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International Arbitration: A New Mechanism to Settle Intra-State Territorial Disputes between States and Secessionist Movements?

The Divorce of Sudan and South Sudan and the Abyei Question

Cindy Daase

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Law & Political Economy

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The Divorce of Sudan and South Sudan and the Abyei Question

Cindy Daase^{*}

Cindy Daase, M.A.
(Research Associate)

Leipzig Centre for the History and Culture of East Central Europe (GWZO)

Geisteswissenschaftliches Zentrum
Geschichte und Kultur Ostmitteleuropas e. V.
an der Universität Leipzig (GWZO)

Speck's Hof Eingang A
Reichsstr. 4-6, 4. OG
04109 Leipzig
Germany
tel.: +49-(0)341-97 35 563
e-mail: cindy.daase@uni-leipzig.de
www.uni-leipzig.de/gwzo/

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Abstract

In 2008, the Government of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A) submitted an arbitration agreement with the Permanent Court of Arbitration (PCA) in The Hague. In a unique fast track procedure, an international arbitration tribunal had to determine in accordance with the Comprehensive Peace Agreement (CPA) of 2005, in particular the Abyei Protocol and Abyei Appendix, the Interim National Constitution (INC) and general principles of law, whether the Abyei Border Commission (ABC) exceeded its mandate, which was to define and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. In case of excess, the parties entrusted the tribunal with redefining the boundaries of the disputed territory based on the parties' submissions. To guarantee the transparency of the procedure and to generate acceptance by all stakeholders on the ground, all hearings and documents were made publically available. The procedure and the more than 200-pages-long final Award from July 2009 constitute an illustrative example of an international dispute settlement procedure dealing with an intra-state (territorial) dispute between a state and a secessionist movement. The paper asks why and how the parties initiated the arbitration procedure and evaluates the still disputed status of the Abyei Region and the record of the parties' (non-)compliance with the Abyei Award and its role in the ongoing status-negotiations between Sudan and the newly independent South Sudan. By *inter alia* taking a comparative perspective with other international dispute settlements the paper critically discusses the legal-political implications of the Abyei Arbitration and whether it could serve as a model or lesson learned when it comes to the effectiveness and success of international arbitration and its potential contribution to the settlement of intra-state (territorial) disputes.

Introduction

In January 2011 the overwhelming majority of South Sudan's population voted for the secession from the North.¹ The United Nations (UN) welcomed the independence on 9 July 2011, and on 14 July 2011 the General Assembly admitted the Republic of South Sudan as the 193rd member of the UN. However, the complicated divorce between Sudan and South Sudan is still not entirely over. Key-issues between the former warring parties, i.e. the definition of the boundaries and status of the Abyei Region and the determination who is a resident of the Region and therewith entitled to vote in a referendum whether Abyei would join independent South Sudan, are still pending.² Thus, South Sudan is a new state with disputed boundaries.³

The CPA of 2005 tried to address the issue in a first step with the establishment of the Abyei Boundary Commission (ABC) through the Abyei Protocol and the Abyei Appendix.⁴ The ABC, however, did not produce a final report that led to a peaceful and final settlement of the intra-state, and now inter-state, dispute about the determination of the territory and status of the Abyei

¹ *Comment:* The referendum was a key-point of the power-sharing arrangement between the GoS and the SPLM/A as laid down in the CPA of 2005. Since the referendum actually took place on 9 January 2011, many observers raised their doubts whether the GoS in Khartoum would indeed comply with the agreement, namely to not only hold a referendum but also to tolerate and enable the decision of it even if it meant the secession of South Sudan. The referendum to determine the status of Southern Sudan was held on schedule on 9 January 2011 and with an overwhelming majority of 98.83% of South Sudan's population voting for independence. The United Nations Secretary-General welcomed the announcement of the final results, stating that they were reflecting the will of the people of Southern Sudan and congratulated the parties of the CPA for the peaceful and credible conduct of the referendum. The main responsibility of the implementation of the referendum was with the Sudanese authorities, while the United Nations provided technical and logistical assistance to the CPA parties' referendum preparations through support from its peacekeeping missions as well as the good offices function provided by the Secretary-General's panel aimed at ensuring the impartiality, independence and effectiveness of the process, and by the UN Integrated Referenda and Electoral Division (UNIRED), for an overview see <http://www.un.org/en/peacekeeping/missions/unmis/background.shtml> (last visited 26.10.2011)

² U.N.-Doc. S/RES/1996, 8 July 2011; U.N.-Doc. S/RES/1997, 11 July 2011; U.N.-Doc. S/RES/1978, 27 April 2011; UN welcomes South Sudan as 193rd Member State, UN News Centre, 14 July 2011, available at <http://www.un.org/apps/news/story.asp?NewsID=39034&Cr=South+Sudan&Cr1> (last visited 26.10.2011); Sudan: Peace Partners Postpone Addis Ababa Meeting On Abyei Referendum, allAfrica.com, 25 October 2010, available at <http://allafrica.com/stories/201010260503.html> (last visited 26.10.2011); The Abyei Referendum, Carnegie Endowment, 4 January 2011, available at <http://sudan.carnegieendowment.org/2011/01/04/the-abyei-referendum> (last visited 26.10.2011).

³ International Peace Institute, The Future of South Sudan, May 2011, available at <http://www.ipacademy.org/index.php> (last visited 26.10.2011)

⁴ The Comprehensive Protocol between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan's People Liberation Army, 9 January 2005; *Comment:* Under the mediation of the Intergovernmental Authority on Development (IGAD), the Government of the Sudan and the SPLM/A signed a series of six agreements: The Protocol of Machakos (Machakos Protocol), 20 July 2002; The Protocol on Security Arrangements, 25 September 2003; The Protocol on Wealth-Sharing, 7 January 2004; The Protocol on Power-Sharing, 26 May 2004; The Protocol on the Resolution of Conflict in Southern Kordofan/Nuba Mountains and the Blue Nile States, 26 May 2004; and concerning Abyei The Agreement between the Government of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A) on the Resolution of the Abyei Conflict, 26 May 2004 (in forth referred to as Abyei Protocol); Understanding of Abyei Boundaries Commission, 17 December 2004 (in forth referred to as Abyei Appendix), for an overview see <http://unmis.unmissions.org/Default.aspx?tabid=515> or <http://peacemaker.unlb.org/> (last visited 26.10.2011)

Region.⁵ The Government of Sudan (GoS) accused the ABC of having exceeded its mandate and therewith did not accept the results of the ABC report, results which were supposed to be final and binding for the parties of the CPA. To solve the problem without risking the entire peace process, the parties ultimately decided to refer the dispute concerning the ABC's findings to an international arbitration tribunal.⁶

This was widely considered to be an unusual and remarkable step of the parties of which only one was a state⁷ and raised the following questions: Whether the Abyei Arbitration could serve as a model for other conflicts about territory, power-sharing and access to resources between state and non-state parties? Which general lessons can be drawn concerning the effectiveness as well as the legal and political implications of international arbitration as a forum and mechanism to settle intra-state (territorial) disputes? In the end, why did the arbitration tribunal's award apparently not decisively contribute to the final settlement of the Abyei dispute?

To address these questions, Part I of this paper will focus on the historical background of the Abyei dispute and the developments that lead to the Abyei Arbitration procedure. This will allow for a better understanding of what is at stake for the disputing parties and which arguments are raised. Part II will then evaluate the general procedural advantages of international arbitration to settle intra-state (territorial) disputes. In a next step the focus will be on the implications of the Abyei Award, the (non-) implementation of the award by both parties, and the ongoing dispute *inter alia* about the demarcation of the territory, the determination of its permanent residents, a future referendum about its status and the management of the borders of the Abyei-Region. Against the background of these experiences, the paper will use the example of the Abyei Arbitration to discuss, from a comparative perspective, the appropriateness and functionality of arbitration to resolve deeply rooted intra-state conflicts.

The conclusion and outlook will summarise whether international arbitration could serve as a mechanism for dealing with intra-state (territorial) disputes between a state and a challenging non-state party, i.e. a self-determination and secessionist movement. In sum, from a generalising perspective, this paper deals with the administration, implementation and adjudication of a peace

⁵ Abyei Boundaries Commission Report, 14 July 2005, *inter alia* available at <http://www.sudantribune.com/TEXT-Abyei-Boundary-Commission,11633> (last visited 26.10.2011).

⁶ Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, Khartoum (Sudan), 7 July 2008, available at <http://www.pca-cpa.org/upload/files/Abyei%20Arbitration%20Agreement.pdf> (last visited 26.10.2011).

⁷ Closely after the award the literature started to deal with questions like *why* the parties chose arbitration in the first place and *whether* this model was a success and could be successfully applied to other disputes, see *inter alia*: F. Baetens; R. Yotova: The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?, 3 Goettingen Journal of International Law 1 (2011), 417-446; W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340; J. Crook, Abyei Arbitration – Final Award, 13 ASIL Insight 15 (2009), available at <http://www.asil.org/insights090916.cfm> (last visited 26.10.2011).

agreement between a state and non-state party through international arbitration in case of a dispute between the parties.

I. Disputed Territory: To Whom Belongs Abyei?

Although it cannot possibly claim to be a comprehensive summary of the highly complex conflict history, this section will begin with some historical background information concerning the North-South conflict in order to illustrate the important role of the Abyei Region and the Abyei Arbitration. After outlining the essential points of the CPA between the conflict parties, especially the Abyei Protocol and the ABC Report, the focus will turn to the arbitration agreement between the parties and the arbitration procedure itself.

1. Historical Background

Sudan, like most states in the region, had its boundaries constructed by colonial powers. The resulting state boundaries often ignored local histories as well as the movements and settlements of different tribal and ethnic groups. This ignorance has not only contributed to inter-communal, inter-state, intra-state and regional disputes but also affected immediate transboundary inter-tribal interests.⁸ In such a post-colonial context, dominant ethnic, religious, economic, military and ideological groups often impose their culture and ideologies on diverse populations under the rationale of national integration, territorial integrity and therewith state-sovereignty; in doing so, they attempt to come to and hold onto governmental power which also grants access to and control of resources.⁹

The Abyei Region can be considered as an example of this phenomenon and has long been a flash point between the conflict lines. It is located between northern Bahr al Ghazal, War-rap and Unity States to the South and Southern Kordofan to the North and is geographically, ethnically,

⁸ *Comment:* An insight into the shifting alliance of tribes with the central government in Khartoum and the SPLM/A as well as the local, domestic and regional effects is given by J. Apsel: The Complexity of Destruction in Darfur: Historical Processes and Regional Dynamics, 10 Human Right Review (2009), 239-259, 245 et seq. and S. Pantuliano: Oil, land and conflict: The decline of Misseriya pastoralism in Sudan, 37 Review of African Political Economy 123 (2010), 7-23, 7.

⁹ *Comment:* Sudan is composed of a heterogeneous population made up of diverse linguistic, ethnic, tribal, and cultural groupings. Following independence from Britain in 1956, the Sudanese government has been dominated by northern Arab elites. This dominance is considered as a colonial path dependency. From the 1970s on these military and government elites sought to impose an Islamic state ideology on the population, in an attempt to fight cultural pluralism, heterogeneity, and in the end, power sharing with other groups. Since the 1989 military coup, the National Islamic Front (NIF), which was later renamed in National Congress Party (NCP), has fought violently against populations in the South, West, and East. The GoS under President Omar al-Bashir has sought to explain these violent conflicts by declaring them to rebellions or civil wars that threaten the stability of the unitary state and welfare of its people. For a detailed overview see *inter alia* J. Apsel: The Complexity of Destruction in Darfur: Historical Processes and Regional Dynamics, 10 Human Right Review (2009), 239-259, 245 et seq.

religiously and politically caught between the North and South.¹⁰ Following the end of the Anglo-Egyptian Condominium, Sudan descended into civil war along one of the major conflict line between the North and South. The First Sudanese Civil War (1956–1972) was ended by the 1972 Addis Ababa Agreement.¹¹ This agreement included a clause that provided for a referendum allowing Abyei to choose between either remaining in the North or joining the autonomous South.¹² This agreement furthermore provided Southern Sudan with regional autonomy and a degree of self-governance.¹³ However, the peace agreement created only a temporary peace. The discovery of oil in the border regions led to conflicting ambitions on both sides, of having the oil-rich areas into the Northern (central), respectively the Southern administration.¹⁴ The North-South conflict also influenced rival pastoral tribes that used to settle in the area: the Ngok Dinka usually supported the rebels and rose to leadership positions in the SPLM/A. The Misseriya, in contrast, opted to side with the Khartoum government in the 1980s. The Abyei-referendum was never held, and renewed conflicts about power, resources, religion and self-determination led to a second civil war in 1983; the war between the North (centre) and the South (periphery) lasted for two decades.¹⁵

2. Defining Territory in Asymmetric Peace Negotiations: The Comprehensive Peace Agreement and the Abyei Annexes

The CPA was signed on 9 January 2005 by the GoS, mainly composed of the National Congress Party (NCP), and the SPLM/A as the main parties.¹⁶ After over a decade of negotiations facilitated by the Inter-Governmental Authority on Development (IGAD), an East African regional organisation, as well as representatives from the United States (USA), United Kingdom

¹⁰ see D. Johnson: Why Abyei Matters: The Breaking Point of Sudan's Comprehensive Peace Agreement?, 107 African Affairs 426 (2008), 1-19, 1 et seq.; see also: International Crisis Group (ICG): Sudan: Regional Perspectives on the Prospect of Southern Independence, Africa Report Number 159, 6 May 2010; ICG: Sudan: Defining the North-South Border, Africa Briefing Number 75, 2 September 2010; ICG: Negotiating Sudan's North-South Future, Africa Briefing Number 76, 23 November 2010.

¹¹ Addis Ababa Agreement, 27 February 1972. *Comment:* The Addis Ababa Agreement also served as reference for later proposals for the formulation of the Abyei Protocol.

¹² Addis Ababa Agreement, Art. 2.

¹³ Addis Ababa Agreement, Art. 1.

¹⁴ For an overview about the relation between the discovery of oil fields and the Abyei dispute see: ICG: Sudan: Defining the North-South Border, Africa Briefing Number 75, 2 September 2010; ICG: Negotiating Sudan's North-South Future, Africa Briefing Number 76, 23 November 2010; L. Patey: Crude Days Ahead? Oil and The Resource Curse in Sudan, 109 African Affairs 437 (2010), 617-63.

¹⁵ S. Nouwen: Sudan's Divided (and divisive?) Peace Agreements, 19 Hague Yearbook for International Law (2007), 113-134, 6. *Comment:* By the conclusion of the major fights, reports put the total number of people who died in both wars at over 2 million people, over 4.5 million people were internally displaced. And still the South Sudan death toll tops 1,800 in 2011, and more than 260,000 people are currently displaced in the South, which includes about 100,000 people who fled the disputed Abyei region, 1 July 2011, see <http://www.reuters.com/article/2011/07/01/us-sudan-violence-idUSTRE7601QM20110701> (last visited 26.10.2011).

¹⁶ The Comprehensive Protocol between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan's People Liberation Army, (see fn. 4).

(UK) and Norway, the CPA was designed to address the main issues of Africa's longest civil war and to end it.¹⁷ The CPA also included provisions relating to the governance of the country, in particular political power-sharing, wealth-sharing (involving issues of land ownership and national resource management), security (including an internationally monitored ceasefire and control over state police forces) and the resolution of the status of the conflict areas of Abyei, Kordofan and Southern Blue Nile – also known as the Three Areas.¹⁸ Furthermore, the CPA granted substantial competencies to the South, i.e. through participation in the national government, the establishment of an autonomous Government of Southern Sudan (GoSS) and oil-revenue sharing arrangements.¹⁹ The CPA consisted of a series of agreements setting out the terms for finally resolving the war between the the GoS/NCP and the SPLM/A and is an illustrative example of an internationalised comprehensive peace agreement that does not only attempt to resolve issues directly related to the conflict, but also contains elements that aim to reshape fundamental constitutional aspects of the entire state.²⁰ In the CPA, the parties outlined transitional constitutional regulations combining domestic and international law; these constitutional arrangement were designed to make a unified Sudan attractive especially for the population and former fighters from the South. However, the South was entitled to exercise the

¹⁷ W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 315; S. Nouwen: Sudan's Divided (and divisive?) Peace Agreements, 19 Hague Yearbook for International Law (2007), 113-134, 6.

¹⁸ W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 315; J. Apsel: The Complexity of Destruction in Darfur: Historical Processes and Regional Dynamics, 10 Human Right Review (2009), 239-259, 244.

¹⁹ See The Comprehensive Protocol between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan's People Liberation Army, Chapter II, III, IV, V, VI.

²⁰ *Comment:* The CPA is not considered as an international treaty, GOS-SPLM/A Final Award, 22 July 2009, 153, § 427, available at http://www.pca-cpa.org/showpage.asp?pag_id=1306 (last visited 27.10.2011). In general, peace agreements between state and non-state parties can be characterised by a "lack of fit", as they cannot be easily accommodated with domestic or international law. There is furthermore no legal definition for peace agreement or peace accord. The reader will find numerous definitions for instance in the Centre for Humanitarian Dialogue, L. Vinjamuri; A. P. Boesenecker: Accountability and Peace Agreements, Mapping Trends from 1980 to 2006' (1 September 2007), 6, available at <http://reliefweb.int/node/22983> (last visited 26.10.2011). This paper follows C. Bell's broad working definition, which states that: "Peace agreements are documents produced after discussion with some or all of the conflict's protagonists, that address militarily violent conflict with a view to ending it", see C. Bell: On the Law of Peace, Peace Agreements and the Lex Pacificatoria (2008), 55. The author also follows the definition of the UN Peacemaker database, which states: "Comprehensive Agreements address the substance of the underlying issues of a dispute. Their conclusion is often marked by a handshake, signifying that a historic moment has ended a long-standing conflict. Comprehensive Agreements seek common ground between the interests and needs of the parties to the conflict; they resolve the substantive issues in dispute and provide the necessary arrangements for implementing the agreement", available at <http://peacemaker.unlb.org/index1.php> (last visited 26.10.2011). For a broader overview of peace agreements as transitional constitution see *inter alia* C. Bell: On the Law of Peace, Peace Agreements and the Lex Pacificatoria (2008); C. Bell: Peace Agreements: Their Nature and Legal Status, 100 The American Journal of International Law 2 (2006), 373-412; and for peace agreements and the distribution of natural resources and the legal status of peace agreements in general see C. Daase: Friedensabkommen zwischen staatlichen und nicht-staatlichen Parteien, Chimären zwischen Recht und Politik, in: J. Bäuml et al. (eds.): Akteure in Krieg und Frieden, 2009, 141 et seq.; C. Daase: The Redistribution of Resources in Internationalised Intra-State Peace Processes by Comprehensive Peace Agreements and Security Council Resolutions, 3 Göttingen Journal of International Law 1 (2011), 23-70.

right of self-determination through a referendum in 2011 after a transitional period of six years.²¹ Yet, the CPA was also criticised for its incomprehensiveness in that it was a bilateral agreement between the elites, or in other words, the most powerful parties of the North (NCP) and the South (SPLM/A). It did not include other intra-state stakeholders and concerned groups as for instance the Ngok Dinka and Misseriya as direct parties; it were the GoS/NCP and the SPLM/A who determined with the CPA what Sudan's political and economic future would look like.²² Moreover, initially a two-party deal, the CPA was transformed into the Interim National Constitution (INC).²³

Already the Machakos Protocol was a first attempt to come to an arrangement for Abyei and South Sudan in form of a pre-negotiation agreement in 2002.²⁴ In 2004/2005, with the CPA and the Abyei Protocol and Appendix, the parties reached the compromise that in the event that the South exercised its right to self-determination via a referendum, the *residents* of Abyei would also decide via a referendum whether the Abyei Area would remain a part of Sudan or join South Sudan.²⁵

Hence, the CPA called for the precise demarcation of all area-borders, as they existed on 1 January 1956, the day of Sudan's independence.²⁶ Establishing the exact line was considered important not only to finally confirm the respective territories of North and South, but also for implementing other aspects of the peace agreement, such as the population census, voter registration and redeployment of GoS' army (the Sudan Armed Forces, SAF) and the SPLM/A.²⁷ Furthermore, the Abyei Protocol outlined the region's special administrative status governed by a local executive council, the sharing of local oil revenues, and the guarantee of continued access

²¹ The Comprehensive Protocol between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan's People Liberation Army, Chapter IV.

²² *Comment*: Exemplary is their agreement on the power sharing percentages for the executive and legislative at the national, Southern and state level, see S. Nouwen: Sudan's Divided (and divisive?) Peace Agreements, 19 Hague Yearbook for International Law (2007), 113-134, 2 et seq.

²³ Interim National Constitution of the Republic of the Sudan (INC), 2005 [Sudan], Adopted by the National Assembly on 6 July 2005 and entered into force on 9 July 2005, available at <http://www.unhcr.org/refworld/docid/4ba749762.html> (last visited 26.10.2011); *Comment*: The importance of the constitutionalisation of the CPA should not be underestimated. As a peace agreement between a state and a non-state party, the legal status of the CPA would have been encapsulated in a grey-zone between international and domestic law. The two parties could have agreed to modify the agreement or terminate its implementation, at least formally, whenever and how they wanted or even unilaterally decided to do so. The INC, however, can only be amended in accordance with constitutionally prescribed procedures. Additionally, violations of the CPA/INC by the parties were no longer considered only as violations of the rights of the other party or as breaking an agreement with unclear legal status but as a violation of the constitution of all Sudanese people. On the other hand, there was a lack of appropriate, effective and neutral domestic monitoring and adjudication mechanisms/institutions, see S. Nouwen: Sudan's Divided (and divisive?) Peace Agreements, 19 Hague Yearbook for International Law (2007), 113-134, 2 et seq.

²⁴ The Protocol of Machakos (Machakos Protocol); GOS-SPLM/A Final Award, 22 July 2009, 38, §§ 110.

²⁵ Abyei Protocol, Art. 8.

²⁶ The Comprehensive Protocol between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan's People Liberation Army, Chapter I, Art. 1.

²⁷ ICG: Sudan: Defining the North-South Border, ICG Policy Briefing, 2 September 2010, 2.

to traditional grazing areas to the two main rival tribes, the Ngok Dinka and the Misseriya.²⁸ However, unlike the protocols for Blue Nile and the Nuba Mountains, the Abyei Protocol left the exact territory to be administered undefined. Also unlike the protocols on the status of the other two areas, the final text of the Abyei Protocol was not drafted by the two parties, but rather presented to them by the US Special Envoy, Senator and Reverend Jack Danforth, to break the impasse in negotiations.²⁹ This reflects the importance of the delimitation and status of the Abyei Area amongst the many disputed issues between the conflicting North and South. As the parties to the CPA were unable to come to a mutual agreement on the definition and delimitation of the Abyei Area, they decided to establish the ABC to issue a binding decision based on scientific evidence.³⁰ The task of the 15 members³¹ of the ABC was "[...] to define and demarcate the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to as Abyei Area".³² The international experts were to take testimony from the peoples of the area and their neighbours, as well as from the two sides, and to consult the British Archives and other relevant sources on Sudan wherever they were available, to arrive at a decision based on *scientific analysis and research* following its mandate in accordance with the Abyei Appendix.³³ The resulting findings of this scientific analysis were to be presented in the form of a report and were supposed to have a legally binding effect on the parties.³⁴ Thus, the final decision about Abyei was left to these experts, and both sides undertook to accept that decision, whatever it would be. The ABC convened in Nairobi in April 2005 and heard the presentations of the SPLM/A and GoS delegations. It then spent six days in the field hearing testimony from Misseriya and neighbouring Ngok Dinka³⁵ before consulting documents in government offices in Khartoum and

²⁸ Abyei, Protocol, Art. 1.1, 3; *Comment*: On the long way it took to (pre-)negotiate the status of the Abyei Areas, see *inter alia* D. Johnson, Why Abyei Matters: The Breaking Point of Sudan's Comprehensive Peace Agreement?, 107 African Affairs 426 (2008), 1-19, 8.

²⁹ GOS-SPLM/A Final Award, 22 July 2009, 90, § 263.

³⁰ The Comprehensive Protocol between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan's People Liberation Army, Chapter IV; Abyei Protocol, Art. 5; Abyei Appendix, Art. 1; see also W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 316.

³¹ The members are nominated as follows: "Pursuant to Article 5.2 of the Protocol on Abyei, the ABC shall be composed as follows: / 2.1 One representative from each Party; / 2.2 The Parties shall ask the US, UK and the IGAD to nominate five impartial experts knowledgeable in history, geography and any other relevant expertise. The ABC shall be chaired by one of those experts; / 2.3 Each Party shall nominate two from the present two administrations of Abyei Area; / 2.4 The GOS shall nominate two from the Misseriya; / 2.5 The SPLM/A shall nominate two from the neighbouring Dinka tribes to the South of Abyei Area, see Abyei Appendix, Art. 2."

³² *Comment*: The ABC consisted of 15-members. Five members were to be appointed by the government, five by the SPLM/A and five impartial experts by the Intergovernmental Authority on Development, the United States and the United Kingdom. These five were, in accordance with the terms of the Abyei Annex, appointed as experts on the basis of their knowledge and experience in African and Sudanese history, geography and other relevant topics.

³³ Abyei Appendix, Art. 3-4.

³⁴ Abyei Appendix, Art. 5.

³⁵ *Comment*: In their initial presentations the two sides offered strongly contrasting positions. The SPLM/A's interpretation of the ABC's mandate was that the commission was to determine the full extent of the nine Ngok Dinka chiefdoms in 1905. The GoS claimed that the territory transferred from Bahr el-Ghazal to Kordofan in 1905

later in archives in the Universities of Oxford and Durham in the UK. In the end, it remained for the experts to determine the area covered by the nine Ngok Dinka chiefdoms in 1905, and this proved more difficult as the documentary record was incomplete. The experts resolved this problem by examining the administrative practice of the Condominium and the legal issues surrounding shared resource use.³⁶

3. The Abyei Boundary Commission's Report and the Arbitration Agreement

The ABC Experts officially presented their report to the Sudanese presidency on 14 July 2005, determining that the Ngok "[...] have a legitimate dominant claim to the territory from the Kordofan-Bahr el-Ghazal boundary north to latitude 10°10'N stretching from the boundary with Darfur to the boundary with Upper Nil, as they were in 1956 [...]", while recognizing that the two parties have shared rights to the remaining area.³⁷ The latter conclusion led the ABC Experts to decide that it was reasonable and equitable to divide the borderland, Goz, between the Ngok Dinka and the Misseriya, leaving the precise identification and demarcation of the northern and eastern boundaries of Abyei to a team of professional surveyors.³⁸

Hence, it was more and more apparent that it would become *inter alia* necessary to re-negotiate the revenue-sharing in the case the referendum in the South and a subsequent referendum in Abyei would lead to independence of the South together with Abyei. This would also lead to the termination of the revenue-sharing arrangements between the parties as included in the CPA.³⁹ While the SPLM/A sought immediate implementation, the GoS asserted that the ABC had 'exceeded its mandate' and that the determination should therefore not be implemented. Although the CPA had characterized the ABC decision as 'final and binding',⁴⁰ there was no formal mechanism laid out in the various agreements through which the GoS could have formally appealed against these findings. In this situation the parties could have taken their dispute concerning the excess of mandate of the ABC to a Sudanese (constitutional) court, as the mandate was based on the CPA and the Abyei Annexes, which had acquired constitutional status.

was restricted to a narrow strip of land south of the Bahr el-Arab, then the official boundary between the two provinces. Both sides laid great stress on the conditions that existed in 1905, rather than on subsequent developments of any part of the territory. Throughout the gathering of testimony in the field, members of the government delegation repeatedly reminded the experts that only evidence referring to conditions in 1905 was relevant, see D. Johnson: Why Abyei Matters: The Breaking Point of Sudan's Comprehensive Peace Agreement?, 107 African Affairs 426 (2008), 1-19, 10 et seq.

³⁶ Abyei Boundary Commission Report, 14 July 2005, 9 et seq.; see also summary in GOS-SPLM/A Final Award, 22 July 2009, 41 et seq., §§ 122 et seq.

³⁷ Abyei Boundary Commission Report, 14 July 2005, 21.

³⁸ Abyei Boundary Commission Report, 14 July 2005, 21 et seq.

³⁹ D. Johnson: Why Abyei Matters: The Breaking Point of Sudan's Comprehensive Peace Agreement?, 107 African Affairs 426 (2008), 1-19, 14; For an oil-sector perspective on the divorce between North and South with an illustration of oil sector development during the last 20 years, see L.A. Patey: Crude Days Ahead? Oil and The Resource Curse in Sudan, 109 African Affairs 437 (2010), 617-636.

⁴⁰ Abyei Appendix, Art. 5.

This was, however, apparently not an attractive option for both parties. Additionally, mediation and negotiation attempts of external parties had failed.⁴¹ Therefore, the refusal by the GoS to accept or implement the ABC report's findings threatened the peace process, especially in the Abyei Region itself.⁴²

To avoid returning to a full-blown civil war, the Sudanese President, Omar al-Bashir, and the President of the autonomous Government of Southern Sudan, Salva Kiir Mayardit, agreed in June 2008 upon The Road Map for Return of IDPs and Implementation of Abyei Protocol, which provided, among other matters, for the referral of the Abyei dispute to international arbitration.⁴³

Having agreed upon arbitration as a dispute resolution mechanism, it was necessary to determine which legal entities would be parties to the arbitration agreement and under which legal regime the procedure would take place. The parties to the Road Map were the GoS/NCP and the SPLM/A, as the two parties of the CPA and its Annexes. However, there was a valid concern that these two parties were not the only or key-stakeholders in this conflict and therefore alone not the proper parties to take the dispute to arbitration. However, the arbitration concerned a territorial dispute in front of an international tribunal, and therefore at least the state/GoS was formally a necessary party to initiate an internationalised dispute settlement. Thus, the GoS and SPLM/A agreed that, as the threshold issue in the Abyei Arbitration was whether or not the ABC had exceeded its mandate as conferred under the CPA and its Annexes, it was appropriate that the parties of the CPA remained the parties for the arbitration procedure. Naming the GoS and the SPLM/A as parties of the Arbitration Agreement also ensured that the entities bound by the award would have the potential effective power to implement and enforce it.⁴⁴

The parties jointly selected the PCA in The Hague to administer the arbitration proceedings instead of, for instance, an *ad hoc* procedure.⁴⁵ The Arbitration Agreement between the GoS and SPLM/A was concluded under a modified form of the PCA Optional Rules for Arbitrating

⁴¹ W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 316 et seq.

⁴² W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 316 et seq.

⁴³ The Road Map for Return of IDPs and Implementation of Abyei Protocol, 8 June 2008, Art. 4.

⁴⁴ W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 334 et seq.

⁴⁵ *Comment:* The parties chose the PCA for a number of reasons. First, the PCA is an internationally recognized institution with a reputation for, and experience in, the resolution of border disputes and conflicts involving state and non-state parties. Second, the parties were confident that the PCA would administer the proceedings efficiently and they assumed that the PCA's reputation would enhance the credibility, authority and in the end the legitimacy of the arbitral proceedings and the final award, see W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 315.

Disputes Between Two Parties of Which Only One is a State.⁴⁶ With this agreement both parties to the dispute formally committed to abide by and implement the resulting arbitral award.⁴⁷ In sum, the parties had the opportunity to tailor their Arbitration Agreement to their particular circumstances and to their need for a speedy and final settlement of the dispute. The concluded agreement required the tribunal to deliver a 'final and binding' award setting out its reasons within six months of appointment, subject to a maximum three-month extension.⁴⁸

In accordance with Article 2 of the Arbitration Agreement, the mandate of the tribunal was to determine:

- (a) Whether or not the ABC Experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is 'to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' as stated in the Abyei Protocol, and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.
- (b) If the Tribunal determines, pursuant to Sub-article (a) herein, that the ABC Experts did not exceed their mandate, it shall make a declaration to that effect and issue an award for the full and immediate implementation of the ABC Report.
- (c) If the Tribunal determines, pursuant to Sub-article (a) herein, that the ABC Experts exceeded their mandate, it shall make a declaration to that effect, and shall proceed to define (i.e. delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties.⁴⁹

Additionally, the tribunal was required to make its determination in accordance with the applicable law, which was set out in Article 3 of the Arbitration Agreement as follows:

1. The Tribunal shall apply and resolve the disputes before it in accordance with the provisions of the CPA, particularly the Abyei Protocol and the Abyei Appendix, the Interim National Constitution of the Republic of Sudan, 2005, and general principles of law and practices as the Tribunal may determine to be relevant.
2. This Agreement, which consolidates the Abyei Road Map signed on June 8th 2008 and the Memorandum of Understanding signed on June 21st 2008 by the Parties with the view of referring their dispute to arbitration, shall also be applied by the Tribunal as binding on the Parties.⁵⁰

Thus, the applicable law was defined to include the CPA and the Annexes referring to the Abyei Region, as well as general principles of (international) law. The applicable law of Article 3 (1)

⁴⁶ Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, Art. 1.1.

⁴⁷ Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, Art. 9. *Comment:* The Arbitration Agreement also contained specific provisions relating to the funding of the arbitration: It established that, regardless of the outcome of the dispute, the costs of the arbitration were to be paid out of Sudan's Unity Fund, which had been created by the CPA and was controlled by the GoS. In addition, the GoS was required to apply for support from the PCA Financial Assistance Fund, see Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, Art. 11; for a detailed overview of the costs of this procedure and which amount was covered by the PCA Assistance Fund, see GOS-SPLM/A Final Award, 22 July 2009, 6 et seq.

⁴⁸ Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, Art. 9.1.

⁴⁹ Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, Art. 2.

⁵⁰ Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, Art. 3.

was considered as *lex specialis* by the tribunal, and interpreted in accordance with the Vienna Convention of the Law of Treaties, like international treaties.⁵¹

In addition, the PCA made the unusual decision to have a live webcast of the arbitration, so that viewers, especially those in the affected region, could follow the proceedings as they were occurring. Additionally transcripts, pleadings and other documents were made available on the PCA's website.⁵²

4. The Abyei Procedure and Award of July 2009

In the procedure the SPLM/A claimed that the ABC had to determine the land occupied and used by the Ngok Dinka in 1905 and to delimit the area based on that determination. This became known as the *tribal interpretation*.⁵³ The GoS stated that the ABC was required to identify the tract of land that was previously located within the province of Bahr-el-Ghazal and was subsequently transferred to the administrative unit of the province of Kordofan in 1905. This point of view became known as the *territorial interpretation*.⁵⁴

The GoS also made several procedural complaints about the manner in which the ABC experts had conducted the proceedings: (1) That there had been a breach by the ABC of mandatory criteria arising from its failure to state reasons, (2) that its decision had been made *ex aequo et bono*, (3) that it applied unspecified principles determining land rights, and (4) that it wrongfully allocated oil resources.⁵⁵ The SPLM/A responded to those complaints asserting that the ABC had correctly interpreted its mandate and had not breached any procedural rules or mandatory criteria.⁵⁶ The parties' views on the applicable standard of review also differed. According to the SPLM/A, decisions of arbitral tribunals, including decision-making bodies such as the ABC, were to be afforded maximum deference. The GoS, on the other side, argued that the standard of review required the tribunal not to determine whether the ABC had reasonably interpreted its mandate, but rather whether it had *correctly* interpreted its mandate.⁵⁷ In keeping with their differing approaches to the interpretation of the ABC's mandate, the parties similarly submitted

⁵¹ GOS-SPLM/A Final Award, 22 July 2009, 140, para. 396, 150 et seq., paras 419 et seq. (Analysis of the Tribunal); W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 319 et seq.

⁵² F. Baetens; R. Yotova: The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?, 3 Goettingen Journal of International Law 1 (2011), 417-446; W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 319 et seq.; the documents and webcasts are available at http://www.pca-cpa.org/showpage.asp?pag_id=1306 (last visited 26.10.2011)

⁵³ GOS-SPLM/A Final Award, 22 July 2009, 61 et seq., paras 170 et seq. (Summary of the parties' arguments).

⁵⁴ GOS-SPLM/A Final Award, 22 July 2009, 60 et seq., paras 168 et seq. (Summary of the parties' arguments).

⁵⁵ GOS-SPLM/A Final Award, 22 July 2009, 67 et seq., paras 192 et seq. (Summary of the parties' arguments).

⁵⁶ GOS-SPLM/A Final Award, 22 July 2009, 70 et seq., paras 200 et seq. (Summary of the parties' arguments).

⁵⁷ GOS-SPLM/A Final Award, 22 July 2009, 172, para. 489 (Analysis of the Tribunal).

diverging views regarding the appropriate demarcation of the area of the nine Ngok Dinka chiefdoms in 1905. The SPLM/A put forward evidence to support the boundaries contained in the ABC report, while the GoS argued that a much smaller strip of land was the correct area.⁵⁸

Based on this argumentation, the SPLM/A formally submitted that the ABC Experts did not exceed their mandate. In the alternative, the SPLM/A asked the tribunal if it determined that the ABC Experts exceeded their mandate, it should make a declaration that the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 was the current boundary of Kordofan and Bahr el-Ghazal to the South extending to 10°35'N latitude to the North and the current boundary of Kordofan and Darfur to the west extending to 29°32'15"E longitude to the east.⁵⁹ The GoS on the other side formally submitted that the ABC Experts exceeded their mandate, and the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 is the area bounded on the north by the Bahr el-Arab and otherwise by the boundaries of Kordofan as they were at the time of independence.⁶⁰

On 22 July 2009, the tribunal issued its Final Award, which had the support of four of the five members of the tribunal.⁶¹ In the end, the award partially annulled the conclusions of the ABC Report based on the finding that the ABC Experts had exceeded their mandate in certain points. The tribunal adopted the general principle of law of partial annulment, such that to the extent there were instances in which the ABC exceeded its mandate, only those parts of the ABC decision found to be an excess of mandate were to be annulled.⁶² Accordingly, the tribunal made its own delimitation of the east, west and northern boundaries of the Abyei area, reducing the extent of the area delimited by the ABC. The re-delimitation of the northern,⁶³ eastern and western boundaries was ordered, while the arbitral panel endorsed the experts' conclusions with respect to the southern boundaries as well as the grazing and other traditional rights.⁶⁴ As a

⁵⁸ W.J. Miles; D. Mallett: *The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts*, 1 *Journal of International Dispute Settlement* 2 (2010), 313-340, 320 et seq.

⁵⁹ The Sudan People's Liberation Movement/Army Rejoinder, PCA No. GOS-SPLM 53,391, 28 February 2009, para. 885.

⁶⁰ Government of Sudan Rejoinder, 28 February 2009, Submission (without paragraph).

⁶¹ See Dissenting Opinion of His Excellency Judge Awn Shawkat Al-Khasawneh Member of the International Court of Justice, 22 July 2009, available at <http://www.pca-cpa.org/upload/files/Abyei%20Dissenting%20Opinion.pdf> (last visited 26.10.2011).

⁶² GOS-SPLM/A Final Award, 22 July 2009, 146 et seq., paras 140 et seq. (Analysis of the Tribunal).

⁶³ The Tribunal decided that "In respect of the ABC Experts' decision that "[t]he Ngok have a legitimate dominant claim to the territory from the Kordofan – Bahr el-Ghazal boundary north to latitude 10°10'N," the ABC Experts did not exceed their mandate. / In respect of the ABC Experts' decision relating to the "shared secondary rights" area between latitude 10°10'N and latitude 10°35'N, the ABC Experts exceeded their mandate. / The northern boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs along latitude 10°10'00"N, from longitude 27°50'00"E to longitude 29°00'00"E.", see GOS-SPLM/A Final Award, 22 July 2009, 267, para. 770 (Decision).

⁶⁴ See GOS-SPLM/A Final Award, 22 July 2009, 258, 267 et seq., paras 745, 770 et seq. (Decision); PCA Press Release, *Abyei Arbitration: Final Award Rendered*, The Hague, 22 July 2009; GOS-SPLM/A Final Award, 22 July 2009, 267, para. 770 (Decision) and PCA Press Release, *Abyei Arbitration Final Award Rendered*, The Hague, 22

result, the re-defined borders gave control over the richest oil fields in the Abyei region to the GoS, but not without assigning several oil fields to the South and reaffirming the status of the town of Abyei as the heartland of the Ngok Dinka. As a result, however, the size of the Abyei Area has been decreased

One of the most interesting points of the award is the tribunal's assessment of its mandate, which it was granted by the mutual agreement of the dispute parties, namely the GoS and the SPLM/A. In the tribunal's view, the sequence of Article 2 required the tribunal to conduct a new review of all evidence if, and only if, the ABC Experts were found to have exceeded their mandate.⁶⁵ Furthermore, it found that the parties did not expect or authorize the tribunal to evaluate the evidence in such a manner as to amount to a re-determination of the *correct* boundaries of the Abyei Area in 1905. This finding prescribed the methodology for the decision making of the tribunal.⁶⁶

Based on general principles of law and practices regarding the annulment of arbitral decisions as well as on the object and purpose of the ABC's constitutive instruments, the tribunal found in a next step that the Abyei Experts were required to clearly and sufficiently explain their decisions and the reasons why they were made. Thus, the ABC Experts would have exceeded their mandate if some or all of their conclusions were unsupported by sufficient reasons, if the reasoning was incoherent, or if the reasons provided were obviously contradictory or frivolous.⁶⁷ Applying this standard, the tribunal found that the predominantly tribal interpretation adopted by the ABC was reasonable in light of the historic facts of the 1905 transfer. Nevertheless, the tribunal added that, since the interpretation made by the ABC Experts was subject to a reasonableness test (rather than a correctness test), its conclusion should not be taken to suggest that the opposite, predominantly territorial, interpretation of the GoS was less reasonable and moreover that the tribunal was not required or authorized to decide which of the two possible interpretations was more *correct*.⁶⁸ Whether the focus on correctness instead of reasonableness would have changed the tribunal's findings in the end is, of course, just speculative.

In the end, while the decision of the ABC was supposed to be based on *scientific analysis* and research, the PCA interpreted its mandate and task as a *legal* one. The tribunal pointed out that the parties selected jurists and scholars of international law as arbitrators and that their selection

July 2009, available at <http://www.pca-cpa.org/upload/files/Abyei%20Press%20Release%2022-07-09%20EN.pdf> (last visited 26.10.2011).

⁶⁵ *Comment*: In these cases, especially the evidence provided by anthropological experts (as presented by the parties) was a key factor in the tribunal's decision-making. Additionally, it also considered the seasonal grazing patterns of both the Ngok Dinka and the Misseriya Humr, and how their use of land was affected by the seasonal ecology of the region, see GOS-SPLM/A Final Award, 22 July 2009, 246 et seq., paras 714 et seq. (Analysis of the Tribunal).

⁶⁶ GOS-SPLM/A Final Award, 22 July 2009, 141 et seq., paras 398 et seq. (Analysis of the Tribunal).

⁶⁷ GOS-SPLM/A Final Award, 22 July 2009, 187, para. 535.

⁶⁸ GOS-SPLM/A Final Award, 22 July 2009, 141 et seq., paras 398 et seq. (Analysis of the Tribunal).

had clear implication as to which legal standards would be used to assess whether the ABC Experts exceeded their mandate. Additionally, if this was found to be the case, it was upon the tribunal to delimit "on map" the Abyei Area by applying the parties' *lex specialis*.⁶⁹

One could argue that the PCA rightly criticised the ABC's findings, but it can be also raised the question whether the PCA gave better reasons for its decision based on the arguments presented by the parties. Although the PCA tribunal claimed to be a legal tribunal, weighing and considering evidences from a legal perspective, the final award of the tribunal does not appear as a document, which was immune to political influences and contemplations.

Furthermore, the tribunal made clear that its findings would not imply that the parties were entitled to disregard other territorial relationships, specifically those between tribes in the Abyei Area. Rather, the tribunal, referring to previous case law, pointed out that the transfer of sovereignty in the context of (international) legal boundary delimitation should not be construed to extinguish traditional rights to the use of land.⁷⁰ The tribunal emphasized that the CPA (including the Abyei Protocol), which was part of the tribunal's applicable law, was supposed to confirm the parties' intention to grant special protection to the traditional rights of the people settling within and in the vicinity of the Abyei Area.⁷¹

The Abyei Arbitration demonstrates the flexible use of international arbitration to resolve a long-standing, seemingly intractable intra-state territorial dispute. It reinforces that arbitration can be a useful, appropriate and timely form of dispute resolution for deeply rooted domestic conflicts between political factions and/or states and peoples.⁷² However, it seems questionable whether the PCA award, which addresses a particular aspect of the territorial dispute between the GoS and SPLM/A, in the end, will effectively contribute to the solution of the Abyei question that also includes the determination of who is a *president* of the Region for holding a referendum on the status in the future.

II. The Abyei Arbitration as a Model for Future Intra-State (Territorial) Dispute Settlements?

This section will begin with some generalising remarks concerning the flexibility and particularities of arbitration procedures from a substantial and procedural point of view. In a next step, it will focus on the current status of Abyei and the (non)implementation of the award. It will finally address the question of whether, despite potential shortcomings, the Abyei Arbitration

⁶⁹ GOS-SPLM/A Final Award, 22 July 2009, 145, para. 407 (Analysis of the Tribunal).

⁷⁰ GOS-SPLM/A Final Award, 22 July 2009, 260, para. 753 (with reference in fn. 1252).

⁷¹ GOS-SPLM/A Final Award, 22 July 2009, 259 et seq., paras 748 et seq. (Analysis of the Tribunal).

⁷² Following assessment of W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 313 et seq.

could serve as a model or lesson learned for future arbitration procedures dealing with intra-state (territorial) disputes.

1. The Flexibility of International Arbitration

Why and when do dispute parties decide for international dispute settlement, especially international arbitration, in case of intra-state (territorial) disputes? The parties will usually seek international dispute settlement mechanisms when bilateral negotiations and internationalised negotiation and mediation attempts have failed or have no chance of being successful, meaning to reach a mutually accepted and effective settlement of a dispute. The parties will also decide upon an internationalised form of dispute settlement when there is no way to settle the dispute in front of a national or international court.⁷³ International arbitration is in fact the most flexible available solution if the parties seek for an international dispute settlement procedure. Furthermore, third party dispute resolution by an international legal tribunal in a situation like the dispute over the Abyei-Region is usually associated with an added value of neutrality and authority. The label of neutrality is attached while parties at the same time have the choice which regime they prefer to refer the settlement of the dispute to and which mandate they want to give to the tribunal.⁷⁴ In the end, both arbitration and adjudication constitute binding means of settling disputes according to international law, with disputants agreeing in advance to accept the award (arbitration) or judgment (adjudication), and both are based on relatively formal procedures of settlement.⁷⁵ The parties to an arbitration procedure are bound by their arbitration agreement *pacta sunt servanda*.

This mutual agreement, however, is contested by the inevitable effect that an arbitration procedure dealing with an intra-state territorial dispute will produce winners and losers. This can also result in the neutral role of the third party or legal framework/dispute settlement mechanism being challenged, especially if there is a certain status and power asymmetry between the disputing parties.⁷⁶ Because of the negative context of the winner-loser dichotomy, several

⁷³ *Comment:* This perception will usually be based on a power-asymmetry between the state and the non-state party and the latter's doubt about the neutrality, effectiveness and legitimacy of domestic laws and courts' adjudication. Furthermore the International Court of Justice (ICJ) exclusively deals with disputes between states in accordance with Art. 34 (1) ICJ Statute. Just in form of Advisory Opinions as for instance the Advisory Opinion on the Declaration of Independence of Kosovo the ICJ can deal with questions, which also directly affect non-state parties to a territorial dispute. However, this is not a dispute settlement procedure but a legal advice, which was formulated based on request by the General Assembly.

⁷⁴ K.E. Wiegand; E.J. Powell: Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes, 55 Journal of Conflict Resolution 1 (2011), 33-59, 34 et seq.

⁷⁵ K.E. Wiegand; E.J. Powell: Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes, 55 Journal of Conflict Resolution 1 (2011), 33-59, 38.

⁷⁶ Form an inter-state perspective on international arbitration, see K.E. Wiegand; E.J. Powell: Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes, 55 Journal of Conflict Resolution 1 (2011), 33-59, 38 et seq.

international methods of dispute resolution have embraced consent-based mechanisms of recommendations in place of formal judgments or awards. However, in the case of territorial disputes, the situation is somewhat different, as dispute resolution following traditional legal methods and approaches to territory, sovereignty and boundaries is rarely able to avoid winner-loser perceptions because settlement involves the loss or gain of territory and the constitution of a fixed and demarcated border.⁷⁷

The following passages will focus on some specific flexible features of the Abyei arbitration, especially based on the parties' choice to follow and modify the 1993 PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State.⁷⁸

a) International Arbitration and the Involvement of a Party which is not a State

It is often asked why the Government of Sudan and the SPLM/A opted for arbitration. Clearly there was more than one underlying consideration, including but not limited to the different legal personality of the disputing parties and the absence of an appropriate international court that allows non-state parties like the SPLM/A to be a party in an international dispute settlement procedure.⁷⁹ The GoS and the SPLM/A chose as suitable rules of procedure the 1993 PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State and introduced specific modifications therein, to tailor the agreement to meet their needs. The PCA Optional Rules are a flexible set designed specifically for mixed arbitration procedures.⁸⁰

The parties also determined that the PCA would serve as secretariat of the proceedings and furthermore, named The Hague as the place of arbitration.⁸¹ This can be seen as a choice by the parties to bring the proceedings outside the area of conflict beyond the possible interference of other national stakeholders or national courts to a place traditionally perceived as neutral.⁸²

In sum, coming to an arbitration agreement in accordance with and as a modification of the

⁷⁷ K.E. Wiegand; E.J. Powell: Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes, 55 *Journal of Conflict Resolution* 1 (2011), 33-59, 39. For comments on the territorial fixation of International Law, see D. Kritsiotis: Public International Law and Its Territorial Imperative, 30 *Michigan Journal of International Law* (2009), 547-566.

⁷⁸ Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State, 1993, Available at <http://www.pca-cpa.org/upload/files/1STATENG.pdf> (last visited 26.1.2011).

⁷⁹ F. Baetens; R. Yotova: The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?, 3 *Goettingen Journal of International Law* 1 (2011), 417-446, 439 et seq.

⁸⁰ With a detailed overview concerning the development of the Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State and their relation to UNCITRAL Arbitration Rules of 1976, which were created to meet the need of an ad hoc procedure acceptable for disputing private parties coming from different legal, social and economic systems, see F. Baetens; R. Yotova: The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?, 3 *Goettingen Journal of International Law* 1 (2011), 417-446, 428 et seq.

⁸¹ Arbitration Agreement, Arts 1, 6.

⁸² F. Baetens; R. Yotova: The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?, 3 *Goettingen Journal of International Law* 1 (2011), 417-446, 440 et seq.

Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State made the identified parties to the dispute, namely the GoS and the SPLM/A, eligible and legal. Nevertheless, it could be questioned whether these parties were also the legitimate parties to represent all stakeholders' interests on the ground and the complexities of issues at stake between them and whether the award and its implementation could contribute to the overall settlement of the Abyei dispute in a meaningful way.

b) When Time is Short: Fast-Track Procedures in International Arbitration

The contextual element of the ongoing conflict and ethnic tensions discussed above, prompted the Parties to conduct the fastest delimitation arbitration possible. Namely, pursuant to Article 4(3) of the Agreement, the tribunal was supposed to complete the entire arbitration within six months of its commencement, with the possibility of a three-month extension, if necessary.⁸³ Furthermore, the procedure for the appointment of arbitrators also had to follow a strict schedule with no prescribed possibility for their extension.⁸⁴ Another specific characteristic of the Arbitration Agreement was the incorporation of multiple safeguards to prevent any possible obstruction or delay of the fast-track proceedings by either the parties or the arbitrators.⁸⁵ The arbitrators and the Registry successfully complied with the ambitious timeline of the Arbitration Agreement.

c) Transparency and Participation via Publicness?

Parties of mixed arbitration rarely agree to make the very existence of the proceedings, let alone each of the stages, public.⁸⁶ It is assumed that the PCA and the parties chose transparency and publicness, as opposed to confidentiality, in an attempt not only to bring the process closer to the

⁸³ Arbitration Agreement, Art. 4 (3); *Comment*: The Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting the Abyei Area was deposited with the PCA on 11 July 2008, four days after its signature by the Parties on 7 July. The Agreement itself, however, determined in Article 4(1) that the arbitration process was deemed to have commenced prior to that date on 8 June 2008, when the two parties signed their Road Map Agreement. This underlines the urgency of the dispute between the parties and the situation on the ground.

⁸⁴ Arbitration Agreement, Art. 5. *Comment*: The formation of the five member Arbitral Tribunal was completed on 27 October 2008 with the appointment of the fifth, presiding arbitrator by the Secretary-General of the PCA pursuant to Article 5(12) of the Arbitration Agreement. The Tribunal started to work as soon as it was constituted in accordance with Article 4(2) of the Agreement, i.e. on 30 October 2008, when the fifth presiding arbitrator signed his declaration of independence and communicated it to the parties.

⁸⁵ *Comment*: Examples for these safeguards are Article 4(8), providing for the continuation of the proceedings if either party defaults in submitting written pleadings or in appearing at the oral stage as well as Article 5(5) against a default of any of the parties in appointing their respective arbitrators by empowering the appointing authority to act on their behalf and Article 5(14) that regulates a situation of a truncated tribunal, giving discretion to the remaining at a minimum of three arbitrators to continue the proceedings and to issue an award.

⁸⁶ See for an deeper analysis of the transparency of the procedure: F. Baetens; R. Yotova: The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?, 3 Goettingen Journal of International Law 1 (2011), 417-446.

people whose lives were directly affected, but also to build confidence and legitimacy and counteract tensions in the region. However, it seems that the arbitration procedure only created a stalemate; it served as a pause for the parties to the violent conflict while the GoS and the SPLM/A took the dispute to an international tribunal. The current situation in Abyei, as will be shown below, raises doubts whether publicness in effect created sufficient and meaningful transparency and led to the acceptance of and compliance with an international arbitration award in an intra- and now inter-state territorial dispute by all stakeholders, especially those who were not party to the arbitration.

2. Implementation and Compliance: The Current Status of the Abyei Region

What effect did the legally binding award have (and what effect does it continue to have) on the ground in such a highly politicised dispute like the one about the territory and status of the Abyei Region?

Despite the 2009 final and binding award of the Abyei Tribunal, which was made based on the mandate the parties outlined for the tribunal, the Abyei Region is still considered one of the most difficult issues in the divorce of Sudan and South Sudan, concerning the effective demarcation of its borders and the determination of who is a permanent resident and therefore eligible to vote in a referendum. The parties initially stated that they were determined to comply with the Abyei Award and considered it as final and binding. However, apart from the Southern Abyei border, which was not central to the dispute, the definition and demarcation of the other borders as defined by the PCA, and what the new boundaries would become should Abyei join the South after the postponed referendum, are still highly disputed.

In June 2010, the CPA parties signed a Memorandum of Understanding in Mekelle (Ethiopia) that committed them to a discussion of the post-referendum issues and outlined its modalities.⁸⁷ The memorandum put the parties in the driver's seat. The talks were first and foremost bilateral, with an option to request facilitation of the AUHIP or other external technical assistance when considered necessary.⁸⁸ In July 2010, a senior member of the GoS stated that amongst all the issues on the agenda especially the Abyei issue was not considered as settled by the GoS.⁸⁹

On 24 September 2010, a high-level meeting convened at the margins of the UN General Assembly. Some 30 heads of state and foreign ministers, including U.S. President Obama, drew attention to Sudan, reiterated their commitment to a timely referendum and underscored that

⁸⁷ ICG: Negotiating Sudan's North-South Future, Update Briefing, 23 November 2010, 3. *Comment:* Such talks would be grounded in the CPA but not constitute a renegotiation of it.

⁸⁸ ICG: Negotiating Sudan's North-South Future, Update Briefing, 23 November 2010, 3.

⁸⁹ *Comment:* According to the facilitator's terms of reference, AUHIP presence in direct negotiations would require the request of both parties.

agreement on post-referendum arrangements.⁹⁰ It also became clear that the Abyei-issue might prevent an agreement on post-referendum arrangements between the North and South if left unaddressed and/or unresolved. Finding a peaceful solution for Abyei, especially for how and when to schedule a referendum, quickly became a priority. The U.S. made a move, and Special Envoy Scott Gration invited the parties to trilateral talks on Abyei in Manhasset, New York.⁹¹ During their meeting the parties addressed *inter alia* questions concerning *citizenship*, *settlement* and *movement rights* within the territory, economic activities, security cooperation and the management of natural resources. The oil revenue-sharing proposal was not particularly contentious.⁹² The key question remained: Who would be eligible to vote in the planned Abyei referendum?⁹³

As agreed, Gration again invited the parties, with Ngok Dinka and Misseriya leaders' participation this time, to more formal talks in Addis Ababa in October 2010. A GoS/NCP paper proposed joint administration of an integrated territory belonging to both North and South, and another idea suggested splitting the area in half between North and South. Neither proposal was seriously considered.⁹⁴ In short, the referendum and status of Abyei was and is a bargaining chip in the divorce between North and South.

Following presidential and parliamentary elections in April 2011, the GoS and SPLM/A began informal discussions about structuring negotiations and post-CPA arrangements between North and South. At the same time, the former South African President Thabo Mbeki and his partners from the African Union (AU) started their common engagement in this process. Mbeki headed the AU High-Level Implementation Panel (AUHIP), which had been given an expanded mandate to assist the Sudanese parties in implementing the CPA and related processes. In mid-April 2011, as a result of repeated violent incidences in the region, the North and South agreed to establish a joint technical committee to oversee the withdrawal of all unauthorized forces and the deployment of Joint Integrated Units throughout the Abyei region, in accordance with the January 2011 Kadugli Agreement and the March 2011 Abyei Agreement.⁹⁵ The UN Mission in

⁹⁰ ICG: Negotiating Sudan's North-South Future, Update Briefing, 23 November 2010, 4 et seq; reference to the Abyei Award just became a footnote, see for examples: ICG: Negotiating Sudan's North-South Future, Update Briefing, 23 November 2010, 4, fn. 19.

⁹¹ ICG: Negotiating Sudan's North-South Future, Update Briefing, 23 November 2010, 4.

⁹² ICG: Negotiating Sudan's North-South Future, Update Briefing, 23 November 2010, 4.

⁹³ ICG: Negotiating Sudan's North-South Future, Update Briefing, 23 November 2010, 4, 8 et seq. *Comment:* Both regimes depend heavily on oil revenues, and secession would alter resource ownership and current wealth-sharing arrangements. Oil was not addressed in great detail in the talks, because Norway, long a key international player in Sudan, is leading a parallel process toward arrangements on future petroleum sector management.

⁹⁴ ICG: Negotiating Sudan's North-South Future, Update Briefing, 23 November 2010, 5.

⁹⁵ See for more information U.N.-Doc. S/2011/451, 26 July 2011; UNMIS welcomes agreement by parties on Abyei, available at <http://unmis.unmissions.org/Default.aspx?tabid=600&ctl=Details&mid=697&Itemid=12494> (last visited 26.10.2011)

Sudan (UNMIS) facilitated the committee that met for the first time on May 8th and was expected to help the parties to withdraw all unauthorized military personnel from the region by May 17th.⁹⁶ The parties now sit at the negotiating table and face the challenge of translating such pledges into action by establishing a framework to identify and regulate cross-border arrangements. Legal details which need to be addressed are the status of commuting groups and individuals, how they are to be identified and where, when and for how long they can cross the border, as well as the rights and responsibilities of individuals on both sides of the boundary (including economic activity, grazing fees, social arrangements and taxation).

On 20 June 2011 the GoS and the SPLM/A signed an agreement on Temporary Arrangements for the Administration and Security of the Abyei Area, which regulates the administration of the areas and financial issues. It determines that it does not directly affect the delimitation of the borders of the Region; it states: "The provisions of this Agreement shall not prejudice the final status of Abyei Area whose borders have been defined by the Permanent Court of Arbitration".⁹⁷ The agreement furthermore asks for the support of and mediation for the implementation of this agreement, for the negotiation of the status of Abyei, and for the support of the AU and AUHIP.⁹⁸ The UN Security Council (SC) also welcomed the agreement. Since 2009, the SC has been repetitively calling upon the parties to implement the Abyei Award and to peacefully negotiate the final status of Abyei.⁹⁹ It furthermore established the United Nation Interim Security Force for Abyei (UNISFA) to monitor the situation in Abyei and support the parties in the implementation of the various commitments and to support the regional organisations in the mediation efforts, especially after the clashes of the 1st of May 2011.¹⁰⁰

Despite the initial hopes, the dispute remains unsolved even after the independence of South Sudan in July 2011. The governments of Sudan and South Sudan currently face the challenge of addressing mutual security arrangements to mitigate the chances of a renewal of conflict. Intertribal violent incidences in Abyei, even if initiated without the knowledge or support of either government, have the potential to drag the North and South back into war.¹⁰¹ In the long run, most see demarcation on the ground as necessary. Some Southerners hope physical markers will help to prevent any future confusion or encroachment. They believe clear markings will also

⁹⁶ International Peace Institute, *The Future of South Sudan*, May 2011, 2.

⁹⁷ Temporary Arrangements for the Administration and Security of the Abyei Area between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Army, Addis Ababa/Ethiopia, 20 June 2011, Introduction.

⁹⁸ See U.N.-Doc. S/RES/1812, 30 April 2008; U.N.-Doc. S/RES/1879, 20 May 2009; U.N.-Doc. S/RES/1919, 29 April 2010; U.N.-Doc. S/RES/1990, 27 June 2011; U.N.-Doc. S/RES/1996, 8 July 2011.

⁹⁹ U.N.-Doc. S/RES/1990, 27 June 2011.

¹⁰⁰ U.N.-Doc. S/RES/1990, 27 June 2011; U.N.-Doc. S/RES/1996, 8 July 2011; see inter alia: ICG: Sudan: Abyei at a Dangerous Tipping Point, Nairobi/Brussels 8 May 2011, available at <http://www.crisisgroup.org/en/publication-type/media-releases/2011/africa/sudan-abyei-at-a-dangerous-tipping-point.aspx> (last visited 26.10.2011).

¹⁰¹ International Peace Institute, *The Future of South Sudan*, May 2011, 3.

assist the respective governments in providing administrative services and security. Others are not certain that physical demarcation will ever be necessary and emphasize that erecting physical markers before border communities are assured of future cross-border arrangements could result in unnecessary confrontation and unwanted violence between the tribes and former parties to the CPA.¹⁰² Hence, a solution for defining the Abyei-borders is not only drawing a line, but also defining the nature and *management* of that border and the future relations of communities on both sides. Currently the parties tend to prefer a *soft-boundary* concept backed by a framework for cross-border arrangements and, if necessary, safeguarded by a joint monitoring mechanism.¹⁰³

However, especially the oil issue triggers fears that the borderline could become a *hard border* at the same time.¹⁰⁴ If partition results in a hard border, and access to the South is restricted, land and resource pressure would intensify. A hard barrier would threaten pastoralist livelihoods in the North and South alike, creating also hardships for Southerners who rely on goods and services from the North and unnecessarily restricting communities who see the benefit of joint cross-border initiatives and interaction. Thus, the ideal scenario for post-referendum arrangements is one in which the parties and their border constituencies can achieve the *softest* border possible. This creates great challenges, also when it comes to defining citizenship and residency of the Region.

Interestingly enough, not only governmental elites like the GoS and the SPLM/A, but most importantly tribes living on Abyei territory, refused the PCA award.¹⁰⁵ Apparently the arbitration procedure between the GoS and the SPLM/A did not necessarily reflect the complexity of interests or the constellation involved on the ground, *inter alia* tribal territorial concepts and relationships rooted in traditional ways of life, and pastoralism but also alliances created during war-time.¹⁰⁶

Following the hidden criticism of the tribunal in its Final Award, one could raise the question whether the parties really made use of the opportunity to delegate the dispute to an international

¹⁰² ICG: Sudan: Defining the North-South Border, ICG Policy Briefing, 2 September 2010, 12 et seq. *Comment:* They are, however, quick to note that such markers should not in any way constitute a barrier. SPLM/A leaders maintain that border posts will allow citizens to know on which side of the boundary they are, and thus which rights and responsibilities apply.

¹⁰³ ICG: Sudan: Defining the North-South Border, ICG Policy Briefing, 2 September 2010, 1, 15 et seq. *Comment:* The UN could take up a monitoring role but the parties also discuss alternative border monitoring and management mechanisms.

¹⁰⁴ ICG: Sudan: Defining the North-South Border, ICG Policy Briefing, 2 September 2010, 1.

¹⁰⁵ More about concepts of territory, land, demarcation and resources from tribal perspective, see S. Pantuliano: Oil, land and conflict: the decline of Misseriya pastoralism in Sudan, 37 *Review of African Political Economy* 123 (2010), 7-23, 7 et seq.

¹⁰⁶ S. Pantuliano: Oil, land and conflict: the decline of Misseriya pastoralism in Sudan, 37 *Review of African Political Economy* 123 (2010), 7-23, 8 et seq.

arbitration tribunal? And, whether they asked the tribunal the right questions and gave a mandate that contributed to settling the political conflict by an international arbitration tribunal by legal means?

The complexity of the negotiations and events since 2009 has been showing that the legal definition and delimitation of a border can only be one aspect of the overall solution of a territorial dispute. Perhaps the parties should have granted a mandate to the tribunal that would have allowed for the reconsideration of the entire ABC Report. A broader mandate could have also allowed to consider aspects which would have taken the broader picture into account, i.e. the cultural construction of borders, the dynamics of state borders and borderlands, and their particular mode of signification to the local people and collision with tribal/community perception of territory and borders.¹⁰⁷ Of course, this is highly speculative. But the final determination of a state-border and the (soft) management of this border is, after all, an opportunity to enter into a discourse about the relationship of these concepts and their potential role and acknowledgement in procedures like negotiations, border commissions, or arbitration procedures.

3. The General Implementation Dilemma of Arbitration Awards in Intra-State (Territorial) Disputes

How can the implementation and enforcement of decisions of international arbitration tribunals like the Abyei Award be enabled and guaranteed? One of the most often-cited attributes of international arbitration is the ability to enforce arbitral awards in a vast number of jurisdictions across the globe. The international enforcement of arbitration awards is addressed in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).¹⁰⁸ With signing the New York Convention, the states agreed to enforce foreign arbitral awards made in the territory of a foreign state, although many countries have exercised their right to limit enforcement to only those awards made in the territory of another member state.¹⁰⁹ Additionally, numerous member states have exercised their right to reserve the applicability of the New York Convention to commercial arbitral awards.¹¹⁰ It is, however, unlikely that an arbitral award resulting from an intra-state or inter-state conflict would be

¹⁰⁷ For an anthropological analysis, see D. Feyissa: The cultural constitution of state border: the view from Gambella, 4 *Journal of East African Studies* 3 (2010), 314-330, 328.

¹⁰⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958; available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (last visited 26.10.2011). *Comment:* The so-called New York Convention entered into force on 7 June 1959 and has currently 146 parties.

¹⁰⁹ New York Convention, Art. 1 (2).

¹¹⁰ The New York Convention entitles a state to declare "[...] that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.", see New York Convention, Art. 1 (3).

characterized as an award arising out of commercial-legal relationships, unless the ownership of significant and valuable natural resources is directly at stake.

Nevertheless, an award made in the territory of a foreign state with respect to a domestic matter in the state in which it is to be enforced may therefore be enforceable pursuant to the New York Convention.¹¹¹ This, in turn, presupposes that the content of the award is capable of being enforced by domestic courts. The subject matter of an award resulting from an intra-state dispute over territory and/or the implementation and interpretation of a peace agreement between a state and a non-state party is by its very nature unlikely to be enforceable by a domestic court.

Thus, such awards generally require the good faith of the parties to comply with it and implement it. Additionally, the prospects of implementation of arbitral awards to resolve intra-state or inter-state (territorial) disputes could be enhanced by involving the international community from the outset of a procedure through to the enforcement of the final award in the framework of external monitoring, enforcement and sanction mechanisms. In the case of Abyei, the SC called upon the parties to follow the ABC Report and later welcomed the decision to refer the question to arbitration. The SC continued to call upon the parties to implement the PCA Award and to peacefully negotiate the delimitation of Abyei. It also determines the Abyei dispute to be a threat to international peace and security and established the UNISFA to monitor the situation and to support a peaceful transition of the Abyei Region.¹¹² However, the SC did not apply more intrusive enforcement or sanction measures under Chapter VII. Furthermore, the deposition of the award with international institutions such as the United Nations could have added authority and legitimacy. However, one can raise doubts as to whether the involvement of international organisations has per se internationalising, legitimising effects and carries accepted authority with it.¹¹³

In sum, it seems more plausible to focus on a correlation of factors, namely the parties' willingness to: (1) enter into an arbitration agreement in the first place to settle their dispute by peaceful means and recognize the authority of the eventual decision by a neutral third party, and (2) refer the dispute to an institutionalised international dispute settlement body and to accept external enforcement and/or to delegate enforcement powers in case of non-implementation especially in intra-state territorial disputes. For future cases, it (3) might be worth considering developing an implementation strategy already in place in the arbitration agreement, e.g. by

¹¹¹ *Comment:* In addition, the New York Convention applies only to foreign arbitral awards in accordance with Art. 1 (1). An arbitral award relating to a dispute between two intra-state parties, rendered in the same state, would not be enforceable in that state's national courts pursuant to the New York Convention.

¹¹² See U.N.-Doc. S/RES/1812, 30 April 2008; U.N.-Doc. S/RES/1879, 20 May 2009; U.N.-Doc. S/RES/1919, 29 April 2010; U.N.-Doc. S/RES/1990, 27 June 2011.

¹¹³ W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 *Journal of International Dispute Settlement* 2 (2010), 313-340, 334 et seq.

delegating enforcement mechanisms and sanction mechanisms to external actors or bodies, rather than merely issuing general promises that an award will be complied with.¹¹⁴

4. International Arbitration indeed a Model for Addressing Intra-State Disputes in the Future?

Thus, arbitration is an appealing method of resolving conflicts mainly because of its inherent flexibility.¹¹⁵ The formal uniformity of practice and procedure in international arbitration on the other hand gives the parties certainty as well. They can expect the procedure to be in accordance with legal principles identified by the parties as applying to their relationship and disputes. In the end, one could say that the parties to a political conflict decide to get a legal and binding award based on legal principles rather than political compromise, as tribunals consist almost certainly of established lawyers or judges, and the parties will expect them to make their decisions in accordance with due process and principles of law. It is the role and the responsibility of arbitral tribunals to uphold the rule of law. In the extreme, parties may expressly consent to the tribunal's power to make a decision *ex aequo et bono*. If the parties do not do so, it is incumbent on the tribunal to render a decision that upholds the rule of law in accordance with the applicable law as identified by the parties.¹¹⁶ However, where appropriate and necessary, the parties are also free to agree on the nomination of arbitrators with specific technical, cultural, legal, political and social backgrounds.

Hence, in the end, there is in fact no strict separation between the legal dimension of an intra-state territorial dispute and its political dimension. Many inter- and intra-state conflicts on the African continent and beyond can be characterised by an explosive mixture of border disputes, contentious ownership of natural resources, self-determination claims, limited or no access to dispute settlement for non-state entities, non-transparency of pending legal procedures, if there are any available to these parties, and a lack of conclusive historical evidence.¹¹⁷ These conflicts have vastly different roots and cannot be treated identically to the chosen example. However, they contain all or most of the issues enumerated above which could be potentially subject to international dispute settlement/international arbitration if bilateral and multilateral negotiations or other mediation attempts fail.

¹¹⁴ F. Baetens; R. Yotova: The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?, 3 Goettingen Journal of International Law 1 (2011), 417-446, 443 et seq.

¹¹⁵ Following W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 325.

¹¹⁶ W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 325.

¹¹⁷ F. Baetens; R. Yotova: The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?, 3 Goettingen Journal of International Law 1 (2011), 417-446, 437.

Additionally, the transfer of an intra-state (territorial) dispute to an international arbitration tribunal was not unprecedented (see *infra*). There is even an evolving tendency to include arbitration clauses in peace agreements between state and non-state parties delegating disputes concerning the interpretation and implementation of the agreement to an external internationalised dispute settlement mechanism. However, these agreements will rarely outline self-executing external dispute settlement mechanisms, as this could be perceived as an additional challenge to the already contested sovereignty of the state. In other cases arbitration is selected as a method of dispute resolution after the concrete dispute has arisen, for example in the case of the Abyei Road Map and the Abyei Arbitration Agreement. While the dispute parties are often unable to enter into a negotiated settlement, or accept a mediated settlement, they may be able to agree to respect a binding determination of an independent, neutral international legal body based on their mutual agreement to comply with the body's decision.¹¹⁸

How did other state and non-state parties conduct arbitration procedures in case of territorial disputes, and did they comply with the award and implement the decision of the tribunal? In 1995 the General Framework Agreement for Peace in Bosnia and Herzegovina (also known as Dayton Agreement) was signed.¹¹⁹ The former warring parties were unable to agree upon the status of the district of Brcko, which was an area of strategic importance for them.¹²⁰ With the Dayton Agreement the parties agreed to binding arbitration of the disputed portion of the Inter-Entity Boundary Line in the Brcko area.¹²¹ It determined that an *ad hoc* panel of three arbitrators, each of them nominated by one party, had to issue their decision no later than one year from the entry into force of the Dayton Agreement and that this decision was supposed to be final and binding and was to be implemented by the parties without delay.¹²² The parties foresaw that there might be difficulties in reaching a majority decision amongst the arbitrators, and so in the event no majority could be reached, the decision of the presiding arbitrator would be binding.¹²³ With delay, in 1999, after several interim-measures, the Final Award established the Brcko District as

¹¹⁸ *Comment*: Earlier cases concerning territorial disputes, see Case Concerning the Territorial Dispute (Libyan Arab Jamuhiriya/Chad), ICJ Reports 1994; and the decisions of the Eritrea-Ethiopia Claims Commission, available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited 26.10.2011).

¹¹⁹ General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton/USA 21 November 1995, U.N.-Doc. A/50/79C, S/1995/999 (Dayton Agreement).

¹²⁰ Agreement on the Inter-Entity Boundary Line and Related Issues, Annex 5 of General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton/USA 21 November 1995, U.N.-Doc. A/50/79C, S/1995/999; see also W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 Journal of International Dispute Settlement 2 (2010), 313-340, 325 et seq.

¹²¹ Agreement on the Inter-Entity Boundary Line and Related Issues, Annex 5 of General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton/USA 21 November 1995, U.N.-Doc. A/50/79C, S/1995/999, Art. V (1).

¹²² Agreement on the Inter-Entity Boundary Line and Related Issues, Annex 5 of General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton/USA 21 November 1995, U.N.-Doc. A/50/79C, S/1995/999, Art. V (5).

¹²³ Agreement on the Inter-Entity Boundary Line and Related Issues, Annex 5 of General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton/USA 21 November 1995, U.N.-Doc. A/50/79C, S/1995/999, Art. V (2).

an independent, self-governing, de-militarized zone with its own democratically elected government, its own police and judiciary. In reaching its conclusions in the Final Award, the tribunal considered itself to be acting in accordance with the purposes of the Dayton Agreement.¹²⁴ By creating this new institution of the Brcko District of Bosnia and Herzegovina, the tribunal interpreted its mandate broadly, going beyond the delimitation of the Inter-Entity Boundary Line to create a system responsive to the purposes of the Dayton peace process.¹²⁵ The Final Award permitted the parties to provide comments on the plan for the new Brcko District, which were set out in the Annex to the Award, during a 60-day period. However, it emphasized that all other elements of the Final Award were final and binding and not subject to further comment.¹²⁶ The Final Award established that the arbitral tribunal's jurisdiction would continue until the Supervisor of the Brcko area had notified it that both parties had fully complied with their obligations. It also established that the tribunal retained jurisdiction to modify the award in the event of serious non-compliance by one of the parties, including the entitlement of the tribunal to transfer the district out of the territory of the non-complying party into the exclusive control of the other party.¹²⁷ The tribunal had enforcement and potential sanctions at its disposal. The arbitration over the Brcko district is an example of an inventive, yet practical resolution of a long-standing conflict. By means of arbitration, the parties were able to overcome a deadlock created by their inability to negotiate an agreement. Despite some implementation problems, the parties have to date broadly abided by the Brcko Award.¹²⁸

Another example is the 2003 peace agreement proposal submitted by the Liberation Tigers of Tamil Eelam (LTTE) to the government of Sri Lanka proposing the establishment of an interim self-governing authority for the LTTE in the northeast of Sri Lanka. This peace agreement proposal included an arbitration clause. Should disputes arise following the entry into force of the peace agreement, the parties would have a framework for the peaceful resolution in the form of arbitration at hand.¹²⁹ The Sri Lankan government did not accept this proposal, and the peace

¹²⁴ Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area, Final Award, 5 March 1999 and Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area, Annex to Final Award, 18 August 1999; The High Representative's Decision on the Establishment of the Brcko District of Bosnia and Herzegovina, 8 March 2000, an overview of this and the interim awards is available at http://www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content_id=42738 (last visited 26.10.2011).

¹²⁵ W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 *Journal of International Dispute Settlement* 2 (2010), 313-340, 325 et seq.

¹²⁶ Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area, Final Award, Part IV, para. 35.

¹²⁷ Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area, Final Award, 5 March 1999, Part VIII, paras 65-68.

¹²⁸ W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 *Journal of International Dispute Settlement* 2 (2010), 313-340, 325 et seq.

¹²⁹ The proposal by the Liberation Tigers of Tamil Eelam on behalf of the Tamil people for an agreement to establish an interim self-governing authority for the North-East of the island of Sri Lanka, October 2003, available at <http://www.tamilnet.com/img/publish/2003/11/proposal.pdf> (last visited 27.10.2011). Art. 22 says: "Where a dispute

agreement was never entered into. Nonetheless, this proposed arbitration agreement provides an interesting template for consideration when drafting arbitration clauses in peace agreements between state and non-state parties in the future.

Disputes regularly arise out of the interpretation or implementation of peace agreements. These agreements are encapsulated in a legal grey zone so to say. Domestic dispute settlement is usually not an option for at least one of the parties; in addition, some international dispute settlement mechanisms like the ICJ are closed when it comes to agreements between state and non-state parties and regulating intra-state conflicts. In the absence of prior agreement on a mechanism to deal with such disputes, the parties often return to violent conflict. Also, continued political compromise between the parties can be extremely difficult due to the differing interests of each party's stakeholders, particularly if the unique combination of factors that existed at the time of the peace agreement (often involving the international community) have changed.¹³⁰ By including an arbitration clause in peace agreements, a clause that allows or even requires disputes regarding the interpretation or implementation of the peace agreement to be referred to arbitration (as in the case of the Tamil Tigers Peace Agreement Proposal or the supplementary agreement between the GoS and the SPLM/A to refer the case to arbitration and to negotiate an arbitration agreement), the peaceful resolution of future disputes between the parties could be promoted.

In sum, the Abyei Arbitration Award may have not led to the final settlement of the dispute or to maximum compliance and implementation by the parties, but it constitutes a strong example and lesson learned of the attempt to settle an intra-state territorial dispute based on a peace agreement and its annexes in front of a neutral international tribunal.¹³¹

Could arbitration procedures like the Abyei arbitration be localised in the context of the peace and justice or peace vs. justice discussion in literature and practice? First of all, it would be dangerously naïve to assume that as soon as parties agree to bring their dispute before an arbitral tribunal, violence will automatically stop. Secondly, it should be accepted that peaceful and

arises between the Parties to this Agreement as to its interpretation or implementation, and it cannot be resolved by any other means acceptable to the Parties including conciliation by the Royal Norwegian Government, there shall be an arbitration before a tribunal consisting of three members, two of whom shall be appointed by each Party. The third member, who shall be the Chairperson of the tribunal, shall be appointed jointly by the Parties concerned. In the event of any disagreement over the appointment of the Chairperson, the Parties shall ask the President of the International Court of Justice to appoint the Chairperson. / In the determination of any dispute the arbitrators shall ensure the parity of status of the LTTE and the GOSL and shall resolve disputes by reference only to the provisions of this Agreement. / The decision of the arbitrators shall be final and conclusive and it shall be binding on the Parties to the dispute."

¹³⁰ W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 *Journal of International Dispute Settlement* 2 (2010), 313-340, 334.

¹³¹ W.J. Miles; D. Mallett: The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts, 1 *Journal of International Dispute Settlement* 2 (2010), 313-340, 338 et seq.

violent attempts to settle disputes are not *per se* mutually exclusive, nor will it always be possible to bring all stakeholders and all issues at stake to the negotiation table or to include them in a dispute settlement at the same time.

Could it be expected that the more peaceful dispute settlement mechanisms are in the focus of (intra-state) conflict parties as a mean to solve their disputes, the more the use of force will decrease? First, as shown, this depends on the *bona fides* of the parties to an arbitration agreement and procedure. Second, this is directly connected to factors like the parties' expectations of and faith in the law and the interaction between law and politics, especially when it comes to the management of natural resources and land by the state and/or external powers.¹³²

There are often high expectations connected with the power and effect of law and legal dispute settlement. Whether one holds these high expectations or not, it can be stated that arbitration could be a useful and effective mechanism for resolving legal disputes with a political dimension, both in respect to the original conflict itself (for example, by referring a conflict regarding the delimitation of a territorial boundary to arbitration), or as a default mechanism for resolving disputes arising in the implementation or interpretation of a peace agreement. Arbitration can be an effective dispute settlement where the parties to a conflict genuinely desire a final, legally binding resolution to their dispute without using force, when the tribunal is given an appropriate mandate to address what is at stake between the parties, and when the implementation of the award is secured by mechanisms, ideally already agreed upon by the parties in their arbitration agreement. This also underlines that the close connection between law and politics should be acknowledged, especially when it comes to questions like why parties decide for arbitration as well as whether and how they comply with the award.

Conclusion and Outlook

The paper identified the advantages and critical points of international arbitration as dispute settlement mechanism in intra-state conflicts referring mostly to the example of the Abyei Arbitration of 2009 between the GoS and the SPLM/A and the current status of the Abyei Region. The Abyei Arbitration could serve as a model for other conflicts over territory, power-sharing arrangements and access to resources between state and non-state parties, and it offers important lessons concerning the effectiveness as well as the legal and political implications of international arbitration as a mechanism to settle intra-state (territorial) disputes. International arbitration offers to the parties of an intra-state conflict a certain flexibility concerning the determination of its format, procedural rules, location, and applicable law. At the same time, a

¹³² M.-C. Cordonnier Segger: Resources of Conflict – Conflicts over Resources, Keynote Speech, 3 Goettingen Journal of International Law 1 (2011), 11-22, 17.

fixed framework and set of rules adds expectations of neutrality, authority, legality and therewith legitimacy to the procedures and awards. Due to these features, arbitration could offer solutions to legal (and at the same time highly political) problems that cannot be solved by domestic consultations, negotiations and other forms of internal, direct dispute settlement. Thus, in every individual case the parties should assess whether arbitration is a suitable dispute resolution mechanism for the particular conflict in question. This also illustrates that it is a false assumption that the political and the legal dimension of a dispute can be entirely divided if it comes to arbitration of intra-state (territorial) disputes by an international tribunal based on the mandate given by the disputing parties.

The question whether the parties will comply with an award is the other side of the coin. Key factors in the parties' compliance with the award are their expressed good faith, the meaningful transparency of the procedure for key-stakeholders in the dispute (even if they are not direct parties to the arbitration), and the opportunity to participate.¹³³ By referring an issue to an international arbitration tribunal, the parties accept that the final arbitration award will impose upon them a formal legal obligation to comply. However, a party cannot be forced or required to engage in an arbitral process or to comply with the award, as shown above. Despite *pacta sunt servanda*, the effectiveness of the award depends on the good faith of the parties and what the parties make of it. Even if the implementation of the awards could be monitored externally and non-compliance could be sanctioned, there are certain limits to the extent to which an intra-state (territorial) dispute settlement can be delegated to third parties without overstepping the boundaries when international arbitration is perceived as illegitimate or without taking ownership of the parties in their dispute.

When drafting an arbitration agreement or referring a dispute to a dispute settlement mechanism outlined in a peace agreement, the parties should evaluate the applicable law, the most suitable procedure, and which entities should be parties to the agreement or which entities' interests are at stake. It rests upon them to decide the mandate of the tribunal and to define therewith the possible scope and implications of the award.

¹³³ M.-C. Cordonnier Segger, Resources of Conflict – Conflicts over Resources, Keynote Speech, 3 Goettingen Journal of International Law 1 (2011), 11-22, 21 et seq.