



THE GOVERNMENT OF THE COMMONWEALTH OF THE BAHAMAS V GBPA

Guide to the Award

The Government's Claim

1. Under the HCA, the Government historically had a right under clause 1(5)(d) to recover costs incurred by it in relation to the Port Area. However, in 1994, in connection with arrangements to extend the substantial tax concessions enjoyed under the HCA, the Government and the GBPA agreed to a provision (paragraph 3 of the Schedule to the 1994 Agreement), whereby the GBPA was to make annual payments to the Government to defray the Government's administrative expenses in the Port Area, subject to an ongoing review process after the first 5 years: **Partial Award, ¶¶ 79-83 and 220-221.**
2. The GBPA's payment obligations under Clause 1(5)(d) of the HCA were replaced by its payment obligations under paragraph 3 of Schedule 1 to the 1994 Agreement: **Partial Award, ¶ 198.**
3. Under the 1994 Agreement, the GBPA is liable to make annual payments to the Government for the remainder of the HCA (until 2054). This is because the payment review right "*remains fully enforceable*" and it is "*self-evident*" that the Government can invoke it for future years: **Partial Award, ¶ 224.**
4. As for costs incurred by the Government in prior years in relation to the Port Area, the Tribunal has not determined this issue, but it is able and prepared to do so if the parties so wish: **Partial Award, ¶¶ 225-227.**

The GBPA's Counterclaim

The GBPA's Claims of Exclusive Rights over Licensing, Immigration, Customs Duties, Utilities, Land Acquisition, Environmental Regulation and Development Approvals in the Port Area

5. The GBPA's claims to exclusive rights to administer the Port Area in relation to licensing, immigration, customs matters, utilities, land acquisition, environmental regulation, and development approvals were rejected for the following reasons.

The Longstanding Agreement Between the Parties from 1968

6. The GBPA's various complaints about wrongful interference by the Government in the administration of Freeport are to be seen (amongst other things) against the background of a very longstanding arrangement between the parties (made in 1968) (the "**1968 Agreement**"): **Partial Award, ¶¶ 62-64**. This provided (amongst other things) that:
 - a. 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;
 - b. immigration and customs controls within the Port Area were to be standardised and coordinated with those applied elsewhere in The Bahamas;
 - c. the GBPA would 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 it would give effect to any recommendations made by that Ministry or agency in question in granting or withholding permits or approvals for any such development; and
 - d. before altering tariffs or rates for utilities under the HCA, the GBPA was required to submit proposals to the appropriate Minister and to obtain his/her prior written approval.
7. It is clear that, for many years thereafter, the parties regarded the 1968 Agreement as binding: **Partial Award, ¶ 68-70**.
8. 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, the Government contended that the GBPA had repeatedly and expressly confirmed that it was bound by, and intended to comply with, the undertakings it had given over several decades from the 1970s to the 1990s, and that it was therefore not open to the GBPA to complain about Government interference in these matters: **Partial Award, ¶¶ 255-258**.
9. The Tribunal therefore agreed with and upheld the Government's arguments regarding the effect of the 1968 Agreement in relation to its involvement in licensing, immigration, customs duty exemptions and land development/environmental controls in the Port Area: **Partial Award, ¶¶ 265, 281, 291 and 336**.

10. Furthermore, had the GBPA sought to challenge URCA's control over charging for electricity in the Port Area, the Government would have been entitled to invoke the 1968 Agreement to defeat the GBPA's case in that respect: **Partial Award, ¶ 314.**

The Government's Legislative and Regulatory Rights

11. Moreover, the Government has continuing legislative and regulatory authority over Freeport and the Port Area in relation to immigration and the construction and operation utilities. The GBPA's rights to administer and regulate these matters in the Port Area in these respects are subject to, and can be overridden by, subsequent legislation and statutes introduced by the Government: **Partial Award, ¶¶ 280-281, 309 and 318.**

12. In addition, there was and is nothing to prevent the Government from requiring any persons (including non-Bahamians) either (i) to apply for, obtain and/or register a permit from the Government in order to acquire or hold land within the Port Area, or (ii) to apply to register, and in fact to register, any such acquisition with the Government: **Partial Award, ¶¶ 325 and 326.**

The GBPA's Claims of Wrongful Diversion or Frustration of Investment Projects

13. Complaints by the GBPA relating to the alleged diversion or frustration of investment projects were rejected. In particular:

a. The Government did not act inappropriately in its dealings with the Pegasus/Weller project. On the contrary, the Government's caution about the Weller/Pegasus project "*cannot be criticised*": **Partial Award, ¶ 360.**

b. As for the GBPA's allegations that the Government wrongfully diverted (i) the Tractebel/Enron project to East End on Grand Bahama; and (ii) the Ginn Barbary Beach project to West End, the Government was entitled to prefer investment projects for other areas of Grand Bahama outside Freeport: **Partial Award, ¶¶ 361-363.**

Approval of Environmental Bye-Laws

14. Only one aspect of the GBPA's counterclaim succeeded. This concerned the failure by successive Governments to give timely consideration to three proposed environmental bye-laws, namely the Freeport Marina and Inland Waterways Amendment Bye-laws, the Freeport Removal of Refuse Amendment Bye-laws (approved in 2023 but not promulgated), and the Building Code and Sanitary Code Bye-laws: **Partial Award, ¶¶ 347-348.**

15. However, the Tribunal could not immediately see any basis for assessing any damages to the GBPA. **Partial Award, ¶ 366.**

