

## **ADDENDUM TO FINAL AWARD**

1. Although the history of this post-Award proceeding is complex, it may be briefly summarized as follows. By letter dated 4 April, 2005, the then High Representative of Bosnia and Herzegovina wrote to the Presiding Arbitrator asking in effect that the Tribunal assist him by stating its “considered views” on certain legal issues as to the respective legal powers of the two Bosnian Entities (the Federation of Bosnia and Herzegovina and Republika Srpska) and the Brcko District as established pursuant to the Tribunal’s Final Award. The Presiding Arbitrator’s response was to decline, as a matter of procedure, to opine on any such subjects without first hearing the views (as to both process and substance) of those most immediately affected, particularly the two Entities and the Brcko District. Thereafter the High Representative acquiesced, at least initially, in the Presiding Arbitrator’s procedural suggestions, and the interested parties were given an opportunity to present their views.

2. During the foregoing process the Brcko District presented a formal claim to the effect (a) that on 5 December 2003, when the two Entities purported to transfer to the State of Bosnia and Herzegovina (“BiH”) all powers, including the District’s powers, with respect to the collection and allocation of indirect tax revenues, that attempt to deprive the District of taxation powers without its consent constituted “serious non-compliance” with the Tribunal’s Final Award, and (b) that the claim thus fell within the Tribunal’s retained jurisdiction under the Final Award to hear and adjudicate such claims of “serious non-compliance.” In factual terms the District’s claim in essence was that after purporting, without the District’s consent, to place all indirect taxation powers in the hands of the State (including those indirect taxation powers previously delegated by the Entities to the District pursuant to the Final Award), the Entities then arranged matters in such a way as to allocate to themselves indirect tax revenues to which the District was entitled under the Final Award. Thus, in one sense at least, the dispute ultimately came down to a matter of money, with the District claiming that the Entities were taking money that lawfully belonged to the District. In due course the views of all interested parties (including OHR, the two Entities, and the Brcko District) were presented to the Tribunal in a series of written briefs, the last of which were presented in late April, 2007.

3. During the foregoing briefing process the High Representative apparently decided to deal directly with the possibility of financial inequities in the allocation of past indirect tax revenues as between the Entities and the District. He evidently conducted discussions and negotiations involving the three, and on 4 May, 2007, he issued three documents — two Decisions and an accompanying “Fact Sheet” — which together have the effect of establishing, with the District’s apparent consent, a new arrangement for allocating indirect tax revenues among the Entities and the District. The OHR Fact Sheet appears to acknowledge not only the District’s legal status under the Final Award and its right to collect indirect tax revenues (the Fact Sheet, 1st paragraph) but also the fact that the District has received less than its proper share of indirect tax revenues in the past (the Fact Sheet, 4th paragraph).

4. The High Representative’s documents of 4 May, 2007 represent that the Brcko District has consented to — indeed, is “in favor of” — the new allocation arrangements as ordered by the High Representative. In substance, it would seem, the District’s grievance, as expressed in its pending claim, has been settled to the District’s satisfaction — a result that must, of course, be welcomed by the Tribunal. Accordingly, on 22 May, 2007, the Tribunal notified all interested parties that unless some written objection were received within thirty (30) days the Tribunal would issue an order dismissing the District’s pending claim of “significant non-compliance” and would include in the order “such comments as may be necessary for an understanding of the dismissal.” Since no interested party submitted any objection to these proposed actions within the prescribed 30-day period, the Tribunal hereby approves the settlement arrangements set forth in the documents of 4 May, 2007, dismisses the defined District claim, and terminates the pending proceeding.

5. In the interest of avoiding future unnecessary controversy, however, the Tribunal feels obliged to

make clear that its endorsement of the High Representative's settlement arrangements does not constitute approval of one specific legal assumption that seems to be implicit in the operative OHR documents. Specifically, the 3rd paragraph of the two OHR Decisions implies that under the Final Award, if and when the two entities should transfer to the State their own powers with respect to indirect taxation (as the Entities did in fact on 5 December, 2003), that action would automatically take away from the Brcko District its equivalent powers with respect to indirect taxation, thus giving the State sole control of such taxation. See also the suggestion in the 1st paragraph of the OHR Fact Sheet that the automatic legal result of the Entities' actions of 5 December, 2003, was that "Brcko lost" all of its authority with respect to indirect taxation. Lest these statements be taken as a correct understanding of the intent of the Final Award, however, the Tribunal feels obliged to express an important caveat as to the legal impact of a two-Entity transfer of power to the State without an equivalent transfer by, or the consent of, the Brcko District. The caveat is as follows: So long as the Entities continue to exist under the BiH Constitution, any purported two-Entity transfer to the State, made without an equivalent transfer by, or the consent of, the Brcko District, would be contrary to and illegal under the Final Award if that transfer had the effect of significantly diminishing the District's ability to function as a single, unitary, multi-ethnic, democratic government for the Brcko Opstina. For example, if the purported transfer resulted in significantly reducing the multi-ethnicity of an existing Brcko institution (for example, the police, the schools, the judiciary), it would violate the Final Award. With that caveat, however, the Tribunal approves the settlement arranged by the High Representative.

Roberts B. Owen

Presiding Arbitrator