

The Permanent Court of Arbitration and the Sudanese Peace Process: Legal Issues from the *Abyei Arbitration* in Reviewing the Mandate of an Ad Hoc Body

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Introduction

The *Abyei Arbitration* ('the Arbitration') arose from a 2008 agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army ('SPLM/A'). The Arbitration dispute regarded land boundary demarcations that were referred to the Permanent Court of Arbitration ('PCA') for a final, binding decision.¹ The issue that arose was whether two groups created as part of the 2005 Comprehensive Peace Agreement ('CPA') — the Abyei Boundaries Commission ('ABC') and the ABC's Experts² — had exceeded their mandate. The fundamental issue was the delimitation of the Abyei area. This is a region of considerable strategic importance as it is resource rich and could potentially become the basis for a new international boundary. The short-term political objective under the CPA was the delimitation of the boundaries of the Abyei area to determine who would be entitled to vote in the 2011 plebiscite. At issue, in particular, was whether the Abyei area should retain its special administrative status in the North, or whether it should instead be part of the province of Bahr el Ghazal in the South.³

The CPA required the ABC Experts to define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. The transfer occurred after the Ngok Dinka tribe complained about rival Humr tribal raids. Great Britain responded to these complaints by placing the Ngok Dinka and Humr under the control of the same governor.⁴ The ABC Experts were appointed by the United Kingdom and the United States. These individuals were experts in African history and law, geography, politics, public affairs, ethnography, and culture.⁵

The Arbitration Tribunal ('the Tribunal') reviewed the work of the ABC and the ABC Experts to consider if the mandate exceeded the Experts' power. The Tribunal found that the ABC Experts made a reasonable interpretation of their mandate after adopting a tribal interpretation scheme.⁶ However, in implementing the mandate, the ABC Experts' failed

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¹ *Government of Sudan/The Sudan People's Liberation Movement/Army Arbitration ('Abyei Arbitration') (Final Award)* (Permanent Court of Arbitration, 22 July 2009).

² The ABC Experts were: Chair Professor Kassahun Berhanu, Ambassador Shardrack Gutto, Dr Douglas Johnson, and Professor Geoffrey Muriuki. See Abyei Boundaries Commission Report (14 July 2005) ('*ABC Report*').

³ See generally *Protocol between the Government of the Sudan and the Sudan People's Liberation Movement/Army on the Resolution of the Abyei Conflict*, presented 19 March 2004, sec 1.3 (entered into force 26 May 2004) ('*Abyei Protocol*'). See also *Abyei Arbitration (Final Award)*, 170.

⁴ *Abyei Arbitration (Final Award)*, 197.

⁵ *Ibid* 165.

⁶ *Ibid* 232–4.

to provide sufficient reasons for the actual lines drawn on the map. As a result, the lines were redrawn by the Tribunal.⁷ The Tribunal determined that the Abyei northern boundary lies along latitude 10°10' North, the western boundary along longitude 27°50' East, and the eastern boundary along longitude 29°00' East.⁸ There was no dispute over the southern boundary.

I. Procedure

The Arbitration occurred in the Peace Palace, The Hague, from 7 July 2008 to 27 July 2009 under the supervision of the Permanent Court of Arbitration.⁹ The PCA resorted to the optional arbitration rules regarding disputes between two parties, of which only one is a state.¹⁰ These rules are a slight modification of the *UNCITRAL Arbitration Rules*,¹¹ originally designed for private commercial arbitrations.¹²

The Arbitration utilised experts in the field, at least 21 lawyers — notably Australian Professor James Crawford, and agents. The Tribunal was composed of five arbitrators, with two selected by each party from a list provided by the PCA. The Government of Sudan selected HE Judge Awn Al-Khasawneh and Dr Gerhard Hafner. The SPLM/A appointed Professor W Michael Reisman and Judge Stephen M Schwebel. These arbitrators then appointed Professor Pierre-Marie Dupuy, the final presiding arbitrator. The Tribunal thus consisted of independent, impartial, highly qualified lawyers and experienced arbitrators competent to preside over such disputes.¹³

The 4:1 decision was handed down on 22 July 2009 and subsequently accepted by all parties. Furthermore, the relevant groups announced plans to complete demarcation of the boundary on the ground by September 2009.¹⁴

2. Key issues

The Arbitration extensively referenced significant legal issues from other jurisdictions, namely various international courts and domestic practices in the United States and the United Kingdom. It is of particular interest for the following reasons:

- characterisation of the type of *ad hoc* bodies constituted by the ABC and the ABC Experts;

⁷ Ibid 235–45.

⁸ Ibid 267–8.

⁹ See *ibid*, 1.

¹⁰ Permanent Court of Arbitration, *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of which only One is a State* (July 1993) ('PCA Rules of Procedure') <http://www.pca-cpa.org/showfile.asp?fil_id=194>.

¹¹ United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules, General Assembly Resolution 31/98 ('UNCITRAL Arbitration Rules').

¹² There was a proposal to UNCITRAL to expand the role of the PCA to be a default provider, but this was not adopted; the rules of 1976 were upheld: *Report of the UNCITRAL 42nd Session*, United Nations General Assembly ('UN GA'), Official Records, 64th sess, Supp No 17, [292] UN Doc A/64/17 (2009); see *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-first session*, UN GA Report, 51st sess, UN Doc A/CN.9/684 (2009).

¹³ See *Abyei Arbitration (Final Award)*, 2.

¹⁴ United Nations Mission in Sudan ('UNMIS'), *Comprehensive Peace Agreement Monitor* (November 2009) ('CPA Monitor') <<http://unmis.unmissions.org/Default.aspx?tabid=2213>>.

- the actual terms of the agreement for the ABC and ABC Experts;
- the standard applicable to the ABC Experts as an *ad hoc* body interpreting their mandate;
- characterisation of the role of the Arbitration Tribunal and the terms of its mandate;
- discussion and application of concepts of judicial review; and
- the impact of finding that the ABC Experts' mandate was exceeded and the notion of severance of parts of the decision in excess of the mandate.

The Arbitration also provided important discussions on related issues. These included occupation and land rights that resulted from the sharing use of land and water between two tribal groups: the nine Ngok Dinka tribes and the Misseriya.

3. Context

The nation of Sudan has been independent since 1956. However, the dispute has its roots in boundary decisions made under former regimes, namely, the Anglo-Egyptian Condominium of 1899–1956. Since 1956, there have been several civil wars between tribes allied with Northern Sudan (Misseriya) and those allied with Southern Sudan (the Ngok Dinka). Although the Ngok Dinka tribesmen maintained permanent settlements for 200 years, they shared land and water with at least one of the Misseriya Arab tribes.

A referendum in 1972 under the *Addis Ababa Agreement* provided for other areas that are culturally and geographically part of the Southern Sudan complex to choose to remain in Northern Sudan or join a new autonomous Southern Sudan.¹⁵ Nonetheless, disputes over power, resources, religion and self-determination led to another civil war in 1983,¹⁶ during which, the Abyei area was the geographical centre of the conflict. In 2002, the *Machakos Protocol* created the CPA, while also providing another referendum organised by the Government of Sudan and the SPLM/A.¹⁷ The referendum allowed the people of Southern Sudan to vote on whether or not to secede from the Sudan.¹⁸

On 26 May 2004, the *Abyei Protocol* was signed.¹⁹ This event led to a special agreement on administering the central region. The most significant attribute of the agreement was that residents of the Abyei area could elect a local executive council. Unfortunately, this raised another issue: the region needed to be defined as the residents of the Abyei area potentially had dual citizenship. All parties accepted that there was no map that showed the area permanently inhabited or used seasonally by the Ngok Dinka in 1905. Nor was there sufficient documentation produced in that year by the Anglo-Egyptian Condominium government authorities that adequately spelled out the administrative situation in the Abyei area.

¹⁵ See *Abyei Arbitration (Final Award)*, 37.

¹⁶ John R Crook, 'Abyei Arbitration – Final Award' (September 2009) 13 *American Society of International Law Insight* ('ASIL Insight') <www.asil.org/files/insight090916pdf.pdf>.

¹⁷ *Agreements between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army*, 20 July 2002, Machakos, Kenya ('*Machakos Protocol*').

¹⁸ *Abyei Arbitration (Final Award)*, 38.

¹⁹ *Abyei Protocol*.

4. The standard applicable to the ABC experts in interpreting their mandate

Central issues in the Arbitration consisted of characterising the ABC and the ABC Experts as particular types of bodies and then assessing the interpretations of their mandates. The ABC was set up in December 2004 and was comprised of:

- five impartial experts nominated by the United States, the United Kingdom and the Inter-Governmental Authority on Development ('the ABC Experts');
- one representative from each of the Government of Sudan and the SPLM/A;
- two nominees of each of the Government of Sudan and the SPLM/A from the present administration of the Abyei area;
- two nominees of the Government of Sudan from Messiriya; and
- two nominees of the SPLM/A from neighbouring Dinka tribes to the south of the Abyei area.²⁰

The ABC Experts were the fact-finding, decision-making body with the goal of arriving at a final and binding decision on the boundary. Thus, the Tribunal needed to determine if the ABC Experts had made a reasonable interpretation of their mandate. The Tribunal relied on the 1899 and 1907 *Hague Conventions*, which declared that international tribunals have authority to establish their own competence (the *Kompetenz-Kompetenz* principle).²¹ The Tribunal found that this was an accepted principle of international law, relying on, *inter alia*, a jurisdiction rule in *Nottebohm*, which stated that:

Since the *Alabama* case, it has been generally recognised, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.²²

The ABC and the ABC Experts were required to define the methods that they used in completing their task. This obligation was established in the Preface of the Arbitration and similarly present in other, related documents.²³ The process required both the ABC and the ABC Experts to listen to the representatives of the Abyei area people and their neighbours, and to the presentations of the two parties. They were also obligated to consult the British archives and other relevant sources on Sudan whenever they were available. This helped the ABC and the ABC Experts to arrive at a decision based on 'scientific analysis and

²⁰ *Abyei Arbitration (Final Award)*, 39; see generally *Abyei Protocol*.

²¹ The *Hague Convention for the Pacific Settlement of International Disputes of 1899*, opened for signature 29 July 1899, 1 Bevans 230 1 AJIL 103 art 48 ('*Pacific Settlement of International Disputes – 1899*'); The *Hague Convention for the Pacific Settlement of International Disputes of 1907*, opened for signature 18 October 1907, 1 Bevans 577 2 AJIL Supp 43 (entered into force 26 January 1910) ('*Pacific Settlement of International Disputes – 1907*').

²² The *Nottebohm Case (Liechtenstein v Guatemala) (Preliminary Objections)* (1953) ICJ Rep 111, 119 quoted in *Abyei Arbitration (Final Award)*, 176.

²³ The ABC task in defining and demarcating the Abyei area is provided for in the *Abyei Protocol* and is one of the six texts of the CPA.

research'.²⁴ Although the Government of Sudan and SPLM/A both provided testimonies on the boundary issues, the evidence was contradictory. Therefore, the ABC Experts needed to seek further proof to determine the boundary issues.²⁵

The ABC Experts separately travelled to other parts of the Sudan, Oxford, Durham, Hull, South Africa and Ethiopia. In conjunction, they obtained evidence from archives during the period of the Anglo-Egyptian Condominium of 1899–1956. The ABC Experts stated that they analysed material applying the 'generally accepted' historical method of comparing oral with written material.²⁶ The notion of 'generally accepted' was a considerable problem and led to much discussion in the Tribunal decision.

The Tribunal found that it had to defer to the interpretation by the ABC Experts of their mandate, provided that interpretation was reasonable. The doctrine of *Kompetenz* applied in this instance as it encompassed an obligation to the reviewing court to accord deference to the original decisionmaker's interpretation; thus establishing their own jurisdiction. The Tribunal further relied on the International Court of Justice, with its decision concerning the *Arbitral Award of 31 July 1989 Guinea-Bissau*, viewed as the most analogous to the Arbitration proceedings.²⁷ In particular, the review of arbitral awards for excess of powers was viewed as important. Review on that basis served to protect the parties from the making of binding third party decisions to which they had not agreed.

5. The processes of the arbitration tribunal

As specified in Article 3 of the *Arbitration Agreement*, the Arbitration processes were strictly legal.²⁸ This required the Tribunal to apply a variety of legal instruments, as well as general principles of law. The Tribunal could not be a viable appeal body as it used a distinct, non-scientific method, in comparison to the ABC Experts.²⁹ Therefore, the differing methodology between the ABC Experts and the Tribunal established an important fact: the Tribunal was not expected or authorised to determine if the ABC Experts were correct. If the parties wanted correctness they should have established another panel with the same expertise as the ABC.³⁰ The Tribunal only had to review the ABC Experts' decisions for reasonableness.

6. The land rights issue and tribal use

The ABC Experts made the decision that the tribal use of land and water was crucial. This fact relied on the Ngok Dinka's occupation of the land to determine what had been transferred in 1905. Unfortunately, there was considerable confusion about the geographic

²⁴ Appendix to the *Abyei Protocol* relating to the Parties' 'Understanding on Abyei Boundaries Commission' ('*Abyei Appendix*'), s 4.

²⁵ *Abyei Arbitration (Final Award)*, 42.

²⁶ *ABC Report*, 12.

²⁷ *Abyei Arbitration (Final Award)*, 179.

²⁸ *Arbitration Agreement Between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area*, 7 July 2008 ('*Arbitration Agreement*').

²⁹ *Abyei Arbitration (Final Award)*, 144.

³⁰ *Ibid* 146.

location of the river in 1905. No map existed that the ABC Experts could avail themselves of for relevant historical material in determining the area that the chiefdoms used in 1905. The ABC Experts wanted to find out where the people lived, where they took their cattle, and where they shared grazing with other people.³¹ Thus, the aim was to discover what territory was being used and claimed by the nine chiefdoms before the transfer to Kordofan. The ABC Experts analysed the evidence in terms of the land rights of the nine Ngok Dinka tribes 'so that the boundaries between the Misseriya may reflect "the two communities' effective connection to land"'.³² Section 1.1.3 of the *Abyei Protocol* recognised the secondary rights of access and use of land by a community in the territory of another that maintains dominant rights. The ABC Experts found three main types of occupation, land rights and land use: exclusive dominant occupation; dominant occupation that allowed non-members of the community to acquire seasonal rights; and shared secondary occupation.

The Tribunal stated that it was reasonable for the ABC Experts to interpret their mandate and refer to the land used by the nine Ngok Dinka tribes. The Tribunal relied on the *Vienna Convention on the Law of Treaties*,³³ which was accepted by the parties and the Tribunal as a source of law within the general principles referred to in article 3 of the *Arbitration Agreement*. Following the rules of treaty interpretation, the Tribunal established the ordinary meaning of the text in light of its objects and purpose. The expression of the mandate could be interpreted in two distinct ways: referring to area only, as the Government of Sudan argued; or incorporating the tribal dimension by referring to the nine Ngok Dinka chiefdoms. The Tribunal found that the ABC Experts' tribal interpretation was not unreasonable.³⁴ With regard to the purpose, the entire aim of the CPA was to achieve durable peace in Sudan. This meant the object from 2004 was relevant to the Tribunal when reviewing the ABC Experts' reasonableness. Therefore, the Tribunal determined in this regard, that the Misseriya and other nomadic peoples retained their traditional rights to graze cattle and move across the territory of Abyei.

7. The decision and lessons for other *ad hoc* tribunals

The ABC Experts' mandate was seen as a reasonable interpretation only after adopting the tribal approach. Despite this, the ABC Experts' decision processes on implementation were deemed inappropriate in relation to the purpose of physical demarcation of boundary lines. The Tribunal found that the ABC Experts did not state sufficient reasons in relation to the demarcation of certain boundaries and that its decision was, in these respects, in excess of the mandate. Weighing the terms of the ABC Experts' mandate, the circumstances of its creation and general practice from decisions of the International Court of Justice, the Tribunal was firm that the ABC Experts needed to provide justifications.

³¹ Ibid 197.

³² *Abyei Arbitration (Final Award)*, 198 referring to *ABC Report*, Part 2, Appendix 2, 21–2.

³³ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31 (entered into force 27 January 1980) ('1969 Vienna Convention').

³⁴ *Abyei Arbitration (Final Award)*, 208–14.

The lines were redrawn by the Tribunal as a result. Hence, for the future, it is important to build in a requirement to provide adequate reasons for any boundary decisions.

Conclusion

Boundaries and shared rights to land and water issues have been, and continue to be, a major issue on many continents and will remain so in the future. Resolving these problems is troublesome. The *Abyei Arbitration* provides a number of lessons, especially when seeking direction from increasingly common *ad hoc* tribunals. First, the document establishing the mandate must be clear. This will create fewer issues to debate as to the reasonable interpretation of a mandate. Second, the evidence-gathering processes need to be drafted by lawyers. This can include alternative methods of evidence gathering, as long as these practices are properly defined. In short, the optimal situation is an international agreement outlining the standard processes for such *ad hoc* tribunals, especially in relation to the need to provide reasons.