

40. By clause 1(3)(a) of the Original HCA, the Crown agreed to grant the GBPA conditional purchase leases (the "**Conditional Purchase Leases**") in respect of the Leased Land, subject to the GBPA complying with its obligation, set out in clause 1(1)(a) and (b) of the Original HCA, by 4 August 1958 to dredge a channel and turning basin and construct a wharf (the "**Port Project**") in accordance with the specifications therein set out.

41. By clause 1(3)(b) and (c) of the Original HCA, GBPA agreed to purchase "*from* private *owners*" around 80 acres and up to a further 1,400 acres of land (together the "**Purchased Land**") in the vicinity of Hawksbill Creek from private owners by 4 August 1958.

42. The Leased Land (including the Port Project), the Purchased Land, and any further land purchased by the GBPA on the Island of Grand Bahama, which was declared

to be a part of the Port Area by Order in Council, were referred to collectively in the Original HCA and are hereinafter referred to, as the "**Port Area**".

43. Also in the Original HCA, the GBPA covenanted:

(a) by clause 1(3), to use its best endeavours to develop industries in the Port Area;

(b) by clause 1(4), to administer and control the Port Project;

(c) by clause 1(5)(a) to (c), to provide (a) schools and educational facilities, (b) medical services and facilities, (c) office and residential accommodation for Government employees stationed in the Port Area.

44. Clause 1(5)(c) of the Original HCA provided as follows as far as relevant:

> "The Port Authority hereby covenant with the Government that…they will:
>
> ….
>
> Provide free of rent both living and office accommodations of a standard at least equal to that provided at the date of this Agreement by the Government in the said Out Islands for such officers and employees of the Government as the Government may station in the Port Area for the maintenance of law and order, the administration of justice, the general administration of Government, the collection of Customs Duties and other revenue and the administration of the Customs Department, the administration of the Immigration Department, Post Offices, and for such other purposes as may be mutually agreed upon from time to time between the Government and the Port Authority …."

45. By clause 1(5)(d) of the Original HCA:

> "The Port Authority hereby covenant with the Government that…they will:
>
> ….
>
> Reimburse the Government annually within Thirty days after the presentation of a detailed account of the same by the Government the annual cost to the Government of providing the services and administration activities referred to in paragraph (c) of this subclause plus Twenty-five per centum of such cost (such Twenty-five per centum being deemed to cover Government administrative overheads in New Providence and elsewhere within the Colony) subject to the

following provisos, namely:

(i) That the salaries to be paid by the Government to the Public Officers and employees of the Government carrying out and administering the services referred to in paragraph (c) of this subclause shall be in accordance with the normal scale for Government salaries having regard to the location and the post filled; and

(ii) That the Port Authority shall only be required to reimburse Government to the extent that Customs Duties and emergency taxes received by the Government in respect of goods entered or taken out of bond at the Port Area are less than the amount expended by Government plus the said Twenty-five per centum."

46. Clause 1 of the Original HCA contained a number of other, ancillary obligations on the GBPA.

47. Clause 2 of the Original HCA contained a number of commitments and obligations on the part of the Government.

48. Pursuant to clauses 2(6) to 2(8) of the Original HCA, the Government granted the GBPA the following tax exemptions (the "**Time-Limited Exemptions**") for a period of 30 years, namely:

(a) real property taxes, rates and levies (whether capital or periodic) of any kind;

(b) personal property taxes, rates and capital levies;

(c) capital gains or capital appreciation taxes;

(d) taxes on earnings of the GBPA in the Port Area and outside the Colony (as it then was); and

(e) taxes on any rents or licence fees paid by any lessee or licensee to the GBPA, and on any salaries, bonus, interests or dividends paid by the GBPA or any lessee company of the GBPA or any licensee.

49. Pursuant to clauses 2(9), 2(10), and 2(11) of the Original HCA, the Government granted the GBPA the following tax exemptions for the whole of the period of the HCA:

(a) exemptions from customs duties for materials, supplies and other items and machinery used in the construction and operation of the Port Area;

(b) exemptions from excise taxes, levies or imposts on goods imported into the Port Area, or manufactured, processed, assembled, or warehoused within the Port Area or exported from the Port Area and ships' stores, bunkers, fuel, supplies and other goods connected with the servicing of ships;

(c) exemptions from export taxes or levies on goods manufactured, produced, processed, repaired or serviced by the GBPA or a licensee within the Port Area; and

(d) exemptions from stamp duty or other taxes or levies in respect of any monies remitted by banks in the Port Area to any place outside of the Colony (as it then was) on behalf of the GBPA or any licensee in respect of their businesses within the Port Area.

50. By clauses 2(12) and 2(13) of the Original HCA the Government recognised the Port Area as a private port, which the GBPA had the right to name.

51. By clause 2(14) of the Original HCA, the Government covenanted that GBPA would have responsibility for the administration and control of the Port Area subject only to the "*provisions as regards administration by the Government in this Agreement contained*".

52. In the Original HCA the Government covenanted to grant the GBPA, *inter alia*, the following specific powers and responsibilities in the Port Area:

(a) by clause 2(1), (2) and (3) the power, itself and for **"GBPA Licensees"**, to import free of duty, such materials and supplies as in the GBPA's opinion

are necessary for the Port Area development, for any manufacturing, industrial or other business within the Port Area; or for the operation and functioning of the administrative, educational and other services carried on by the GBPA;

(b) by clause 2(20), the right, itself and for GBPA Licensees, to bring into The Bahamas and employ within the Port Area, such key, trained and/or skilled personnel (along with family and dependents of such personnel) as in the opinion of the GBPA or of any GBPA Licensee are necessary, the Government not to withhold permission for such persons to enter or to compel such persons to leave The Bahamas except on grounds of personal undesirability;

(c) by clause 2(21), the sole right to construct and operate utilities, and the necessary distribution systems in connection therewith, in the Port Area and full discretion as to the rates to charge for such utilities;

(d) by clause 2(22), the sole right in GBPA's absolute discretion to plan, lay out and vary the development of the Port Area, without requiring any building or other permit from the Government;

(e) by clause 2 (23)(a) the right, itself and for GBPA Licensees, to engage in businesses and undertakings in the Port Area without having to obtain any permit or licence from the Government, or any Government department or Government licensing authority, present and future laws and regulations notwithstanding;

(f) by clause 2(24), the right to alter any public road or bridge as in the GBPA's opinion it sees fit to alter, all roads and bridges constructed by GBPA being private roads and bridges;

(g) by clause 3(3), with any GBPA Licensee, the right to bring into the Port Area and employ unskilled workmen or labourers (including their family and

dependents) if required, if they were unable to recruit them from the Port Area, and if the Government has been unable to recruit them within 30 days of a notice from GBPA notifying it of the labourers required, and the Government retaining the right to inquire into the character and antecedents of any such workmen with GBPA to reimburse the Government's costs of carrying out any such inquiries;

(h) by clause 3(7), the power to license any person or entity (the GBPA Licensees) to carry out any lawful business or undertaking in the Port Area on such terms and conditions as the GBPA in its absolute discretion deems fit and proper;

(i) by clause 3(9):

> "Except as in this Agreement otherwise specifically provided, the laws of the Colony from time to time in force shall apply within the Port Area in all respects."

The 1960 Agreement

53. Following the execution of the Original HCA, the GBPA proceeded to carry out the Port Project (which was completed in the stipulated three years) and other works in the Port Area, and Freeport was developed and run as a substantial port and thriving town.

54. The GBPA took the view that the Project would be more profitable, and it appears that the Government took the view that it would be more beneficial to the economy of the Bahamas, if further amenities could be provided in Freeport in order to attract tourists and settlers.

55. To that end, the Government and the GBPA entered into a Supplemental Agreement on 11 July 1960 (the "**1960 Agreement**), under which it was agreed:

(a) by clause 1(1), that the GBPA would construct a "*first-class de luxe hotel ... within the Port Area*";

(b) by clauses 1(2) and 2 that certain variations and amendments would be made to the Original HCA.

56. The provisions of the 1960 Agreement which varied or amended the Original HCA included:

(a) clause 2(1), which extended clause 1(3) of the Original HCA to *"the establishment of other lawful enterprises which shall appear likely to be of economic benefit to [the Bahamas]"*;

(b) clause 2(3), which amended clause 1(5)(a) of the Original HCA, so that the GBPA's educational obligation was limited to providing schools, teachers and facilities to enable free primary education for "*all children living in the Port Area*";

(c) clause 2(4), which amended clause 1(5)(b) of the Original HCA, so that, while the GBPA was obliged to provide free medical services to officers and members of the Bahamas police force stationed within the Port Area, and near-free medical services to "*indigent people*", it was entitled to charge "*reasonable fees*" to other persons resident in Freeport to whom it was obliged to provide medical services;

(d) clause 2(11), which granted an extension of five years to the Time-Limited Exemptions for a further period of five years; and

(e) clause 2(16), which granted to the GBPA the right to license any person or entity to perform any act that the GBPA is obliged or empowered to perform under the HCA as amended.

Events in 1965

57. In 1965, as in previous and subsequent years, there were letters passing between representatives of the Government and the GBPA relating to operational and other

matters. However, in that year, there was for the first time (at least so far as any document the Tribunal has been shown), a letter signed on behalf of the Bahamas Treasurer to the GBPA on 30 October 1965 ("**the 1965 letter**") making reference to clause 1(5)(d).

58. Although this letter was the earliest document from the Government referring to its rights under clause 1(5)(d) which the Tribunal has seen, it began "*With* reference *to my letter of the 18th March 1957*". It then continued "*I have the honour to enclose a Summary of the Administrative Expense incurred in respect of Freeport, Grand Bahama during the year 1964…details of which have already been supplied to you*", and going on to say that "*[a]s the Revenue for 1964 exceeded the expenditure plus 25%, no reimbursement is due [under] Clause 1(5)(d)*".

The 1966 Agreement

59. Thereafter, according to the evidence, it became apparent to the Parties that some of the responsibilities taken on by the GBPA for providing public services were hard to reconcile with its trading activities, and, partly so as to deal with that problem, they entered into a further Supplemental Agreement on 1 March 1966 (the "**1966 Agreement**").

60. In order to give effect to the concern that the GBPA should be relieved of some of its public service responsibilities:

(a) clause 4 of the 1966 Agreement, released the GBPA from its obligation to provide free primary education under clause 1(5)(a) of the Original HCA as amended by clause 2(3) of the 1960 Agreement;

(b) clause 5 of the 1966 Agreement, released the GBPA from its obligation to provide medical services under clause 1(5)(b) of the Original HCA as amended by clause 2(4) of the 1960 Agreement; and

(c) clause 6 of the 1966 Agreement, replaced clause 1(5)(c) of the Original HCA with the following provision:

> "The Port Authority hereby covenant with the Government that…they will:
>
> ….
>
> > Provide and lease to the Government or procure to be so provided and leased any area of vacant land (as that term is hereinafter defined) within the Port Area which the Government may need within the Port Area for government purposes (as that term is hereinafter defined) subject to the area of any parcel of such land and its location being in all the circumstances reasonably related to the needs of the Government.
> >
> > ….
> >
> > For the purposes of this sub-clause:
> >
> > …
> >
> > (B) "government purposes" means any function of government carried out within the Port Area to discharge any of the responsibilities of Government in relation to the Port Area for the maintenance of law and order, the administration of justice and the collection of revenue the provision of housing accommodation for Government officers or the carrying on of the work of any Ministry or Department of Government."

61. Certain other amendments to the Original HCA, some of them directly consequential on the aforesaid provisions were made. These other amendments included the following:

(a) in clause 1(1) and (2), an agreement by the GBPA to construct a large number of houses in the Port Area, including a house, if required, for any teacher;

(b) in clause 1(3) and (4), an agreement by the GBPA to construct (or pay for the construction of) a school, and, if required by the Government a further school, in the Port Area;

(c) in clause 2, an agreement by the GBPA to provide (i) a site in the Port Area on which the Government could construct a medical services building, and (ii) a further source of water for the Port Area; and

(d) in clause 3, the grant to GBPA of the right to promulgate a comprehensive building code, to continue to manage sewage disposal, garbage collection, and ditch drainage, and to safeguard water supplies, to expand and extend water supplies as necessary, to manage pest controls and to manage the Port Area such other matters as it may be necessary for welfare of Port Area.

The "1968 Agreement"

62. In early 1968, the GBPA notified the Government that it was intended that the shares in GBPA would be transferred to a Philippines-based company Benguet Consolidated Incorporated ("**Benguet**"). The notification of this proposed transfer was given to the Government, not least because the Government had a right of pre-emption, and a right to withhold consent to a transfer, in relation to those shares.

63. By letter dated 14 September 1968 (the "**14 September 1968 letter**"), the Government indicated that it would waive its pre-emption rights to purchase shares in the GBPA and consent to the merger, on condition that the GBPA accepted a series of undertakings limiting its rights under the HCA (defined as including the 1955, 1960 and 1966 Agreements) and agreeing that subject to the passage of enabling legislation, the HCA would be amended to transfer to Government the powers necessary for control in relation to immigration and customs, building development approval, licensing rights and utilities.

64. The substance of the proposals in the 14 September 1968 letter which were intended to affect the exercise by the Government and the GBPA of their rights and obligations under the HCA, may be summarised as follows:

(a) under paragraph 4(b), the GBPA was required to consult fully with designated ministries or agencies in relation to "*laying out of new subdivisions [and] the approving of proposals to schedule particular areas for particular types of development*" and "*will in the granting or withholding of permits or approvals for any such development* ***give effect to any recommendations*** *made by that Ministry or agency*" [The letter left out the emphasised words, but they were included in the version published in a contemporaneous press release];

(b) under paragraph 4(c), before altering tariffs or rates for utilities under clause 2(21) of the HCA, the GBPA was required to submit proposals to the appropriate Minister and to obtain his/her prior written approval;

(c) under paragraph 4(e), all licence applications made to the GBPA to carry on manufacturing, industrial or commercial enterprises within the Port Area were first to be referred to the Government, and they could not be granted if the Government objected;

(d) under paragraph 6, Immigration and customs controls within the Port Area were to be standardised and coordinated with those applied elsewhere in The Bahamas.

65. By letter dated 19 September 1968, the GBPA confirmed its acceptance of these conditions, thereby giving rise to the so-called "**1968 Agreement**", and undertook that " *...as from November 1 1968, the various powers of the Grand Bahama Port Authority set out in Paragraph 4 of (the Government's letter of 14 September 1968) will, as an administrative arrangement between us be exercised until further notice in accordance with the stipulations prescribed by the Government in that paragraph*." However, pointing to the strict requirements of the HCA which required the consent of not less than four-fifths of the licensees to amendments of the HCA, the GBPA stipulated that

> "Accordingly, we agree that in due course the proper steps should be taken by the Government and the Port Authority to give legal effect to the above changes by making any necessary amendments to the (HCA) in accordance with the strict requirements of Clause 3(8) of the 1955 Agreement, as amended by Clause 2(18) of the 1966 Agreement. In regard to this, the (GBPA) is prepared to use its best endeavours to secure the consent of not less than four-fifths in number of the licensees at the present time.*"*

66. By letter dated 23 September 1968 the Government, through Sir Baltron Bethel ("**Sir Baltron**", a very senior figure in the Prime Minister's Office), acknowledged the GBPA's letter of 19 September and its undertakings, stating that:

> "The Government, like your Companies, is fully aware of the present provisions of the Hawksbill Creek Agreement whereby four-fifths of the licensees should consent to the amendment of that Agreement. I am directed by the Premier to reiterate that the Grand Bahama Port Authority Limited can now conclude its negotiations with Benguet Consolidated Incorporation subject to the terms and conditions set out in my letter of September 14".

67. The merger and share exchange with Benguet then proceeded, and the transfer of the shares in GBPA to Benguet took place in about November 1968, and the Government was allocated the stake **("the Stake")**.

68. It is clear that, for many years thereafter, the parties regarded the 1968 Agreement as binding. Thus, an internal GBPA memorandum of 4 September 1970 recorded the effect of the 1968 Agreement as being that "*where the Government wished the Port Authority to exercise its discretion in a particular manner, the Port Authority would be prepared to conform*". And, in a letter to the Government on 17 February 1982, Edward St George indicated that the GBPA was bound by paragraph 4 of the Conditions, being part of what he referred to as "*the agreement reached between Government and The Grand Bahamas Port Authority on 14th September 1968*". Three years later in relation to the same paragraph he wrote on 14 September 1968 that it was "*perfectly clear that [the GBPA] has no intention of defaulting on its agreement*".

69. However, when considering the argument that the 1968 Agreement was effective, Adams J held that the correspondence in 1968 did not mature into a formal agreement presumably because it was too much effort to obtain the contractually required agreement of four-fifths of the Port Area licensees, and that "*such informal and inconclusive correspondence has no legal effect*": see *Shangrila (1982) Ltd v Grand Bahama Port Authority Ltd* BS 1984 SC 23 ("***Shangrila***"), at p 10.

70. Nonetheless, even after that decision, the parties made it clear to each other both by their words and by their actions that they were proceeding on the basis that the 1968 Agreement was effective.

Subsequent corporate changes

71. In 1972, a Panamanian company, Intercontinental Diversified Corp ("**IDC Panama**") was formed, and it acquired various assets from Benguet, including the shares in the GBPA, and the Government gave up the Stake for BSD 8.7m.

72. In or about 1974, IDC Panama reorganised its subsidiaries and their holdings, as result of which the GBPA's assets were transferred to Grand Bahama Development Company Ltd ("**Devco**"), which was also a subsidiary of IDC Panama.

73. In or about 1984, IDC Panama was wound up and its assets (including the shares in GBPA and in Devco) were transferred to a Cayman Islands company, Intercontinental Diversified Corp ("**IDC**"), with the Hayward and St George families apparently still retaining control.

74. In addition to the GBPA and Devco, other companies (the "**Other Companies**") were created as subsidiaries of IDC from time to time, and some of those Other Companies had interests in or rights over the Port Area, but for present purposes, the summary in the preceding four paragraphs suffices.

75. From about 1978, it appears that Sir Jack Hayward and Edward St George, who had been chairman of the GBPA since 1976, became the two individuals who between

them effectively owned and controlled IDC Panama, and the evidence was that by 1981 they had acquired all (or at any rate most) of its issued shares in that company.

76. The Hayward and St George families are still very much involved with, and are apparently in control of, IDC and the GBPA. Sarah St George, who is the daughter of Edward St George, is co-chairman of the GBPA, together with Rupert Hayward ("**Mr Hayward**"), who is the grandson of Sir Jack Hayward, and who is also a director of all or many of the Other Companies.

The Bahamas achieves independence

77. Meanwhile, in 1973, the Commonwealth of The Bahamas achieved independence and ceased to be a colony of the United Kingdom.

Events between 1990 and 2003

78. The Time-Limited Exemptions, as extended by the 1960 Agreement, expired on 4 August 1990, and they were extended with retrospective effect from 4 August 1990 until 4 August 1993 by the Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) (Extension of Tax Exemption Period) Act (the "**1992 Act**").

79. On 30 July 1993, the Government introduced the Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) (Extension of Tax Exemption Period) Act 1993, (the "**1993 Act**"), with a view to extending further the Time-Limited Exemptions until 4 August 2015.

80. Thereafter, there was a further agreement made on 4 April 1994 (the "**1994 Agreement**", although it is sometimes referred to as the "1993 Agreement"), between the Government, GBPA, and Devco.

81. The preamble to the 1994 Agreement sets out the facts that:

(a) under the Original HCA, the 1960 Agreement and the 1966 Agreement, the GBPA enjoyed the Time-Limited Exemptions for a period of 35 years;

(b) that period had been extended by the 1992 Act; and

(c) the Government was satisfied that that period should be extended by a further 22 years.

82. The 1994 Agreement contained the following obligations, *inter alia*:

(a) by clause 1, the GBPA and Devco covenanted, subject to force majeure etc, "*jointly and severally [to] carry out … in an efficient diligent and timely manner the several works and undertakings set out in the Schedule to this Agreement*";

(b) by clause 2, agreement that until 4th August 2025 "*no real property taxes or rates and no real property levies … of any kind shall be levied, charged or collected… within the Port Area or upon or against any land … within the Part Area*"; and

(c) by clause 3, a stipulation that if the GBPA failed to comply with any obligation under clause 1 (after having been given notice and a requirement to remedy by the Government), the exemption granted under clause 2 should "*cease*".

83. The Schedule to the 1994 Agreement included the following obligations on the GBPA (and Devco):

(a) by paragraph 1, to build a "centre for the administration of justice";

(b) by paragraph 2, to make two substantial payments in 1994 towards the construction of two schools;

(c) by paragraph 3:

> "[To] Make an annual payment to the Treasurer on or before July 1st of each year for the purpose of defraying the administrative expenses incurred by the Government in the Port Area of the sum of Five

hundred thousand dollars for a period of five years and to carry out with the Government a review in the fifth year of this undertaking";

(d) by paragraphs 4 and 5, to fund the construction of a library and a teaching centre;

(e) by paragraphs 6, 7, and 10, to construct a sports facility, a food market, and beachfront cottages;

(f) by paragraphs 8 and 15, to upgrade the water system, and assess water allocation;

(g) by paragraph 9, to *"promote home porting and container port facility"*;

(h) by paragraphs 12 and 21, to donate land for a hospital and for police headquarters;

(i) by paragraphs 11, 13, 14, 16, 17, 18, 19 and 20, to assist in creating local government, to promote a university, address erosion, to "*introduce additional environmental frameworks*", to update a Master Land Use Plan, to promote Grand Bahama internationally, to "*upgrade Freeport into a garden city*", and to maintain Queen's Highway.

84. The obligation to pay BSD 500,000 for five years under paragraph 3 of the Schedule to the 1994 Agreement ("**Paragraph 3**") was complied with by the GBPA, albeit that at least some of the payments were made by Devco. The payments were made in July of each year between and including 1996 and 2000 under cover of a letter from GBPA which on four occasions referred to the BSD 500,000 being "*the annual contribution under the amended terms of the Hawksbill Creek Agreement*". The receipt from Government in 1998 referred to the payment having been made under the "*amended*" HCA, and in 1997 and 2000 referred to the payment being made under the HCA.

85. In the letter accompanying the payment in July 2000, the GBPA wrote saying that it was "*final contribution under the amended terms of the Hawksbill Creek Agreement*" and that *"[a]ccording to the Agreement, this commitment should be reviewed this year. I will wait to hear from you".* The Government provided a short acknowledgment of the contribution in August 2000. More than twenty months later, on 16 May 2002, the Government started to implement the review provisions in Paragraph 3 (the "**Review**") in these terms:

> "I am directed to refer to your letter dated 7th July 2000, at which time you enclosed a cheque for the final contribution under the amended terms of the Hawksbill Creek Agreement.
>
> It is the intention of the Government that the provision of Section 3 of the amended Agreement be renewed along similar terms except that the annual contribution to the Treasurer should be one million dollars ($1,000,000.00) for another five year period with effect from July 2001.
>
> We look forward to receiving your confirmation to this figure, so that the matter may be concluded."

86. According to a letter sent on behalf of the GBPA by its lawyers, Callenders & Co, on 13 January 2003, the GBPA "*declined to agree to pay $1,000,000 per annum … and instead proposed (in accordance with the 1993 Agreement) that the process of 'review' be undertaken*". This letter went on to record that there had been a meeting on 19 August 2002 between representatives of the Government and of the GBPA, at which the Government representatives contended that the payment under the 1994 Agreement should continue (apparently at BSD 500,000 per annum), and the representatives of the GBPA had made it clear that its case was that the GBPA should not be required to make any further annual contributions, in light of the substantial investments in and contributions towards Freeport which it had already made. The 13 January 2003 letter then explained that its purpose was to set out in some detail the GBPA's case as had been promised at that meeting. Having set out the expenditure incurred in the Port Area by GBPA, the 13 January 2003 letter invited the Government "*to withdraw its request to the [GBPA] that it should continue any further to the defrayment of administrative expenses by the Government in the Port Area*".

87. Nothing further appears to have happened in relation to the Review, although there were records of meetings and correspondence passing between representatives of the parties discussing issues relating to the Port Area. For instance, although there is a record of a meeting on 31 January 2003 attended by very senior members of the Government (including the Prime Minister, senior cabinet Ministers, two Finance Ministers and the Attorney General) and very senior members of the GBPA board (including the co-chairs, Mr Edward St George and Sir Jack Hayward) where a number of issues were discussed, there was no mention either expressly or impliedly of any actual or potential liability of the GBPA under clause 1(5)(d) of the HCA ("**clause 1(5)(d)**") or Paragraph 3.

88. It seems clear that some of the works which the GBPA agreed to carry out under the 1994 Agreement were not carried out as they should have been, as evidenced for instance by a statement by Ms St George at a meeting on 27 January 2016 that "*[f]rom the family perspective, the 1993 commitments were partially fulfilled*", as well as clearly set out in the evidence of Sir Baltron B. However, there has been no suggestion that the Government contemplated invoking, let alone that it sought to invoke, its rights under clause 3 of that agreement.

Events in 2015 and 2016

89. Following a request by the GBPA for an extension of the Time-Limited Exemptions, the Government appointed a committee, the Hawksbill Creek Agreement Review Committee ("**HCARC**"), in March 2015 to conduct a review, and to make recommendations, as to the GBPA's tax exemptions and other measures to promote economic growth in Freeport. From mid-March 2015, it appears that the HCARC had meetings with representatives of the GBPA, most notably Ms St George, and the records of those meetings suggest that much of the discussions concentrated on the current activities in the Port Area, the income generated, and the expenditure incurred, by the GBPA's activities, and how best to develop and improve Freeport. However, a letter from Ms St George to Dr Marcus Bethel, who chaired the HCARC, asking for details of the "*deficit of $50Million in respect of its expenditure*

on Grand Bahama", and requesting sight of the report from McKinsey & Co, who had apparently made the assessment.

90. The HCARC published its report on 22 June 2015 (the "**2015 Report**"), and it included a recommendation that the Time-Limited Exemptions be extended for a further 20 years, and that a long-term economic development plan, with appropriate mechanisms, should be put in place. The 2015 report recorded that "*the Government runs a deficit on GBI that is greater than that of The Bahamas generally*", but that there was disagreement between the Government and the GBPA as to whether "*Freeport is a net contributor to the Public Treasury*". Immediately after, under the heading "*GBPA is required to reimburse the Government under certain circumstances*", the 2015 Report set out clause 1(5)(d), and stated that:

> "[I]t may be that GBPA could be liable to reimburse the Government for such deficit. However, as stated above, further analysis would need to be done to determine the extent of any deficit. Moreover, legal considerations such as acquiescence, and statute of limitation would need to be taken into account before arriving at a definitive position."

91. The Time-Limited Exemptions were thereafter extended:

(a) on 4 August 2015, for a period of six months by the Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) (Extension of Tax Exemption Period) (Amendment) Act 2015; and

(b) on 4 February 2016, for a further period of three months by the Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) (Extension of Tax Exemption Period) (Amendment) Act 2016.

92. The HCARC seems to have been inactive for the next few months. However, during the first four months of 2016, members of the HCARC (including in particular Sir Baltron) had meetings from time to time with representatives of the GBPA (and in particular Ms St George), to discuss various aspects of the HCA, GBPA itself, and the GBPA's activities in and around the Port. These topics included the building work done by the GBPA, the shareholdings in the GBPA, the GBPA's wish for a

further extension of the Time-Limited Exemptions, the possibility of a sale of GBPA's leasehold interests, and a number of other topics. It was envisaged that the negotiations would result in a Memorandum of Understanding ("**MoU**").

93. These meetings sometimes were lengthy and involved quite detailed discussions about various issues including financial matters. However, relatively limited attention was accorded to issues relating to the annual payment which GBPA was obliged to make under clause 1(5)(d) and/or Paragraph 3. At a meeting on 20 January 2016, Ms St George raised and challenged the alleged $50 million deficit. On occasions when Ms St George or others on behalf of the GBPA objected to the possibility of there being payments due from the GBPA to the Government, Sir Baltron's line was that, as a matter of law, it needed to be sorted out.

94. There was a conference call on 29 January 2016, between Sir Baltron, and Ms St George and Mr Hayward. A note of this call recorded that there was discussion "*with regards to the suggestion of some sort of claim, or netting*" and as to Ms St George that "*she understood the concept of what the Government spends and what Freeport generates and there may be a way of bringing it more up to date*". Sir Baltron said in his evidence that this conversation included references to clause 1(5) of the HCA ("**clause 1(5)**"), which he described as including "*a legal requirement that needs to be done*", whereas Ms St George referred to it as an "*old clause*".

95. After various meetings, at which some reference may have been made to the GBPA's liability to make payments to the Government, Ms St George wrote a long (9-page) letter on 7 April 2016 to Sir Baltron, discussing various issues, including the statement that "*Clause 1(5) which speaks to this issue of audited accounts is arcane and inequitable in light of the many changes since 1955 and 1965*", and making the point that Freeport was no different from other places in the Bahamas, so far as running a deficit was concerned.

96. On 14 April 2016, there was a meeting at the Ritz Hotel, London to discuss the content and the drafting of what became a memorandum of understanding (the "**2016 MoU**"). At that meeting, Ms St George was recorded as saying words to the

effect that "*A deficit bill has never, in 60 years, been presented to the Port Authority. For the Government to attempt to do so now would open a Pandora's Box*;… *Clause 1(5) which speaks to this issue of audited accounts is arcane and inequitable in light of the many changes since 1955 and 1965*".

97. According to Sir Baltron, the Attorney General "*expressly countered that the* Government's *view was that that clause 1(5) of the HCA was enforceable*". The Attorney General was reported as explaining to Ms St George that "*under that clause" [namely, clause 1(5)(d)] it would be GBPA paying the Government*" and "*we ought to be seen to be going through that exercise of whether there is/is not a claim*". He is also recorded as saying that "*the HCA has obligations for the GBPA and Gov [sic] and that if there is a shortfall, the GBPA has to be reimburse Gov [sic]*". He also apparently proposed a form of words in relation to clause 1(5) which was in due course inserted into the 2016 MoU.

98. Meanwhile, Sir Baltron explained that Pannell, Kerr, Foster ("**PKF**") were instructed "*to determine the revenues versus the expenditures of the Government" and that "the purpose of the exercise was to determine whether the GBPA was liable to reimburse the Government under Clause 1(5)(d)*". In accordance with those instructions, PKF prepared a report which was titled "*Compilation of revenue & Expenses of the Port Authority 2011-2014 (unaudited*)" (the "**PKF Report**") which was presented to the Government on or about 19 April 2016.

99. In the introductory section of PKF Report, it was stated that PKF had "*compile[d] unaudited abridged financial statements (statement of revenue and expenses) in accordance with the HCA for the fiscal years 2011 to 2014*" *with "the objective … to compare the income generated from the Part [sic] Area to the Government…with the expenses incurred by the Government in administering the Port Area in accordance with Section 5(c) & 5(d) [sic] of the HCA and amendments thereto*". The resultant figures suggested that 125% of the Expenses exceeded the revenue in respect of the Port Area in a sum between BSD 150-160m for each financial year ("**Year**") 2011, 2012 and 2013, and by more than BSD 170m for the Year 2014.

100. At a meeting of the HCARC (which was not attended by any representative of the GBPA) on 22 April 2016, Sir Baltron reported that the meetings which had taken place with representatives of the GBPA had been "*productive*" and that "*the relevant MoUs are in the process of being finalized*". It appears that Sir Baltron took the meeting through the PKF Report, and there was discussion as to the reasonableness of certain assumptions made by PKF. Dr Bethel said that it was "*now up to the Government to make a decision regarding the presentation of the Detailed Accounts and concomitant invoices for the Years 2011-2014 to the [GBPA]*".

101. It appears that there was still some fairly hard bargaining between the Government and the GBPA, and a note prepared on 25 April records that there was a "*very long conference last night*" and a five-hour discussion that day, both involving Sir Baltron and Ms St George (and others). There was apparently some talk about what, if anything, the Government was going to seek as "*the claims*", with Ms St George referring to "*rumours*" that the Government might be seeking BSD 200m which, she described as "*a hostile exercise*". She was told these were only "*rumours*".

102. The Prime Minister joined this meeting for the last hour. Ms St George mentioned the possible BSD 200m claim to him, and he said that he "*wanted to bring resolution*" and that "*we all need to be sensible*". He is then recorded as saying that "*Once you can see that there is no threat for GBPA as while I'm sitting here no one in this side will cause you any harm. Whatever the issues are that separate us, I want everyone to look at the big picture.*"

103. Thereafter, on 26 April 2016, the Government, the GBPA, Devco, and two other companies, Freeport Harbour Company Ltd (the operator of the harbour area, as a licensee of the GBPA) and Freeport Commercial and Industrial Limited (the owner of over 3,000 acres of development land in Freeport) entered into a memorandum of understanding (viz. the 2016 MoU– see above at paragraph 96), under which it was agreed that various steps would be taken to increase the Government's involvement in the GBPA and to improve the management of the Port Area and the relationship between the parties to the 2016 MoU, and the GBPA agreed (*inter alia*) to use best endeavours to grant the Government, for consideration, an option to

purchase equity in a newly formed entity which would hold IDC's interest in undeveloped land of FCI and in Devco, and that the Government could appoint two directors of the GBPA.

104. In particular, by clause 1.9 of the 2016 MoU, the GBPA agreed:

(a) to maintain adequate working capital to "*deliver on its mandate under the HCA*";

(b) to "*address questions raised by the Government in relation to clause 1(5) of the HCA as soon as reasonably practical, and agree to work… with the Government to wholly resolve such questions*"; and

(c) "*subject to all questions raised by the Government in relation to clause 1(5) of the HCA being resolved, [to] use its best endeavours to address questions about GBPA's capital position*".

105. Thereafter, on 1 May 2016, there was a meeting attended by the Prime Minister, Sir Baltron and Ms St George which included discussions about a claim by the Government against the GBPA. Reference was made by Sir Baltron to a "*'non-fighting'/amicable approach*", and the Prime Minister said that "*politically he doesn't want this to get out of hand, and he just wants some things to be done for the island*", and, later, "*we need to put this behind us*".

106. On the same day, the Government sent a copy of the PKF Report to the GBPA, who instructed KPMG to review the PKF Report. KPMG provided that review to the GBPA in the form of letter dated 31 May 2016 (the "**KPMG Review**"). According to KPMG, far from there being a deficit (at least in the Years 2013 and 2014), the Government actually had a small surplus.

107. The following day, 1 June 2016, the GBPA, through Ms St George, provided its response to the PKF Report to the Government, through Sir Baltron,. The 1 June

letter included the KPMG Review as an attachment and briefly explained why the GBPA considered that the KPMG approach was correct. It then stated that:

> "In 1993 … the Government and the GBPA entered into a new agreement … ("the 1993 Agreement"). In paragraph 3 of the Schedule of the 1993 Agreement, GBPA undertook to "make an annual payment to the Treasurer on or before July 1st of each year for the purpose of defraying the administrative expenses incurred by the Government in the Port Area" and "to carry out with the Government a review in the fifth year of this undertaking". This undertaking would have been pointless if the obligation under clause 1(5)(d) of the HCA was considered by the parties to be operative."

The 1 June letter then set out the fact that the payments under Paragraph 3 had all been made and that there had been negotiations for a review in 2002/3 and attached all the correspondence relating to those payments and those negotiations.

108. There appears to have been a detailed discussion between Sir Baltron and Ms St George the following day (with the Attorney General briefly attending). However, nothing of relevance for present purposes appears to have been said. All that seems to have been agreed was that the question of what if any payments were due to the Government needed to be sorted out amicably and quickly.

109. On 15 and 16 June 2016, there were emails about the GBPA's projected capital expenditure. On 15 June Ms St George wrote to Sir Baltron:

> "If it is still the position of the Government that hundreds of millions of dollars are owed to it by the GBPA under clause 1(5)(d) of the HCA, you will no doubt appreciate that the GBPA's position must be that any undertakings to commit resources to social and infrastructural obligations ought to be deferred, until there is a resolution of these questions."

The following day she wrote saying that she understood that the Government "*had in fact activated the reimbursement clause of the HCA*", which was "*totally contrary to the discussions which I had with the Prime Minister on this matter*". Sir Baltron responded saying that she "*should not be distracted by newspaper reports*" and should "*continue your discussions and negotiations with the Prime Minister*".

110. This led to Ms St George sending an email saying on 17 June that she was "*comforted*" by Sir Baltron's email, and that she had been negotiating "*in good faith*" with Sir Baltron and the Prime Minister. In that email she also agreed to provide the Government with a draft list of social and infrastructural improvements which GBPA would carry out, "*subject to … All issues relating to clause 1(5) of the HCA being resolved*", and subject also to the approval of the board of directors of the GBPA.

111. On 26 August 2016, the Government enacted the Grand Bahama (Port Area) Investment Incentives Act, which extended the Time-Limited Exemptions until 4 May 2036.

Events since 2016

112. Following the election of a new government in September 2021, there were meetings between representatives of the Government and of the GBPA regarding the HCA and the MoU. Following those discussions, the Government instructed PricewaterhouseCoopers ("**PwC**") to prepare a report identifying how much, if anything, was due from the GBPA pursuant to clause 1(5)(d) in respect of the five Years from 2018 to 2022.

113. On 26 March 2024, PwC produced its report (the **PwC Report**") which, concluded in a *"Summary of Costs Reimbursable to GoB"* that "*the total costs reimbursable to the Government for the five-year period, inclusive of the 25% mark-up, amounts to $357.1m"* consisting of BSD 30.666m for 2018, BSD 88.773m for 2019, BSD 68.326m for 2020, BSD 85.175m for 2021, and BSD 84.204m for 2022, totalling BSD 357.144m.

114. On 26 March 2024, the Government sent a letter to the GBPA enclosing the PwC Report, and demanding payment of BSD 357.144 million within 30 days purportedly pursuant to clause 1(5)(d) in respect of the Years 2018-2022. This was apparently the first demand (or assertion that anything was owing) pursuant to clause 1(5)(d) since the 1965 letter.

115. The GBPA has not made the payment of BSD 357.144 million or of any other sum to the Government in respect of Years 2018-2022 under clause 1(5)(d) or under any other provision of the HCA.

Other legislative changes

116. Over the seventy years since the Original HCA was entered into, there have been several pieces of legislation which have had an impact on the running of the Port Area.

117. In November 1967, the previous Immigration legislation was repealed and replaced by the Immigration Act 1967 ("**IA 1967**"), which applied in the Port Area.

118. In 1970, the Immigration (Special Provisions) Act 1970 ("**IA 1970**") was enacted, and, in summary, effectively nullified any contractual provision which had the effect of committing the Government to allow immigration into The Bahamas. The Government relied on the 1970 Act to control immigration into the Port Area.

119. In 1981, the Immovable Property (Acquisition by Foreign Persons) Act 1981 ("**IPA 1981**") came into force, and it required non-Bahamian persons to obtain a permit from the Foreign Investment Board if they wished to acquire land, whether directly or by way of a trustee. The 1981 Act was enforced by the Government within the Port Area between 1981 and 1993.

120. In or around 1993, the 1981 Act was repealed and replaced by the International Persons Landholding Act ("**IPLA 1993**") which requires non-Bahamians to register with the Investments Board if they wish to acquire land of less than 2 acres, and to apply to the Investments Board for a permit if they wish to acquire land of more than 2 acres. The Act has been enforced in the Port Area since it came into force.

121. In 1993, the Government established the Bahamas Investment Authority ("**BIA**") and required any non-Bahamian investor wishing to invest in The Bahamas, to apply through the BIA for approval by the National Economic Council ("**NEC**"). As a

result, any non-Bahamian wishing to obtain a licence from the GBPA has since 1993 been required first to apply through the BIA for NEC approval.

122. Also in 1993, the Government established the Bahamas Environmental Science and Technology Commission ("**BEST Commission**"), and between 1993 and 2020 the approval of the BEST Commission was required in respect of proposed investments by non-Bahamian investors in the Port Area that might have an impact on the environment.

123. In 2015, the Electricity Act 2015 ("**EA 2015**") established the Utilities Regulation and Competition Authority ("**URCA**") as the regulator for all utilities in The Bahamas, including the Port Area. The 2015 Act was repealed and replaced by the Electricity Act 2024 ("**EA 2024**"), which retained URCA's power to regulate utilities in The Bahamas, including the Port Area.

124. In September 2019, the Bahamas suffered severe damage as a result of Hurricane Dorian.

125. At the end of that year, the Environmental Planning and Protection Act 2019 (the "**EPP Act"**) was enacted: it was concerned with protecting the environment, but it was not prompted by the hurricane as it had already been substantially drafted by September 2019.

126. In 2020 the BEST Commission was replaced by the Department of Environmental Planning and Protection ("**DEPP**"), whose approval has been required since 2020 to "*any development that proposes a man-made change to the environment or any ecosystem whether for business, sports or residential purposes, including a physical project, plan, program or policy of the private sector, government or any other entity that has not yet received final approval from all the relevant agency*."

The Government's Claim: Introductory

127. The Government's basic claim is for a substantial sum, namely BSD 357.144m, which is said to be the sum which represents an assessment of the amount due in accordance with the provisions of clause 1(5)(d) in respect of the five Years 2018-2022.

128. If (which the GBPA denies) the Government is entitled to rely on clause 1(5)(d), the GBPA contends that:

(a) on the true construction of clause 1(5)(d), the Government is only entitled to a payment in respect of a Year if the "*detailed account*" (i.e. the Account) in respect of that Year is rendered to the GBPA by the end of the following Year; (this may in fact require the Account to be rendered 30 days before the end of the following Year, but that qualification will be taken as implied in any further reference to the end of the following Year);

(b) the "*annual cost to the Government*" (the "**annual cost**") referred to in clause 1(5)(d), should not be assessed, as was done in the PwC Report, by reference to the gross cost, but to the net cost;

(c) the PwC Report did not satisfy clause 1(5)(d) because it was not signed by the Treasurer of the Bahamas ("**the Treasurer**"); and

(d) the PwC Report contains a number of significant errors, so that it cannot be characterised as a valid "*detailed account*" for the purposes of clause 1(5)(d).

129. However, the GBPA contends that clause 1(5)(d) is no longer effective and therefore the GBPA has no liability to the Government for any payment as:

(a) clause 1(5)(d) was replaced by Paragraph 3;

(b) nothing has happened since 1994 to justify the contention that clause 1(5)(d) has somehow revived;

(c) the review provisions in Paragraph 3 have not been implemented and therefore nothing can be owing in respect of any Year since 1999, and this self-evidently includes the Years 2018-2022.

130. A further point was raised by the Government, namely, if Paragraph 3 is still effective:

> "Whether the review provisions in Paragraph 3 can now be implemented, and if so to what extent, should not be determined in this arbitration, but, if it can be, the provisions cannot be implemented."

131. The GBPA's counterclaim, in summary, involves a claim for substantial damages for losses and for declaratory relief in respect of various acts or omissions on the part of the Government, which the GBPA alleges amounted to breaches of the HCA. The GBPA accepts that the limitation period of 6 years applies to these contractual claims, and so, in its Re-Amended Defence and Counterclaim at paragraph 243, it accepts that it can claim only for losses from 5 May 2018. However, the GBPA asserts, nonetheless, that it can rely on alleged breaches of the HCA before 5 May 2018 on the basis that those breaches, or at least some of them, are '*continuing*'. We address GBPA's counterclaim below after having dealt with the issues arising on the Government's claim.

132. Before turning to the various issues, it is right to mention some issues which can be disposed of. In its written opening submissions, the GBPA developed arguments based on Act of God, Force Majeure, lack of good faith, and derogation from grant. These arguments were hardly or not at all pursued in the GBPA's oral opening submissions or thereafter.

133. As the Tribunal made clear during the hearing in relation to the argument based on good faith, we consider that the GBPA was well-advised not to pursue these issues. In that connection, we should record that (i) no finding of bad faith was made out against the Government, and (ii) (a) while Act of God, Force Majeure, and derogation from grant are, unlike lack of good faith, well-established and clear principles, there was no basis, in the Tribunal's view, for either party relying on any

of those principles in this arbitration, and (b) in any event they would have added nothing to the GBPA's case based on the terms of the HCA.

134. We now turn to the Government's claim. The Tribunal will deal with the issues to which it gives rise in the same order in which they are set out in paragraphs 128 to 130 above. It is true that, if we were to decide that the GBPA was right on certain issues, then other issues would be academic, and likewise, if the Government were right on certain issues, then other issues would be academic. However, given that all the issues were fully argued, we think it is right to deal with all the issues which involve points of principle – and to do so, at least roughly, in the same order in which they were developed by the Parties in their comprehensive arguments.

The Government's Claim: (1) Could the Government be paid under clause 1(5)(d) for all five years 2018-22?

135. The Government's case is that in 2024, it was entitled under clause 1(5)(d) to demand payment in respect of the annual account for at least the preceding six Years on the ground that, in respect of each such year:

(a) there is no time limit in clause 1(5)(d) within which an Account has to be presented; or alternatively

(b) if there is a time limit as the GBPA argues;

i. time is not of the essence of that time limit and it has never been made of the essence; or

ii. there is a six-year limitation period in respect of that time limit.

136. By contrast, the GBPA's case is that on the true construction of clause 1(5)(d):

(a) the use of the word "annually" in the first line means that, if the Government wishes to recover a payment in relation to its annual cost in respect of any

Year, the Account for that year must be provided during the following Year; or alternatively

(b) there is an implied term that the Account must be provided within a reasonable time;

and so, subject to GBPA's other arguments, the Government can only claim in respect of 2022.

137. The questions raised on this issue are questions of contractual interpretation, and therefore oral or other documentary evidence is unlikely to be of assistance. Given that it is not suggested by either party that, if clause 1(5)(d) is still enforceable, the HCA has not been varied in any way relevant for the purpose of these questions, the questions appear to turn on what was agreed in 1955. Unsurprisingly, therefore, there was in any event no oral or documentary evidence which was argued to be relevant for the purpose of resolving those questions.

138. The first question to be considered is the effect of the fourth word of clause 1(5)d), "*annually*". If it does not have the effect of providing that the GBPA's liability is to pay the annual cost each Year, it is hard to see what other meaning it can have. It cannot be a reference to what the Account is for, as that is governed by the words "*annual*" before *"cost*". Anyway, the word "*annually*" clearly refers to payment (or, more accurately, reimbursement), and therefore its natural meaning is that payment (or reimbursement) is to be made each yearly period.

139. There is no obligation on the GBPA to make an annual payment, unless and until the Government has rendered an Account. That seems to be clear from the wording of clause 1(5)(d). It is also clear once one considers the practicalities: until the Account (or some similar document) is served on GBPA by the Government, the GBPA will have no idea whether any annual payment is due in respect of a particular Year, and, if it is, what the quantum of that payment may be.

140. There is obvious logic in the argument that it follows from this that, if the Government does not render an Account in respect of a particular Year's annual cost in time to ensure that the GBPA is able to comply with its obligation to make such payments each year, the Government's right to recover the annual cost in respect of that particular Year is lost. The force of that argument is strengthened when one considers the practicalities if that argument is wrong. If there is no such fetter on the timing of the Government's right to serve an Account in respect of a particular Year's annual cost, it would seem that there could be no express fetter on the timing of its right to recover (unless one were to be implied). If that was right, it would seem that the Government could wait for, say, 20 years and then seek 20 sets of annual costs. GBPA would not be able to bring matters to as head by serving notice making time of the essence, as there would be no time limit, in respect of which time could be made of the essence.

141. By contrast, the practical consequences of the Government losing the right to a particular Year's annual cost if it does not render an Account in respect of that cost in time to ensure that the GBPA is able to comply with its obligation to make such payments each year, does not seem particularly harsh. One would expect such records to be available at the end of the particular Year, which is a view which is strongly supported by the fact that various financial statements as to the Year-end position are required to be provided by the Treasurer under section 97 of the Public Finance Management Act, 2023 "*within a period of three months after the close of each financial year or as soon as reasonably practicable thereafter*". Quite apart from this, if the relevant figures need to be collated, assessed and totalled for a particular Year, there is no reason to doubt that that could be easily accomplished within six, and certainly within nine months following the end of that Year. And the possession and the preparation of such accounts will be under the control and/or supervision of the Government.

142. Having said that, the preparation of the Account would have been expected to involve collecting a fair amount of detailed information and sometimes exercising a judgment whether and how to include certain items. Accordingly, it may be argued that this militates against the argument that the Government loses its right under

clause 1(5)(d) if it fails to render the Account within the following Year. In the Tribunal's view, this point has force, but only to the extent that it needs to addressed and allowed for. It gives rise to two concerns:

(a) in exceptional cases, there may be certain information which is needed to finalise the Account and is unavailable in time, in which case the right to recover the whole annual cost could be lost; and

(b) the Account, although compiled in good faith, may be shown to be inaccurate in one or more respects, in which case, it would have to be re-presented, and the re-presentation would be out of time, in which case, once again, the right to recover the whole annual cost would be lost.

143. The Tribunal considers that the answer to both concerns is to be found in the fact that the Account as rendered can be challenged by the GBPA, either by negotiation with Government or by taking it to arbitration, and any unresolved issues between the Parties as to the contents of the Account can be resolved by the arbitral tribunal, and the Account, as varied by award of that tribunal is then treated as the Account as already rendered – i.e. the tribunal can correct or rectify the original Account.

144. Turning to the first concern, if the Account has to be rendered within a particular Year, then it must follow that, in a case where there is some unavailable information, the Account should contain the Government's (or its agent's) honest estimate of the figure involved. If the GBPA is content with the figure, that is the end of it. If the GBPA wishes to challenge the figure, it can do so by negotiation or by referring it to arbitration. If, during the arbitration process, the figure becomes available, it can be substituted for the original figure. If the figure continues to be unavailable, the Tribunal will determine the figure, and the Tribunal's figure can be substituted for the original figure.

145. As to the second concern, if the GBPA chooses not to challenge a figure assessed by the compiler, it becomes binding. If the GBPA does challenge the assessed figure, the tribunal will no doubt bear in mind that there will often be a range of

assessments, or more than one reasonable assessment, and if the assessed figure is within the range or otherwise reasonable it will not interfere with it. But if the tribunal decides that the figure needs to be re-assessed, it will make the reassessment, and the Account will be treated as including the reassessed figure rather than the original figure.

146. Having determined that the Account for a particular Year has to be rendered by the end of the following Year, the Tribunal does not need to address the GBPA's alternative argument that the Account has to be rendered within a reasonable time. It is a more flexible alternative, but it would be a very uncertain one, which does not make it attractive.

147. The next question is whether, notwithstanding this time limit, it is open to the Government to render an Account for a particular Year later than the end of the following Year in light of the general principle that time is not of the essence. In the Tribunal's view the Government has to render such an Account by the end of the following Year, and time is indeed of the essence for the rendering of such an Account.

148. It is true that (i) there is no obligation on the Government to render an Account in respect of any particular Year and (ii) there is no express time limit by which such an Account has to be served. However, neither point prevents time being of the essence for the rendering of such an Account. As to point (i), in the leading case of *United Scientific Holdings Limited v Burnley Borough Council* [1978] AC 904 the fact that the landlord had a right, rather than an obligation, to serve a rent review notice did not prevent time being of the essence for the service of such a notice. As to point (ii), given that we have decided that annual costs in respect of a particular Year have to be paid by the end of the following Year there is a contractually binding date by which the Account for a particular Year has to be rendered as a matter of necessary implication.

149. There is self-evident force in the GBPA's argument that, if time is not of the essence, so that an Account can be rendered after the expiry of the following Year, it would

mean impermissibly varying the contractual liability to which the GBPA has committed, namely, to pay the annual cost "*annually*". That argument is that the contention that time is not of the essence in relation to the date by which the Account should be rendered, would unfairly alter the nature of the GBPA's obligation under clause 1(5)(d), not just by moderating a contractual time limit imposed on one party, but by impermissibly depriving the other party of a different, albeit connected, contractual right. Thus, if the Government was entitled to render a valid Account in respect of a relevant Year after the end of the following Year, it would mean that the GBPA would have to pay in respect of the relevant Year after the expiry of the following Year, which would involve imposing a greater burden on the GBPA than it had agreed to shoulder.

150. There is some similarity between this argument and the unsuccessful tenant's argument in *United Scientific*, in that, in that case, time not being of the essence for service of the rent review notice meant that the tenant was likely to have to pay rent which would have been due on an earlier date. However, the contractual background in *United Scientific* and the rent review case-law cited in it were very different from those in the present case. The tenant was going to have to pay a substantial rent each quarter in any event, and the rent review merely meant that it would have to pay more in the future, as well as an accrued back payment. Further, even if a timely notice had been served, that still could have happened if the rent review process had been at all drawn out. And, as pointed out by Lord Diplock, the tenant could have got a good idea of what the new rent was going to be by asking an estate agent. In this case, by contrast, the GBPA had to pay nothing unless and until it received an Account, and a late Account would mean that the only payment which it had to pay was paid late; and there was no satisfactory way in which the GBPA could find out in advance what it was going to have to pay.

151. Further, unlike *United Scientific* and the other rent review cases considered by Lord Diplock, this is not a normal landlord and tenant case. Although the foundational relationship between the Government and the GBPA can fairly be said to be that of landlord and tenant, it is very much a commercial and administrative relationship. In particular, the annual cost the subject of the present dispute relates to commercial

and administrative activities. In *Bunge Corporation v Tradax Export SA* [1981] WLR 711, it was said by Lord Wilberforce that *United Scientific* had not overruled the principles: "*(1) that the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties, and (2) that broadly speaking time will be considered of the essence in 'mercantile contracts'*".

152. In the Tribunal's opinion, the way in which clause 1(5)(d) is framed, the combination of the nature of the payment (a reimbursement of expenses), the character of the relationship between the parties (commercial/administrative) leads to the conclusion that the parties intended that the liability of the GBPA to pay the annual costs in respect of a particular Year was to be a strictly annual liability, which was not intended to be performed at a later date; so that, if the Government wished to recover the annual cost for that Year, the Account for that Year had to be served by the end of the succeeding Year. Particularly given that the Government's interest in connection with payment of the annual cost was fully protected by the GBPA having the obligation to pay within 30 days of the rendering of the Account, it appears to the Tribunal clear that the word "yearly" was included in clause 1(5)(d) to protect the GBPA by limiting its period of exposure to a potential payment of annual costs, and we do not consider that it would be consistent with that to hold that time is not of the essence for the rendering of an Account. Accordingly, we conclude that the Government cannot invoke the principle adopted in *United Scientific* to justify rendering an Account after the end of the Year following the Year in respect of which the Account is rendered.

153. Having considered the argument that time is not of the essence in relation to the rendering of an Account, the Tribunal can deal more swiftly with the final aspect under this heading, namely, the Government's case that, even though it is required to render the Account for a Year by the end of the following Year, the effect of the limitation law is that, provided that it renders the Account within the limitation period, namely within six years, of the end of that period, it may validly do so.

154. Unfortunately for the Government, this argument appears to the Tribunal to fall foul of the same reasoning which caused us to reject the argument that time is of not of the essence for the rendering of the Account. The basis of that reasoning is that the obligation of the GBPA was to pay during the following Year and not at any other time. The existence of a limitation period cannot, in our judgment, be invoked to enable the Government to render an Account identifying the annual costs as it would have the effect of reviving an expired obligation of the GBPA, which cannot, as a matter of contractual right, be revived.

155. Accordingly, if a claim can be brought by the Government against the GBPA under clause 1(5)(d) in respect of the annual costs, it can (as the GBPA submitted) only relate to the last of the five Years, namely 2022.

The Government's Claim: (2) Is the "annual cost" in Clause 1(5)(d) a gross or net cost?

156. The general meaning of the word "cost" is pretty clear, but the precise nature of the items which should be taken into account when assessing a cost for a particular purpose is highly context dependent, and is to be determined in the usual way, namely by reference to the words used, contractual and commercial context, and commercial common sense.

157. In this case, the main dispute of principle between the parties is whether, when assessing the annual cost under clause 1(5)(d), (unless instructed otherwise in the clause or elsewhere) one takes:

(a) the gross cost of the various items covered by the clause (the "**items**"), i.e. the money spent, or treated as spent, by the Government on the items without regarding any fees or revenue earned by the Government from those items; or

(b) the net cost of those items, i.e. the money spent, or treated as spent, less any fees or revenue earned.

The Accounts were prepared on the assumption that interpretation (a) was correct, whereas the GBPA argues for interpretation (b).

158. As with the previous issue, it was not suggested by either party that there was any extraneous evidence (whether oral or written) which would assist in resolving this issue.

159. In support of the argument that the annual cost is intended to be based on the gross cost, the Government relies on the following points, namely:

(a) clause 1(5)(d)(ii) expressly identifies the revenues which can be set off against the annual costs, namely "*Customs duties and emergency taxes received by the Government in respect of goods entered or taken out of the bound at the Port*": given that they are expressly referred to, the natural inference is that other sources of income are to be excluded from being taken into account;

(b) clause 1(5)(d)(ii) also refers to "*the amount expended by the Government*", which the Government argues is presumably intended to have the same meaning, and "expended" implies the notion of gross costs rather than costs net of income;

(c) where the Parties to the HCA wanted to provide for reimbursement of net, rather than gross, costs, they spelled it out – see clause 2(25)(b)(ii) of the HCA, which provides:

> "That the Port Authority shall reimburse the Government annually within Thirty days after the presentation of a detailed account of the same by the Government the annual cost to the Government of maintaining and operating the said wireless telegraph and wireless telephone systems plus Twenty-five per centum of such cost, credit being given for the net income (exclusive of any operating costs) therefrom."

160. In support of the argument that the annual cost is intended to be based on the net cost, the GBPA relies on:

(a) the natural meaning of the word "*cost*" is more consistent with the concept of net cost rather than gross cost; and

(b) the suggestion that the GBPA should reimburse the Government the cost of providing an item without first taking into account what the Government earned by providing the item is commercially unlikely: a telling example is the Government's claim for Immigration Department expenditure is for BSD 15.2m, in circumstances when it received BSD 176.2m in immigration fees.

161. The Tribunal does not consider that the GBPA is right in saying that the natural meaning of "*cost*" is net cost: as already indicated "*cost*" is a word which takes its precise meaning from its context. However, when an entity is seeking to be "*reimburse[d]*" the "*cost*" of providing a service which it makes available, in circumstances in which the entity recovers sums from third parties in respect of that service, the more commercially sensible presumption is that those sums should be credited against the expenditure incurred in providing the service concerned. One would not expect the reimbursement of cost to result in a profit for the payee. It is important to emphasise that that this is a *prima facie* view, and that other words used in the relevant provision, or elsewhere in the relevant agreement, could quite easily justify a different conclusion – as could considerations of commercial common sense or the surrounding circumstances in the particular case.

162. Accordingly, the Tribunal starts with the presumption that net costs are intended, and we ask ourselves if there any indications which call this presumption into question. The Government relies on the fact that if the costs were net generally, it would have been unnecessary to spell out the fact that "*Customs Duties and emergency taxes*" were to be deducted from the gross costs, and that the irresistible implication is that other sources of income should be disregarded. Although initially attracted to that argument, we have concluded that the GBPA's answer to it is correct, namely that, while fees (e.g. from immigrants as already mentioned, and, albeit in lower sums, court fees and copying fees) would naturally be deducted, there is at least a risk that taxes might be seen as not falling within the scope of deductions to be made from the gross cost. Indeed, there seems to us to be some force in the

GBPA's argument that, if income in the form of custom duties and tax is to be deductible, fees should be *a fortiori* deductible.

163. As for the Government's reliance on clause 2(25)(b)(ii), it appears to the Tribunal to cut both ways. On the one hand, as the Government rightly contends, it contrasts with clause 1(5)(d) in that it specifically says that earnings should be deducted, and the contrast can be said to suggest that no such deduction is appropriate for clause 1(5)(d).

164. On the other hand, commercial consistency suggests that if deductions for earnings are to be allowed for one type of cost reimbursement, it is rather unlikely that they were not intended for others. Both arguments have a little force, but it is worth bearing in mind that the strongest way of putting the Government's point is that the allowance for earnings in clause 2(23)(b)(ii) is surplusage if the GBPA's interpretation of "*cost*" in clause 1(5)(d) is correct, and, as has been said in a number of cases, an argument based on surplusage is not very telling, given the verbosity, multiple use of precedents and back-covering involved when it comes to drafting many commercial contracts.

165. Finally, there is the Government's reliance on the expression "*the amount expended by the Government*" at the end of clause 1(5)(d)(ii). In the Tribunal's view this does not help the Government's case and may even assist the GBPA's case. The expression "*the amount expended*" must be referring to the gross cost, as it is the amount from which the "*Customs Duties and emergency taxes*" are to be deducted. In other words when the Parties wish to refer to the Gross Cost it is described as "*expended*", and there is no such verb in clause 1(5)(d). So far as this is said positively to assist the GBPA's case, the point cannot be taken very far as there is no verb used in relation to "*cost*".

166. In these circumstances we are of the view that our *prima facie* conclusion as to the correct analysis has not been dislodged. Indeed, it is supported (albeit only mildly and for a reason which is almost no more than instinctive) by the fact that the GBPA

is not merely obliged to reimburse the annual cost, but to reimburse 125% of the annual cost.

167. Accordingly, we conclude that the annual cost referred to in clause 1(5)(d) is the net cost, not the gross cost.

The Government's Claim: (3) Should the PwC Report have been signed by the Treasurer?

168. While the Account clearly has to be prepared by an appropriately authorised employee or agent of the Government, there is no express provision in clause 1(5)(d) or elsewhere in the HCA that the Account has to be prepared or signed by, or even under the direction of, any specific individual. Further, it is apparently (and, in the Tribunal's view, correctly) accepted by the GBPA that there is no term implied according to the normal principle of necessity or obviousness that the Account is to be signed by the Treasurer.

169. However, it is the GBPA's argument that sections 9 and/or 97 of the Public Finance Management Act, 2023 ("**PFMA**") required the Account to be signed by the Treasurer, and that it would be of no effect if it was not so signed.

170. This raises an issue of statutory construction, on which, once again, it was not suggested that any extraneous evidence would be of assistance.

171. The equivalent legislation when the HCA was entered into was the Treasury Department Act 1914, which was replaced by the Ministry of Finance Act 1963, which was in turn replaced by the Financial Administration and Audit Act 1973, which was then replaced by the Financial Administration and Audit Act 2010, which was next replaced by the Public Finance Management Act, 2021, which was two years later replaced by the PFMA. The terms of these earlier statutes merely serve to emphasise that, at least in principle, this argument has been open to the GBPA throughout the term of the HCA, and, if right, would not be a new fetter on the rendering of an Account. However, if the argument is right, the precise statutory

requirements relating to the Account would depend on the terms of the statute in force when the Account was prepared. The fact that those requirements differed from statute to statute would not invalidate this argument, which we now turn to consider.

172. Section 9 of PFMA ("**section 9**") provides as follows, so far as relevant:

> "(1) The Treasurer shall be responsible for: …
>
> (a) setting the financial reporting standards consistent with generally accepted accounting principles; …
>
> (c) maintaining … the accounts of the Government to show
>
> the current state of … funds, and financial position of the Government;
>
> (d) preparing the financial statements of the Government [including "any other statements as are necessary to fairly reflect the financial operations of the Government … and its financial position] and other reports required by law, the Minister or the Financial Secretary;
>
> (e) supervising and maintaining the Government's accounting system and the financial and accounting records; … and
>
> (r) other responsibilities assigned to him by law or the Minister [of Finance].
>
> …
>
> (3) The Treasurer may delegate any of his responsibilities or powers to a public officer or public office holder not below the rank of Deputy Treasurer or Financial Controller."

173. Section 97(1) of PFMA ("**section 97**") is concerned with the preparation of, *inter alia*, *"appropriation accounts" "a statement of performance", "budgeted figures for the financial year"*, and *"statements of commitments, receipts, revenue, receivables, refunds, and waivers" "[i]n respect of each financial year and within a period of two months after the close of the financial year".* These are to be prepared by *"principal accounting officers or permanent secretaries"* and *"transmit[ted] to the Financial Secretary and the Treasurer".* Section 97(4) provides that:

> "In respect of each financial year and within a period of three months after the close of each financial year or as soon as reasonably practicable thereafter, the Treasurer shall prepare, sign and transmit to the Auditor General, to be audited, the following statements in respect of the Government;

(a) a statement of the financial position at the balance sheet date;

(b) a statement of financial performance;

(c) a statement of cash flows;

(d) a statement of borrowings; …

(j) any other statements as are necessary to fairly reflect the financial operations of the Government for that year and its financial position at the end of the financial year; and

(k) in relation to each statement required by paragraphs (a) to (h) of this subsection and, where appropriate, paragraph (j) of this subsection—

(i) comparative budgeted and actual figures for the financial year; and

(ii) comparative budgeted and actual figures for the previous financial year."

174. In light of these statutory provisions, the GBPA's case, which was fully developed in closing oral submissions, was well summarised in its written opening submissions in the following terms (with the Tribunal's numbering), which rely primarily on section 9(1)(d) and 97(4)(j):

(a) The accounting for Government costs incurred and revenue collected, and the preparation of financial statements and reports required by law, the Minister or the Financial Secretary, therefore lies with the Treasurer or his lawful delegate only.

(b) A detailed account is an account that only the Treasurer (or a lawful delegate) can prepare as it is a 'statement necessary … to fairly reflect the financial operations of the Government for that year and its financial position at the end of the financial year' and/or is one of the 'other reports required by law, the Minister or the Financial Secretary'.

175. The Tribunal rejects the contention that the Account should have been signed by the Treasurer. Properly interpreted, there is nothing in any of the provisions of the PFMA to which the parties have referred that impinges on a document which the Government is entitled (or indeed obliged) to serve under the terms of a contract.

176. Although the language of sections 9(1)(d) and 97(4)(j) could as a matter of language just about be interpreted as applying to a document such as the Account, the two provisions have to be interpreted in their respective contexts, as context is fundamentally important when it comes to the interpretation of words in a statute, just as in a contract. Once one bears in mind the purpose of the PFMA, it appears to

the Tribunal that an Account under clause 1(5)(d) is neither a "*financial statement ... of the Government [or] other report ... required by law*" or "*any other statement ... necessary to fairly reflect the financial operations of the Government ... and its financial position ... required by law*" within section 9(1)(d), nor a "*statement ... necessary to fairly reflect the financial operations of the Government for [a] year and its financial position at the end of [a] financial year*" within section 97(4)(j).

177. Quite apart from this conclusion, there are other reasons for rejecting the applicability of those two statutory sections to the Account.

178. Section 9 is in Part II of PFMA which is headed "*Roles and Responsibilities*", and, while subsection (1) imposes a duty on the Treasurer to prepare certain documents, there is no defensible basis for contending that it precludes a third party preparing such a document. If A is required to take a step, that does not mean that B cannot take that step as well, but if B takes that step, that does not exonerate A from its duty to do so. And the fact that subsection 9(3) limits the persons through whom the Treasurer can carry out the subsection 9(1) duty does not somehow justify concluding that a third party cannot carry out the same function as is allocated to the Treasurer: what subsection 9(3) does is to preclude the Treasurer from fulfilling his or her function by delegating it to someone other than a person falling within that subsection.

179. As for section 97, it is headed "*Financial statements of the Government*", and it is under a series of sections under the title, "*Reporting and Transparency Requirements*", which is in Part VII of PFMA which in turn is headed "*Accounts and Reports Accounting*". These headings strongly suggest that a document such as the contractual Account is not a document which is covered by a provision which is within Part VII or under one of those headings. But, quite apart from that, the same point as has just been made about section 9 can be made about section 97: the fact that the Treasurer is mandated to produce a document does not mean that someone else cannot do so. Quite apart from this, it does not seem as if the Account could be within the scope of the section as it is to be presented to the GBPA not to be "*transmit[ted] to the Auditor General*".

180. Accordingly, the fact that the PwC Report was not made or signed off by the Treasurer would not serve to invalidate it.

The Government's Claim: (4) Was the PwC Report a "*detailed account*" within clause 1(5)(d)?

181. There were a fair number of criticisms advanced on behalf of GBPA of the individual figures in the PwC Report, and indeed as to whether it was a "*detailed account*" at all. These criticisms were considered in written and oral evidence which was given by Mr Hickman (who was responsible for preparing the Report), and the expert witnesses, Mr Pilgrim and Mr Taylor. We could of course deal with and resolve those disputes and would normally do so.

182. However, even at this stage, it is questionable whether that exercise would be worth doing, given that we have decided that the Government is only entitled to recover the annual cost for one Year, namely 2022, and that that cost is to be assessed on a net basis.

183. However, it is fair to say that, if it is no more than "questionable" at this stage whether we should consider these criticisms, that would not be a strong enough reason for not addressing at least some of those criticisms. The reason why the Tribunal does not think it right to address those criticisms is because of the conclusion which we have reached on the next few issues: they effectively render the PwC Report an academic exercise, as will be more fully explained in following sections of this Award.

184. Because the Tribunal considered that we might well conclude that the issues relating to the PwC Report might not need to be resolved, we informed the Parties in our directions of 22 September 2025, referred to in paragraph 36 above, that they should not deal with issues relating to the contents of the PwC Report in their respective PHBs, on the basis that we would receive written submissions on them later, if necessary. In the event, it is unnecessary.

The Government's Claim: (5) Has clause 1(5)(d) been replaced by paragraph 3?

185. The GBPA's contention that clause 1(5)(d) was replaced by Paragraph 3 is based purely on the wording of the two agreements, and primarily on the wording of those two provisions. However, it is also of at least potential relevance to have regard to the surrounding circumstances, which are, of course, often of relevance to issues of interpretation.

186. If Paragraph 3 has replaced clause 1(5)(d), it can only have done so by implication, as there is plainly no express term in the 1994 Agreement which suggests or supports such replacement or substitution. In that connection, there is no doubt that a provision in one agreement can be replaced or substituted by a provision in a later agreement by implication. The exercise of determining whether this has happened in a particular case involves an orthodox exercise in contractual interpretation. As was said by Butcher J in *Wallis Trading Inc v Air Tanzania Company Ltd* [2020] EWHC 339 (Comm) at [351]:

> "In relation to questions as to whether a subsequent agreement varies or replaces an earlier one, guidance is provided by *Viscous Global Investments v Palladium Navigation Corp. (The 'Quest')* [2014] EWHC 2654 (Comm) at [18]-[21]. There is no necessary requirement that the subsequent agreement be 'fundamentally inconsistent with' or 'go to the root of' an existing clause for it to replace rather than merely to vary existing arrangements. The question is simply one of construction: looking at the matter objectively and in the light of the relevant background, what meaning would the agreement convey to a reasonable person?"

187. In *Wallis*, Butcher J went on to consider all the surrounding circumstances and concluded at [353] that "*what a reasonable person having the background knowledge available to the parties would have understood by the [later] agreement was that it was intended to recognise and quantify an existing debt [under an earlier agreement], and to agree that this could be discharged by payment by 30 August 2014 of [a somewhat lower sum]*".

188. Although some witnesses (notably Sir Baltron and Ms St George) expressed views on the question as to whether Paragraph 3 replaced clause 1(5)(d), their evidence,

though clearly honest, is not of assistance. Sir Baltron was not involved in negotiating the 1994 Agreement, and his view that Paragraph 3 did not replace clause 1(5)(d) was partly based on the fact that that contention was not raised by the GBPA in the discussions in 2015/2016, in which he was, of course, closely involved, and partly based on the fact that this was the view of the HCARC. Ms St George relied on her letter of 7 April 2016 and upon the proposition that "*it would be entirely unfair and counterproductive to revive an arcane Clause which had not been relied upon for 60 years, and had not been* invoked *during the various discussions conducted over the previous two years.*" None of this evidence really impinges on the question, which raises an issue of contractual interpretation.

189. As to that issue, the Government raised a number of initial points against that contention that Paragraph 3 replaced clause 1(5)(d), namely:

(a) the striking fact that there is nowhere any reference, or even a suggestion, of an intention in the 1994 Agreement that Paragraph 3 was intended to effect a substitution, although the 1994 Agreement was plainly drafted by competent lawyers;

(b) the test for implication of terms is not met by the argument that Paragraph 3 replaces clause 1(5)(d) – i.e. it is neither "*necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it*", nor is it "*so obvious that 'it goes without saying*'" – see *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2016] AC 742, [18] and [21];

(c) the purpose of Paragraph 3 was no more and no less than to operate as a *quid pro quo* for the extension of the Time-Limited Exemptions recorded in the 1994 Agreement; and

(d) the rights of the GBPA under the 1994 Agreement are potentially precarious in the light of clause 3 thereof.

190. In the Tribunal's view, one has to start with the proposition that, whatever the outcome of this present argument, there must be a relationship of some sort between clause 1(5)(d) and Paragraph 3. The Government at one time raised the possibility that Paragraph 3 was limited to providing funds for local government in Freeport, but that was not pressed (and correctly so in our view), presumably because it is inconsistent with the language of the provision, and is further undermined by paragraph 11 of the Schedule to 1994 Agreement which specifically refers to local government. And, as the arguments developed, it appeared to be (quite rightly in the Tribunal's view) common ground between the Parties that the two provisions are self-evidently concerned with the same matter. "*[R]eimburs[ing] … the annual cost to the Government of providing [any of the responsibilities of Government in relation to the Port Area]*" in clause 1(5)(d) and (c) is effectively indistinguishable from "*defraying the administrative expenses incurred by the Government in the Port Area*" in Paragraph 3. The essential point is that the two liabilities cannot realistically be treated as being simply concurrent, or the Government would benefit from double recovery.

191. The Government's answer to this point is that in each Year, the GBPA's payment under Paragraph 3 would be credited against its liability under clause 1(5)(d), so that there would be no liability under clause 1(5)(d) in respect of a particular Year unless the annual cost in that Year exceeded BSD 500,000. That is a possible and not unrealistic conclusion.

192. Given that the alternative reading, as favoured by the GBPA, is that the liability to pay under Paragraph 3 is in substitution for the liability under clause 1(5)(d), it seems to the Tribunal that the Government's arguments mentioned in paragraph 189 above are of very limited, if any value. Quite apart from the fact that those arguments also apply to the GBPA's interpretation:

(a) it is true that the 1994 Agreement contains no express provision governing the relationship between Paragraph 3 and clause 1(5)(d), but it is for that reason that the strict rule for implication affirmed in *Marks & Spencer* applies;

(b) some term has to be implied to govern the relationship between clause 1(5)(d) and Paragraph 3;

(c) it is very doubtful that Paragraph 3 was simply regarded as the *quid pro* quo for the extension of the Time-Limited Exemptions, given the provisions of clause 3; and

(d) clause 3 itself does not assist on the issue, as its implementation would not discontinue the operation of Paragraph 3.

193. Accordingly, it is necessary to decide whether Paragraph 3 provides a floor or a substitution in respect of the GBPA's payment obligation under clause 1(5)(d).

194. In answer to that point, the Tribunal has reached the conclusion that the GBPA's argument is correct and that Paragraph 3 replaced clause 1(5)(d) rather than providing a floor in respect of it.

195. First, it accords with the more natural meaning of Paragraph 3. While the Tribunal readily accepts that "defraying" can mean reimbursing part or all of that liability or cost, the more natural meaning of "*defraying the administrative expenses*" is that it extends to all the administrative expenses. By way of example, if, on the basis of a promise by A to defray the cost of a holiday, B pays for a holiday, it appears to the Tribunal that B would have cause for complaint if A then said he or she would only pay for 80% of the cost of the holiday. If the BSD 500,000 a Year is contractually agreed to defray all the administrative expenses in a particular Year, then it would appear to follow that there is no room for a further sum to be claimed to be due to "*reimburse*" those expenses.

196. Secondly, the notion of a one-off annual payment subject to review after five years to cover all costs and expenses, seems a simpler, and therefore an inherently more likely arrangement, than an annual minimum payment subject to review after five years. Not only is it conceptually simpler, but it avoids the Government having to go through the exercise of providing a "*detailed*" Account of all relevant costs every

year, and to risk going through the sort of exercise which Mr Hickman (and indeed Mr Taylor and Mr Pilgrim) went through each year. If the GBPA's argument is correct, this sort of exercise need be done only every five years (if the operation of the closing words of Paragraph 3 result in agreements for a fixed annual sum every five years).

197. Thirdly, if the Government's interpretation was correct, one would have expected the arrangement to have included provision for a repayment to the GBPA if it transpired that, in any Year, BSD 500,000 was greater than the amount payable under clause 1(5)(d), and yet there is no such provision.

198. Accordingly, the Tribunal concludes that clause 1(5)(d) was replaced by Paragraph 3 with effect from the date of the 1994 Agreement, or in practice from 1 July 1999.

The Government's Claim: (6) Has clause 1(5)(d) been revived?

199. In addition to the documentary evidence as to the negotiations in 2015 and 2016 leading up to the 2016 MoU summarised in paragraphs 89 to 103 above, the Tribunal heard oral evidence about those negotiations ("**Negotiations**"). The relevance which that documentary and oral evidence has for present purposes is whether, either on their own or together with the 2016 MoU, they support an argument by the Government that, despite clause 1(5)(d) having been replaced by Paragraph 3, the clause was revived or reinstated in 2016 by agreement or estoppel.

200. It follows from what we have said in the last section that it would be possible for the parties to have replaced Paragraph 3 with clause 1(5)(d) as a matter of implication in 2016 MoU. However, at least if the 2016 MoU is read on its own, the Tribunal considers that it cannot support, let alone justify, the conclusion that clause 1(5)(d) had somehow been revived or that it had replaced Paragraph 3.

201. In this connection, the centrally relevant aspect of the 2016 MoU is the undertaking by the GBPA in clause 1.9 of the 2016 MoU to "*address questions raised by the Government in relation to clause 1(5) ... and [to] agree to work... with the*

Government to wholly resolve such questions", and "*subject to all questions raised by the Government in relation to clause 1(5) of the HCA being resolved, [to] use its best endeavours to address questions about GBPA's capital position*".

202. The reference to clause 1(5) in clause 1.9 of the 2016 MoU is perfectly consistent with the notion that clause 1(5)(d) has been replaced and does not alter the fact that the remaining provisions of clause 1(5) of the HCA survived. Limiting oneself to the four corners of the MoU, that is really the end of any argument that clause 1(5)(d) was revived by the MoU without more.

203. In any event, it is a little difficult to see how the reference in clause 1.9 of the 2016 MoU should be treated as being to clause 1(5)(d). As discussed above, clause 1(5)(d) involves the Government gathering, collating, and providing to the GBPA, information which would be within the Government's knowledge, and not that of the GBPA. The only responsibility of the GBPA under clause 1(5)(d) is to pay within 30 days a sum of money identified by the Government. So, it is hard to see how any "*questions*" can be "*raised by the Government in relation to*" clause 1(5)(d).

204. However, the argument that clause 1(5)(d) has been revived becomes a little more forceful when one reads the 2016 MoU together with the Negotiations. Clearly, one can consider the Negotiations when interpreting the 2016 MoU, as there is specific reference in clause 1.9 of the 2016 MoU to "*questions raised by the Government in relation to clause 1(5)".*

205. The position with regard to what was said and understood by the Government and the GBPA about clause 1(5)(d) and Paragraph 3 during the Negotiations leading up to the completion of the 2016 MoU and in its immediate aftermath are pretty clear from what is revealed by the contemporaneous documents, as summarised in paragraphs 90 to 110 above.

206. Sir Baltron's evidence on the Negotiations (unsurprisingly) did little more than summarise the effect of the contemporary documents. Ms St George's evidence was

that the publication of the HCARC report on 23 June 2015 came as "*a great surprise*", as clause 1(5)(d) had not been raised for some time, but otherwise, her evidence did not take the matters significantly further than the contemporary documentary evidence.

207. Although Ms St George suggested that there was little reference to clause 1(5)(d) in the Negotiations, it is clear from the contemporaneous records that the Government, primarily through Sir Baltron but also through the Attorney General, persistently maintained that it was entitled to the benefit of, and to enforce, clause 1(5)(d), but that it was open to the possibility of not insisting on its strict rights thereunder. Because no steps had been taken to enforce its rights under clause 1(5)(d) for sixty years (save to the extent that Paragraph 3 had been agreed and implemented for five years), the Government wished to investigate what its rights under the clause amounted to in dollar terms. Hence the instructions to PKF.

208. The question which therefore arises is whether the events and discussions in 2015 and 2016 give rise to an agreement that clause 1(5)(d) was effective or give rise to an estoppel in favour of the Government to that effect.

209. In the Tribunal's view, there can be no question of a contract having arisen as a result of the events and discussions in 2015 and 2016 (and to be fair to the Government, that was not the basis on which its case was primarily advanced). Apart from anything else, during the course of the Negotiations, Ms St George, on behalf of the GBPA, consistently challenged the applicability of clause 1(5)(d). Her grounds of challenge, were, in summary terms: (i) that the clause was archaic; (ii) that the clause had never been operated; and (iii) that the Government made losses in areas other than the Port Area. Those grounds were (with the possible exception of (ii)) not well-founded in law, but they render it impossible for it to be realistically contended that there was any agreement that clause 1(5)(d) was still effective, let alone that it should be treated as revived.

210. As for the reference to clause 1(5) in clause 1.9 of the 2016 MoU, there is the point that, as already mentioned, it is hard to see how the reference to clause 1(5) in clause 1.9 of the 2016 MoU can be to clause 1(5)(d).

211. However, even assuming that the reference to clause 1(5) in clause 1.9 of the 2016 MoU can be treated as being to clause 1(5)(d), it is insufficient to give rise to a contract. Although the reference to "*questions raised by the Government*" entitles the Government to rely on the Negotiations in order to seek to justify the contention that the reference should be treated as being to clause 1(5)(d), the reliance on the Negotiations cannot just stop there: the whole of the Negotiations comes into play. And that brings one back to the point that, albeit for reasons which were probably unsound in law, the GBPA had made it clear that it did not accept that the clause should be operable.

212. In that connection, the Tribunal is also of the view that the language of clause 1.9 of the 2016 MoU is insufficiently clear to justify the conclusion that the parties were agreeing that clause 1(5)(d) was effective. Agreeing to "*address questions raised by the Government in relation to clause 1(5)*", to "*work… with the Government to wholly resolve such questions*", does not necessarily mean that the clause is agreed to be effective: it would be open to the GBPA to address the Government's questions by saying that it did not accept that clause 1(5)(d) was effective.

213. It seems to the Tribunal that it may also be said that any reference to clause 1(5)(d) after 1994 should be treated as a reference to Paragraph 3, on the basis that Paragraph 3 is to be seen as an amendment to the HCA, such that it was treated as an amended version of clause 1(5)(d). As mentioned in paragraph 84 above, in the course of the correspondence relating to some of the annual payments of BSD 500,000 under Paragraph 3, the parties referred to those payments as being made under the HCA as amended.

214. The Government's case based on estoppel is more attractive to the extent that it can fairly contend that it plainly believed, and it was plain to the GBPA that it believed,

that clause 1(5)(d) was effective, and until Ms St George's letter of 2 June 2016 the GBPA never took the point that clause 1(5)(d) had been replaced by Paragraph 3.

215. However, it seems to the Tribunal that the Government's estoppel argument faces two insurmountable hurdles. First, for the reasons already discussed, it cannot fairly be said that the GBPA can have led the Government to believe that it was accepting that clause 1(5)(d) was effective. The fact that Ms St George's objection to the clause being effective was based on what were, legally speaking, weak or hopeless arguments does not alter the fact that she was not encouraging, by silence or otherwise, the Government to think that the GBPA accepted that the Government could operate clause 1(5)(d). And, for the reasons already given, clause 1.9 of the 2016 MoU does not assist the Government in this connection either.

216. Secondly, and quite apart from this, even if the GBPA had led the Government to believe that clause 1(5)(d) was effective during the Negotiations, there is no basis for saying that it would be unjust to permit the GBPA to resile from that stance. Before the GBPA was involved in any negotiations, the Government plainly believed that clause 1(5)(d) was effective when it instructed PKF, and it never resiled from that view. All that it could therefore argue is that if the GBPA had raised the point that Paragraph 3 had replaced clause 1(5)(d) during the Negotiations, it, the Government, would have acted differently – e.g. by seeking to implement the review provisions in Paragraph 3, if only protectively. However, that argument can confidently be rejected as, when the GBPA did raise that very point on 2 June 2016, the Government did not even consider implementing the review provisions and has not done so to this day.

217. It is right to deal specifically with the Government's argument that there was an estoppel by convention that clause 1(5)(d) was effective, because the reference to it in clause 1.9 of the 2016 MoU meant that the parties were taking the position that clause 1(5)(d) was effective. The answer to that argument is that, for reasons already mentioned, (i) the reference in clause 1.9 is by no means clear to clause 1(5)(d) and, even if it is, clause 1.9 does not make it unequivocally clear that clause 1(5)(d) is

effective, and (ii) even if that were not the case, there would be no basis for contending that it would be inequitable for the GBPA to resile from that position

218. Accordingly, the Tribunal concludes that the Negotiations and the terms of the 2016 MoU do not justify the contention that, having replaced clause 1(5)(d), Paragraph 3 was in turn replaced, or should be treated as replaced, by clause 1(5)(d).

The Government's Claim: (7) Can the Government claim any sums under clause 1(5)(d) or paragraph 3?

219. Given that clause 1(5)(d) has been replaced by paragraph 3 with effect from the date of the 1994 Agreement, it must follow that the Government is not entitled to claim any payments under clause 1(5)(d).

220. As for any claim under Paragraph 3, it appears to the Tribunal that it provides that, once the first five years have expired, the annual amount payable is to be reviewed to a sum which is negotiated between the parties. As recorded in all paragraphs 85 to 87 above the parties had written and oral discussions about the Review in 2002 and 2003, but nothing was agreed.

221. Subject to one point, therefore, it would appear to follow that, unless and until the parties have agreed a figure (or a figure has been determined by a tribunal or the court – in the absence of agreement), nothing can be claimed by the Government, even though it is in principle entitled to an annual sum. The one point to which this is subject is the contention that, as a matter of implication, in the absence of a Review, the BSD 500,000 per annum should continue to be paid as a sort of default sum. Such an argument is attractive, but in the Tribunal's view, it fails on the ground that it is not necessary or obvious (and for that reason, no doubt, it was not pleaded by the Government).

222. It therefore follows that the Government is not entitled to any sum in respect of administrative expense for any of the Years 2018 to 2022, at least unless and until a sum in respect of those Years is assessed pursuant to the Review.

The Government's Claim: (8) Can the review provisions in paragraph 3 be implemented, and if so, how?

223. The conclusion just arrived at gives rise to the question whether it is open to the Government to invoke the Review and, if so, how far back it can go.

224. The Tribunal considers that it is self-evident that the Government can invoke the Review for future Years, because it is inherent in the GBPA's argument, and in the Tribunal's conclusion, that Paragraph 3 has replaced clause 1(5)(d), that Paragraph 3, and therefore the Review, remains fully enforceable. In any event, there is no basis for contending that the review is inoperable simply because it has been allowed to lie dormant by the Government.

225. The more difficult question is whether the Review itself, and any agreed or determined annual figure, can be enforced in respect of any expired Years, and, if so, how far back the Government can go.

226. The Tribunal is anxious to assist the Parties by resolving as many issues as it properly can, but we are reluctantly persuaded by the GBPA that this is an issue which we should not determine. It is not an issue which has been pleaded; it is not the subject of any relief that is claimed; it has not been fully ventilated in argument; and it is not an easy issue to resolve. It would therefore be inappropriate to seek to resolve that issue in this Award.

227. However, if both the Parties would like the Tribunal to resolve this issue, given that this is a partial Award, the Tribunal would be able and prepared to take that course and would anticipate giving directions to enable the issue to be resolved as quickly as is practical and consistent with justice.

The GBPA's Counterclaim: Introductory

228. We turn now to consider the GBPA's counterclaim, and hereafter, save where the contrary is stated to be the case, all references to clauses are to clauses in the HCA.

229. As stated in paragraph 131 above, the GBPA claims damages for losses and for declaratory relief in respect of various acts or omissions on the part of the Government, which the GBPA alleges amount to breaches of the HCA.

230. The GBPA summarised its case on its Counterclaim in its Opening Submissions in the following general terms (which are edited to remove references to (i) the GBPA's contention that it can invoke these arguments as defences to the Government's claim, and (ii) the GBPA's pleaded claim based on lack of good faith):

(a) the breaches of the Government's obligations under the various provisions set out in below which are alleged arise from the introduction, promotion and/or implementation of legislation and policy which have allegedly undermined the GBPA's ability to perform its obligations and/or exercise its rights under the HCA;

(b) as a result of those alleged breaches, the Government has caused Freeport's economy to decline and/or stagnate and/or grow to a lesser extent than would have been the case had these alleged breaches not been committed and/or continued;

(c) the GBPA seeks declarations as to the meaning and effect of the various Provisions to identify how the Government may act consistently with them and

(d) the GBPA asserts that declaratory relief is required so that the true construction of the HCA is finally determined, and both parties understand the scope of their respective rights and responsibilities in the Port Area moving forward.

The relevant provisions of the HCA

231. The GBPA's case relies on a number of provisions which confer powers on it and which it alleges have been breached by the Government.

232. By clause 2(14) of the HCA, the Parties agreed as follows:

> "That the Port Authority shall have the responsibility of and for the administration and control of the Port Project and the laying out of the development of the Port Area and (subject to the provisions as regards administration by the Government in this Agreement contained) the administration and control thereof."

233. Commensurate with the stipulated responsibilities of the GBPA in the Port Area, various powers and rights were conferred on the GBPA under the original HCA, and all such powers and rights are expressly delegable to the GBPA's Licensees pursuant to clause 2(16) of the 1960 Agreement, which provides:

> "Wherever in the Principal Agreement (as amended by these presents) the Port Authority is (either expressly or by implication) obliged or empowered to perform any act the Port Authority shall be entitled in writing under their Common Seal to license any other person or company to perform such act and all references in the Principal Agreement (amended as aforesaid) to the Port Authority's performing any act shall be deemed to include references to such act being performed by any person or company licensed as aforesaid to perform such act. Provided that nothing in this subclause shall relieve the Port Authority from any of its primary obligations under the Principal Agreement (amended as aforesaid)."

234. The powers, rights and responsibilities said by the GBPA to have been conferred on the GBPA and its licensees under the HCA include the following:

(a) *Licensing:*

i. the right to engage in any lawful business or undertaking in the Port Area (except those subject to professional regulation, falling within clause 2(23)(b) "*without having to obtain any permit or licence therefor or in respect thereof from the Government or any department thereof or any licensing Authority thereof,* ***any present laws and regulations of the Colony and the enactment of future***

laws or regulations within the Colony to the contrary notwithstanding" - clause 2(23)(a) (emphasis added); and

ii. the right to license[1] "*any person, firm, or company to carry on any lawful business, undertaking, or enterprise within the Port Area on such terms and conditions as the Port Authority shall in their absolute discretion deem fit and proper*", subject to having to notify the Government within 30 days of the grant of a license per clause 1(12) - clause 3(7).

(b) *Immigration***:**

i. "*the right to bring into the Colony and to employ within the Port Area such key, trained, and/or skilled personnel as in the opinion of the Port Authority or of any Licensee (as the case may be) are necessary for the construction, operation, administration, and other purposes of the Port Project of the Port Development Area, for the Manufacturing Purposes, for the Administrative Purposes [both Purposes as defined], and for the purposes of any and all businesses, undertakings, and enterprises carried on within the Port Area by the Port Authority or by any Licensee*" and the family and dependents of such persons - clause 2(20); and

ii. the right to bring in and employ unskilled workers who are required but cannot be recruited within the Port Area (plus their family or dependents), subject to certain conditions[2] (clause 3(3)),

[1] It is not disputed that the GBPA has such a right by virtue of its ownership of the Port Area. Further, the GBPA maintains (in accordance with Bahamian case law) that this right is recognised and/or implied by the provisions of the HCA: *Reply and Defence to CC, paras186 & 213* **;** *Rejoinder and Reply to Defence to CC para 80* ; citing *Shangrila (1982) Ltd v Grand Bahama Port Authority Ltd et al,* BS 1984 SC 23 ("*Shangrila*") and *The Queen v The Assistant Deputy Controller of Road Traffic and Another, Ex Parte G. B. Janiki Investments Company Limited* (2012) 1 BHS J. No. 77.

[2] The terms and conditions are set out in sub-sub-paragraphs (a)-(j) of Clause (3)(3). In summary, under (a)-(d) the GBPA shall notify the Government of the number of workers required and the Government shall have 13 days from notice to try to recruit the requisite workers. If it cannot, it will not withhold permission for the entry of those workers. Condition (e) limits the time for which such workers may be contracted, and any renewal

with the Government precluded in each case from withholding permission on any substantive grounds other than personal undesirability.

(c) *Customs***:**

the right to import free of duty such materials and supplies as the GBPA thinks necessary for (a) development of the Port Area, (b) manufacturing, industrial or other business within the Port Area, or (c) the operation and functioning of the administrative, educational and other services carried on by the GBPA in the Port Area - clause 2(1)-(3).

(d) *Utilities:*

i. subject to clause 1(10)[3] "*the sole right to construct and operate utilities (… in particular electrical supply, gas supply, water supply, telephone and sewerage disposal system) within the Port Area, and the necessary distribution systems in connection therewith…*", without requiring a licence or permit from Government - clause 2(21); and

ii. subject to satisfying the relevant standards, the right to "*charge such rates or other charges of such utilities or any of them as the [GBPA] shall in their absolute discretion deem fit and proper…*" - clause 2(21).

(e) *Environmental planning and protection:*

period, to 3 years. Condition (f) requires from the GBPA or its Licensee a bond for transportation related costs. Condition (h) requires the GBPA to reimburse the Government for all costs reasonably incurred in making inquiries into *"the antecedents, character and all other matters and things"* concerning such workers, as it is entitled to do under condition (g). Conditions (i)-(j) provide for the entry of family/dependents, and for permission to be withheld on grounds of personal undesirability.

[3] Which required that all buildings and structures erected within the Port Area and all machinery and apparatus installed in or about any such buildings and structures to be so built as to provide properly for the health and safety of employees and the general public; and for good public sanitation within the Port Area.

the sole right "*to plan, lay out and vary the development of the Port Area in its absolute discretion*". In that connection, clause 2(15) relates to control over roads and clause 2(24) relates to control over layout of the Port Area. clauses 2(14), 2(23)(a) and 3(7) require the Government to permit the GBPA to operate the Port Area unfettered by any registration or approval process in the nature of that prescribed by the regime put in place by the Government.

(f) *Environmental regulation:*

the right to have any application for legislation permitting the making of bye-laws in order to discharge its various responsibilities (including its obligation to maintain health, safety and sanitation under clause 1(10)) *"considered sympathetically"* by the Government - clause 13 of the 1966 Agreement.

(g) *Land development:*

i. "*the sole right … to plan, lay out, and vary the development of the Port Area in such manner as the Port Authority shall in their absolute discretion deem fit and proper*", without the need for any permit from the Government: clause 2(22);

ii. the right to alter any public roads in the Port Area which conflict with a proposed lay out or development, subject to notification clause 2(24)); and

iii. the absolute right to exclude any persons (other than Government officials) from roads or bridges constructed by the GBPA or its licensees within the Port Area - clause 2(15).

The Tribunal's approach to determination of the counterclaim

235. Any question as to whether the Government has acted, as alleged, in breach of any provision of the HCA must be answered, not by reference to the Government's intentions or motive, but by reference to the express wording of the respective

provision itself, having regard to the particular rights or obligations it may properly be construed as conferring or imposing, applying the modern objective and contextual approach to contractual interpretation - see *Investors Compensation Building Society v West Bromwich Building Society* [1998] 1 WLR 896; *Arnold v Britton* [2015] AC 1619, and *Wood v Capita Ins. Services* [2017] AC 1173.

236. We address below each of these successive heads of the GBPA's counterclaim, setting out first a summary of the Parties' respective cases followed by the Tribunal's analysis and determination in relation to each head separately.

237. We then set out our conclusions in relation to the appropriate relief in respect of those heads of the counterclaim which we have found established.

The GBPA's Counterclaim: (1) Licensing

The GBPA's case on its licensing counterclaim

238. The GBPA submitted as follows:

(a) the Government has since 1993 operated a policy by which its approval is required before the GBPA is permitted to issue a licence to a non-Bahamian, and which requires a non-Bahamian wishing to obtain a licence from the GBPA to apply through the BIA. This policy, currently in place, is therefore not mandated by Bahamian statute;

(b) in 1984, in *Shangrila*, the Bahamian Supreme Court held that it was not a condition precedent to GBPA granting a licence to a person/entity that there had to be prior approval by the Government; in its reasoning the Court observed that the "*[GBPA] is the sole licensing body*" for businesses of a nature of those covered by clause 2(23)(a). Although that case was under a

policy in different form from that in operation today[4], the fundamental finding remains the same; and

(c) it follows that the Government's application of the policy is in breach of clauses 2(14), 2(23)(a) and 3(7), taken separately or together. It is in the nature of a continuing breach because it is a policy which is maintained in place by the Government and, for so long as it remains in place, and is applied from day to day and in relation to each licence application, and in relation to prospective applications, the GBPA cannot operate under the licence regime which the Government covenanted it could do.

239. The GBPA further submitted that, for the following reasons, the Government is clearly in breach of its obligations under the HCA:

(a) although the Government invokes clause 3(9) to suggest that it has "*sovereign power*" to involve itself in licensing in this way,[5] that clause merely provides that: "*[e]xcept as in this Agreement otherwise specifically provided, the laws of the Colony from time to time in force shall apply within the Port Area in all respects*", which simply makes clear that Bahamian law applies in the Port Area; and in any event the Government identifies no law pursuant to which it says it is entitled to impose its policy;

(b) no less weak is the Government's argument that there is no breach given the absence of explicit reference to the GBPA as licensor for the Port Area – a position that ignores what is manifestly implicit in the proviso to clause 3(7) (as set out above), the express findings of a Royal Commission (the "**Royal Commission**") which produced a Report in 1971, and, indeed, the entire structure of the HCA; and

[4] Then described in a letter set out at page 4 of *Shangrila*, as a "*condition precedent*" to the grant of a licence to operate charter fishing and other water sport activities that the grantee "*immediately applies to the Ministry of Finance … for and obtains a Business Licence from the Government of the Bahamas annually in accordance with the provisions of the Business License Act,1980.*"

[5] Government written opening cross-referring at para 298.1 to para 290.1(b).

(c) separately, the Government seeks to deny relief for breach in respect of licensing in reliance on the 1968 Benguet correspondence and associated estoppel, a position which is itself rendered untenable by pronouncements of the Supreme Court in *Shangrila*, as already discussed above.

240. Accordingly, the GBPA argued that the Tribunal should make Declaration (2):

> "It is declared that the Government is in breach of each of Clauses 2(14), 2(23)(a) and 3(7) of the HCA (as amended) by requiring Government approval for the issuing of GBPA licences to non-Bahamian persons, contrary to those provisions."

The Government's response on the licensing counterclaim

241. The Government submitted that:

(a) the GBPA's complaint about the licensing policy in force between 1968 and 1993 (was under a policy which was repealed in 1993, and thus cannot form the basis of any continuing breach. This claim is therefore time-barred;

(b) in relation to the policy in place from 1993 onwards, the GBPA provides no particulars of the policy or its implementation, nor does it not refer to any specific application of that policy within the limitation period;

(c) in any event, at no time did the Government's system of approval of licences amount to a breach of the HCA:

i. the Government's legislative and regulatory powers were preserved by the HCA, and the GBPA's administrative control was subject to the provisions relating to administration by the Government;

ii. as the Royal Commission observed in paragraph 27 of its Report, the HCA does not expressly grant any power to the GBPA in respect of licensing new companies within the Port Area, nor does it exclude or prohibit the exercise of the Government's power in that respect;

(d) the GBPA's reference to clause 3(7), which relates to the requirement that the Government consent to any assignment of the GBPA's right under the HCA is not understood;

(e) the Government is entitled to rely on clause 3(9);

(f) further and in any event, by the 1968 Agreement, the GBPA expressly agreed with the Government that licence applications would be referred to the latter for approval and that they would not to be granted in the event of Government objections, and even if that is not contractually enforceable, it has given rise to an estoppel or waiver in favour of the Government.

242. As to the terms of the Declaration (2) in relation licensing, the GBPA has failed to identify precisely what conduct is capable of amounting to a breach as alleged. In particular:

(a) the GBPA's pleaded case refers only in general terms to the application of Government licensing policy to non-Bahamian applicants from 1993 onwards.[6] The declaration now sought is framed without any temporal limit; and

(b) further, the declaration does not identify the precise terms of the policy or any implementation complained of. Instead, it seeks to make a general pronouncement that goes beyond the pleaded case.

The Tribunal's decision on the licensing counterclaim: the contractual position

243. As previously mentioned, clause 2(14) provides that the GBPA shall have the responsibility for administration and control of the Port Area, but it is a generally worded provision, which makes no mention of licensing. By contrast, clause 2(23) is specific in its terms, in that it provides not only that the GBPA or its licensees shall have the right to conduct business within the Port Area during the continuance

[6] Amended Defence and Counterclaim, ¶¶178-179.

of the HCA, but also that the GBPA and its licensees can do so *"without having to obtain any permit or licence therefor or in respect thereof from the Government or any department thereof or any licensing Authority thereof,* ***any present laws and regulations of the Colony and the enactment of future laws or regulations within the Colony to the contrary notwithstanding***" (emphasis added).

244. Those words, as a matter of construction, carry the clear implication that the Government, including the Legislature, will not impose policy or legislate so as to remove the licensing authority from the GBPA. Accordingly, bearing in mind that clause 3(9) does not apply in relation to a topic for which the HCA "*specifically provide[s]*", we conclude that the Government has indeed acted in breach of its obligations under the HCA as a result of the licensing regime which it has imposed through the BIA or NEC since 1993.

245. And while the HCA does not expressly vest the licensing authority in the GBPA, the exclusive right held by the GBPA to issue licences is implicitly recognised by the proviso to clause 3(7).

246. Furthermore, given that the grant of licences by the GBPA appears to be essential to the commercial undertakings contemplated by the HCA, any contrary construction would be inconsistent with business efficacy.

247. This view of the GBPA's unfettered right to grant licences is supported by the decision of the Supreme Court in *Shangrila,* where it was declared, despite the Business Licence Act 1980 then being in effect, that it was not a precondition to the grant of a licence by the GBPA that the applicant had to obtain the prior approval of the Government. Indeed, the court further decided that, upon the true construction of clauses 2(28) and 3(7), a condition precedent to the issuance of a licence by the GBPA - that such licence be first submitted by the GBPA to the Government for the Government's consideration and approval - was without legal justification, unlawful, void and of no effect.

248. Accordingly, we conclude that, as a matter of the construction of the HCA itself, and subject to any other argument it may raise, the Government, by requiring licences to be obtained in respect of non-Bahamians, breached the rights of GBPA under the HCA.

The Tribunal's decision on the licensing counterclaim: waiver and estoppel

249. However, the Government contends that, even if (as we have held) the GBPA would otherwise have a good counterclaim in relation to licensing as just explained, the GBPA has lost its right to pursue its claim in respect of such breach as a result of the 1968 Agreement. In that connection, as explained above, paragraph 4(e) of the 14 September 1968 letter provided that all licence applications made to the GBPA to carry on manufacturing, industrial or commercial enterprises within the Port Area were first to be referred to the Government, and they could not be granted if the Government objected.

250. It is clear from the exchange of correspondence in September 1968, that in the 14 September 1968 letter the Government gave its approval to the Benguet Arrangement conditional upon (*inter alia*): (i) the transfer to Government of certain of the quasi-governmental functions which were being performed by the GBPA; and (ii) the standardisation and coordination of immigration, licensing and customs procedures in the Port Area. While it had not yet secured the required four-fifths majority consent of its licensees in order to effect a formal amendment to the HCA, the GBPA itself agreed to these conditions in paragraph 2 of its letter of 19 September 1968, which was signed jointly on behalf of GBPA by its then President Mr K. Gonsalves and for Benguet by Mr Herbert Allen.[7] It was also agreed, in the same paragraph, that the 1968 Agreement would take effect from 1 November 1968.

251. The relevant undertakings in the 1968 Agreement (which reflected the objective of the 1968 Agreement, namely that the exercise of quasi-governmental powers should

[7] Then the largest single shareholder of Benguet Stock as well as a holder of GBPA shares.

be transferred from the GBPA to the Government) are summarised in paragraph 64 above, and they included a specific term relating to licences.

252. While the GBPA undertook to secure the consent of four-fifths of the licensees, and thereby effect a formal contractual amendment to the HCA which would have bound the licensees, it was agreed that, as between the Government and the GBPA, the 1968 Agreement would nonetheless take effect from November 1968.[8] However, it is arguable that, notwithstanding this, the 1968 Agreement should be treated as not having contractual effect, and particularly in the light of the *Shangrila* decision, the Tribunal is prepared to assume, in favour of the GBPA, that that is indeed the case.

253. But even if the 1968 Agreement was not a valid contract as a matter of law, the Government argued that the effect of its existence and/or implementation over some 50 years: (i) resulted in the GBPA having waived its rights under the HCA in respect of licensing; and/or(ii) gave rise to a promissory estoppel or an estoppel by convention to that effect. In particular, the Government submitted:

(a) the GBPA made a clear and unequivocal representation to the Government that it would refer all licence applications to the Government and that they would be decided by the Government;

(b) the Government relied upon that representation (and other representations by the GBPA) by foregoing its valuable pre-emption rights and consenting to the Benguet merger, and later by enforcing immigration controls in the Port Area;

(c) for more than five decades, both parties proceeded on the shared assumption that the GBPA's rights under the HCA were qualified by the undertakings it gave in September 1968, including those on licensing (as recorded in paragraph 4 of the 14 September Letter);

[8] Letter dated 19 September 1968, para 2.

(d) by its consistent conduct thereafter, the GBPA conveyed to the Government that it was entitled to rely on the GBPA's undertaking as regards licensing, and it thereby assumed responsibility for the Government's reliance on this assurance; and

(e) it would now be inequitable to allow the GBPA to enforce its rights under the HCA and to claim damages against the Government for seeking to control licensing in the Port Area.

254. A brief summary of the facts giving rise to the waiver and estoppel arguments is set out in paragraphs 68 to 70 above, but, given the importance of those arguments, it is appropriate to set out the relevant facts a little more fully.

255. Following the 1968 Agreement, the Government and the GBPA proceeded to participate in the administration of the Port Area in line with what both parties appear to have believed had been agreed. Thus, in its 1971 Report the Royal Commission stated that by 1966 "*The Port Authority was appreciating that as a commercial entity it should not be preoccupied with governmental responsibilities*", and that, in correspondence in September 1968, GBPA and the Government had agreed that immigration and customs procedures in the Port Area should be coordinated with those elsewhere in the Bahamas, and that the Government had sought an undertaking from the GBPA that all licence applications should be referred to it, and that the GBPA had "*expressly undertook ... to accede to the Government's proposal and the undertaking has been honoured consistently up to the present time*". The Royal Commission concluded that it was "*wholly desirable that the functions and authorities exercised by the Government under the administrative arrangement in terms of the undertaking sought and given ... should continue to be so exercised*".

256. The GBPA did not challenge the Government's authority or activity as regards immigration or customs controls, building development approval, licensing rights or utilities. On the contrary, in a formal written presentation to a Bahamian Parliamentary Select Committee on 21 May 1990—which had been appointed to

review the impact of the HCA on the social, political and economic life of Grand Bahama and The Bahamas more widely—the GBPA explained the position as follows:

> "As a condition of approving the transfer [of shares in the GBPA], **the Bahamian Government extracted a number of important concessions from the Port Authority which transferred most of the quasi-governmental functions from the Port Authority into the hands of Government. Included in these conditions were the de facto control of licensing in Freeport and Immigration control. The other controls included the supervision of the rates set by the Power and Water Company which had to that time been unrestricted**" (emphasis added).

257. The GBPA also repeatedly and expressly confirmed that it was bound by, and intended to comply with, the undertakings it had given. By way of example:

(a) an internal GBPA memorandum dated 4 September 1970 provides a detailed account of the negotiations leading to, and the effect of, the 1968 Agreement. It records the GBPA's understanding that it might reach "*an administrative understanding with the Government*" regarding the matters in respect of which under the HCA "*the Port Authority had complete and absolute discretion in the exercise of its quasi-governmental functions*". The understanding was that "*where the Government wished the Port Authority to exercise its discretion in a particular manner, the Port Authority would be prepared to conform*";

(b) by a letter to the Deputy Prime Minister dated 17 February 1982, Edward St George (the then Chairman of the GBPA) expressly referred to the fact that the GBPA was bound by paragraph 4 of the 14 September 1968 letter and to the "*agreement reached between Government and The Grand Bahamas Port Authority on 14th September 1968"*;

(c) by a further letter dated 21 February 1985 to the Prime Minister**,** Edward St George referred again to the GBPA's undertakings in paragraph 4 of the letter dated 14 September 1968 and "*[made] it perfectly clear that [the GBPA] has no intention of defaulting on its agreement*", notwithstanding the *Shangrila* judgment of the Bahamian Supreme Court, which was binding on

the GBPA vis-à-vis its licensees. In this letter Mr St George also proposed that the Prime Minister's representative be appointed to the board of the GBPA to oversee the licensing process and grant any required approvals on behalf of Government and so, at the same time, also ensure the GBPA's compliance with the Court's decision in *Shangrila*; and

(d) by a letter to the Minister of National Security dated 10 May 1985, Edward St George praised the Government's immigration policy and its application to the Port Area, saying "… *I would like to say that the policy, as you explained it to us, will now help us to bring in new potential investors and help the growth of Freeport*".

258. In light of the foregoing, the Government's position is that the case that the GBPA now seeks to advance in relation to licensing is not open to it in light of the 1968 Agreement, even if that agreement cannot amount to a contract in law. The 1968 Agreement has been applied by both parties without question for over half a century; it was affirmed shortly after its formation by a detailed inquiry and report of the Royal Commission in the 1970s; the Chairman of the GBPA repeatedly confirmed in the 1980s that he stood by it; and the GBPA itself commended in its presentation to Parliament in 1990 as an important transfer of licensing and other regulatory powers.

259. The Government therefore seeks to invoke equitable defences to the counterclaim. The following summary of the legal principles provided by the Government appear to be uncontroversial, and the GBPA, instead of joining issue on them, instead primarily relies on its assertion that the decision in *Shangrila* declares the 1968 Agreement to be of no binding, or legal, effect.

260. In the Tribunal's view it is well established that waiver and estoppel, while possibly arising from different types of circumstances, including that attendant upon contractual dealings, are not, however, derived from contractual but rather from equitable principles. Given the history of relationships, representations and interactions between the parties as described above, the question is whether the

mutual dealings between the parties or the representations, actions or inactions on the part of the GBPA, have been such that the Government's reliance upon the course of mutual dealings, representations, actions or inactions of the GBPA, gave rise to an estoppel.

261. There are several types of estoppel recognised in English law. These include estoppel by representation, promissory estoppel, proprietary estoppel, estoppel by convention and most recently, so-called contractual estoppel. Whatever their historical roots, most of these doctrines are nowadays usually regarded as equitable doctrines, not least because there is heavy emphasis in the case law on "unconscionability" *Tinkler v HMRC* [2022] AC 886. Here the Government relies upon three forms of estoppel — estoppel by convention, estoppel by representation and waiver by estoppel — as explained below.

262. The ingredients for an estoppel by convention have been restated by the UK Supreme Court in *Tinkler*, [42] to [53]. In summary:(i) there must be a common assumption of fact or law (made clear by words or conduct on the part of the party to be estopped , (ii) the assumption must be expressly shared between the parties; (iii) the assumption must have "*crossed the line,*" e.g. by the estopped party conveying to the relying party an understanding that he expected the latter to rely upon it; (iv) the person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter; (v) that relying party's reliance on the common assumption must have occurred in connection with subsequent mutual dealings between the parties; and (vi) the relying party must have suffered sufficient detriment to make it unconscionable for the estopped party to assert the true position.

263. To establish an estoppel by representation there must be: (i) a clear representation of fact, which can be made expressly, impliedly or by conduct, intended to induce the representee to adopt a particular course of conduct (see *Pickard v Sears* (1837) 6 Ad. & El. 469, per Lord Denman at 474); (ii) an act of the representee reasonably taken in reliance on the representation; and (iii) the representee must be able to show

that they will suffer detriment if the representor is not held to their representation – see *Steria Ltd v Hutchison* [2007] I.C.R. 445 at [93].

264. Waiver by estoppel (or promissory estoppel) applies where: (i) a person having legal rights against another unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; (ii) in such circumstances, the other party acts or desists from acting, in reliance on that representation, with the effect that (iii) it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with the representation, and he will, to that extent, be precluded from doing so: *Kosmar Villa Holidays v Trustees of Syndicate 1243* [2008] Bus Law 931 at [36]-[38]; see also *Chitty on Contracts*, 35th ed., para. 26-043.

265. Having summarised the salient facts and summarised the relevant legal principles in paragraphs 255 to 264 above, the Tribunal concludes that the Government's case, whether expressed in terms of estoppel or waiver, in answer to the GBPA's case on licensing, is clearly made out. Accordingly, the GBPA's case on licensing fails.

The GBPA's Counterclaim: (2) Immigration

The GBPA's case on its immigration counterclaim

266. The GBPA's principal contention under this head is that, by introducing, and then implementing, the IA 1967 and/or the IA 1970 in the Port Area, including the manner in which the provisions of those statutes were implemented, the Government has breached and continues to breach clauses 2(14), 2(20) and 3(3).

267. In particular, the GBPA submitted as follows:

(a) the way in which the Government implemented the terms of the IA 1967 in the Port Area, has given rise, and continues to give rise, to delays in processing applications and failures to give reasons for dismissing applications;

(b) the HCA confers on the GBPA and its licensees the right to bring in and employ all necessary skilled workers from outside the country, and any necessary unskilled workers who cannot be recruited by the GBPA in the Port Area or by the Government elsewhere in The Bahamas. This right is necessary for the GBPA to discharge its responsibility under clause 2(14) properly to control and administer the Port Area, although the Government has at all times been entitled to exclude or expel such workers on grounds of personal undesirability: see the HCA, clauses 2(20) and 3(3). But the Government is not entitled to exclude or expel them for any other reason (including the failure to pay an entry fee), except where the specific conditions at clause 3 (3) are not met in the case of unskilled workers;

(c) the Government's original breach in this regard arose from the enactment of sections 26, 27 and 28 of the IA 1967 which provided that: (a) it was a criminal offence for any non-Bahamian to engage in gainful employment without a work permit; (b) that the Director of Immigration might require any person applying for a work permit to provide a bond (with or without sureties) for such sums as might be required for costs of repatriation etc. and; (c) a work permit might be granted subject to any conditions and restrictions; and

(d) these requirements for securing a work permit were set out in sections 19 and 36 of the IA 1967 (the implementation of which was also a breach) and were very different from those by which an immigration officer was entitled to refuse entry or to deport a non-Bahamian on grounds of personal undesirability as permitted by the HCA.

(e) Further:

i. section 2(7) of the IA 1967 as originally enacted provided as follows:

> "Nothing in this Act shall be construed as derogating from or abridging-

> (a) any provision of any agreement made under the authority of any Act whereby special provision is made with respect to admission into, residence or occupation in or departure from the Colony of certain persons or classes of persons mentioned in such agreement"; and

ii. section 2(7)(a) of the IA 1967 was repealed by section 3 of the IA 1970.

iii. Moreover, section 2(1) of the IA 1970 also declared *"null and void"* any provision of any agreement by which the Government undertook to allow any person or class of person to enter the country in the following terms:

> "Notwithstanding anything in any enactment to the contrary, any provision of any agreement to which this section applies which constitutes or purports to constitute any undertaking on the part of the Government of the Bahama Islands to allow, subject or not to any conditions –
>
> (a) the entry of any person or class of persons; or
>
> (b) any person to bring any person or class of persons,
>
> into the said Islands for any purpose shall, with effect from the date of commencement of this Act, be null and void for all purposes … and any such agreement as aforesaid shall be read and construed as though it did not contain such provision"; and

iv. section 2(2) of the IA 1970 made it clear that subsection 2(1) applied to the HCA.

(f) Accordingly, the introduction and/or promotion of this legislation before its enactment, and/or its implementation in the Port Area once in force, amounted to a breach of the HCA by the Government, in that it abrogates and/or restricts the right of the GBPA and its licensees to bring in, and employ, workers on grounds other than personal undesirability, contrary to clauses 2(20) and 3(3).

(g) In addition, the Government has, in the intervening years continued, and continues, to breach the HCA by:

i. failing to introduce legislation to amend or repeal the IA 1967 and/ or IA 1970, so as to remove the Government's legal powers to interfere with immigration control in the Port Area other than as provided under the HCA; and/or

ii. failing automatically to grant approval to any applicant who seeks to work for GBPA or any of its licensees in circumstances where the applicant has not been found to be personally undesirable according to the correct and applicable processes for doing so.

(h) Further, the Government has thereby also breached its implied obligation not to derogate from rights conferred by the HCA.

268. Accordingly, the GBPA contends that it is entitled to damages and to Declaration (1) in the following terms:

> "It is declared that the Government breached and is in breach of each of clauses 2(20) and 3(3) of the HCA (as amended) and in derogation of grant by (i) promoting the enactment of the Immigration Act 1970 and not promoting the repeal of that act; and (ii) not putting and maintaining in place an immigration regime in respect of the Port Area as provided for in those clauses."

269. In anticipation of the Government's response, the GBPA, also submitted that, whether or not the Government has the constitutional power to introduce and/or promote legislation, has no bearing on whether or not such legislation amounts to a breach of the terms of the HCA. The GBPA accepts that Parliament is (subject to the Constitution) sovereign and can legislate as it wishes, including to abrogate a subject's contractual rights. But, the GBPA contends, the introduction by the Government of legislation which abrogates the rights conferred by the HCA is no less a breach of the agreement by the Government simply because that breach takes effect by way of the introduction of an Act of Parliament.

The Government's response on the immigration counterclaim

270. The GBPA's immigration claims are rejected by the Government for the following reasons:

(a) although the claims are advanced on the basis that, since 1967, there have been and continue to be, delays in processing applications and failures to give reasons for dismissing applications for work permits, the GBPA does not plead any particulars of the alleged delays or improper refusal of applications, let alone of their purported continuing nature. The only reference to an event within the limitation period is a reference to a letter from the GBPA to the Government in relation to the implementation of the MOU. It does not allege any continuing breach arising out the implementation of the 1967 Immigration Act. It follows that this claim is time-barred on any view;

(b) in any event, the counterclaim is untenable, having regard to: (i) the terms of the HCA; and (ii) the facts as revealed by the documentary record. In that connection:

i. the HCA did not prohibit the Government from enforcing immigration controls in the Port Area. On the contrary:

a. clause 2(14) provided that the GBPA shall have responsibility for "*the administration and control*" of the Port Area "*subject to provisions of the HCA as regards administration by the Government in this Agreement contained*";

b. clause 3(9) of the HCA provided that the laws of The Bahamas applied in the Port Area, except as specified by the HCA; and clauses 2(20) and 3(3), which allowed the GBPA to bring into the Port Area skilled personnel and workers respectively,

rendered that provision subject to the Government's sovereign power to withhold permission; and

ii. nor did any delays in processing applications for work permits and unjustified refusals to grant applications constitute a breach of the HCA. The GBPA has not provided any particulars of its claim that the Government allegedly breached the specific mechanisms permitting the entry of skilled personnel and/or workers under clauses 2(20) and 3(3) of the HCA.

(c) Further and in any event, the GBPA agreed to the standardisation and coordination by the Government of immigration and customs procedures in the Port Area, and it proceeded on this basis for many years. The GBPA is wrong in contending that, absent a formal amendment of the HCA, the 1968 Agreement has no legal effect, either because it is a valid contract as between the GBPA and the Government (although it may be ineffective against third parties) or because it has given rise to a waiver or estoppel whereby the GBPA cannot insist on enforcing the strict terms of the HCA in relation to Immigration;

(d) In any event, the Government relies on clause 3(9).

271. As to the terms of Declaration (1), the Government contends that:

(a) it is vague and unclear. Other than references to the enactment of primary legislation, none of them identifies with any specificity the conduct or measures said to amount to breach;

(b) it does not identify: (i) which provisions of the 1970 Act contravene the HCA; (ii) any act of implementation or enforcement of the relevant statutory provision, which is alleged to amount to the breach or breaches alleged; and/or (iii) what "*immigration regime*" is alleged to be required under the HCA for the Port Area, and how this would apply in practice; and

(c) the contention that the Government is subject to a continuing positive duty to create and maintain a bespoke immigration regime for the Port Area has been raised for the first time in this draft declaration. It is not pleaded and it has not been the subject of evidence or legal argument. It cannot fairly form the basis of a declaration at this stage.

The Tribunal's decision on the immigration counterclaim

272. The GBPA's case, in summary terms, is that the Government, by the enactment and implementation of the IA 1967 and the IA 1970, breached its obligations and duties owed to the GBPA under clauses 2(20) and 3(3) of the HCA.

273. As already referred to above, clause 2(20) gives the GBPA the right "*to bring into the Colony and to employ within the Port Area such key, trained and/or skilled personnel as in the opinion of the Port Authority or of any Licensee (as the case may be) are necessary… for the purposes of any and all businesses, undertakings, and enterprises carried on within the Port Area… and that the Government will not withhold permission for the entry of such key, trained and/or skilled into the Colony…and Provided Always that the Government reserves the right of personal undesirability (a) to withhold permission for any individual to enter the Colony, and (b) to compel any individual to leave the Colony.*

274. Clause 3(3) expands upon clause 2(20) by explaining the arrangements by which recruitment may proceed, including, *inter alia*, by allowing the Government to recruit workers for the Port Area from elsewhere within the Bahamas, before the GBPA or a licensee can seek to recruit from overseas.

275. On the face of it at least, particularly in light of the words "*to bring into the Colony*" and "*the Government will not withhold permission for the entry*", the application of national immigration controls to individuals whom the GBPA wishes to employ in the Port Area would appear to be an interference with the rights granted to the GBPA under clause 3(20), at least where those controls are of general application rather

than being limited to "*personal undesirability*" which are not aimed at specific individuals.

276. Clause 2(14), which provides that the GBPA shall have responsibility for "*the administration and control*" of the Port Area "*subject to provisions of the HCA as regards administration by the Government in this Agreement contained*", does not appear to us to be of any assistance to the Government. It is a generally worded provision, which cannot cut down the natural meaning and effect of clause 2(20).

277. More importantly in the view of the Tribunal, the Government relies on clause 3(9) which, as explained above, states that, *"[e]xcept as in this Agreement otherwise specifically provided, the laws of the Colony from time to time in force shall apply within the Port Area in all respects*". There is no provision in clause 2(20), such as there is in clause 2(23) which as discussed above includes the ability to exercise the relevant right "*any present laws and regulations of the Colony and the enactment of future laws or regulations within the Colony to the contrary notwithstanding*". Accordingly, if clause 3(9) is to be interpreted so as to require a provision such as clause 2(20) to include express reference to statutory powers before it can avoid being overridden by legislation, then the Government's reliance on clause 3(9) would be well-founded.

278. However, there is an argument that it is "*otherwise specifically provided*" within the meaning of clause 3(9) if the language of the clause bestowing the relevant right does so in clear and unequivocal terms. Thus, it may be said that, if clause 2(20) had merely provided that the GBPA was free to employ whom it wanted, that would not have been enough, but the inclusion of the right freely to bring potential employees into The Bahamas for the purpose of being employed by the GBPA in the Port Area renders the clause sufficiently specific for that purpose.

279. The Tribunal sees the force of that argument as a matter of commercial reality: if a right such as that granted by clause 2(20) can be overridden by statute, it could be said to involve the Government being able freely to take away with one hand what it has given with the other. Against that, there is force in the argument that it is

pretty unusual for a contract to provide that future statutes can be disapplied (particularly in a contract which is to last for many years), and that very clear and specific words (such as those at the end of clause 2(23)) should be required before a provision is interpreted as having that effect.

280. The Tribunal has reached the conclusion that the right granted by clause 2(20) can be overridden by statute. The primary natural meaning of clause 3(9) is that there must be a provision such as that at the end of clause 2(23) before the right granted by the clause can benefit from opening words of clause 3(9): as a matter of the clause's syntactical construction, what has to be "*specifically provided*" is that "*the laws of the Colony ... shall not apply*". The precise form of words does not matter, but there must be some such statement. Further, the notion that particularly clear words are required before a clause granting rights can be within the scope of the opening words of clause 3(9) appears to be something of a recipe for uncertainty and argument. And the fact that clause 2(23) includes a statement which specifically refers to the right not being overridden by present or future statutes is of some significance, particularly as such a statement is unusual: it provides support for the notion that the opening words of clause 3(9) envisaged just such a statement.

281. Accordingly, the GBPA's counterclaim based on immigration fails. It is right to add that, even if had succeeded on the basis of the contractual interpretation, it would nonetheless have failed on the ground of estoppel, in light of paragraph 6 of the 14 September 1968 letter, and the reasoning in paragraphs 255 to 265 above.

The GBPA's Counterclaim: (3) Customs duty exemptions

The GBPA's case on its customs duty exemptions counterclaim

282. The GBPA's case is that insofar as the Customs Department determines what may be allowed into the Port Area as duty exempt, the Government has breached clauses 2(1), 2(3) and 2(14), and has derogated from the rights granted to the GBPA under the HCA:

283. More specifically, the GBPA submitted as follows:

(a) the GBPA and its licensees have the right to import free of duty such materials and supplies as the GBPA thinks necessary;

(b) the Government: (i) admits that the Customs Department processes all shipments coming in and out of the Port Area; and (ii) is understood to admit that it has at all material times applied, and continues to apply, customs controls in the Port Area;

(c) the Customs Management Regulations 2013 provide for the collection of taxes, revenues and levies by the Customs Department. Save for the express carve outs under sections 7(2)(b) and 71(2), there are no fee exemptions in respect of the Port Area. There were also no exemptions from the Comptroller's various discretions: for example, to seal and secure stores, provide duty-free allowances, impose conditions on the unloading of goods, refuse the warehousing of certain goods, and also his discretion to waive declaration requirements (Regulations 18, 20, 46(1) & 98);

(d) the Stamp Act (Ch.370) of 1925 ("**the 1925 Act**") remained in force in The Bahamas until the passage of the Stamp Act 2024, by which it was repealed. The 1925 Act was amended by various pieces of legislation, including the Stamp (Amendment) Act 2013 ("**the 2013 Act**"), which effected, *inter alia*, the following amendments:

i. by section 2(b), exemptions from stamp duty were removed for properties exceeding $500,000 in value;

ii. by section 2(d)(ii), exemptions were restricted to Bahamian nationals, and even they could only apply if they intended to occupy and reside in the property for an aggregate of 9 months; and

iii. by section 4, the rate of duty payable on certain instruments was increased;

(e) accordingly, the Government has breached the said clauses of the HCA relating to customs duty and also the implied obligation not to derogate from rights conferred by the HCA. Further, as the GBPA did not and has not waived these rights or its ability to exercise them, it is not estopped from enforcing them by way of its counterclaim.

284. In the circumstances, the Government is liable for its breaches and the GBPA is entitled to Declaration (3):

> "It is declared that the Government is in breach of Clauses 2(1) and 2(3) of the HCA (as amended) by operating a customs regulatory regime in respect of the Port Area contrary to those provisions."

The Government's response on the customs duty exemptions counterclaim

285. In summary, the Government submitted as follows:

(a) apart from contending that it was entitled to determine when customs duty exemptions applied in the Port Area, and that, by allowing the Customs Department to regulate exemptions from 1967, the Government breached clauses 2(14), 2(1) and 2(3) of the HCA, and/or that it derogated from the rights granted to the GBPA, the only specific particulars pleaded by the GBPA are an allegation that the Government has continued to breach the HCA "*resulting in many cases before the courts in which the breaches have been successfully challenged*." This claim is without foundation and in any event time-barred;

(b) in any event, this claim is insufficiently particularised, and the matters alleged did not amount to a breach of the HCA;

(c) the Government is entitled to rely on clause 3(9);

(d) further, under the 1968 Agreement, the GBPA agreed with the Government that there would be standardisation of customs controls with those elsewhere in The Bahamas, and this is binding as a matter of contract or waiver/estoppel on the GBPA;

(e) as to Declaration (3), the GBPA does not identify or define the alleged "*customs regulatory regime*" —whether by reference to specific legislation, administrative practices or enforcement measures—nor does it specify how any such regime is said to contravene clause 2(1) or 2(3) of the HCA.

The Tribunal's decision on the customs duty exemptions counterclaim

286. In summary, the GBPA's case is that, insofar as the Customs Department, in pursuance of the Customs Management Regulations 2013, decides what is, and what is not, allowed into the Port Area as duty exempt, there is a failure to comply with the provisions of clause 2 of the HCA, in that the Government has abrogated the rights to duty exemptions granted to the GBPA under the HCA. In response the Government relies upon clauses 3(9) and 2(14).

287. Clauses 2(1) confers upon the GBPA the right to import, during the continuance of the HCA, all "*Supplies*" (as that term is defined by the subclause, "*free from all Customs Duties, emergency taxes and all other duties and* ***taxes now or hereafter levied, charged or imposed by the Government*** *upon the importation of goods into the Colony*" (emphasis added).

288. Similar exemptions are granted by clauses 2(2) and 2(3) in relation to Manufacturing Supplies and Administrative Supplies (as those terms are widely respectively defined), except that the only temporal qualification expressed is "*during the continuance of this Agreement*", without words like those in clause 2(1), which are emphasised above.

289. Putting aside the general question of rights of administration under clause 2(14), because customs duties are in the nature of tariffs not falling within that general

remit, we conclude that it is plain that clause 2(1), especially the words emphasised above, provide the kind of exception contemplated by clause 3(9). The word "*hereafter*" makes it clear that clause 2(1) does not only extend to duties currently imposed but also to duties which may be imposed in the future by legislative change. The fact that there is no reference in clause 2(1) to statutes or other forms of legislation in terms does not present a problem for the GBPA's reliance on the opening words of clause 3(9): it is clear that the parties were referring to legislation, as it is through legislation that taxes are imposed.

290. Accordingly, we conclude that, as a matter of the construction of the HCA itself, and subject to any other argument it may raise, the Government, by imposing a customs tariff regime which raises customs duties upon those items which would otherwise be duty free under clause 2 of the HCA, has been, and continues to be, in breach of the HCA.

291. However, for the reasons which we have given in relation to the GBPA's case on licensing in paragraphs 255 to 265 above, the Government's defence based on waiver and estoppel succeeds in relation to the GBPA's case on customs duties exemptions, in light of paragraph 6 of the 14 September 1968 letter.

292. Accordingly, the GBPA's case on customs duty exemptions fails.

The GBPA's Counterclaim: (4) Utilities

The GBPA's case on its utilities counterclaim

293. The GBPA submitted that, by virtue of clause 2(21) of the HCA, the Government has expressly covenanted that the GBPA has the sole right to construct and operate utilities (and to charge and fix rates), and that this extends to any and all utilities, including electricity, internet, television, cable television and radio services; and further, that these rights extend to anyone licensed by the GBPA to construct and operate utilities in the Port Area, by virtue of clause 2(16) of the 1960 Agreement.

The GBPA's case on utilities: electricity

294. The GBPA's case is that, in implementing the EA 2015 and the EA 2024 in the Port Area, the Government has breached clauses 2(14), 2(21) and 2(23)(a) of the HCA and clause 2(16) of the 1960 Agreement and has derogated from the rights granted to the GBPA under the HCA. In particular, the GBPA submitted:

(a) It has the sole right to construct and operate utilities (including electricity), without requiring a permit from the Government, and to charge rates at its discretion: clause 2(21). This right extends to anyone licensed to do so under its Common Seal, pursuant to section 2(16) of the 1960 Agreement;

(b) GB Power (formerly Freeport Power Company Ltd) has been licensed by the GBPA to provide electricity in the Port Area since 1964, under various licence agreements;

(c) the EA 2015, which pursuant to s.4(2) applies to *"the entirety of The Bahamas, inclusive of the Port Area",* provides that nobody can "*generate, transmit, distribute or supply electricity within, into, from or through The Bahamas*" without a licence from URCA, the independent regulator of electricity, which also has the power to set rates for electricity charges;

(d) the EA 2024, which again expressly applies in the Port Area, repealed and replaced the EA 2015, and its provisions so far as relevant are much the same, save that the GBPA is no longer the *"approving authority"* for the Port Area, a role which has been given to GB Power;

(e) Legal proceedings have been brought (by URCA) against the GBPA to injunct it from acting as regulator of electricity in the Port Area or reviewing and/or fixing tariff rates in the Port Area;

(f) the Government has since the passage of each Act continued, and continues, to breach the HCA by implementing this legislation in the Port Area and failing to introduce legislation to amend or repeal the EA 2015 prior to 2024,

and then failing to amend or repeal the EA 2024 thereafter so as to exclude their application from the Port Area and prevent URCA's interfere with the construction, operation, supply and/or regulation of electricity in the Port Area; and

(g) the Government has therefore breached and continues to breach clauses 2(14), 2(21) and 2(23)(a) of the HCA, clause 2(16) of the 1960 Agreement and also is derogating from rights conferred on the GBPA by the HCA.

295. Accordingly, the GBPA submitted that it is entitled to Declaration (4):

> "It is declared that the Government is in breach of Clauses 2(14), 2(21), 2(23)(a) of the HCA (as amended) and Clause 2(16) of the 1960 Agreement by operating an electricity regulatory regime in respect of the Port Area, by which the Utilities Regulation Commission Authority purports to be the sole and exclusive regulator, contrary to those provisions."

The GBPA's case on utilities: telephony, internet and cable systems

296. The GBPA submitted in relation to telephony and the internet regime:

(a) the same clauses of the HCA are relevant to this declaration as for electricity;

(b) clause 2(21) also expressly includes "*telephone…systems*" in the definition of "*utilities*";

(c) as for internet and cable television, given that these services did not exist at the time the HCA was agreed, and given the close connection between internet and cable tv services and "*telephon[y]*", each of them being a means of communication/information transmission, internet and cable television come within the clause;

(d) there is no dispute that telephony and internet services are respectively provided in the Port Area by two licensees of the GBPA

and that URCA is (purporting) to act as their regulator and collecting fees from them;

(e) the regime operated by the Government by which URCA regulates telephony and internet originated with the Telecommunications Act 1999; and

(f) accordingly, the GBPA's case in respect of interference with telephony / internet regulation is effectively the same as its case in relation to electricity regulation.

297. The GBPA submitted that it therefore entitled to Declaration (5):

> "It is declared that the Government is in breach of Clauses 2(14), 2(21), 2(23)(a) of the HCA (as amended) and Clause 2(16) of the 1960 Agreement by operating a telephony and internet utility regulatory regime in respect of the Port Area, by which providers are required to obtain a licence from and pay fees to the Utilities Regulation Commission Authority, contrary to those provisions."

The Government's response on the utilities counterclaim

298. The Government submitted that so, far as it relates to electricity, telephony and the internet, the GBPA's claim is unsustainable because:

(a) EA 2015 has been repealed, so this part of the claim is time-barred;

(b) as for the remainder of the GBPA's claim under this head, the GBPA is not entitled to enforce alleged rights of GB Power by way of a claim against the Government for breach of the HCA;

(c) further and in any event, since the allegations raised by the GBPA are the subject of two pending actions before the Bahamian Court, namely:

i. a case commenced by GB Power (in which the GBPA is a party), where GB Power seeks a determination of the issue whether URCA is GB Power's regulator; and

ii. a case commenced by URCA against the GBPA seeking a declaration that URCA is the independent regulator of the electricity sector throughout The Bahamas with exclusive regulatory authority in respect of the rates of electricity and an injunction prohibiting the GBPA from fixing such rates;

the Tribunal should, in the exercise of its discretion, stay further consideration of this aspect of the counterclaim pending the Court's determination of those actions;[9] and

(d) the Government also relies on the retention of its right to legislate by clause 3(9).

299. As for URCA's regulation of telephone and internet services, and its demand for fees from two licencees, the two licensees are Cable Freeport Limited ("**CFL**") and System Resource Group Limited ("**SRG**"), who provide telephone, internet and TV service providers in the Port Area, and the Government submitted that the GBPA's claim under this head is misconceived. CFL and SRG are separate entities from the GBPA and the GBPA cannot seek to enforce third party rights via a claim against the Government under the HCA.

[9] The Tribunal has broad discretion to conduct the arbitration as it deems appropriate under Article 17(1) of the UNCITRAL Rules. This includes a power to stay or adjourn its own proceedings in the face of parallel or related court proceedings. There are few authorities on the factors that tribunals must take into account when ordering a stay in case of parallel or related proceedings. However, the International Law Association ("**ILA**") has issued the ILA Recommendations and a Final Report on Lis Pendens and Arbitration, which provides guidance to tribunals asked to decide whether to stay proceedings in case of parallel or related proceedings. The principles applicable when deciding whether to stay their own proceedings before a court of the jurisdiction of the place of the arbitration are dealt with in Recommendation 3: F. De Ly and A. Sheppard, *ILA Final Report on Lis Pendens and Arbitration, 2009, in Arbitration International,* 2009, Issue 1, p 84. In the context of related court proceedings, ILA commentary notes the issue is simply one of case management; referring to authority that a tribunal may, in its discretion and as a matter of comity, decide to stay the exercise of its discretion pending the decision in a related matter: F. De Ly and A. Sheppard, *ILA Final Report on Lis Pendens and Arbitration, 2009, in Arbitration International,* 2009, Issue 1, 4.25-4.28, pp 25-26.

300. Further or in the alternative, if it is unable to dismiss the claim now, the Tribunal should, in the exercise of its discretion, stay further consideration of this aspect of the counterclaim pending the Court's determination of the licensees' action against URCA.

301. As to the terms of Declarations (4) and (5), the Government submitted that there is lack of specificity in that the regulatory regime in question is not defined, nor are the respects in which it is alleged to contravene the relevant clauses of the HCA and the 1960 Agreement identified. If granted, a broad declaration in the terms sought would create considerable uncertainty as to the validity of any and all regulatory acts concerning the supply of power in the Port Area. While the GBPA's pleaded case referred to oversight by URCA, a licensee in the Port Area which supplies electricity within the Port Area,[10] no such delineation or limitation appears in the draft declaration which it now seeks.

The GBPA's case on utilities: the constitutional argument: the Government's case

302. In its post-hearing brief, the Government relied on the proposition that the Executive could not fetter (whether by contract or otherwise) the right of the Legislature to enact legislation affecting the Port Area. In this context it submitted:

(a) First, it is a principle of "*of high constitutional importance*" under Bahamian law that Parliament is sovereign, subject to the Bahamian Constitution. While the Bahamian courts may examine whether legislation enacted by the Legislature is consistent with a constitutional provision, "*[t]hat function apart, the duty of the courts is to administer Acts of Parliament, not to question them*": see *Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v Symonette* [2000] UKPC 31 at [26] and [29]. This leaves no room for a remedy of damages against the

[10] Amended Defence and Counterclaim, ¶219; Amended Reply and Defence to Counterclaim ¶293.

Executive where legislation alters contractual rights: the remedy is constitutional review only;

(b) Second, any provision in a government contract, which purports to fetter the ability of the Legislature to enact primary legislation, is unenforceable and *ultra vires*:

i. the separation of powers between the Executive and the Legislature is enshrined in the Bahamian Constitution: *Coalition To Protect Clifton Bay v Mitchell* [2016/PUB/con/00016] at [37] and [45]-[46];

ii. the power of the Legislature to enact legislation cannot be fettered by a contract entered into by the Executive. Thus the HCA could not prevent the Legislature from passing laws that might affect the administration of the Port Area or the contractual rights of the GBPA in relation thereto. To hold otherwise would be to ignore the constitutional separation of powers between the Legislature and the Executive;

iii. if the Government purported to fetter or impede the law-making power of the Legislature, it would act ultra vires and its decision would be unenforceable: *Silly Creek Estate and Marina Co Ltd v Attorney-General of Turks and Caicos Islands* [2021] UKPC 9 , where the Privy Council held that a contractual promise by the Governor to grant development permission, or to undertake to grant it for the future, would be ultra vires and unenforceable. Contractual arrangements cannot override or displace statutory functions, especially the law-making authority of Parliament under Article 52 of the Bahamian Constitution;

iv. alternatively, even if a government contract is expressly authorised by a statute, it will remain subject to legislative override in the future: *Searle* at [133].

(c) Third, the GBPA cannot obtain damages for or a declaration of breach of the HCA arising out of the enactment of primary legislation. The award of any compensation arising out of the enactment of primary legislation is limited to that provided for by the legislation in question (if any). As to this:

i. it is common ground that Parliament is sovereign and that it may legislate as it wishes, including by abrogating a citizen's contractual rights;

ii. given the legislative supremacy of Parliament under the Constitution, no person has a right to demand compensation for something done by or under the authority of statute: *Craies on Legislation* (13th Edition), para. 11-053**,** and cases there cited;

iii. a party who has suffered loss as a result of an enactment of legislation by the Legislature is confined to the remedy of such compensation as the Constitution or the Legislature has seen fit to allow: *Id.* citing *Hammersmith Railway v Brand* (1869) L.R. 4 H.L. 171;

iv. the Government, which has to abide by the law, cannot be sued for a state of affairs resulting from the enactment of laws passed by the Legislature, even if such legislation interferes with rights under a contract entered into between the Government and a third party;

v. accordingly, the GBPA has no private law remedy for the loss of property rights as a result of an enactment of statutes by the Legislature. It may, however, have a constitutional right to claim compensation in such circumstances under Article 28 of the Bahamian Constitution. This includes the ability to claim that the enactment of legislation interferes with property rights, which are to be understood broadly: see Article 27 of the Bahamian Constitution; *Smith v. Bahamas Hotel Catering and Allied Workers Union* [1985] BHS J.

No. 81, [19] and; *Attorney General v Financial Clearing Corporation* [2002] BHS J. No. 35, [9].

(d) This constitutional right is routinely exercised by claimants and enforced by the Bahamian courts: see e.g. *Leclevia Danica Colebrooke v Attorney General* [2023] 1 BHS J. No. 182. However, it is not a right which has been sued upon in this arbitration, nor would the Tribunal have jurisdiction to grant any remedy in respect of it if the GBPA had made such a claim. A constitutional claim of this nature is to be brought before the Supreme Court: see Article 28(1) of the Bahamian Constitution.

The GBPA's case on utilities: the constitutional argument: the GBPA's case

303. The GBPA submitted as follows[11] in relation to issue as to whether a contract entered into by the Executive could fetter (whether by contract or otherwise) the right of the Legislature to enact legislation affecting the Port Area:

(a) In addressing this issue it was important to identify the correct starting point. The Government entered into each of the 1955, 1960 and 1966 Agreements (and indeed the 1994 Agreement) with the express authority of Parliament conferred by Acts to which those agreements were annexed in draft. Whilst the agreements undoubtedly fetter the future exercise by the Government of its powers, the position is as summarised in *Searle v Commonwealth of Australia* [2019] NSWCA 127 at [133]:

> "Plainly enough, where a particular contract is expressly authorised by statute, as a majority of the High Court held in respect of the 'two airlines' agreement in *Ansett*, the fact that a discretion is fettered by the contract does not make it *ultra vires*. Indeed, the contract in such a case will expressly be *intra vires* although, as Hayne has pointed out extra-judicially, it will remain subject to **legislative** override (Hayne at 178-

[11] The Tribunal sets out the Parties' respective arguments on this issue at this stage, because, as will be seen from our analysis below, the Tribunal considers that the GBPA has indeed *prima facie* established a breach of the HCA under this head and therefore – for the first time in this award – the issue becomes relevant and requires consideration.

> 180) subject to any arguments, at least in the Commonwealth sphere, attracting s51(xxxi) of the Constitution" [emphasis in the original].

(b) For the same reason, it could not sensibly be said that, because they involve the fettering of the future exercise of the Government's executive powers, any of the provisions of the HCA offend against any principle of public policy; it is difficult to see how provisions which were expressly sanctioned by Parliament could ever be said to be contrary to public policy.

(c) The starting point, therefore, is that the HCA is valid and binding notwithstanding that it involves in certain respects an agreement by Government not to exercise certain executive powers, or to exercise them in a certain way, in the future; and the GBPA would be entitled to damages and a declaration in respect of any breach by the Government of the HCA notwithstanding that such breach consists of the exercise or non-exercise of such powers.

(d) It is nonetheless accepted that, subject to the Constitution, Parliament could enact subsequent legislation which conflicts or potentially conflicts with the provisions of the HCA – i.e. the 'legislative override' referred to in the passage from *Searle* quoted above. This is reflected in the judgment of Gleeson CJ in *Hooper v Commonwealth of Australia* (14(1) AMPLA Bulletin 41) at p.57 in the following passage, which was cited in *Searle* at [126]:

> "[Plaintiff] accepts that it is within the legislative power of the Commonwealth Parliament to enact legislation divesting the Authority of the pipeline and putting the pipeline into the ownership of some third party. The fact that this may be inconsistent with contractual obligations binding on the Commonwealth does not affect the power of the Commonwealth Parliament, although it may expose the Commonwealth to liability for damages".

(e) Whether or not the Government in the present case is exposed to a claim in damages as a result of the enactment by Parliament of primary legislation subsequent to the HCA depends on the nature and effect of the legislation.

(f) First, there is legislation which confers powers on the Government which merely permit the Government to act in a manner contrary to the terms of the HCA, by conferring a discretion on the Government the exercise of which in a particular manner would conflict with those terms. In such a case, it is sufficient that the Government has exercised (and is continuing to exercise) the powers conferred upon it by the legislation in a manner inconsistent with its obligations under the HCA for a breach to arise. It is not the enactment of the legislation which brings about the non-compliance with the terms of the HCA, but the exercise of discretion by the Government pursuant to the powers conferred on it by the legislation. Such actions should sound in damages: see *Searle* at [122]. The same analysis applies vis-à-vis declaratory relief.

(g) Second, there is the situation where the legislation mandates the Government to act in a particular way which is contrary to the terms of the HCA or put another way, disables the Government from complying with its contractual obligations under the HCA (including obligations to bring about or maintain a particular state of affairs). In such a situation the analysis is different, but the result is the same. Whilst the legislation may have disabled the Government from complying with its contractual obligations under the HCA, on the ordinary principles of frustration of contracts, the Government cannot rely on such an event to discharge it from its liability to pay damages, because the disabling state of affairs has been brought about by the Government itself – whether by promoting or enabling the legislation in the first place and/or by failing to bring about the repeal or modification of the legislation so as to place it in conformity with the terms of the HCA.

(h) The position was analysed by the Supreme Court of Canada in *Wells v Newfoundland* [1999] 3 SCR 199, where the respondent had been appointed to a statutory board and was entitled to hold office until the age of 70. New legislation was passed abolishing the post; the respondent was paid no compensation, and he sought damages. The Court held that, whilst the new legislation had abolished the respondent's post, it had not abolished his right

to compensation for severance: see the judgment of Major J, delivering the Judgment of the Court, at [41] to [43]. The Crown argued that the respondent's contract was frustrated by the passage of the new Act, which made further employment of the respondent in his previous position impossible. The Court held that self-induced frustration does not excuse non-performance and, whilst it recognised the separation of powers between the Legislature and the Executive, it further held that it was *"disingenuous for the Executive to assert that the legislative enactment of its own agenda constitutes a frustrating act beyond its control"* and that the frustration argument was not therefore a valid one: at [50] to [55].

(i) In *Wells*, the Supreme Court of Canada considered the earlier decision of the Privy Council, on appeal from Canada, in *Reilly v The King* [1934] AC 176, in which the appellant had claimed damages where he had been appointed to a public office which was later abolished by a statute which repealed the provision that established the office. An issue before the Privy Council had been whether the relations between the Crown and the holder of a public office were contractual at all; the Privy Council held that it did not need to decide that issue, but that if the relations were purely statutory the relevant statute had been abolished and, if contractual, the contract had been frustrated, with the result either way that no compensation was due: see pages 179-180. The possibility that the Crown had promoted the relevant repealing legislation and, if so, whether its argument relating to frustration was thereby undermined, were not considered by the Privy Council. In *Wells*, the Supreme Court of Canada held (at [47]) that *"Reilly should be taken as turning on the interpretation given to the specific statute of abolition"*.

(j) The approach adopted in *Wells* is entirely consistent with the general law on frustration of contracts. "*The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it*", and "*a frustrating event must take place without blame or fault on the side of the party seeking to rely on it*": *J Lauritzen AS v Wijsmuller BV* [1990] 1 Lloyd's Rep 1, per Bingham LJ at p.8, [4] & [5]. The Government cannot rely on the enactment

of legislation subsequent to the HCA as disabling it from complying with its obligations under the HCA in circumstances where (as will inevitably be the position) the legislation was promoted or enabled by the Government and where in any event the Government is presently in a position to repeal or modify any such legislation so as to remove any such disabling effect but has not done so. Whilst no order for specific performance or injunction would be made to require the Government to breach such statute law, there is no reason why the Government should not on ordinary principles be liable to pay damages in respect of its breach of such obligations, and there is no reason why the tribunal should not declare that such breaches have occurred and are continuing.

The Tribunal's decision on the utilities counterclaim

304. The GBPA says that rights granted to URCA by the EA 2015 and EA 2024, infringe the GBPA's rights under clause 2(21) of the HCA which provides:

> "That subject to the provisions of sub-clause (10) of Clause 1 hereof only, the Port Authority shall have the sole right to construct and operate utilities (and without limiting the generality of the foregoing word "utilities", in particular electrical supply, gas supply, water supply, telephone and sewerage disposal system) within the Port Area, and the necessary distribution systems in connection therewith, and that no licence or other permission or authority shall be required by the Port Authority from the Government or any department thereof or in connection therewith, and that (subject to the provisions of sub-clause 6 of clause 1 hereof) the Port Authority shall have the authority to and may charge such rates or other charges for such utilities or any of them as the Port Authority shall in their absolute discretion deem fit and proper."

305. The GBPA also invokes clause 2(16) of the 1960 Agreement as extending these rights to anyone licensed by the GBPA to construct and operate utilities in the Port Area.

306. For its part, the Government realistically does not challenge the GBPA's reading of these provisions.

307. As for the Government's argument based on privity of contract, the Tribunal considers that it has no bearing on the GBPA's case, which is simply that the powers granted to URCA infringe: (i) the GBPA's exclusive rights to lay cables etc.; and (ii) the right to do so freely. It is of course for the court proceedings to declare and determine the respective rights in these respects, as between URCA and GB Power, and as between URCA and the GBPA, under the HCA.

308. So far as the position as between the Government and the GBPA, as the parties to the HCA, is concerned, and subject to any other argument, we conclude that the wording of clause 2(21) renders the Government's intervention in the regulation and licensing of utilities within the Port Area a breach of the HCA.

309. However, for the reasons given in paragraphs 277 to 281 above, we are of the view that the Government's right to legislate overrides the GBPA's rights under clause 2(21), and therefore the enactment and implementation within the Port Area of the EA 2015 and the EA 2024 did not amount to a breach of the HCA by the Government. The reference in clause 2(21) to "*no licence*" being required is not in our view enough to bring the right granted by the clause within the ambit of the opening part of clause 3(9): it does not provide that no licence will be required as a result of future legislation; the contrast with clause 2(1) which grants exemptions from taxes etc "*now or hereafter levied, charged or imposed by the Government*" speaks for itself.

310. That renders it unnecessary to consider the other arguments raised by the Government, but we will briefly deal with them.

311. As the Tribunal understood it, the Government rested its limitation argument on: (i) the fact that the 2015 Act had been repealed; and, failing that, (ii) the point that it was not open to the GBPA to claim damage suffered as a result of the powers granted to URCA by the EA 2015 if that damage accrued before 5 May 2018. Section 5 of the Bahamian Limitation Act 1995 provides that an action founded on a contract (which is not a deed) must be brought within six years of the date when the cause of action accrued. The fact that the 2015 Act was repealed in 2024 is

irrelevant to the limitation issue, as the effect of the 1995 Act is simply that any breach of the HCA by the Government cannot be the subject of a claim by the GBPA unless it occurred after 5 May 2018 unless a statutory exception applies (which is not alleged by the GBPA) or unless the breach can be characterised as continuing (which is an exception relied on by the GBPA).

312. In relation to the GBPA's case on continuing breach, the Tribunal is unpersuaded that the continued existence and enforcement of provisions of the EA 2015 somehow entitle the GBPA to claim for losses it contends it suffered before 5 May 2018 as a result of the existence and enforcement of that statute. The fact that a breach of contract continues simply means that a fresh cause of action can be said to arise each day, but that merely serves to show that it is a non-sequitur to say that, because a breach is continuing, damage which was caused before the limitation period can be claimed – see for instance *Chitty on Contracts* (35th edition), paragraph 32-035.

313. Accordingly, the GBPA's claims based on the implementation of the EA 2015 cannot go back more than six years, but the limitation defence cannot (and is not claimed to) apply to the EA 2024.

314. The 1968 Agreement would not have assisted the Government in relation to this claim, although if the GBPA was seeking to allege that URCA's control over charging for electricity infringed its rights (which we do not understand the GBPA to be contending), then the Government would be entitled to invoke the 1968 Agreement. That is because paragraph 4(c) of the 14 September 1968 letter provides that, before altering tariffs or rates for utilities under clause 2(21) of the HCA, the GBPA was required to submit proposals to the appropriate Minister and to obtain his/her prior written approval.

315. Had it been necessary to rule on the constitutional argument raised by the Government, the Tribunal would have preferred the arguments and analysis of the GBPA. Having set out the arguments of the parties on this point in some detail, we can express our reasons succinctly.

316. Whilst the legislation (in particular the EA 2015 and the EA 2024) may have disabled the Government from complying with its contractual obligations under the HCA, by analogy with the principles of frustration of contracts, the Government (i.e. the State of the Bahamas) cannot rely on such an event to discharge it from its liability to pay damages, because the disabling state of affairs has, effectively, been brought about by the Government itself – whether by promoting or enabling the legislation in the first place and/or by failing to bring about the repeal or modification of the legislation so as to place it in conformity with the terms of the HCA. The analysis in the cases of *Searle* and *Wells v Newfoundland supra* supports this conclusion.

317. Obviously no claim to specific performance could, or would, succeed, but we see no reason why, in principle, the Government should not be subject to a liability, in its capacity as commercial contracting party, to pay contractual damages or to the making of a declaration against it, in circumstances where, albeit for justifiable public purposes, it chooses to pass legislation which deprives the other contracting party of its rights under its contract with the Government/ the State. Nor are we persuaded by the analysis that a potential contractual liability under the HCA would act as an improper fetter on the ability, or freedom, of the Government /the State to enact appropriate legislation and therefore is not an enforceable remedy at the suit of the GBPA. It is equally arguable that a potential liability under Article 28 of the Bahamian Constitution to pay compensation where a person is deprived of its property rights, would have a similar "fettering effect".

318. However, because of the provisions of clause 3(9), the GBPA's claim in relation to utilities is rejected.

The GBPA's Counterclaim: (5) Land purchases

The GBPA's case on its land purchases counterclaim

319. The GBPA submitted that it has the sole right to lay out and/or vary the development of the Port Area at its discretion without the need for it, or any of its licensees, to

secure a permit from the Government, as well as the right to control the use of private roads, and alter the layout of public roads: citing clauses 2(15), 2(22), and 2(24). Under this head the GBPA submitted:

(a) the rights are necessary in order for the GBPA to discharge its responsibility under clause 2(14) to administer and control, and to lay out the development of, the Port Area;

(b) further, under clauses 3(7) and 2(23)(a) respectively, the GBPA has an absolute discretion to license any person to carry on any lawful business in the Port Area, and that both the GBPA and its licensees have the right to such lawful business without a permit or licence from Government;

(c) section 5(1)(a) of the IPA 1981 provided:

> "no foreign person shall acquire or hold any immovable property in The Bahamas except under the authority of a permit granted to such foreign person by the [Foreign Investment] Board; and **every conveyance which is not made under the authority of a permit purporting to convey any immovable property to any foreign person shall be null and void and be without effect for all purposes of law** (emphasis added)";

(d) sections 3 and 4 of the **IPLA 1993**, which repealed and replaced the IPA 1981 (see section 2), provided as follows (although it has been amended in certain respects):

> "3. **A non-Bahamian**, (other than a permanent resident or a non-Bahamian acquiring land or an interest in land under a devise or by inheritance), who purchases or acquires an interest in a condominium, or property vacant or otherwise to be used by him as a single family dwelling or for the construction of such a dwelling **shall apply to the Secretary to the Board to register the purchase or acquisition and the Secretary upon receipt of the respective fee specified in the Schedule shall register that purchase or acquisition in the register and issue a certificate** to the applicant unless the property being acquired is undeveloped land and the non-Bahamian would by virtue of the acquisition become the holder of two or more contiguous acres of land in The Bahamas.

…

(3) A non-Bahamian who acquires land or an interest in land under a devise or by inheritance shall apply to the Secretary to the Board to have the acquisition registered with the Board and the Secretary upon receipt of the respective fee specified in the Schedule shall register the acquisition in the register and issue a certificate to the applicant.

….

4. A non-Bahamian (other than a permanent resident or non-Bahamian acquiring land or an interest in land under a devise or by inheritance) who intends to acquire land or an interest in land either by way of freehold or leasehold and which acquisition is not within section 2(1) **shall obtain a permit from the Board to make the acquisition by making the requisite application and paying the appropriate fee** specified in the Schedule to the Secretary of the Board otherwise any acquisition shall be null and void and be without effect for all purpose of law in the absence of such a permit…

(2) **The Board may with respect to an application for a permit in its absolute discretion grant or refuse to grant a permit**… (emphasis added)";

(e) as the Government accepts, the IPA 1981 was implemented in the Port Area until 1993, and the IPLA 1993 has been implemented in the Port Area thereafter;

(f) accordingly, by requiring any persons (including non-Bahamians) to either (i) apply for, obtain and/or register a permit from the Government in order to acquire or hold immovable property within the Port Area, and/or (ii) apply to and in fact register any such acquisition with the Government, subject to the payment of a fee, the Government has breached clauses 2(14), 2(23)(a) and 3(3). It has thereby also breached its implied obligation not to derogate from rights conferred by the HCA;

(g) the fact that the breaches were committed through the enactment and implementation of legislation has no bearing on whether or not such acts amount to a breach of the terms of the HCA;

(h) in addition to the initial breaches, namely the implementation of the introduction and promotion of, first, the IPA 1981 and, second, the IPLA

1993 (and also their implementation in the Port Area), the Government has in the intervening years since the passage of each Act continued, and continues, to breach the HCA by:

i. failing to introduce legislation to amend or repeal the IPA 1981 prior to 1993, and then failing to amend or repeal the IPLA 1993 thereafter, so as to remove the Government's legal powers to interfere with planning and development of the Port Area and also licensing of businesses within the Port Area; and/or

ii. failing to automatically grant purchase permits and/or certificates of registration to any applicant in respect of the Port Area; and

(i) thus the Government's introduction and promotion and/or implementation in the Port Area of the IPA 1981 and IPLA 1993 amounts to a breach of the HCA. So too does its failure to introduce legislation to repeal or amend, before 1993, the IPA 1981 and/or (after 1993) the IPLA 1993 so as to exclude their application to the Port Area and/or its failure to automatically grant permits or certificates to the GBPA or its licensees for the purchase or registration of land. The Government has thereby also breached its implied obligation not to derogate from rights conferred by the HCA.

320. Accordingly, the GBPA seeks Declaration (6) as follows:

> "It is declared that the Government is in breach of each of Clauses 2(14), 2(23)(a) and 3(7) of the HCA (as amended) by operating a real property transfer regime in respect of the Port Area which requires non-Bahamian persons to register with the Foreign Investments Board in order to acquire real property in the Port Area and, in respect of property over a certain acreage, to obtain permission from that board before doing so, contrary to those provisions."

The Government's response on the land purchases counterclaim

321. The Government contended that:

(a) any allegation based on the IPA 1981 is time-barred, because the Act was repealed in 1993;

(b) as to the case in relation to IPLA 1993, the GBPA has not provided any particulars of the implementation of the Act in relation to the Port Area, which is alleged to have caused it loss. There is only a general allegation that "*[t]he enforcement of this requirement operates in practice to delay the acquisition of property in the Port Area*." It is impossible to explore a factual case under this head: there is none. This counterclaim should be dismissed; and

(c) in any event, the Government can rely on clause 3(9).

322. As to the terms of Declaration (6), the Government pointed out that:

(a) the GBPA does not identify the source, content and contours of the alleged "*regime*", nor any wrongful act of implementation of such a regime. The GBPA's pleaded case consists only of a broad assertion that "*[t]he enforcement of this requirement operates in practice to delay the acquisition of property in the Port Area*";[12]and

(b) it is impossible for the Government to argue, or for the Tribunal fully and fairly to assess, a factual case in respect of such a claim for declaratory relief.[13] Accordingly, and unsurprisingly, it was not the subject of argument at the hearing. It cannot now be the subject of the declaration sought.

[12] Amended Defence and Counterclaim, ¶198.
[13] Government Written Opening ¶310 **{B/2/113}**

The Tribunal's decision on the land purchases counterclaim

323. The GBPA's complaint in summary is that the statutory restrictions on non-Bahamians acquiring land in section 5 of the IPA 1981 and sections 3 and 4 of the IPLA 1993 interfered with its rights under the HCA. In addition to clause 2(14), the GBPA invokes clauses 2(15), 2(23), 2(24) and 3(7) which variously describe its rights and responsibilities, and those of its licensees, in relation to the development of the Port Area.

324. It can fairly be argued that the IPA 1981, by its requirement of a permit from the Foreign Investment Board for the acquisition of land by a non-Bahamian, and the IPLA 1993, by its requirement that all such acquisitions be made only after a permit is obtained for a fee, each imposed an undeniable restriction upon the aforesaid rights and responsibilities of the GBPA (and its licensees).

325. In the view of the Tribunal, however, none of the clauses of the HCA relied on by the GBPA can fairly be said to address specifically the issue of the rights of a non-Bahamian to acquire or hold land free from any regulatory measures, such as those imposed by the IPA 1981 or the IPLA 1993. In other words, it cannot be said that the clauses of the HCA upon which the GBPA relies prohibited the statutory requirements, in that none of those clauses "*specifically provid[e]*" for the arrangements covered by the IPLA 1993. Clauses 2(22) and (24) are concerned with the lay-out and development of the Port Area, not with who can own land in the Port Area, and the fact that limiting ownership of land may indirectly affect the development of land cannot be sufficient to bring the IPLA 1993 provisions complained of within the scope of the GBPA's claim. Clauses 3(7) and 2(23)(a) are concerned with the "*carry[ing] on of lawful business*", not the ownership of land.

326. In any event, any claim based on the IPA 1981 would be self-evidently time-barred as that Act was repealed by the IPLA 1993; and any claim under the latter statute would be time-barred unless any loss was suffered as a result of a breach within the six-year period. The most recent of the four specific cases of licences being refused or delayed relied on by the GBPA was in 2014.

327. It is perhaps worth dealing very briefly with the evidence produced by the GBPA to support its case that it had suffered substantial damage as a result of this alleged breach. Apart from the general point that "*the enforcement of this requirement operates in practice to delay the acquisition of property in the Port Area*", the GBPA's case relied on the relevant provisions of the IPA 1981 and the IPLA 1993 were responsible for a very sharp drop in the number of non-Bahamian purchases of land in the Port Area. There was some very general and not very convincing oral evidence on this point. Thus, the GBPA relied on a chart showing the annual purchases of land in Freeport between 1960 and 2024, The chart showed that:

(a) there was a very large and sustained increase in sales between 1961 and 1974, followed by very few sales from 1976 to 2025, with a slight improvement between 1997 and 2009; and

(b) the proportion of non-Bahamian purchasers as against Bahamian purchasers fluctuated somewhat, but not a great deal, with non-Bahamian purchasers predominating, between 1965 and 1975, i.e. mostly during the "boom years" and Bahamian purchasers predominating thereafter.

328. Overall, the Tribunal was unimpressed with the GBPA's evidence as to the deterring effect of the IPA 1981 and the IPLA 1993. At least judging from the chart, for around eleven years up to 1975, Freeport clearly enjoyed enormous growth, which then tailed off very sharply, and never got near to getting back to its heady growth which it enjoyed some sixty years ago. Most importantly for present purposes, it seems quite apparent that the collapse in foreign and local demand clearly pre-dated by several years the enactment of the IPA 1981, as did the change in the proportion of non-Bahamian purchasers. It may well be that the collapse in foreign buyers was initiated by the exchange control regulations (as suggested by the GBPA to the HCA Select Committee on 21 May 1990) but that does not undermine the point, not least because no complaint has been (or could be) made of those regulations by the GBPA.

329. These brief remarks on the evidence as to damage are purely *obiter* as we conclude that (i) as a matter of the construction of the HCA, and in particular in light of clause 3(9), the introduction and implementation of the IPA 1981, or the ILPA 1993, in relation to the Port Area, did not constitute a breach of the HCA, and (ii) even if they had constituted a breach, in view of the Government's limitation defence, this head of claim would fail.

The GBPA's Counterclaim: (6) land development/environmental approval

The GBPA's case on its land development /environmental approval counterclaim

330. The GBPA submitted as follows:

(a) clause 2(22) provides that the GBPA has the "*sole right … to plan, lay out and vary the development of the Port Area as the [GBPA] shall in [its] absolute discretion deem fit and proper*" and that, in respect of various particulars of such development activity, the GBPA shall not "*require any building or other permit from the Government or any department thereof*". Clause 2(15) concerns control over roads and Clause 2(24) concerns control over layout of the Port Area;

(b) since 2020 the Government operated an environmental approval regime in relation to projects which require a Certificate of Environmental Clearance;

(c) the relevant legislation underpinning this regime is the EPP Act which was enacted on 19 December 2019[14] and remains in force. Accordingly, the Government continues to be in breach in operating an environmental regime inconsistent with its covenants under the HCA, and, whether the relevant legislation is properly to be characterised as that which confers a discretion on Government which it has exercised in breach of the HCA, or whether

[14] The GBPA's written opening at paragraph 452 erroneously refers to this as an act of 1999.

there is no such discretion, the Government remains in continuing breach; and

(d) the Government's only relevant objections to relief are those of waiver/estoppel and lack of particularisation; these, the GBPA submitted, have been addressed in connection with the other draft declarations above.

(e) Accordingly, the GBPA seeks Declaration (7):

> "It is declared that the Government is in breach of each of Clauses 2(14), 2(15), 2(22), 2(23)(a) and 2(24) of the HCA (as amended) by operating an environmental approval regulatory regime in respect of the Port Area which requires any development to obtain the approval of the Department of Environmental Planning and Protection and/or to comply with any condition of a Certificate of Environmental Clearance, contrary to those provisions."

The Government's response on the land development /environmental approval counterclaim

331. The Government submitted as follows:

(a) the relief sought by the GBPA is vague, imprecise and divorced from the GBPA's case;

(b) in its pleaded case, the GBPA referred, by way of particulars, to: (i) the enactment of the EPP Act, and (ii) delays to two specific projects, namely the Clean Marine project,[15] and the Carnival project[16]; and

(c) in any event this claim cannot succeed in light of the 1968 Agreement.

332. So far as the draft declaration is concerned, the Government contended that it does not reflect the GBPA's pleaded case. Instead, it refers to the "*operation*" or an

[15] Rejoinder and Reply to Defence to Counterclaim, ¶103
[16] Rejoinder and Reply to Defence to Counterclaim, ¶101-2

"*environmental approval regulatory regime*" without identifying which aspects of that regime are impugned or what conduct the Government must refrain from.

The Tribunal's decision on the land development /environmental approval counterclaim

333. In summary, the GBPA alleges that it follows from clause 2(14) and three other clauses of the HCA that the Government has breached and continues to breach the HCA by requiring:

(a) between "*some stage after 1968*" and 1993, an "*Approval in Principle*" from the Prime Minister for any large-scale development in the Port Area;

(b) between 1993 and 2020, every non-Bahamian development project in the Port Area to be approved, initially by the Prime Minister, and from 1993 by the BEST Commission under IPLA 1993; and

(c) since 2020, all developers to submit environmental impact assessments to the Government for any projects, pursuant to the EPP Act.

334. In particular, the GBPA relies on clause 2(22) which provides that the GBPA has the "*sole right … to plan, lay out and vary the development of the Port Area as the [GBPA] shall in [its] absolute discretion deem fit and proper*" and that in respect of various aspects of such development activity the GBPA shall not "*require any building or other permit from the Government or any department thereof*". Further, clauses 2(15) and 2(24) specifically concern control over roads and control over layout of the Port Area respectively.

335. In the Tribunal's view, in the light of the wording of clause 2(22), it is hard to resist the GBPA's case that, by requiring projected developments in the Port Area to obtain approval of the Prime Minister, the Government or under the EPP Act, the Government breached the HCA, and that clause 3(9) cannot be invoked to support the contrary view.

336. It appears to us, however, that the Government's case based on the 1968 Agreement disposes of this aspect of the GBPA's claim for the reasons developed at paragraphs 255 to 265 above. The reference in paragraph 4(b) of the 14 September letter to "*the approving of proposals to schedule particular areas for particular types of development*" is rather opaque. We readily accept that it could well be read as referring to, and limited to, zoning-type decisions rather than individual planning decisions. However, it could fairly be read as referring to individual planning decisions, and the fact that from 1993, indeed from shortly after 1968, the Government, initially through the Prime Minster, had required, and exercised, the right to approve certain planning applications, without any apparent objection from the GBPA, appears to the Tribunal to render it inequitable for the GBPA now to raise a contention which involves the assumption that this was unlawful.

337. In any event, in so far as any claim is brought in respect of the 1993 Act, we do not consider that there is any realistic claim of any breach or any damage being caused to the GBPA within the limitation period, given that the 1993 Act was repealed in 2020. The only projects cited by the GBPA as having been impacted by the requirements of EPP Act were the Clean Marine and Carnival Cruise Port projects. Although it is said by the GBPA that each of those projects was delayed as a result of the requirements of the EPP Act, both projects proceeded and are now in operation, and there is no evidence of any loss having been suffered by the alleged delay.

338. Accordingly, we conclude that the GBPA's allegations of breaches in relation to land development/ environmental approval fail.

The GBPA's Counterclaim: (7) environmental bye-laws

The GBPA's case on its environmental bye-laws counterclaim

339. The GBPA contends that in not approving and/or properly considering certain environmental bye-laws proposed by the GBPA, the Government has breached

clauses 2(14) and 2(24), clause 13 of the 1966 Agreement, and clause 1 of the 1994 Agreement (by virtue of clause 16 of the Schedule thereto).

340. In summary the GBPA submitted as follows:

(a) Clause 13 of the 1966 Agreement provides that:

> "The Government hereby undertakes to consider sympathetically any application by the [GBPA] for the promotion of legislation to permit the [GBPA] to make bye-laws subject to the approval of the appropriate Minister for the purpose of enabling the [GBPA] to discharge the said responsibilities and to authorise the [GBPA] or any duly authorised Licensee to collect or recover from owners or occupiers of premises reasonable fees or charges for services provided or rendered by the [GBPA] or such Licensee in the discharge of the said responsibilities."

(b) As to the GBPA's rights and the Government's obligations:

i. clause 1(10) obliges the GBPA to "*provide properly for the health and safety of employees and the general public, and for good public sanitation within the Port Area*";

ii. the GBPA has the right to alter public roads as required to meet its responsibility under clause 2(24) to lay out the development of the Port Area;

iii. in 1994, the GBPA covenanted to "*Introduce additional environmental frameworks for development*" in the Port Area (clause 1 of the 1994 Agreement and clause 16 in the Schedule thereto);

iv. the Freeport Bye-Laws Act 1965 provides that the GBPA may, with the approval of Government, introduce bye-laws to enforce building and sanitary standard (section 3), prevent water pollution (section 5), ensure proper conduct of sewage and waste (sections 8 and 10), regulate the erection and display of advertisements (section12)

and/or ensure safety in respect of the use of machinery (section 13) in the Port Area; and

v. clause 13 of the 1966 Agreement requires the Government sympathetically to consider any proposals put forward by GBPA for the making and promulgation of bye-laws.

341. The GBPA alleges that the Government was in breach of its obligations for the following reasons:

(a) according to the testimony of Ms Karla McIntosh (the GBPA's in-house counsel), since December 2006 "*the Government has failed to properly consider and/or promulgate the package of bye-laws (and subsequent revisions and amendments) which have been put forward by GBPA*", and she has witnessed the protracted back and forth, and many delays in respect of the same, with the GBPA chasing for approval for almost 20 years;

(b) no evidence had been given by the Government's witnesses in respect of the proposed environmental bye-laws package and matters arising therefrom. Instead, Ms Woods Hanna testified on environmental policy in respect of the activities of BIA, BEST and DEPP. The Government did not give evidence as to whether the package or any part of it had been properly considered, approved and/or promulgated;

(c) the right and responsibility of the GBPA to make bye-laws for health and safety in the Port Area has long been recognised (as is demonstrated by, for example, GBPA memos from 1970 on safety, public health, waste disposal);

(d) in 1993, the GBPA established its own internal Environmental Department, which, in March 2006, was tasked with developing a new set of environmental bye-laws and guidelines for the Port Area; and

(e) a package of new environmental bye-laws for Freeport was put together in the following months and submitted to the Government for review in December 2006. A copy was sent to Dr Marcus Bethel, who was Environment Minister at the time, soon after. Far from considering the proposals sympathetically, the Government's handling of the application can reasonably be described as evasive at best, obstructive at worst. A list of alleged failings on the part of Government to consider its proposals for reform was set out at [533.1 -533.10] of the GBPA's Opening submissions.

342. The GBPA submitted that, in light of this, it is entitled to Declaration (8):

> "It is declared that the Government is in breach of Clause 13 of the 1966 Agreement and in derogation of grant by continuing to fail to take the necessary steps to effect the promulgation of the environmental bye-laws for the Port Area first proposed by the GBPA in December 2006."

The Government's response on the environmental bye-laws counterclaim

343. The Government submitted that:

(a) the GBPA appears to seek a declaration of ongoing breach without identifying any specific wrongful acts or omissions which are alleged to have been committed by the Government. This mirrors its pleaded case, which referred to disparate bye-laws without further explanation;

(b) in any event, the claim is time-barred in relation to any alleged failure by the Government outside the six-year limitation period; and

(c) further, the lack of clarity as to the factual and legal basis of the declaration sought underscores why declaratory relief is inappropriate, and accordingly, no relief should be granted.

The Tribunal's decision on the environmental bye-laws counterclaim

344. Under this head the GBPA contends that the way in which the Government dealt, or failed to deal with its application to make bye-laws in order to discharge its obligations constituted breaches of clause 13 of the 1966 Agreement, in light of:

(a) clause 1(10), which obliges the GBPA to "*provide properly for the health and safety of employees and the general public, and for good public sanitation within the Port Area*";

(b) clause 1 of, and paragraph 16 of the Schedule to, the 1994 Agreement, under which the GBPA covenanted to "*Introduce additional environmental frameworks for development in the Port Area*"; and

(c) clause 13 of the 1966 Agreement which requires the Government sympathetically to consider any proposals put forward by the GBPA for the making and promulgation of bye-laws, but the making of such bye-laws remains "*subject to the approval of the appropriate Minister.*"

In furtherance of objectives such as these, the Freeport Bye-Laws Act 1965 provides that the GBPA may, with the approval of Government, introduce bye-laws for enforcement within the Port Area.

345. The Government's response is that it undertook only to '*consider sympathetically*" any application by the GBPA to make bye-laws which remained "*subject to the approval of the appropriate Minister"* and therefore the GBPA's claim cannot amount to a breach of the GBPA.

346. As explained in paragraphs 341(a) and (b) above, there was unchallenged evidence called by the GBPA that since December 2006 "*the Government has failed to properly consider and/or promulgate the package of bye-laws (and subsequent revisions and amendments) which have been put forward by the GBPA*". The to-ing and fro-ing in relation to Environmental Bye-Laws, first put to the Government in

December 2006, and apparently approved in 2023, but still not yet issued, seems remarkable.

347. In the absence of any meaningful response from the Government, the Tribunal concludes that the Government was indeed in breach of its obligations under the HCA to give reasonable and timely consideration to the proposed bye-laws.

348. Apart from the Environmental Bye-laws first proposed in 2006, the only bye-laws of which complaint is made by the GBPA and which fall within the limitation period are:

(a) the Freeport Marina and Inland Waterways Amendment Bye-laws;

(b) the Freeport Removal of Refuse Amendment Bye-laws (which were approved in 2023 but not then promulgated); and

(c) the Building Code and Sanitary Code Bye-laws (which were not approved in 2022).

(A complaint about the Pollution and Waste Bye-laws in 2013 is clearly time-barred).

349. The damage said to have been suffered by the GBPA as a result of these breaches is that the GBPA has been prevented from "*properly administering and controlling Freeport",* and that it has had "*a deleterious im[pact] on Freeport and its value proposition*" to potential investors and it has resulted in "*blighted landscape caused by the GBPA's inability to demolish derelict buildings*".

The GBPA's Counterclaim: (8) diversion and frustration of investment projects

The GBPA's case on its diversion and frustration of investment projects counterclaim

350. The GBPA submitted:

(a) the Government has diverted, discouraged and/or frustrated investment into the Port Area in breach of clause 2(14);

(b) the breaches alleged in respect of specific development projects are:

i. Tractabel/Enron/Suez: the proposed construction of an LNG facility in Freeport;

ii. the Weller/Pegasus Six Senses hotel resort project;

iii. the Ginn/JV/Devco Barbary Beach resort project; and

iv. the Bluwater proposal for development of a resort at the Port Lucaya Marina;

(c) evidence was given by a number of witnesses, particularly Ms Moss, Ms St George and Mr Hayward, at the hearing about these projects and the reasons why they failed, or in the case of others such as the Carnival Port project, were unreasonably delayed. Their evidence was based on their own views, bolstered in some instances by correspondence, and supported by the views of others, of the Government's "*misguided policies*" and "*failings of administration*" which were said to have resulted in the erosion of the foundational value proposition of Freeport as a special economic zone for attracting foreign direct investment, and dismantling the earlier successes and ease of doing business created by the GBPA acting as a "*one stop shop*" under the auspices of the HCA.

351. The GBPA seeks Declaration (9) in the following terms:

> "It is declared that, by operation of the implied duty of good faith in the HCA (as amended) and/or the requirement not to derogate from grant in respect of the HCA (as amended), the Government is required to refrain from: (i) actively discouraging investment into the Port Area, and/or (ii) actively diverting investment opportunities from the Port Area to other parts of The Bahamas."

The Government's response on the diversion and frustration of investment projects counterclaim

352. The Government submitted as follows:

(a) the acts of the Government which are alleged to constitute "*active discouragement of investment in the Port Area*" are unparticularised and undefined, as are the acts which are alleged to amount to "*active diversion of investment opportunities from the Port Area*";

(b) the GBPA does not attempt to align the declaration sought with its pleaded case, which identified two specific alleged cases of the conduct complained of: (i) an alleged diversion by the Government of the Ginn Street Project from the Port Area to West End in 2002; and (ii) the alleged discouragement by the Government of the development of the Pegasus project in 2023.[17] No other complaint is pleaded. As to these projects:

i. The allegation concerning the Ginn Street Project relates to events which are alleged to have taken place 23 years ago. Any claim for breach of contract in relation to that project has long since been time-barred, and in any event no useful purpose would be served by making a declaration in relation to the alleged diversion of that project at this stage. A declaration would not be an effective way of resolving the issues raised by the GBPA in relation to this time-barred complaint.

ii. That leaves the sole complaint in relation to the Pegasus project. This project too is now over, and it is hard to see what useful purpose would be served by making a declaration in the terms sought in relation to this project.

[17] Amended Defence and Counterclaim, ¶238.

353. Evidence was also given in response on behalf of the Government about these issues at the hearing by Attorney General, Mr Leo Pinder and Ms Phylicia Woods -Hanna of the BIA.

354. Furthermore, even if the GBPA succeeded in establishing breaches in respect of the Ginn and Pegasus projects—which it has not—this would not justify a broad, open-ended declaration such as Declaration (9) with its sweeping pronouncement on future conduct.

The Tribunal's decision on the diversion and frustration of investment projects counterclaim

355. The principal project relied on in this connection was the Weller/Pegasus, an ambitious project which was characterised by the promoters as promising upwards of USD10 billion of investments into the Port Area. The GBPA accuses the Government of deliberate frustration of this project in order to force the GBPA shareholders to divest of their interests in GBPA and its parent, IDC, to Government itself or else to others, most proximately the Weller/Pegasus conglomerate.

356. The contemporaneous evidence does reveal that the Government was against the Weller/Pegasus buying into IDC while the existing shareholders—the St George and Hayward families—remained in control. This opposition was largely based on misgivings about the viability of the GBPA itself.

357. In 2015, the HCA Review Committee, a bi-partisan committee established by the Government to review the history and operation of the HCA, reported that, at around the same time as Edward St George and Sir Jack Hayward took over its control, the GBPA had divested itself of its operational assets, including its land-holding companies, utility company, service charge-collecting companies, harbour company and sanitation company. The Report concluded that, as a result of the divestments, the GBPA lost the capital base necessary to pursue the development objectives outlined in the HCA. Having sold off its core assets, the GBPA lacked the means to drive Freeport's growth. As the Report recorded:

> "The intent of the HCA was such that GBPA would be an entity able to carry out all municipal and regulatory functions in Freeport. Meeting that expectation requires capital. Given that GBPA has sold all of its assets, it no longer has the capital to do so. Moreover, GBPA itself stated that the revenues earned by GBPA today fall short of what is needed for basic maintenance, in light of outstanding receivables".

Thus, the GBPA had admittedly become at least balance sheet insolvent, a state in which it has apparently remained ever since.

358. There were, moreover, other understandable concerns on the part of Government about the source of financing for the Pegasus/Weller project itself. In that connection, there was extensive exchange of correspondence between the Attorney General and Mr Michael Holtzman, a senior executive of Pegasus, in which the latter disclosed that the source of funds was proposed to be the Green Climate Fund. While the GBPA insists that this was a conclusive response, it appears that from the Government's point of view, there was never an acceptable answer to its concerns in this regard.

359. Nonetheless, even if the Government's concerns were unjustified, it emerged from the cross-examination of Mr Steven Seigel at the hearing (Day 6, transcript, pp127-138), that the Pegasus/Weller project had earlier obtained Government approval without delay and land had been acquired for the project which was either soon to be or was already under construction (Day 6, transcript, pp179-180).

360. Accordingly, while relations between the parties deteriorated, this did not result in the Government acting inappropriately in its dealings with the Pegasus/Weller project. Rather, once one affords the Government its proper margin of appreciation as custodian of the public interest, its concern to ensure that the GBPA acquired, as the Prime Minister put it, "a *fundamental change of direction, leadership and strategy*" in order to take Freeport (and hence Grand Bahama as a whole) forward[18], and its resulting caution about the Weller/Pegasus project cannot be criticised.

[18] That view was shared by the HCA Review Committee in their 2015 Report in their recommendation that there be, *inter alia*, a change of ownership of the GBPA in exchange for further extensions by Government of the tax

361. As to the GBPA's contentions about the alleged diversion of: (i) the unpleaded Tractabel/Enron project to East End on Grand Bahama; and (ii) the Ginn Barbary Beach project to West End, again, once one affords the Government its due margin of appreciation as custodian of the wider public interest, the Tribunal concludes that the Government's contractual duties owed to GBPA under the HCA did not, in all the circumstances, preclude the former's ability to prefer investment projects for other areas of Grand Bahama outside Freeport.

362. In particular:

(a) in the case of Tractabel/Enron, environmental protection concerns were raised by the BEST Commission in relation to the development of the Port Area; and

(b) in the case of the Ginn project, there was a perceived need for economic stimulation of and diversification to other areas of Grand Bahama.

363. Accordingly, the Tribunal concludes that these claims fail on their merits, although it is right to add that the claim based on the Ginn project would have failed on the grounds of both limitation and absence of loss, as the project would admittedly in any event not have proceeded because of the impact of the 2008 Global Financial Crisis.

The GBPA's counterclaims: the relief to be granted

364. It follows from the above discussion that the GBPA succeeds on its Counterclaim but only in relation to one of the eight issues, namely environmental bye-laws, and only to the extent of any breaches causing damage since 5 May 2018.

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concessions given under the HCA and for the sake of revitalising the GBPA itself as the developer of the Port Area. It is notable also that these recommendations were made against the background of the Hayward and St George families both having registered their wish to divest their interests in the GBPA, as confirmed by Sarah St George: Day 5 Transcript pp129-131 and at p 136, accepting that there was nothing wrong with the Government itself having made an offer to purchase the shares of the families.

365. It is at least possible that the GBPA has suffered loss since 5 May 2018 as a result of: the Government failing to deal efficiently with (i) the Freeport Marina and inland Waterways Amendment Bye-Laws, (ii) the Freeport Removal of Refuse Amendment Bye-laws, and (iii) the Building Code and Sanitary Code Bye-laws.

366. However, at least on the present state of the arguments, the Tribunal does not immediately see a basis for assessing the damages to which the GBPA is entitled for these breaches.

367. The GBPA's case on damages relied on the evidence of a Chartered Accountant, Mr Mark Taylor. His full and interesting report was prepared on the basis of what the GBPA's counsel referred to as:

(a) making a "*'But-For Scenario Assessment', estimating [the aggregate of] the profits the GBPA would have made [between 1967 and 2025] 'but-for' the Government's various alleged breaches of the HCA since 1967 and continuing*";

(b) assessing the aggregate of the actual profits (or when they are not available, the estimated profits) which the GBPA made in that period; and

(c) subtracting the latter figure from the former.

368. There are obvious difficulties in using Mr Taylor's evidence and conclusions to arrive at an appropriate figure to award the GBPA by way of damages for the Government's breaches after 5 May 2018 of the GBPA's right to sympathetic approach to Bye-Law approval, given that his assessment is based on the assumptions that:

(a) in addition to this class of breach, the Government also breached the GBPA's rights in relation to immigration, licences, customs duty exceptions, land development, land purchase, environmental regulation, as well as wrongly diverting and frustrating investment projects; and

(b) the GBPA was not limited to claiming damages which it suffered from May 2018 but could go back to 1967.

369. Quite apart from this, the Tribunal considered that, Mr Taylor adopted a very, indeed an unjustifiably, optimistic view as to what would have happened to Freeport, and in particular the profits which the GBPA could have enjoyed from 1967, even if he had been right in the two assumptions identified in the previous paragraphs. It would, of course, normally be inappropriate to make such an unspecific criticism of Mr Taylor's assessment bearing in mind his long and detailed report and his cross-examination (and the evidence on the point of some of the other witnesses).

370. However, given that the Tribunal is of the view that, even if we had accepted that Mr Taylor's assessment as accurate on the basis of the assumptions which he made, we could not, at least on our current view, use it to assess an appropriate level of damages given that our conclusion as to the extent of the Government's liability is so very different from his assumptions. However, as mentioned in paragraph 36 above in the Written Closing Directions sent in the email dated 24 September 2025, the Tribunal directed that "*the Parties should not make submissions as to the quantification of such damages*", on the basis that this was one of the issues which "*should be postponed until the Tribunal has decided whether, and if so how, they should be dealt with*".

371. Accordingly, the Parties may make concise written submissions, strictly limited to identifying the passages in the evidence which bear on (i) the GBPA's entitlement to, and (ii) the quantification of any damages for the breaches identified in paragraph 347 above.

372. As for the declaratory relief sought by the GBPA, Declaration (8) is appropriate.

Conclusion

373. **ACCORDINGLY, THE TRIBUNAL ORDERS AND AWARDS:**

(a) **The Government's claim against the GBPA is dismissed;**

(b) **The GBPA's counterclaim against the Government succeeds, but only to the extent of its counterclaim in respect of delays in approving bye-laws, as to which:**

i. the parties should make submissions as to damages;

ii. the GBPA is entitled to the following declaration:

- **That the Government is in breach of Clause 13 of the 1966 Agreement by continuing to fail to take the necessary steps to effect the promulgation of the environmental bye-laws for the Port Area first proposed by the GBPA in December 2006.**

(c) **The parties should try and agree in identifying the outstanding issues (including damages and costs), and a procedure, including a timetable, for determining those issues, and should report back to the Tribunal by 6 March 2026, indicating what they have agreed, and what, if anything, they have been unable to agree.**

Signed: ……

Sir Anthony Smellie KCMG KC (Presiding Arbitrator)

Date**: 27/02/2026**

Three Verulam Buildings, Gray's Inn, London WC1R 3NT, United Kingdom

Signed: ……

Lord Neuberger of Abbotsbury (Co-Arbitrator)

Date**: 27/02/2026**

One Essex Court, Temple, London EC4Y 9AR, United Kingdom

Signed: ……

Dame Elizabeth Gloster DBE (Co-Arbitrator)

Date**: 27/02/2026**

One Essex Court, Temple, London EC4Y 9AR, United Kingdom